

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

No.: **ICC-01/04-01/06**  
Date: **21 December 2017**

**TRIAL CHAMBER II**

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

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

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

**Public Redacted Version**

**Corrected version of the “Decision Setting the Size of the Reparations Award  
for which Thomas Lubanga Dyilo is Liable”**

**With Corrected Version of One Public Annex (Annex I); of One Public Annex  
(Annex III) and One Confidential Annex, EX PARTE, Registry, Trust Fund for  
Victims, Legal Representatives of the V01 and V02 Groups of Victims, and Office of  
Public Counsel for Victims (Annex II); and Confidential Redacted Version of  
Annex II**

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

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**Counsel for Thomas Lubanga Dyilo**

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**Legal Representatives of V01 Victims**

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**Legal Representatives of V02 Victims**

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Mr Joseph Keta Orwinyo

**Office of Public Counsel for Victims**

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**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

Mr Philipp Ambach

**Trust Fund for Victims**

Mr Pieter de Baan

<b>I.</b>	<b>PROCEDURAL OVERVIEW .....</b>	<b>5</b>
<b>II.</b>	<b>INTRODUCTION .....</b>	<b>14</b>
<b>III.</b>	<b>TRIAL CHAMBER I'S FINDINGS AND THE TRUST FUND'S ESTIMATE OF THE NUMBER OF VICTIMS AFFECTED BY THE CRIMES OF WHICH MR LUBANGA WAS CONVICTED .....</b>	<b>17</b>
<b>IV.</b>	<b>THE SAMPLE OF DOSSIERS (THE 473 DOSSIERS OF POTENTIALLY ELIGIBLE VICTIMS).....</b>	<b>21</b>
	<b>A. Introduction.....</b>	<b>21</b>
	<b>B. The concept of victim: conditions and standards applicable to the reparations phase .....</b>	<b>22</b>
	<b>C. Contents of the dossiers submitted by the 473 potentially eligible victims and redactions made thereto.....</b>	<b>23</b>
	<b>D. Method used by the Chamber to assess the 473 dossiers.....</b>	<b>30</b>
	<b>E. Assessment against the conditions of eligibility as a victim for the purposes of reparations.....</b>	<b>34</b>
	<b>F. Findings on the eligibility of the 473 victims .....</b>	<b>70</b>
	<b>G. The victims to receive collective reparations.....</b>	<b>71</b>
<b>V.</b>	<b>DOCUMENTS RECEIVED FROM THE GOVERNMENT OF THE DRC.....</b>	<b>72</b>
<b>VI.</b>	<b>SUBMISSIONS OF THE PARTIES ON THE TOTAL NUMBER OF DIRECT AND INDIRECT VICTIMS AFFECTED BY THE CRIMES OF WHICH MR LUBANGA WAS CONVICTED.....</b>	<b>74</b>
<b>VII.</b>	<b>ADDITIONAL DOCUMENTS ENTERED ON RECORD .....</b>	<b>79</b>
	<b>A. Introduction.....</b>	<b>79</b>
	<b>B. Example of the application of data by the Chamber.....</b>	<b>82</b>
	<b>C. Conclusion.....</b>	<b>84</b>

<b>VIII. NUMBER OF VICTIMS WHO SUFFERED HARM AS A CONSEQUENCE OF THE CRIMES OF WHICH MR LUBANGA WAS CONVICTED.....</b>	<b>86</b>
<b>IX. MONETARY VALUE OF THE HARM SUFFERED BY THE PERSONS IN THE SAMPLE WHO HAVE ESTABLISHED THAT THEY ARE VICTIMS FOR THE PURPOSES OF REPARATIONS.....</b>	<b>93</b>
<b>X. SIZE OF THE REPARATIONS AWARD FOR WHICH MR LUBANGA IS LIABLE .....</b>	<b>97</b>
<b>A. Submissions of the Trust Fund and the parties .....</b>	<b>97</b>
<b>B. Determination of the size of the reparations award for which Mr Lubanga is liable.....</b>	<b>99</b>
<b>XI. HOW EFFECT IS TO BE GIVEN TO THE PRESENT DECISION.....</b>	<b>104</b>
<b>A. Funding of reparations.....</b>	<b>104</b>
<b>B. Other potentially eligible victims.....</b>	<b>106</b>
<b>C. States Parties .....</b>	<b>108</b>
<b>D. Assistance mandate of the Trust Fund.....</b>	<b>109</b>
<b>E. Publication of the present decision .....</b>	<b>109</b>
<b>XII. RECONSIDERATION SOUGHT BY THE TRUST FUND .....</b>	<b>110</b>

**TRIAL CHAMBER II** (“Chamber”) of the International Criminal Court (“Court”), acting pursuant to article 75 of the Rome Statute (“Statute”), decides as follows.

### **I. PROCEDURAL OVERVIEW<sup>1</sup>**

1. On 14 March 2012, Trial Chamber I, sitting in its previous composition (“Trial Chamber I”), handed down judgment pursuant to article 74 of the Statute (“Judgment Handing Down Conviction”).<sup>2</sup> It found Thomas Lubanga Dyilo (“Mr Lubanga”) guilty of the crimes of conscripting and enlisting children under the age of 15 years into the *Union des patriotes congolais* (“UPC”) [Union of Congolese Patriots] and the *Forces patriotiques pour la libération du Congo* (“FPLC”) [Patriotic Forces for the Liberation of Congo] and using them to participate actively in hostilities, within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute, between 1 September 2002 and 13 August 2003.

2. On 10 July 2012, Trial Chamber I passed the decision on sentence pursuant to article 76 of the Statute, imposing a total term of imprisonment of 14 years on Mr Lubanga (“Determination of Sentence”).<sup>3</sup>

3. On 7 August 2012, Trial Chamber I gave a decision establishing the principles and procedures to be applied to reparations in the case (“Decision on Reparations”).<sup>4</sup>

4. On 1 December 2014, the Appeals Chamber, sitting in its previous composition (“Appeals Chamber”), affirmed the Judgment Handing Down

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<sup>1</sup> A comprehensive review of the entire proceedings is provided in Annex I to the present decision.

<sup>2</sup> Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, dated 24 March 2012, [French] translation registered on 31 August 2012, ICC-01/04-01/06-2842. See also separate opinion of Judge Adrian Fulford and dissenting opinion of Judge Elizabeth Odio Benito, ICC-01/04-01/06-2842, p. 594 and p. 608, respectively.

<sup>3</sup> Trial Chamber I, “Decision on Sentence pursuant to Article 76 of the Statute”, dated 10 July 2012, [French] translation registered on 31 August 2012, ICC-01/04-01/06-2901.

<sup>4</sup> Trial Chamber I, “Decision establishing the principles and procedures to be applied to reparations”, dated 7 August 2012, [French] translation registered on 19 February 2013, ICC-01/04-01/06-2904.

Conviction (“Appeal Judgment Affirming Conviction”)<sup>5</sup> and the Determination of Sentence (“Appeal Judgment Affirming Sentence”).<sup>6</sup>

5. On 3 March 2015, the Appeals Chamber delivered its “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’”<sup>7</sup> (“Appeal Judgment on Reparations”) and the appended “Order for Reparations (amended)”<sup>8</sup> (“Amended Order for Reparations”), whereby, in part, it affirmed and amended Trial Chamber I’s Decision on Reparations. It also directed the Trust Fund for Victims (“Trust Fund”) to file, within six months, *viz.* by 3 September 2015, a draft implementation plan giving effect to the principles and procedures adopted in the Amended Order for Reparations.<sup>9</sup> In addition, the Appeals Chamber set said Chamber the task of monitoring and overseeing the implementation stage of the Amended Order for Reparations, as that Chamber “ha[s] the authority to approve the draft implementation plan submitted by the Trust Fund”.<sup>10</sup> It also directed the Trust Fund “to provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted, based on information gathered during the consultation period

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<sup>5</sup> Appeals Chamber, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, ICC-01/04-01/06-3121-Conf and two annexes, ICC-01/04-01/06-3121-Anx3 and ICC-01/04-01/06-3121-Anx4. A public redacted version was filed that day (ICC-01/04-01/06-3121-Red). See also “Partly Dissenting Opinion of Judge Sang-Hyun Song”, ICC-01/04-01/06-3121-Anx1 and “Dissenting Opinion of Judge Anita Ušacka”, ICC-01/04-01/06-3121-Anx2.

<sup>6</sup> Appeals Chamber, “Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 1 December 2014, ICC-01/04-01/06-3122 and annex, ICC-01/04-01/06-3122-Anx2. See also “Partly Dissenting Opinion of Judge Sang-Hyun Song”, ICC-01/04-01/06-3122-Anx1.

<sup>7</sup> Appeals Chamber, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2”, 3 March 2015, ICC-01/04-01/06-3129.

<sup>8</sup> Appeals Chamber, Amended Order for Reparations, dated 3 March 2015, [French] translation registered on 1 August 2016, ICC-01/04-01/06-3129-AnxA.

<sup>9</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 75.

<sup>10</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 76.

leading up to the submission of the draft implementation plan”<sup>11</sup> and gave that Chamber the task of setting the size of the reparations award for which Mr Lubanga is liable.<sup>12</sup>

6. On 14 August 2015, the Chamber accorded the Trust Fund a further three months for submission of the draft implementation plan (“Decision of 14 August 2015”).<sup>13</sup> It also made clear that the draft implementation plan must, *inter alia*, identify the victims who qualify for reparations and assess the extent of the harm caused to the victims.<sup>14</sup>

7. On 3 November 2015,<sup>15</sup> the Trust Fund submitted its “Filing on Reparations and Draft Implementation Plan” (“Filing on Draft Implementation Plan of 3 November 2015”);<sup>16</sup> Annex A, “Draft Implementation Plan for collective reparations to victims” (“Draft Implementation Plan of 3 November 2015”);<sup>17</sup> and Annex I, “Registry Report on Mapping of Victims Thomas Lubanga Dyilo Case, Reparations Proceedings” (“Registry Report on Mapping of Victims”).<sup>18</sup>

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<sup>11</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 78. See also Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 240.

<sup>12</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, paras. 241-242. See also Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 80-81.

<sup>13</sup> “Decision on the ‘Request for extension of time to submit the draft implementation plan on reparations’”, 14 August 2015, ICC-01/04-01/06-3161-tENG.

<sup>14</sup> Decision of 14 August 2015, ICC-01/04-01/06-3161-tENG, para. 6.

<sup>15</sup> “Filing on Reparations and Draft Implementation Plan”, dated 3 November 2015, [French] translation registered on 29 January 2016, ICC-01/04-01/06-3177-Conf, with public annex A, ICC-01/04-01/06-3177-AnxA and a confidential annex, *ex parte*, Trust Fund for Victims and Registry, ICC-01/04-01/06-3177-Conf-Exp-AnxI. A public redacted version of the decision was filed that day (ICC-01/04-01/06-3177-Red), and a confidential redacted version of the first annex was filed on 14 December 2015 (ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red).

<sup>16</sup> Filing on Reparations and Draft Implementation Plan, dated 3 November 2015, [French] translation registered on 29 January 2016, ICC-01/04-01/06-3177-Red.

<sup>17</sup> “Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06)”, dated 3 November 2015, [French] translation registered on 29 January 2016, ICC-01/04-01/06-3177-AnxA.

<sup>18</sup> “Registry Report on Mapping of Victims Thomas Lubanga Dyilo Case, Reparations Proceedings”, 3 November 2015, ICC-01/04-01/06-3177-Conf-Exp-AnxI. A confidential redacted version was filed on 14 December 2015 (ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red).

8. On 9 February 2016, the Chamber deferred approval of the Draft Implementation Plan of 3 November 2015 for its want of compliance with the instructions of the Chamber and the Appeals Chamber.<sup>19</sup> The Chamber took the view that, in some respects, the draft implementation plan fell short of the requirements specified in its Decision of 14 August 2015.<sup>20</sup> Accordingly, it directed the Trust Fund “to begin the process of locating and identifying victims potentially eligible to benefit from the reparations [...]”<sup>21</sup> and to compile and submit dossiers for those victims who are potentially eligible for reparations in the case (“potentially eligible victims”) by 31 December 2016 (“Order of 9 February 2016”).<sup>22</sup>

9. On 15 July 2016, the Chamber, by majority, directed the Registry to provide all necessary and appropriate aid and assistance to the Legal Representatives of the V01 and V02 groups of victims (“Legal Representatives of V01 and V02 Victims”), the Office of Public Counsel for Victims (“OPCV”) and the Trust Fund for the purpose of locating and identifying the potentially eligible victims (“Order of 15 July 2016”).<sup>23</sup>

10. On 21 October 2016, the Chamber, by majority, directed the Trust Fund to continue the process of locating and identifying potentially eligible victims, and the Registry to commence outreach activities as soon as possible (“Order of 21 October

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<sup>19</sup> “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 10.

<sup>20</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, paras. 12 and 20.

<sup>21</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 15.

<sup>22</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, paras. 17-18 and p. 12.

<sup>23</sup> “Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations”, 15 July 2016, ICC-01/04-01/06-3218-tENG and dissenting opinion of Judge Herrera Carbuca, ICC-01/04-01/06-3217-Anx.



2016”).<sup>24</sup> The Chamber also authorized the OPCV to proceed with the process of locating and identifying potentially eligible victims, to put their dossiers together and to submit them to it through the Victims Participation and Reparations Section on a rolling basis by 31 December 2016.<sup>25</sup>

11. On 21 December 2016, further to requests from the Legal Representatives of V02 Victims<sup>26</sup> and the OPCV,<sup>27</sup> the Chamber extended until 31 March 2017 the time for completing the location and identification process and compiling and submitting to the Chamber the dossiers of potentially eligible victims (“Order of 21 December 2016”).<sup>28</sup>

12. On 24 January 2017, the Registry provided to the Chamber a document received from the *Unité d’Exécution du Programme National de Désarmement, Démobilisation et Réinsertion du Gouvernement de la République Démocratique du Congo* [Executive Unit of the Government of the DRC’s National Disarmament, Demobilization and Reintegration Programme] (“Executive Unit of the National DDR Programme”) on 25 September 2015 in response to a request for cooperation.<sup>29</sup> The document contains a list of children under the age of 18 years who separated

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<sup>24</sup> “Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016”, 21 October 2016, ICC-01/04-01/06-3252-tENG and dissenting opinion of Judge Herrera Carbuca, ICC-01/04-01/06-3252-Anx-tENG.

<sup>25</sup> Order of 21 October 2016, ICC-01/04-01/06-3252-tENG, p. 10.

<sup>26</sup> “Demande de prorogation du délai initialement fixé au 31 décembre 2016 pour la transmission à la Chambre des dossiers des victimes”, 16 December 2016, ICC-01/04-01/06-3265.

<sup>27</sup> “Demande de prorogation du délai aux fins de dépôt des demandes en réparation supplémentaires de bénéficiaires potentiels”, 20 December 2016, ICC-01/04-01/06-3266-Conf. A public redacted version was filed that day (ICC-01/04-01/06-3266-Red).

<sup>28</sup> “Order to complete the process of identifying victims potentially eligible to benefit from reparations”, dated 21 December 2016, [French original] registered on 22 December 2016, ICC-01/04-01/06-3267-tENG.

<sup>29</sup> “Rapport du Greffier sur l’exécution de l’Ordonnance ICC-01/04-01/06-3260”, dated 24 January 2017, [French original] registered on 25 January 2017, ICC-01/04-01/06-3272 (“Registrar’s Report of 25 January 2017”) and 5 confidential annexes, ICC-01/04-01/06-3272-Conf-AnxI, ICC-01/04-01/06-3272-Conf-AnxII, ICC-01/04-01/06-3272-Conf-AnxIII, ICC-01/04-01/06-3272-Conf-AnxIV and ICC-01/04-01/06-3272-Conf-AnxV.

from the armed group, the UPC/FPLC, and who had been recruited between 1 September 2002 and 13 August 2003.<sup>30</sup>

13. On 20 February 2017, in response to the Order of 22 November 2016, the Registry provided to the Chamber a further document from the Executive Unit of the National DDR Programme<sup>31</sup> containing another list of children under the age of 15 years who separated from the armed group, the UPC/FPLC, and who had been recruited between 1 September 2002 and 13 August 2003.

14. Between 31 May 2016 and 15 June 2017,<sup>32</sup> with further time accorded,<sup>33</sup> the Trust Fund, working with the Legal Representatives of V01 and V02 Victims, and the OPCV, submitted 473 dossiers of potentially eligible victims to the Chamber,<sup>34</sup> and in redacted form to the Defence team for Mr Lubanga (“Defence”).<sup>35</sup>

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<sup>30</sup> Annex III to Registrar’s Report of 25 January 2017, ICC-01/04-01/06-3272-Conf-AnxIII. The list was incorporated into the Registry Report on Mapping of Victims (ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red).

<sup>31</sup> “Transmission of the Observations of the Government of the Democratic Republic of the Congo in Response to Order ICC-01/04-01/06-3260”, 20 February 2017, ICC-01/04-01/06-3274-tENG and confidential annex, *ex parte* Registry, ICC-01/04-01/06-3274-Conf-Exp-AnxI (“Annex to Registrar’s Report of 20 February 2017”).

<sup>32</sup> “Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo”, 22 February 2017, ICC-01/04-01/06-3275-tENG.

<sup>33</sup> “Decision on the request of the Trust Fund for Victims for an extension of the time limit for the submission of the first batch of files of potential victims”, dated 29 March 2016, [French original] registered on 30 March 2016, ICC-01/04-01/06-3205-tENG; “Order to complete the process of identifying victims potentially eligible to benefit from reparations”, dated 21 December 2016, [French original] registered on 22 December 2016, ICC-01/04-01/06-3267-tENG.

<sup>34</sup> “First submission of victim dossiers With Twelve confidential, *ex parte* annexes, available to the Registrar, and Legal Representatives of Victims V01 only”, 31 May 2016, ICC-01/04-01/06-3208 (“Trust Fund Filing of 31 May 2016”) and 12 confidential, *ex parte* annexes; “Second submission of victim dossiers With Eleven confidential, *ex parte* annexes, available to the Registrar, and Legal Representatives of Victims V02 and OPCV only”, 14 July 2016, ICC-01/04-01/06-3216 and 11 confidential, *ex parte* annexes; “Third submission of victim dossiers”, 22 December 2016, ICC-01/04-01/06-3268 and 8 confidential annexes (dossiers), *ex parte* Registry, VPRS, Legal Representatives of V01 and V02 Victims, and 3 annexes (VPRS’s analyses of three batches) *ex parte* Registry and VPRS (ICC-01/04-01/06-3268-Conf-Exp-Anx9, ICC-01/04-01/06-3268-Conf-Exp-Anx10, ICC-01/04-01/06-3268-Conf-Exp-Anx11); “First Transmission and Report on Applications for Reparations”, 22 December 2016, ICC-01/04-01/06-3269 and 23 confidential annexes (dossiers), *ex parte* Registry and OPCV, and one confidential annex (Registry report), *ex parte* Registry and OPCV (ICC-01/04-01/06-3269-Conf-Exp-Anx24); “Second Transmission and Report on Applications for Reparations”, 20 January 2016,

15. Between 10 April 2017 and 29 June 2017,<sup>36</sup> the Defence filed submissions on the redacted dossiers of potentially eligible victims.<sup>37</sup>

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ICC-01/04-01/06-3270; “Third Transmission and Report on Applications for Reparations”, 31 March 2017, ICC-01/04-01/06-3287 and confidential annexes 1-93, *ex parte* Registry and OPCV. A confidential redacted version of annexes 1-92 was filed for the attention of the Defence on 24 April 2017 (ICC-01/04-01/06-3298); “Fourth Transmission to Trial Chamber II of Confidential Applications for Reparations and the Report Thereon”, 4 May 2017, ICC-01/04-01/06-3304 and confidential annexes 1-62, *ex parte* Registry and OPCV. A confidential redacted version of annexes 1-61 was filed for the attention of the Defence that day (ICC-01/04-01/06-3305); “Fifth Transmission to Trial Chamber II of Confidential Applications for Reparations and the Report Thereon”, 18 May 2017, ICC-01/04-01/06-3312 and confidential annexes 1-61, *ex parte* the Chamber and OPCV. A confidential redacted version of annexes 1-60 was filed for attention of the Defence that day (ICC-01/04-01/06-3313); “Sixth Transmission to Trial Chamber II of Confidential Applications for Reparations and the Report Thereon”, 1 June 2017, ICC-01/04-01/06-3323 and confidential annexes 1-34, *ex parte* the Chamber, Legal Representatives of V02 Victims and Trust Fund, and confidential annexes 35-62, *ex parte* the Chamber and OPCV. A confidential redacted version of annexes 1-60 was filed for attention of the Defence that day (ICC-01/04-01/06-3324); “Seventh Transmission to Trial Chamber II of Confidential Applications for Reparations and the Report Thereon”, 15 June 2017, ICC-01/04-01/06-3329 and confidential annexes 1-10, *ex parte* the Chamber, Legal Representatives of V01 Victims V01 and Trust Fund, confidential annexes 11-25, *ex parte* the Chamber, Legal Representatives of Victims V02 and Trust Fund, and confidential annexes 26-56, *ex parte* the Chamber and OPCV.

<sup>35</sup> “First Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017”, 8 March 2017, ICC-01/04-01/06-3276 and confidential redacted annexes 1-31; “Second Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017”, 22 March 2017, ICC-01/04-01/06-3281 and confidential redacted annexes 1-23; “Third Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017”, 5 April 2017, ICC-01/04-01/06-3288 and confidential redacted annexes 1-95; “Fourth Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Decision ICC-01/04-01/06-3290 of 6 April 2017”, 24 April 2017, ICC-01/04-01/06-3298 and confidential redacted annexes 1-92; “Fifth Transmission to the Defence of Confidential Redacted Applications for Reparations pursuant to Trial Chamber II Decision ICC-01/04-01/06-3290 of 6 April 2017”, 4 May 2017, ICC-01/04-01/06-3305 and confidential redacted annexes 1-61; “Sixth Transmission to the Defence of Confidential Redacted Applications for Reparations pursuant to Trial Chamber II Decision ICC-01/04-01/06-3290 of 6 April 2017”, 18 May 2017, ICC-01/04-01/06-3313 and confidential redacted annexes 1-60; “Seventh Transmission to the Defence of Confidential Redacted Applications for Reparations pursuant to Trial Chamber II Decision ICC-01/04-01/06-3290 of 6 April 2017”, 1 June 2017, ICC-01/04-01/06-3324 and confidential redacted annexes 1-60; “Eighth Transmission to the Defence of Confidential Redacted Applications for Reparations pursuant to Trial Chamber II Decision ICC-01/04-01/06-3290 of 6 April 2017”, 15 June 2017, ICC-01/04-01/06-3330 and confidential redacted annexes 1-53.

<sup>36</sup> “Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo”, 22 February 2017, ICC-01/04-01/06-3275-tENG; “Decision on the Admissibility of Documents filed by the Parties on 13 and 21 April 2017 and 5 May 2017”, 19 May 2017, ICC-01/04-01/06-3314-tENG.

16. On 13 July 2017, the Chamber denied the OPCV motion for reconsideration seeking further time in which to submit to the Chamber the dossiers of potentially eligible victims, and directed the Legal Representatives of V01 and V02 Victims and the OPCV to provide to the Trust Fund the dossiers in their possession which they had not been in a position to place before the Chamber on time (“Decision of 13 July 2017”).<sup>38</sup>

17. On 21 July 2017, the Chamber directed the Registry to enter into the record additional documents which, to the Bench, appeared relevant to the determination of the size of the award for which Mr Lubanga is liable (“Order of 21 July 2017”).<sup>39</sup>

18. On 8 and 11 September 2017 and 2 October 2017, at the Chamber’s behest,<sup>40</sup> the Legal Representatives of V01<sup>41</sup> and V02<sup>42</sup> Victims, the OPCV<sup>43</sup> and the Defence<sup>44</sup>

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<sup>37</sup> “Observations of the Defence for Mr Lubanga on the First Transmission of Redacted Applications for Reparations of 8 March 2017”, 10 April 2017, ICC-01/04-01/06-3291-tENG (“Defence Observations of 10 April 2017”) and three confidential annexes; “Observations of the Defence for Mr Lubanga on the First Transmission of Redacted Applications for Reparations of 8 March 2017”, 24 April 2017, ICC-01/04-01/06-3299-tENG (“Defence Observations of 24 April 2017”) and one confidential annex; “Observations of the Defence for Mr Lubanga on the Third Transmission of Redacted Applications for Reparations of 5 April 2017”, 5 May 2017, ICC-01/04-01/06-3311-tENG (“Defence Observations of 5 May 2017”) and two confidential annexes; “Observations of the Defence for Mr Lubanga on the Fourth Transmission of Redacted Applications for Reparations of 24 April 2017”, 22 May 2017, ICC-01/04-01/06-3315-tENG (“Defence Observations of 22 May 2017”) and two confidential annexes; “Observations of the Defence for Mr Lubanga on the Fifth Transmission of Applications for Reparations of 4 May 2017”, 30 May 2017, ICC-01/04-01/06-3320-tENG (“Defence Observations of 30 May 2017”) and one confidential annex; reparations “Observations of the Defence for Mr Lubanga on the Sixth Transmission of Redacted Applications for Reparations”, 31 May 2017, ICC-01/04-01/06-3322-tENG (“Defence Observations of 31 May 2017”) and one confidential annex; “*Observations de la Défense de M. Lubanga à la septième transmission des formulaires de réparation expurgés du 1<sup>er</sup> juin 2017*”, dated 29 June 2017, [French original] registered on 30 June 2017, ICC-01/04-01/06-3335 (“Defence Observations of 30 June 2017”) and one confidential annex; “*Observations de la Défense de M. Lubanga à la huitième transmission des formulaires de réparation expurgés du 15 juin 2017*”, 11 July 2017, ICC-01/04-01/06-3336 (“Defence Observations of 11 July 2017”) and one confidential annex.

<sup>38</sup> “Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017”, 13 July 2017, ICC-01/04-01/06-3338-tENG.

<sup>39</sup> “Order Instructing the Registrar to File Additional Documents in the Case Record”, dated 20 July 2017 and [French original] registered on 21 July 2017, ICC-01/04-01/06-3344-tENG, public annexes 1-24 and 26 and confidential annex 25.

<sup>40</sup> “Order Instructing the Parties to File Submissions on the Evidence Admitted for the Determination of Thomas Lubanga Dyilo’s Liability for Reparations”, 13 July 2017, ICC-01/04-01/06-3339-tENG;

filed submissions on the evidence admitted in the present proceedings with a view to setting the size of the reparations award for which Mr Lubanga is liable.

19. On 22 November 2017, the decision on the size of the reparations award for which Mr Lubanga is liable was scheduled by the Chamber for pronouncement in open court on 15 December 2017.<sup>45</sup>

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

<sup>41</sup> “Submissions on the Evidence Admitted in the Proceedings for the Determination of Mr Thomas Lubanga Dyilo’s Liability for Reparations”, 8 September 2017, ICC-01/04-01/06-3359-tENG (“Observations of Legal Representatives of V01 Victims of 8 September 2017”).

<sup>42</sup> “Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345”, dated 8 September, [French original] registered on 11 September 2017, ICC-01/04-01/06-3363-tENG (“Observations of Legal Representatives of V02 Victims of 11 September 2017”).

<sup>43</sup> “Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo’s Liability for Reparations”, 8 September 2017, ICC-01/04-01/06-3360-tENG (“OPCV Observations of 8 September 2017”) and two public annexes.

<sup>44</sup> “Defence Submissions on the Evidence Admitted for the Determination of Thomas Lubanga Dyilo’s Liability for Reparations”, dated 29 September 2017, [French original] registered on 2 October 2017, ICC-01/04-01/06-3374-tENG (“Defence Observations of 2 October 2017”).

<sup>45</sup> “Order Setting the Date for the Delivery of the Decision on the Amount of Thomas Lubanga Dyilo’s Liability for Reparations”, 22 November 2017, ICC-01/04-01/06-3378-tENG.

## II. INTRODUCTION

20. As said, the Appeals Chamber gave the Chamber the task of monitoring and overseeing the implementation of the Amended Order for Reparations<sup>46</sup> and of setting the size of the reparations award for which Mr Lubanga is liable.<sup>47</sup>

21. Whereas the present decision addresses a number of matters which go to implementation of the Amended Order for Reparations, its prime purpose is to determine the size of the reparations award for which Mr Lubanga is liable.

22. Of note is that the Appeals Chamber has underscored that a person subject to a court order must be apprised of the precise extent of his or her concomitant obligations, in particular in the light of the corresponding right to appeal, and that the extent of those obligations must be determined by the Chamber concerned in a judicial process.<sup>48</sup>

23. The Appeals Chamber also made it clear that, in principle, it would need to specify the scope of Mr Lubanga's liability for reparations and to set it down in the Amended Order for Reparations. However, the Bench underlined, it would require the relevant information, since Trial Chamber I had made only limited enquiries before handing down the Decision on Reparations. Yet to such end, the Appeals Chamber said, it would have to engage in an exercise which Trial Chamber I was better placed to undertake.<sup>49</sup>

24. Lastly, the Appeals Chamber made the point that, were it to specify the scope of Mr Lubanga's liability in the Amended Order for Reparations, it would be the first time that that determination was made and, with it, finality would ensue and so from it no appeal would lie. That being so, the Appeals Chamber did not think it

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<sup>46</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 76.

<sup>47</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, paras. 241-242; Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 80-81.

<sup>48</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 237.

<sup>49</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 238.

appropriate, in the circumstances of the case before it, to determine the scope of Mr Lubanga's liability for reparations.<sup>50</sup>

25. For those reasons, the Appeals Chamber gave the present Chamber the task of setting the size of the reparations award for which Mr Lubanga is liable.

26. So, by the present decision, the Amended Order for Reparations is made complete. Furthermore, appeal lies from this decision in accordance with article 82(4) of the Statute and rule 150(1) of the Rules of Procedure and Evidence.<sup>51</sup>

27. In setting the size of the reparations award for which Mr Lubanga is liable (Section X), the Chamber will begin by recalling the findings of Trial Chamber I and the Trust Fund's estimate of the number of victims affected by the crimes of which Mr Lubanga was convicted (Section III); the sample of dossiers, that is, the 473 dossiers of potentially eligible victims placed before it until 31 March 2017 (Section IV); the documents received from the Executive Unit of the National DDR Programme (Section V); the submissions of the parties on the total number of direct and indirect victims in the case (Section VI); and the additional documents from official sources and/or the public domain, such as the United Nations or various governmental and non-governmental organizations, which the Chamber required the Registry to enter into the record (Section VII).

28. Upon arriving at its own findings as to the number of victims affected by the crimes of which Mr Lubanga was convicted (Section VIII), the Chamber will proceed to determine the monetary value of the harm suffered by the persons in the sample who have established that they are victims for the purposes of reparations (Section IX).

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<sup>50</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 239.

<sup>51</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 81.

29. Lastly, the Chamber will address how effect is to be given to the present decision (Section XI), and the reconsideration sought by the Trust Fund on 31 May 2016 (Section XII).



### III. TRIAL CHAMBER I'S FINDINGS AND THE TRUST FUND'S ESTIMATE OF THE NUMBER OF VICTIMS AFFECTED BY THE CRIMES OF WHICH MR LUBANGA WAS CONVICTED

30. The Chamber observes that the number of victims affected by the crimes of which Mr Lubanga was convicted is a matter which arises from that of the scope of Mr Lubanga's liability for reparations. Of note, in the Chamber's view, are Trial Chamber I's findings on the number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted and the Trust Fund's conclusions set out in its Draft Implementation Plan of 3 November 2015.

31. In the Judgment Handing Down Conviction, Trial Chamber I found that "between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15 [...]".<sup>52</sup> Trial Chamber I expressed the scale of the practice of using child soldiers in a variety of terms – "conducted a large-scale recruitment exercise directed at young people",<sup>53</sup> "widespread recruitment of young people, including children under the age of 15",<sup>54</sup> "a significant number of children"<sup>55</sup> – and

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<sup>52</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 911 [Footnotes omitted]. Of note in this regard is that that finding on the widespread nature of the involvement of individuals under the age of 15 years was undisturbed on appeal, Appeals Chamber, "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", 1 December 2014, ICC-01/04-01/06-3122, paras. 99-104.

<sup>53</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1354: "The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion".

<sup>54</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 49.

<sup>55</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 811 [Footnotes omitted]: "Given the consistency and credibility of these witnesses, the Chamber is satisfied there were a significant number of children under the age of fifteen who were trained by the UPC/FPLC at Mandro camp during the period of the charges".

also made reference to figures and proportions put forward in the evidence it heard *viva voce*.<sup>56</sup>

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<sup>56</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 700 [Footnotes omitted]: “P-0014 witnessed military training at the UPC’s headquarters in Bunia immediately preceding the period of the charges in 2002. He indicated the recruits were trained to fight the RCD-ML and the Lendu, and they ranged from 5 years old to adulthood. P-0014 estimated that 30% of approximately one hundred young recruits he saw were children aged 15 and under. Excluding those who were 15, he estimated about 20% of the recruits were below that age”; para. 766 [Footnotes omitted]: “P-0046 testified that 167 children, whose cases she had recorded prior to May 2004 as part of MONUC’s child protection service, had been associated with the UPC, and that 71 of them were below the age of 15 when they were recruited or used between mid-2002 and mid-2003. P-0046 was provided with information about recruitment by the UPC/FPLC in the area near Ndrele around 15 February 2003. This was on a market day and the armed men involved, wearing uniforms and carrying Kalashnikovs, were speaking in Swahili and Lingala. They recruited between 50 and 60 individuals, some of whom spoke with P-0046. They included three children who were taken to Mount Awa because the person who recruited them was aware that they were from Uganda.”; para. 786 [Footnotes omitted]: “He indicated many children were at the military camp, the great majority of whom were adults.”; para. 804 [Footnotes omitted]: “P-0016 testified that he was at the Mandro training camp for about 10 days in August or early September 2002, after the battle of Bunia, by which time Thomas Lubanga had become president. There were over a hundred recruits and others at the camp, three quarters of whom were children”; para. 805 [Footnotes omitted]: “P-0016 was asked how many of the children were aged 14 and below during his training at Mandro. He said he did not know the exact number, but it was less than 50 percent. Training was an ongoing activity, and when he arrived two or three batches of children were already at Mandro, and others had already been assigned to other places, such as Tchomia, Nizi, Iga-Barrière and Kasenyi. According to P-0016, none of the children at Mandro in August or early September 2002 were younger than 13 years.”; paras. 812-815 [Footnotes omitted]: “The Chamber has heard evidence that children under the age of 15 years were trained at the UPC camp in Mongbwalu. Two witnesses, P-0016 and P-0038, gave credible, reliable and consistent evidence to this effect. As discussed above, the Chamber is of the view that it can rely on the age estimates of these witnesses. [...] P-0017 visited the training camp in Mongbwalu during his time with the UPC, between late August/early September 2002 and August 2003. He saw between 380 and 420 recruits there, including children under the age of 15. [...] During the final military training at Mongbwalu that involved P-0038, around the end of 2002, many of the trainee child soldiers were within the age range of 13 to 16, although the witness was unable to estimate the exact number. [...] On the basis of this evidence, the Chamber concludes that children under the age of 15 were trained by the UPC/FPLC at Mongbwalu during the period of the charges.”; para. 826 [Footnotes omitted]: “P-0012 gave evidence that he saw child soldiers, many of whom were under 15, in the armed groups in Bunia in 2003. He described how some from the UPC/FPLC were in the front line at the battle of Bunia on 12 May; para. 877, [Footnotes omitted]: “The Chamber concludes from the evidence of P-0017 that approximately 45 child soldiers within the ranks of the UPC/FPLC, some of them under the age of 15, were grouped together in the spring of 2003 in a ‘Kadogo Unit’”; para. 882 [Footnotes omitted]: “The Chamber has taken into account the evidence concerning domestic work undertaken by girls under the age of 15 when the support provided by the girl exposed her to danger by becoming a potential target. On the basis of the evidence overall, the Chamber concludes that during the period of the charges a significant number of girls under the age of 15 were used for domestic work, in addition to the other tasks they carried out as UPC/FPLC

32. That said, Trial Chamber I ultimately stated that “[it] ha[d] not reached conclusions [...] beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years.”<sup>57</sup>

33. In a similar vein, in the Decision on Reparations, Trial Chamber I spoke of “the uncertainty as to the number of victims of the crimes in this case”, and, it said, “that a considerable number of people were affected” was all that was known.<sup>58</sup> It went on to comment that “the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified” given “the limited number of individuals who have applied for reparations”.<sup>59</sup>

34. In its Draft Implementation Plan of 3 November 2015, the Trust Fund enumerated what it saw as the factors essential to establishing Mr Lubanga’s liability – among them, the total number of direct and indirect victims.<sup>60</sup> Having concluded that it was not in a position to say exactly how many victims may be entitled to reparations,<sup>61</sup> the Trust Fund noted that, for planning purposes, and despite the considerations it set out on the data it had compiled, it was necessary, in designing and drafting the implementation plan, to give an estimate of the number of direct and indirect victims who may be entitled to reparations:

This estimated number of a total of 3,000 potentially eligible direct and indirect victims is accompanied by the caveat that a final determination of the number of eligible

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soldiers, such as involvement in combat, joining patrols and acting as bodyguards”; and para. 1325 [Footnotes omitted]: “[P-0024] suggested any demobilisation that occurred only concerned a limited number of children – he estimated no more than 20”.

<sup>57</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 50 [Footnotes omitted].

<sup>58</sup> Trial Chamber I, “Decision establishing the principles and procedures to be applied to reparations”, dated 7 August 2012, [French] translation registered on 19 February 2013, ICC-01/04-01/06-2904, para. 219.

<sup>59</sup> Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 219. See also Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 153 referring to the aforesaid Decision on Reparations.

<sup>60</sup> Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 218.

<sup>61</sup> Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 241: “The Trust Fund regrets that, at this time, despite best efforts it is not in a position to assist the Court with a definite number of potentially eligible (direct and indirect) victims”.

victims will be made [...]. As discussed [...] the figure is merely an estimate for purposes of collective reparation programme planning and budgeting at the design stage [...]<sup>62</sup>.

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<sup>62</sup> The Trust Fund further stated that “[..] the figure is merely an estimate for purposes of collective reparation programme planning and budgeting at the design stage, and a final tabulation will be verified in the course of implementation” (Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 253).

#### IV. THE SAMPLE OF DOSSIERS (THE 473 DOSSIERS OF POTENTIALLY ELIGIBLE VICTIMS)

##### A. Introduction

35. Upon consideration of the Draft Implementation Plan of 3 November 2015, and with particular attention paid to the factors the Trust Fund regards as essential to setting the size of the reparations award for which Mr Lubanga is liable, the Chamber required the Trust Fund and, subsequently, the OPCV and the Legal Representatives of V01 and V02 Victims to locate and identify potentially eligible victims, to compile their dossiers and to convey “the results of this process” to the Chamber.<sup>63</sup> It went on to make clear that the dossiers so provided would be only a sample of all of the potentially eligible victims.<sup>64</sup>

36. The Chamber received 473 dossiers of potential victims between 31 May 2016 and 15 June 2017.<sup>65</sup> As said in the Decision of 13 July 2017, it has decided that the figure of 473 dossiers of potential victims received until 31 March 2017 is sufficiently representative of all of the victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted.<sup>66</sup> The Chamber also stated that it would subsequently be for the Trust Fund to consider whether the persons who were not in a position to submit a dossier on time qualify for the collective award at the implementation stage of reparations.<sup>67</sup>

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<sup>63</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 15; “Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations”, 15 July 2016, ICC-01/04-01/06-3218-tENG, para. 8; “Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016”, 21 October 2016, ICC-01/04-01/06-3252-tENG, para. 15.

<sup>64</sup> “Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations”, 15 July 2016, ICC-01/04-01/06-3218-tENG, para. 8.

<sup>65</sup> See, above, para. 14.

<sup>66</sup> “Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017”, 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 10.

<sup>67</sup> “Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017”, 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 11.

37. This section will recapitulate the conditions which a natural person must satisfy to be awarded reparations, the standard of causation and the standard of proof applicable to reparations proceedings as laid down by the Appeals Chamber. Next come the criteria for evaluating the evidence in the dossiers and the method the Chamber used to assess them. Then, the Chamber will set out in greater depth the three conditions to be met in the specific circumstances of the case *sub judice*: (1) proof of identity and sufficient proof of (2) the harm suffered and of (3) the causal nexus between the harm and the crime. Ultimately, the Chamber will present its findings on the sample and on the monetary assessment of the harm.

38. The Chamber must underscore that another aim of the assessment of the dossiers is to devise a method for the screening of the victims for eligibility to be undertaken by the Trust Fund during the victim selection process upon which it will embark as it starts to implement the reparations.<sup>68</sup>

39. For ease of consultation and presentation, the assessment of the dossiers in the sample, informed by the specific criteria applied,<sup>69</sup> is tabulated in Annex II hereto.

#### **B. The concept of victim: conditions and standards applicable to the reparations phase**

40. The Chamber recalls that for a natural person to qualify as a victim for the purposes of reparations under rule 85(a) of the Rules of Procedure and Evidence,

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<sup>68</sup> “Information regarding Collective Reparations”, 13 February 2017, ICC-01/04-01/06-3273, paras. 42-50 (“Trust Fund Project of 13 February 2017 for Service-based Collective Reparations”) and three public annexes (ICC-01/04-01/06-3273-AnxA, ICC-01/04-01/06-3273-AnxB, ICC-01/04-01/06-3273-AnxC), one confidential annex (ICC-01/04-01/06-3273-Conf-AnxD1) and one confidential annex *ex parte* Trial Chamber II (ICC-01/04-01/06-3273-Conf-Exp-AnxD2). A public redacted version of the confidential annex was filed that day (ICC-01/04-01/06-3273-Anx-D1-Red). See also “Observations on the ‘Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016’”, 3 October 2016, ICC-01/04-01/06-3237, paras. 24-33.

<sup>69</sup> See below, paras. 60-189.

he or she must provide identification, and sufficient proof of the harm suffered and of the causal nexus between the crime and the harm.<sup>70</sup>

41. Harm may be material, physical or psychological.<sup>71</sup> The Chamber would also underline that the harm to the victim need not be direct but must have been personally suffered. In determining the eligibility of an indirect victim, it is a prerequisite that there was a close personal relationship between the direct victim and the indirect victim, such as that binding a child soldier and his or her parents.<sup>72</sup>

42. The standard of causation requires that the crimes of which the person was convicted were the “proximate cause” of the harm for which reparations are sought,<sup>73</sup> and consists of a but-for relationship between the harm and the crime.

43. Lastly, it is to be noted that the standard of proof as to whether a victim qualifies for an award is a balance of probabilities.<sup>74</sup>

### **C. Contents of the dossiers submitted by the 473 potentially eligible victims and redactions made thereto**

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

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<sup>70</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22; and Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 81.

<sup>71</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 10.

<sup>72</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 63.

<sup>73</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 59.

<sup>74</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 22 and 65.

militia-member tattoos, and written statements declaring that the harm alleged was a consequence of membership of the militia.

45. The Chamber recalls that, on 9 February 2016, it ordered the Trust Fund to start the process of locating and identifying potentially eligible victims and to impart to it the results.<sup>75</sup> The Chamber went on to point out that the Trust Fund could seek the assistance of the Victims Participation and Reparations Section (“VPRS”), the V01 and V02 Legal Representatives and the OPCV in locating and identifying said victims.<sup>76</sup> Furthermore, it made clear, it would invite the views of the parties as to the scope of Mr Lubanga’s overall liability and would entertain their submissions before making a determination on his liability for reparations.<sup>77</sup>

46. The Trust Fund subsequently expressed some misgivings about the process for the identification of potentially eligible victims and conveyed to the Chamber the reservations that some victims harboured about participating in collective reparations, out of fear of the security situation in Ituri.<sup>78</sup>

47. The Legal Representatives of V01<sup>79</sup> and V02<sup>80</sup> Victims reported that some potentially eligible victims were hesitant or were refusing to disclose their identity to the Defence on account of the influence which, in their eyes, Mr Lubanga continues to wield over their communities. Likewise, the OPCV drew attention to the real

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<sup>75</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 15.

<sup>76</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 16.

<sup>77</sup> Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 26.

<sup>78</sup> Trust Fund Filing of 31 May 2016, ICC-01/04-01/06-3208, para. 56. See also “Additional Programme Information Filing”, 7 June 2016, ICC-01/04-01/06-3209, paras. 25, 59-60.

<sup>79</sup> “Consolidated observations of the V01 Group of Victims on the documents ‘First submission of victim dossiers’ and ‘Additional Programme Information Filing’, filed by the Trust Fund for Victims on 31 May and 1 June respectively”, 1 July 2016, ICC-01/04-01/06-3213-tENG, paras. 9-11.

<sup>80</sup> “Observations of the V02 team on filings ICC-01/04-01/06-3208 and ICC-01/04-01/06-3209 submitted by the Trust Fund for Victims”, 1 July 2016, ICC-01/04-01/06-3214-tENG, para. 17.



danger posed by disclosure of the victims' identities to the Defence in the current situation in Ituri.<sup>81</sup>

48. At a hearing on 11 and 13 October 2016, convened by the Chamber, the Women's Initiative for Gender Justice, an *amicus curiae* that had been invited to appear, spoke of the victims' apprehension about their safety, and their fears of retaliation, were they to take part in collective reparations projects.<sup>82</sup>

49. At the hearing, the Defence drew the Chamber's attention to the dearth of objective information on the security situation in the Ituri region and the unfoundedness of the fears of retaliation voiced by the victims.<sup>83</sup>

50. [REDACTED].<sup>84</sup>

51. In its Order of 22 February 2017, the Chamber specified how the dossiers of potentially eligible victims were to be redacted before disclosure to the Defence.<sup>85</sup> The Chamber required in particular that the Registry redact all information pertaining to the current place of residence of the potentially eligible victims and other contact information which could give their whereabouts.<sup>86</sup> In the case of dossiers of those potentially eligible victims who objected to disclosure of their identity to the Defence, the Chamber required the Registry to redact their names and any information which could identify them.<sup>87</sup> The Chamber further stated that it

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<sup>81</sup> "Consolidated response to the submissions filed on 31 March and 7 June 2016 by the Trust Fund for Victims", 1 July 2016, ICC-01/04-01/06-3212-tENG and confidential annex, *ex parte* OPCV, para. 48.

<sup>82</sup> ICC-01/04-01/06-T-367-FRA ET WT 11-10-2016 1-85 SZ T, 11 October 2016, p. 8, lines 17-19, and p. 9, lines 9-11. See also ICC-01/04-01/06-T-367-FRA ET WT 11-10-2016 1-85 SZ T, 11 October 2016, p. 9, line 28 and p. 10, lines 1-4.

<sup>83</sup> ICC-01/04-01/06-T-367-FRA ET WT 11-10-2016 1-85 SZT, 11 October 2016, p. 80, lines 6-28, p. 81, lines 1-28 and p. 82, lines 1-17.

<sup>84</sup> [REDACTED].

<sup>85</sup> "Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo", 22 February 2017, ICC-01/04-01/06-3275-tENG, paras. 14-19.

<sup>86</sup> Order of 22 February 2017, ICC-01/04-01/06-3275-tENG, para. 14.

<sup>87</sup> Order of 22 February 2017, ICC-01/04-01/06-3275-tENG, paras. 16 and 18.

would decide in due course how to treat the dossiers of those potentially eligible victims who had not consented to disclosure of their identity to the Defence.<sup>88</sup>

52. In its Decision of 5 June 2016 on the Defence application of 24 April 2017 on redactions to some dossiers of potentially eligible victims,<sup>89</sup> the Chamber made plain that any information which could identify or give the whereabouts of a person named or referred to in a dossier, but who has not given express consent to the disclosure of his or her identity to the Defence, must, as the Registry had suggested, also be redacted.<sup>90</sup> The Chamber ruled “that, despite the redactions, the [dossiers] disclose enough information for the Defence to meaningfully exercise its right to respond to the files of Potentially Eligible Victims”.<sup>91</sup>

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<sup>88</sup> Order of 22 February 2017, ICC-01/04-01/06-3275-tENG, para. 17.

<sup>89</sup> “Decision on the Application of the Defence for Thomas Lubanga Dyilo of 24 April 2017 concerning Redactions in some of the Files of Potentially Eligible Victims”, dated 5 June 2017, [French original] registered on 6 June 2017, ICC-01/04-01/06-3328-tENG.

<sup>90</sup> Decision of 5 June 2017, ICC-01/04-01/06-3328-tENG, para. 12.

<sup>91</sup> Decision of 5 June 2017, ICC-01/04-01/06-3328-tENG, para. 13. The decision applies to the specific observations on the dossiers, wherein the Defence mostly maintains that all of the redacted dossiers prevent it from making submissions on the coherence of the events described and the reliability and credibility of the accounts given by the potentially eligible victims, and from verifying age, family relationship or whether the harm alleged by the potentially eligible victims occurred (Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, paras. 2, 19, 26, 30; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 109, 111, 118, 121; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, paras. 2, 13, 24, 32, 53; Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 2, 4, 5, 13, 15, 22, 24, 30, 32, 39, 41, 46, 48, 54, 59, 61, 65, 70, 75, 85, 99, 105, 112-113, 126, 133, 137, 141, 154, 161; Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 2, 4, 40, 45, 127, 156, 159, 163, 179, 182, 188, 190-191, 195, 205, 208-209, 231, 240, 306-307, 310, 320-322, 333, 339, 347-348, 369, 377-378, 400, 407, 412, 423-424; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 4, 11-12, 21, 32, 40, 65-66, 129-130, 161-162, 165, 192-193, 199, 209-210, 216, 239, 244, 258-259, 266-267, 274, 278-279, 287, 299-300, 308-309, 338-339, 344, 348-349, 352, 358, 369, 373, 377, 390, 404, 407, 412, 415, 417; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 2, 4, 12-13, 28, 31-32, 35, 37, 54, 70, 73, 77, 99, 107, 110, 122, 126, 136, 138, 141, 144, 148, 152, 155, 159, 167, 178, 183, 187, 189, 193, 199, 204, 209-210, 214, 230-231, 235, 240, 242-243, 246-248, 261, 263-264, 268, 285, 288, 292-293, 300-301, 308-309, 312, 318, 320-321, 325, 338, 340-341, 344, 351, 354, 369-370, 375, 382, 392-393, 405-406; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 19, 22, 27, 35, 38, 67, 76, 85, 99, 101, 106, 122, 156-157, 176-177, 181, 187, 192, 196, 208-209, 213, 218-219, 223, 229, 238, 242, 280-281, 285, 289, 291, 374-375, 380; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 5, 26, 28-29, 33, 39-40, 43, 46, 57, 70, 73, 79-80, 86-87, 96, 98, 109-110, 139, 149, 151, 164, 166, 180,

53. The Chamber notes that in its Observations of 10 April 2017 the Defence argued that the withholding from the Defence of the identity of most of the potentially eligible victims and, with it, factual details which could directly or indirectly identify them, “precludes any serious investigation or analysis of the merits of the [dossiers] so redacted”.<sup>92</sup> The withholding, the Defence also contended, “[was] solely in accordance with the wishes [of the potentially eligible victims]” and was “not based on any demonstration of specific needs for protection.”<sup>93</sup> Moreover, in its view, that a significant number of potentially eligible victims had agreed to make their identity known shows that the current situation in Ituri did not warrant a protective measure of that kind, which could be prescribed only in exceptional circumstances and on compelling grounds particular to the applicants concerned.<sup>94</sup> It pointed out that some potentially eligible victims were refusing to make their identity known or to disclose their particulars to the Defence, despite saying that they had no fears for their safety.<sup>95</sup> The Defence argued that “a refusal to disclose

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183, 190, 198, 209, 212, 218, 220, 224, 238, 240, 254, 256, 263, 265, 285, 287, 305, 310, 313, 323-324, 344, 347, 351-352, 359, 362, 368, 372, 375, 394-395, 402, 407, 414, 418, 434, 437, 442-443, 448-449, 453, 476, 482, 492, 501, 506-507, 513; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 3, 5, 9, 21, 23, 54, 58-59, 96, 100, 104, 109, 111, 117, 119, 123, 134, 139-140, 143, 169, 172, 193, 202, 204-205, 217-218, 221, 236-237, 240, 247-248, 281, 257-258, 265-266, 270-271, 282-283, 287, 300, 308-309, 313, 320, 323, 341, 345, 361, 365, 371, 377, 381, 386, 390, 426, 431, 439, 441, 473, 485, 499, 502, 507; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 56, 131, 133, 262, 268, 270, 275, 280, 282, 286, 290, 294-295, 303, 311, 322, 359, 363, 371, 375, 390, 399, 406, 424, 427, 487, 494, 498; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 33, 38, 104-105, 149, 151, 169, 235, 238-239, 242, 247-248, 251, 258, 260-261, 264-265, 271, 273-274, 278, 325-326, 329, 333-334, 373, 378, 385, 391, 401, 404, 411, 417, 425, 428, 437, 443, 450, 454, 483, 486).

<sup>92</sup> Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-tENG, para. 19.

<sup>93</sup> Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-tENG, para. 20.

<sup>94</sup> Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-tENG, para. 20.

<sup>95</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, para. 176; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 28, 36, 63, 287, 344; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 238, 259, 336, 390; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 229; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 94, 147; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 166, 200, 254; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 45, 256, 301.

one's identity to the Defence may reasonably be interpreted as an attempt to obstruct the required verifications, raising serious doubts as to the sincerity of an applicant's claims."<sup>96</sup> Further, it asserted:

As [these dossiers] of [v]ictims who may be eligible have not been subjected to genuine adversarial scrutiny, they cannot be taken into consideration by the Chamber. They certainly cannot be used against Mr Thomas Lubanga to determine the scope of his liability.<sup>97</sup>

54. Lastly, it is the Defence's submission that, where the potentially eligible victims have agreed to disclose their identity to the Defence, the withholding of information which could identify their place of residence – and to which the Chamber and other parties were privy – is also an impediment to the Defence's legitimate enquiries and to a process which fully affords notice and the opportunity to be heard in accordance with the requisites of procedural fairness.<sup>98</sup>

55. To begin with, the Chamber recalls that, as in all proceedings before the Court, the Chamber "must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other".<sup>99</sup> Moreover, it is to be remembered, the reparations phase is a distinct phase of the judicial proceedings before the Court<sup>100</sup> and, in that connection, the Appeals

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<sup>96</sup> Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-tENG, para. 21. See also Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, para. 176; Annex 2 to Defence Observations on Third Transmission of Applications for Reparations, 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 28, 36, 63, 287, 344; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 238, 259, 336, 390; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 229; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 94, 147; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 166, 200, 254; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 45, 256, 301.

<sup>97</sup> Observations of 10 April 2017, ICC-01/04-01/06-3291-tENG, para. 22.

<sup>98</sup> Observations of 10 April 2017, ICC-01/04-01/06-3291-tENG, para. 23. See also Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 44, 74, 88, 117, 143.

<sup>99</sup> *The Prosecutor v. Germain Katanga*, "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 18 ("*Katanga*" and "Order of 24 March 2017", respectively). See also articles 64(2) and 68(1) of the Statute.

<sup>100</sup> "Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016", 4 March 2016, ICC-01/04-01/06-3202-tENG, para. 12 referring to Appeals Chamber, "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the

Chamber has underlined that the rules applying to criminal proceedings brought against an accused person do not necessarily find application at the reparations phase.<sup>101</sup>

56. [REDACTED]<sup>102</sup> [REDACTED].<sup>103</sup> [REDACTED].<sup>104</sup> [REDACTED].<sup>105</sup> [REDACTED].<sup>106</sup>  
[REDACTED].<sup>107</sup> [REDACTED].<sup>108</sup>

57. On that subject, the Chamber points out that it was the concerns raised by the potentially eligible victims themselves that prompted the redactions <sup>109</sup> [REDACTED]. The Chamber wishes to underscore in that regard that, in *Katanga*, even though the

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principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", 14 December 2012, ICC-01/04-01/06-2953, para. 70 ("Decision on Admissibility of Appeals against Decision on Reparations"). See also *Katanga*, Annex I to "Decision replacing two judges in Trial Chamber II", 16 April 2014, ICC-01/04-01/07-3468-AnxI, paras. 6 and 8. In the annex, the Presidency drew particular attention to the fact that the differences between reparations proceedings and criminal proceedings are numerous, spanning many aspects of substance and procedure, and that there is no requirement for reparations proceedings to constitute a stage of the trial *stricto sensu*.

<sup>101</sup> Appeals Chamber, Decision on Admissibility of Appeals against Decision on Reparations, ICC-01/04-01/06-2953, para. 70. Further, the Chamber has had occasion to recall the holding of European Court of Human Rights that the fair-hearing guarantees enshrined in article 6(1) of the European Convention on Human Rights "are not necessarily the same" and that "as regards cases [...] concerning civil rights [the requirements of article 6] are less onerous than they are for criminal charges". Moreover, the Chamber has referred to the balance to be struck between the rights vested in the convicted person and the rights of the victims, in particular their right to a fair and expeditious resolution of this final phase of the proceedings in which they have a prominent part. In the Chamber's opinion, the exercise of the Defence's right to respond belongs to that context (See "Decision on the Request of the Defence for Thomas Lubanga Dyilo seeking his Appearance via Video-Link at the Hearings of 11, 13 and 14 October 2016", 6 October 2016, ICC-01/04-01/06-3243-tENG, para. 11).

<sup>102</sup> [REDACTED].

<sup>103</sup> [REDACTED].

<sup>104</sup> [REDACTED].

<sup>105</sup> [REDACTED].

<sup>106</sup> [REDACTED].

<sup>107</sup> [REDACTED].

<sup>108</sup> [REDACTED].

<sup>109</sup> See, e.g. "First Transmission and Report on Applications for Reparations", 22 December 2016, ICC-01/04-01/06-3269, para. 18. See also "Second Transmission and Report on Applications for Reparations", 20 January 2017, ICC-01/04-01/06-3270, para. 10.

victims voiced no such concerns the Chamber nevertheless considered the redaction of their contact details to be necessary.<sup>110</sup>

58. Furthermore, the Chamber sees that most of the potentially eligible victims agreed to disclose their identity and, what is more, upon an initial perusal of the dossiers, the Chamber noticed that those potentially eligible victims who had agreed to disclose their identity and those who had refused furnished similar statements recounting the events and similar supporting documentation to bolster allegations. That being so, the Chamber considers that the Defence was in a position to make submissions on the dossiers of victims which are similar to the dossiers of those potentially eligible victims who had refused to disclose their identity to the Defence.

59. In the light of the foregoing, and per the Decision of 5 June 2017, the Chamber is satisfied that the Defence had sufficient information to impugn the evidence brought against it in a process which duly afforded it notice and the opportunity to be heard, and, hence, a fair hearing. Accordingly, the Chamber, as guarantor of the interests of the victims and the Defence, in considering the dossiers and the Defence submissions thereon, has decided to take account of all of the information furnished by the potentially eligible victims, including redacted information. Likewise, in setting the size of the reparations award for which Mr Lubanga is liable, the Chamber has decided also to consider the dossiers of those potentially eligible victims who refused to disclose their identity to the Defence, where the dossiers satisfy the requisite conditions.

#### **D. Method used by the Chamber to assess the 473 dossiers**

60. The Defence argues that most of the potentially eligible victims fail to present any supporting documentation, or statements from witnesses to corroborate the facts

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<sup>110</sup> *Katanga*, “Decision on the ‘Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve’ and future stages of the proceedings”, 8 May 2015, ICC-01/04-01/07-3546-tENG, p. 10.

and the harm alleged, even when they refer to witnesses or supporting documentation,<sup>111</sup> or when their dossiers state that documentation is provided, but it is in fact not included.<sup>112</sup> The Defence also contends that the accounts of most of the potentially eligible victims and witnesses are vague and imprecise as to the circumstances of enlistment, the activities carried out in the armed forces of the UPC/FPLC, demobilization, the names of places and commanders and the causes of wounds, making it impossible for the Defence to comment on the credibility of the facts alleged.<sup>113</sup> The Defence also points to contradictions and inconsistencies in the accounts of some potentially eligible victims regarding the circumstances of their enlistment, in particular to contradictions between participation forms and reparations forms or between reparations forms completed on different dates. For

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<sup>111</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, paras. 6, 34, 45, 54, 64, 73, 84; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 27, 43, 54, 88; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 184, 201, 269; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 223, 380; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 100; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 180; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 31, 68, 80, 134, 168, 216; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 6-7, 17, 39, 51, 59, 70, 80, 91, 98, 106, 116, 126, 142, 152, 162, 175, 183, 195, 203, 214, 221, 229, 285, 296, 316, 338, 348, 374, 379, 386, 412, 418, 438, 451, 478.

<sup>112</sup> Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, para. 372.

<sup>113</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, paras. 9, 33, 44, 53, 63, 72, 83; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 3, 13; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, paras. 33, 43-44; Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 81, 85, 92, 99, 120, 126, 133, 138, 141, 146, 154, 161; Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 4, 8, 113, 164, 194, 214, 239, 247, 252, 263, 273, 283, 309, 324, 383; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 13, 22, 131, 198, 313; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 9, 58, 246, 302, 398, 409; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 43, 272, 336, 376, 381; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 32, 46, 144, 350, 408, 419, 477, 483, 498-499, 502, 511, 513; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 57, 138, 210, 271, 288, 312, 361, 366, 382, 432, 477, 503, 511; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 1, 9, 16, 29, 36, 44, 54, 62, 67, 78, 108, 146, 163, 173, 187, 214-215, 221, 228, 236, 246-247, 254-255, 293, 294, 394, 403, 428, 474, 486; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 4, 28, 50, 58, 68-69, 88, 96-97, 105, 113, 125, 150, 160, 174, 192, 201-202, 211, 220, 243, 252, 368, 396, 405, 429, 433, 446, 476, 487.

the Defence, these contradictions and inconsistencies mar the credibility of the accounts.<sup>114</sup>

61. It is noted, the Defence having also made the point, that in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations. Nevertheless, rule 94(1)(g) of the Rules of Procedure and Evidence requires applicants to present documentation to support their applications for reparations “[t]o the extent possible”. It is the Chamber’s view that this rule makes allowance for the fact that potentially eligible victims are not always in a position to furnish documentary evidence in support of all the harm alleged, given the circumstances in the DRC and the many years that have elapsed since the material events.<sup>115</sup>

62. In some cases, however, the potentially eligible victims were in a position to provide supporting documentation, such as documents containing statements by the village or neighbourhood chief or by other people acting as witnesses to corroborate said victims’ allegations; certificates of separation from a militia; photographs of militia-member tattoos; photographs of the presumed direct victim in soldier’s uniform; and certificates of physical, psychological and material harm. Upon examination of the documentation, the Chamber nevertheless considers that, even if

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<sup>114</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, paras. 5, 7-8, 14-16, 17, 23, 41, 50, 60-61, 74, 80, 85, 91; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 17, 24, 34, 42, 52, 64, 76, 86-87, 98; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, paras. 5, 6, 14-15, 25, 35, 52, 54, 65, 75; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, para. 240; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 271-272, 360-362; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 88, 115, 127, 161, 170, 227, 244, 291, 298, 487; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 62, 84, 97, 125, 152; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 17, 27, 28, 77, 85, 100, 108, 115, 123, 132, 138, 145, 162, 165-167, 194-195, 237-238; Annex to 1 Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 34, 56, 57, 77, 79, 90, 123, 135-140, 170-173, 188, 281-283, 290-293, 306.

<sup>115</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22. See also Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 81; *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 84.



some supporting documentation may corroborate the victims' statements, its probative value is limited.

63. Accordingly, to assess victim status, the Chamber looks for corroborating evidence that would specifically establish child-soldier status.<sup>116</sup> The Chamber looks mainly at whether the statements made by a potentially eligible victim in the dossier are consistent with one another. Where it sees necessary (in particular where the Defence raises discrepancies between the statements in the dossier and those in a previous application for reparations, or where deficient statements in the dossier need to be made complete), the Chamber also considers the statements provided by the victim in his or her application for participation and/or a previous application for reparations.

64. The Chamber pays particular attention to the level of detail of the facts described, including the circumstances of enlistment, the positions held and duties performed in the UPC/FPLC, the living conditions in the militia and the circumstances in which the victim left the UPC/FPLC. The Chamber also looks at references to relevant information, such as the activities connected to child-soldier status, the sites of recruitment, training, deployment (including battlefields) and demobilization, the names of superiors in the UPC/FPLC militia, and the organizations responsible for demobilization. In that connection, it is of note that in *Katanga* the Chamber considered – as have other Chambers of this Court in relation to applications for participation – that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.<sup>117</sup>

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<sup>116</sup> See, below, paras. 78-155.

<sup>117</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 70; *Katanga*, “Decision on the treatment of applications for participation”, dated 26 February 2009, [French original] registered on 27 February 2009, ICC-01/04-01/07-933-tENG, paras. 33 and 34; “Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims”, 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 32; *The Prosecutor v. Bosco Ntaganda*

### E. Assessment against the conditions of eligibility as a victim for the purposes of reparations

65. The Chamber recalls that a person seeking the *locus standi* of victim for the purposes of reparations must, upon establishing his or her identity, provide sufficient proof of the harm suffered and of the causal nexus between that harm and the crime of which the person was convicted.<sup>118</sup> Furthermore, in adjudging an application, the Chamber must give consideration to the features of the case before it.<sup>119</sup>

66. In the case at bar, the crimes of which Mr Lubanga was convicted entail as a precondition to qualify for reparations as a victim – direct or indirect – that the enlistment, conscription or active participation in hostilities of a child under the age of 15 years in the UPC/FLPC’s armed forces in a non-international armed conflict between 1 September 2002 and 13 August 2003 (“child-soldier status”) be established on a balance of probabilities. Otherwise put, “child-soldier status” is the *sine qua non* that the victim, direct or indirect, must prove.

67. So, in the case of a potentially eligible direct victim, the Chamber verifies (1) identity and looks at (2) the direct victim’s child-soldier status. In the case of a potentially eligible indirect victim whose identity it has verified, the Chamber looks at (3) the child-soldier status of the direct victim and whether there was a close personal relationship between the direct and the indirect victim. Where the direct victim’s child-soldier status is established and, in the case of an application from an

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(“Ntaganda”), Pre-Trial Chamber II, “Decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”, 15 January 2014, ICC-01/04-02/06-211, para. 23; *Ntaganda*, Trial Chamber VI, “Decision on victims’ participation in trial proceedings”, dated 6 February 2015, [French] translation registered on 13 March 2015, ICC-01/04-02/06-449, para. 46; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, “Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings”, 28 October 2011, ICC-02/05-03/09-231-Corr, para. 24.

<sup>118</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 81; Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22.

<sup>119</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22. See also Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 81.

indirect victim, where the close personal relationship with the direct victim is established, the Chamber then considers (4) whether the potentially eligible direct or indirect victim has established on a balance of probabilities the existence of the harm alleged and (5) the causal nexus between the harm alleged and the crimes of which Mr Lubanga was convicted.

### 1. Identity

68. The Chamber sees that, in the case at bar, all of the potentially eligible victims have used the same types of documents to establish their identity: IPM [*impôt personnel minimum* (minimum personal tax)] cards, voter cards and student or pupil identity cards.

69. The Defence draws attention to the fact that the potentially eligible victims do not present any civil status records, nor do they justify why they were unable to obtain them. It submits that an IPM card serves only to prove that its holder has duly paid tax for the year.<sup>120</sup> Similarly, the Defence argues that pupil identity cards<sup>121</sup> and student identity cards<sup>122</sup> do not constitute civil status records proving a direct or indirect victim's identity or date of birth.

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<sup>120</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 11, 21, 31, 49, 57, 65, 74, 85, 95, 106, 123, 136, 178, 179, 217, 228, 235, 287-288, 297-298, 326, 340, 354, 367, 387, 405, 422; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 2, 18-19, 46, 57, 74, 83, 91, 110, 118, 153, 172, 181, 218, 228, 247, 275, 317, 327, 356, 367, 377, 393; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 30, 41, 163, 179, 189, 208, 217, 237, 253, 262, 284, 309, 322, 327-328, 336, 358, 371, 379, 387, 393, 403, 415, 425, 433, 441, 447, 456, 462, 474, 480-481, 488, 497, 508; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 2, 20, 55, 95, 108, 116, 168, 192, 206, 219, 238, 249, 256, 267, 284, 299, 310, 319, 342, 349, 362, 369, 378, 385, 393, 404, 414, 423, 430, 438, 448, 458, 466, 474, 481, 490-491, 500, 508, 517; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 52, 130, 267, 279, 291, 317, 326, 342, 351, 357-358, 366-367, 378, 391, 400, 409-410, 425, 431, 439-440, 451-452, 457, 463, 473, 477-478, 784-785, 491.

<sup>121</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 218, 340 and 398; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 30.

<sup>122</sup> Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, para. 38.

70. As regards persons acting as witnesses for the indirect victims, the Defence underlines that the IPM cards submitted do not prove their identity.<sup>123</sup> In some cases, the Defence seems to object to the submission of voter cards as sufficient proof of an applicant's identity and, yet, in other cases, it appears not to.<sup>124</sup>

71. Lastly, the Defence submits that the redactions to the voter cards<sup>125</sup> and the IPM cards<sup>126</sup> preclude its verification of the identity of potentially eligible victims or of witnesses.

72. The Legal Representatives of V02 Victims submit:

Vital records cannot be a required form of supporting documentation unless civil registries are operating normally. Mr Lubanga was convicted for acts dating to the period between September 2002 and August 2003, when Ituri was an armed conflict zone with no functioning civil registry. The victims therefore could not have obtained any vital records.<sup>127</sup>

73. The OPCV submits that the IPM card "is an identity document that began to be issued in 2016" and is "issued by the local administration and now seems to be as widely used as the voter card to establish and prove identity in the Democratic Republic of the Congo".<sup>128</sup>

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<sup>123</sup> Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 301, 309-310.

<sup>124</sup> See Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 114-115, 148-149, 166-167, 197-198, 243-244, 250-251, 256-257, 266-267, 277-278, 311-312. See Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 39, 158, 189, 207.

<sup>125</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 40, 191, 209, 320; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 193, 259, 274, 279, 339, 349, 300.

<sup>126</sup> Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 162, 274, 279 and 300.

<sup>127</sup> "V02 Team Reply to the Observations of the Defence for Mr Lubanga" (ICC-01/04-01/06-3319 and annexes), 22 June 2017, ICC-01/04-01/06-3332-tENG, para. 18.

<sup>128</sup> "Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings", dated 13 April 2017, and a corrigendum and explanatory note [both in French only] were registered on 25 April 2017, ICC-01/04-01/06-3293-Conf-Corr and ICC-01/04-01/06-3293-Conf-Corr-Anx. A public redacted [French] version was also filed on 25 April 2017. [English version filed on 2 January 2018], ICC-01/04-01/06-3293-Red-tENG, para. 14 ("OPCV Observations of 25 April 2017").

74. The Court has consistently held that a natural person seeking the standing of participating victim at trial may use official or unofficial identification or any other means of proof of identity. Where an applicant cannot present “acceptable” documentation, a statement signed by two credible witnesses establishing the person’s identity may be accepted.<sup>129</sup> The Appeals Chamber has held that the same applies to the reparations phase.<sup>130</sup>

75. Thus, contrary to what the Defence asserts, the Chamber considers that a victim is not duty-bound to present a civil status record as proof of identity or to justify why it was impossible to do so. In the case before it and as stated above,<sup>131</sup> the Chamber notices that the potentially eligible victims presented IPM cards, voter cards and student or pupil identity cards. The Chamber also takes note of the submissions of the Legal Representative of V02 Victims and of the OPCV with regard to such documentation and considers that such cards are official documents and therefore fit to prove the identity of potentially eligible victims. The same holds true for the documents from persons acting as witnesses for potentially eligible indirect victims.<sup>132</sup>

76. Regarding the redactions made, the Chamber refers to its conclusions above.<sup>133</sup> Moreover, given that the same types of documents – voter cards and IPM cards – were presented as proof of identity of the potentially eligible victims and the persons acting as witnesses for potentially eligible indirect victims, the Chamber is of the opinion that the Defence had ample opportunity to canvass the reliability and

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<sup>129</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 57. See also “Decision on the Applications of the Office of Public Counsel for Victims and the Legal Representatives of the V02 Group of Victims for Leave to Reply to the Observations of the Defence Team of Thomas Lubanga Dyilo of 22, 30 and 31 May 2017”, 16 June 2017, ICC-01/04-01/06-3331-tENG, para. 30.

<sup>130</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 57. See also *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 71.

<sup>131</sup> See, above, para. 68.

<sup>132</sup> See, below, para. 162.

<sup>133</sup> See, above, paras. 55-59.

adequacy of such documents in relation to the dossiers of the victims who agreed to disclose their identity to the Defence, and, hence, Mr Lubanga has received a fair hearing.

77. Upon consideration of this aspect of the dossiers, the Chamber finds that all the potentially eligible victims and persons acting as witnesses for potentially eligible indirect victims have established their identity.

## **2. Child-soldier status of potentially eligible direct victims**

78. As said above, the crimes of which Mr Lubanga was convicted entail, as a precondition to qualify for reparations as a victim, that a direct victim's child-soldier status be established on a balance of probabilities. That means that the victim was under the age of 15 years when (a) enlisted or conscripted into the armed wing of the UPC/FPLC or (b) used by Mr Lubanga to participate actively in hostilities in a non-international armed conflict between 1 September 2002 and 13 August 2003.

79. The Chamber now turns to these two criteria in the light of the Defence submissions.

### **a. The direct victim was under the age of 15 years when enlisted or conscripted or when used by Mr Lubanga to participate in hostilities between 1 September 2002 and 13 August 2003**

80. The Defence takes issue with several dossiers from potentially eligible direct victims which, in its view, do not establish that said victims were under the age of 15 years during the time frame of the charges.<sup>134</sup>

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<sup>134</sup> Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, para. 17; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 439-440; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 500; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, para. 294.

81. It again draws attention to the failure of the potentially eligible victims to provide a civil status record – in this instance, as proof of age – and any explanation of why it was impossible for them to do so.<sup>135</sup>

82. The Defence further submits that the various documents appended to the dossiers and some of the statements by potentially eligible victims give often differing dates of birth; those discrepancies cast doubt on the real age of the potentially eligible victims and, therefore, it cannot be considered established that they were under the age of 15 years at the material time.<sup>136</sup>

83. Regarding the validity of the identification, the Chamber refers to its findings on the documents presented by the potentially eligible victims as proof of identity.<sup>137</sup>

84. Article 8(2)(e)(vii) of the Statute prescribes that the person be under the age of 15 years at the time of enlistment. Furthermore, the time frame of the charges spans 1 September 2002 to 13 August 2003. Therefore, for a direct victim to have been under the age of 15 years during the time frame of the charges, he or she must not have been born before 1 September 1987 in order to have been recruited by 1 September 2002. Accordingly, if the age of a direct victim is not established or if the recruitment took place when the victim was 15 years of age or older, the dossier cannot be considered in relation to the award of reparations in the case.<sup>138</sup>

85. The Chamber further recalls:

it suffices that it is established that the victim is within a certain *age range*, namely *under* the age of fifteen years. The Appeals Chamber finds that the question of whether such

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<sup>135</sup> See, e.g. Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 11, 65, 129 and 209.

<sup>136</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, paras. 8, 16, 25, 41, 50, 80, 91; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 24, 97; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, para. 52; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 2-8, 487-489, 498-500; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 25, 77, 94, 134, 281-283, 290-293.

<sup>137</sup> See, above, paras. 74-77.

<sup>138</sup> See, below, para. 301, for the Trust Fund's assistance mandate.

a finding can be established in circumstances where the identity and exact date of birth of the victim are unknown is a question of fact and must be decided on a case-by-case basis taking into account the specific facts and circumstances of the case and individual at issue.<sup>139</sup>

86. The Chamber moreover reiterates that, as said earlier, in *Katanga* it considered that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.<sup>140</sup> In this respect, the Chamber also takes note of the OPCV's submission:

Since the beginning of 2017, it has become easier for victims to produce an official identity document thanks to the voter registration campaigns taking place around the country. However, the Legal Representative observes that errors continue to be entered on the voter cards by representatives of the relevant authorities, who are poorly trained, badly informed or simply careless. Most of the potentially eligible victims did not notice the errors until the Legal Representative's team checked the information on their cards with them; others have encountered difficulties prevailing upon the authorities to correct errors. In any case, and notwithstanding these errors, the Legal Representative finds that it is now easier to establish the identities of the individuals interviewed.<sup>141</sup>

87. The OPCV also draws the Chamber's attention to the fact that the overwhelming majority of former child soldiers did not finish their education and that some cannot read. They are therefore not in a position to check whether the information entered on their identification is correct when issued by the authorities.<sup>142</sup>

88. In some dossiers the Chamber sees discrepancies between the dates of birth of potentially eligible victims. Nonetheless, given the considerations above, these discrepancies have no bearing on the determination of the age of a potentially eligible victim, insofar as the various dates of birth provided would, in any case, mean that the victim was under the age of 15 years at the material time.

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<sup>139</sup> Appeals Chamber, Appeal Judgment Affirming Conviction, ICC-01/04-01/06-3121-Red, para. 198.

<sup>140</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 70.

<sup>141</sup> OPCV Observations of 25 April 2017, ICC-01/04-01/06-3293-Red-tENG, para. 13.

<sup>142</sup> OPCV Observations of 25 April 2017, ICC-01/04-01/06-3293-Red-tENG, footnote 11.



**b. The direct victim was conscripted or enlisted into the armed wing of the UPC/FPLC or was used by Mr Lubanga to participate actively in hostilities between 1 September 2002 and 13 August 2003**

**i. Introduction**

89. A potentially eligible victim, the Chamber recalls, must establish not only that he or she was a child soldier during the time frame of the charges, but also that he or she was a child soldier in the UPC/FPLC. To be specific, Mr Lubanga cannot be held liable for the recruitment of children as soldiers into other armed groups. Mr Lubanga's liability is, however, not ruled out with regard to children who were under the age of 15 years, recruited or conscripted by other groups, but who served in the UPC/FPLC for all or part of the time frame of the charges. In that respect, the Chamber considers that, say, where a direct victim names one or more commanders or one of the training camps, that might, depending on the circumstances, suffice to establish that he or she did belong to the UPC/FPLC.

90. It must be underscored that the Chamber's analysis is qualitative rather than quantitative, inasmuch as it does not require a set number of criteria to be met. The victim's eligibility is determined with regard to the quality of all of the evidence he or she provides and in consideration of the requisite standard of proof – a balance of probabilities. Further it is to be underlined that the veracity of the information provided is not verified because the Chamber is not in a position to check whether a given commander was in fact part of the UPC/FPLC's hierarchy. In that respect, the Chamber considers that, besides the commanders mentioned by name in the Judgment Handing Down Conviction, some might have gone by nicknames.

91. For the sake of clarity and fairness, the Chamber concludes that while the Judgment Handing Down Conviction, affirmed by the Appeals Chamber, circumscribes its determination of the scope of Mr Lubanga's liability for reparations, the only bounds set by the operative provisions of that Judgment

concern the crimes of which Mr Lubanga was convicted – conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute – and the time frame of the charges, 1 September 2002 to 13 August 2003. The Judgment Handing Down Conviction does not, however, exhaustively enumerate the sites of the crimes committed or Mr Lubanga’s co-perpetrators.

ii. Between 1 September 2002 and 13 August 2003

92. The Defence submits that some potentially eligible direct victims state that they were enlisted before the time frame of the charges, that is, before September 2002, and, in some instances, even that they left the militia before that time frame.<sup>143</sup> Hence, in its view, they are not eligible for reparations.<sup>144</sup>

93. The Chamber recalls that the Judgment Handing Down Conviction found Mr Lubanga guilty of three different crimes: enlisting and conscripting children under the age of 15 years, and using them to participate actively in hostilities.<sup>145</sup> For this reason, a child can very well have been conscripted or enlisted before the time frame of the charges, but have participated actively in hostilities during that period. A child’s recruitment before that time frame is therefore not decisive to the conferral of victim status. It suffices that the child was enlisted or conscripted or that the child participated actively in hostilities during the time frame of the charges.

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<sup>143</sup> Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 335-336.

<sup>144</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, para. 17; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, paras. 54, 65, 75; Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 6, 16, 26, 50, 98; Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 46, 109, 139; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 22, 67, 77, 93, 100, 120, 138, 166, 183, 197; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 45, 98, 129, 134, 147, 158, 267; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 239; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 27, 53, 63, 85, 98, 118, 137, 335-337.

<sup>145</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1358.

94. Consequently, even where the potentially eligible victims refer to dates outside that time frame, it does not affect their credibility, provided that they establish in a coherent and credible manner their enlistment, conscription and/or use by Mr Lubanga to participate actively in hostilities during the time frame of the charges and that they were under the age of 15 years then.

iii. Certificates of demobilization

(a) Admissibility of certificates of a child's separation from an armed force or group

95. The Defence submits that the documents entitled "Certificate of a Child's Separation from an Armed Force or Group" do not specify the armed groups to which the potentially eligible victims may have belonged.<sup>146</sup> In the Defence's view, the Judgment Handing Down Conviction<sup>147</sup> moreover revealed this type of document to be devoid of probative value.<sup>148</sup>

96. The Chamber points out that the Judgment Handing Down Conviction addresses only the probative value of the logbooks which record the names of demobilized children and refers to certificates of separation only to recapitulate the

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<sup>146</sup> Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 5, 15, 28, 44, 55, 68, 78, 89, 101; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, paras. 17, 56, 67, 77; Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, para. 391; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, para. 49; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 161, 164, 331; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 47; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 231, 302, 409, 420; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 294, 315; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 116-118, 206-207.

<sup>147</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 733-740.

<sup>148</sup> Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 232 and 303; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 295 and 316.

Defence stance, but does not make a determination on the probative value of such certificates.<sup>149</sup>

97. The Chamber also considers that while the presentation of a certificate of separation is insufficient to establish that the potentially eligible victim served as a child soldier in the UPC/FPLC where the armed group is unspecified, such a certificate may nonetheless be taken into account to determine whether the potentially eligible victim belonged to the UPC/FPLC, provided that the victim's account is coherent and credible.

(b) Lack of certificates of demobilization

98. The Defence maintains that some applicants claim to have been demobilized by the *Commission Nationale de la Démobilisation et Réinsertion* [National Commission for Disarmament, Demobilization and Reintegration] ("CONADER") or by a non-governmental organization, but do not present a certificate of demobilization as proof.<sup>150</sup>

99. On that matter, the Chamber notes that several potentially eligible victims claim that they lost their certificate of demobilization or that it had been destroyed. Where such documents were provided, they were issued over a decade ago. It is therefore wholly possible that some potentially eligible victims lost their certificate of demobilization or thought it of no practical use to them.

100. Moreover, the Chamber would point out that most of the potentially eligible victims do not present a certificate of demobilization. In addition to the potentially

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<sup>149</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 736.

<sup>150</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, para. 9; Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 56, 106, 119, 127, 147; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 203, 257; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 14, 88, 146, 512; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 140, 271; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, para. 477.

eligible victims who claim to have lost their certificate of demobilization or that it was destroyed, the Chamber sees that some of them state that they demobilized themselves or that they were demobilized before CONADER was established.

101. Be that as it may, where an account is coherent and credible and the potentially eligible victim establishes that he or she was a child soldier in the UPC/FPLC through other supporting evidence, the Chamber will not require that victim to provide a certificate of demobilization.

102. Lastly, turning to the Defence submission that for a potentially eligible victim to claim to have been demobilized in 2006 is illogical given that the demobilization process began in 2003 after the arrival of Artemis,<sup>151</sup> the Chamber must stress that the fact that the process began in the summer of 2003 does not rule out its continuation, say, until 2006. For that reason, the Chamber does not discount claims by a potentially eligible direct victim that he or she was demobilized several years after the demobilization process started in the summer of 2003.

#### iv. Names of commanders

##### (a) Lack of exhaustive enumeration

103. The Defence argues that some commanders mentioned in the dossiers<sup>152</sup> are not among those whom Trial Chamber I found to have belonged to the UPC/FPLC hierarchy.<sup>153</sup>

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<sup>151</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, para. 9; and Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, para. 56.

<sup>152</sup> Kaguma, Jaguar/Jagoire, Alexis, Saïdi/Saiti, Baguna, Busha, Ngbape, Bahati, Kpaki, Salumu/Salomon, Christian, Gilet November, Kilo-Yankee/Kilo-Yanki, John, Mangaino/Mangahino, Mugisa, Sami/Samy, Aigle-Vipère, Bienvenu, India-Koni, Olivier, Smiro, Bras de fer, Tasilé, Bishoker, Kakura, Tiba, Steven, Ndongo, Adolphe, Freddy Mboyo, Odongo, Patrick, Omar, Mbuza, Salik, Akumame, Pissi, Umirambe, Kisugu, Ndéisaba/Ndaisaba/Ndaysaba/Noaysaba/Nsaïsaba, Bagonja/Bagondja, Byarwanga, Kialipa, Pita Karimbu, Ngadja, Charuie, Pachen, Uketi, Diro, Katembo, Roger, Djoma, Kabongo, David, Mumbisa Mukele, Kabo, Mustapha, Romatchali, Linganga, Samson, Pitchen, Leija, Ngujor, Asimwe, Noire, Kaguta, Lonema, Lokana, Armachali, Lima Bravo, Bravo Ohali, Nzani, Kaswara, Tchaligonza/Cialigonza, Claude Bamuhiga, Bagaya, Lango, Meka,

104. The Chamber notes that, in the Judgment Handing Down Conviction, Trial Chamber I concluded that:

from late 2000 onwards, Thomas Lubanga acted with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa and commanders Tchaligonza, Bagonza and Kasangaki.<sup>154</sup>

105. The Chamber is of the opinion that the wording “who included” does not establish that the commanders are exhaustively enumerated.

106. Moreover, the Chamber notes that some of the evidence heard, and found in the Judgment Handing Down Conviction to be credible and reliable, describes Richard Lonema as one of the founders of the UPC/FPLC, as being at its helm with Mr Lubanga and as taking over from him when Mr Lubanga was incarcerated in Kinshasa.<sup>155</sup> The Chamber also notes that the Judgment Handing Down Conviction relied on testimony from the stand and videos in finding that Éric Mbabazi was

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Gregoire, Éric/Erick, Simba, Baguma, Bravo Bravo, Lopa, Zéro One, Bebwa/Beebwa, Pablo, Pichou, Sadam, Siera Mike, Matéso, Ucircam, Willy, Zape, Ukumu-Zape, Jean de Dieu Ukumu, Ukuma, Swanyo, Pili Pili, Ngeu, Muesige, Moussa, Rasta, Beré Vert, Ngewu, Charles (Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 15, 26, 35, 52, 61, 69, 79, 89, 99, 130, 141, 151, 169, 202, 222, 292, 314, 357, 415; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 23, 78, 86, 95, 122, 139, 221, 231, 251, 291, 320, 329, 361, 380, 396; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 63, 85, 93, 114, 172, 222, 399; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 2-3, 86, 93, 117, 130, 136, 146, 164, 171, 203, 231, 250, 267, 273, 300, 309, 316, 323, 329, 342, 353, 359, 366, 387; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 12, 20, 103, 114, 123, 171-172, 193-194, 229-230, 245-246, 271, 277-278, 293-294, 299-300, 330, 380-381, 388-389, 428-429, 457-458, 467-468; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 28-29, 35-36, 40-41, 47-48, 65-66, 72-73, 79-80, 86-87, 127-128, 147-148, 154-155, 292, 352-353, 397-398, 409-410, 416-417, 451-452, 460-461, 493-494; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 2-3, 20-21, 87-88, 102-103, 109-110, 148-149, 156-157, 181, 197-198, 229, 239, 301, 310, 320-321, 329-330, 347, 353, 381-382, 416, 433, 445, 469, 480; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 5, 115, 194, 228, 315, 347, 357, 363, 462-463, 470-471.

<sup>153</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 1172-1173, 1353-1354.

<sup>154</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1352.

<sup>155</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 89, 788, 1041, 1061, 1063, 1065, 1069, 1070, 1071, 1110, 1111, 1130 and 1172.

responsible, within the UPC/FPLC, for matters relating to troop morale and relations between the militia and the civilian population.<sup>156</sup>

107. The Chamber also points out that a commander named “Tibasima” was mentioned in the Judgment Handing Down Conviction and that he could be the Commander Tiba referred to in the dossiers of applications for reparations.

108. Lastly, the Chamber notes that some witnesses who testified at trial and were found to be credible and reliable spoke of certain commanders who were not in the non-exhaustive enumeration. However, certain names of commanders mentioned by potentially eligible victims and raised in the Defence submissions do not appear in the statements of the witnesses who testified at trial either.<sup>157</sup>

109. The Chamber considers that it may nonetheless consider the names of these commanders, where an account by a potentially eligible direct victim is coherent and credible as to the facts alleged.

#### (b) Names of specific commanders

##### (i) *Jérôme Kakwavu*

110. The Defence submits that Jérôme Kakwavu (“Mr Kakwavu”), who defected from the UPC in early March 2003, created the FAPC and took control of Aru as of 6 March 2003. On the strength of that, it views those potentially eligible victims and

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<sup>156</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 31, 753, 785, 1174 and 3128, 1300 and 1338.

<sup>157</sup> Bienvenu, Baguna, India-Koni, Smiro, Bahati, Christian, Sami, Saïdi/Saiti, Kilo-Yankee, Gilet November, Olivier, Bras de fer, Kpaki, Busha, Ngbape, Mugisa, Aigle-Vipère, Tasilé, Bishoker, Kakura, Tiba, Steven, Ndongo, Adolphe, Freddy Mboyo, Odongo, Patrick, Omar, Mbuza, Salik, Akumame, Pissi, Umirambe, Kisugu, Ndéisaba/Ndaisaba/Ndaysaba/Noaysaba/Nsaïsaba, Bagonja/Bagondja, Byarwanga, Kialipa, Pita Karimbu, Ngadja, Charuie, Pachen, Uketi, Diro, Katembo, Roger, Djoma, Kabongo, David, Mumbisa Mukele, Kabo, Mustapha, Romatchali, Linganga, Samson, Pitchen, Leija, Ngujor, Asimwe, Noire, Kaguta, Lokana, Armachali, Lima Bravo, Bravo Ohali, Bravo Bravo, Nzani, Kaswara, Claude Bamuhiga, Bagaya, Lango, Meka, Gregoire, Simba, Baguna, Lopa, Zéro One, Bebwa/Beebwa, Pablo, Pichou, Sadam, Siera Mike, Matéso, Ucircam, Willy, Zape, Ukumu-Zape, Jean de Dieu Ukumu, Ukuma, Swanyo, Pili Pili, Ngeu, Muesige, Moussa, Rasta, Beré Vert, Ngewu, Charles.

who allege that they served under Mr Kakwavu thereafter as not having been part of the UPC.<sup>158</sup>

111. The Chamber underlines that, in the Judgment Handing Down Conviction, Trial Chamber I decided not to rely on evidence it heard from one witness alleging facts similar to those raised by the Defence because it was not clear whether Mr Kakwavu's forces were under Mr Lubanga's control at the relevant time.<sup>159</sup>

112. That being so, the Chamber will afford consideration to the allegations by potentially eligible direct victims that they were Mr Kakwavu's subordinates after 6 March 2003.

*(ii) Chief Kahwa*

113. The Defence submits that Chief Kahwa's departure from the UPC in late October 2002 is established.<sup>160</sup>

114. The Chamber sees that a UPC decree dated 2 December 2002, formally removing Chief Kahwa from his position as UPC defence minister and leading to his departure from the UPC, was found by Trial Chamber I to be authentic.<sup>161</sup>

115. Where potentially eligible direct victims allege that they were Chief Kahwa's subordinates after 2 December 2002 and, as some of them might have mistaken the dates, not least given the time elapsed since the events relevant to the charges, the Chamber nevertheless looks at whether their statements allow it to find to the

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<sup>158</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 301, 390 and 408; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 85, 94; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315, paras. 104, 116; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 342; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 241-242; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 179-182 and 212.

<sup>159</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 856.

<sup>160</sup> Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, para. 7; Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, para. 269; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, para. 361.

<sup>161</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 228.



requisite standard of proof that said victims were conscripted or enlisted or that the UPC/FPLC used them to participate actively in hostilities, during the time frame of the charges, and that they were under the age of 15 years at the material time.

*(iii) Chief of Staff Floribert Kisembo*

116. The Defence submits that Mr Kisembo was Chief of Staff of the FPLC and therefore could not have been the immediate commander of a potentially eligible victim. It argues that the allegations that a potentially eligible victim was Mr Kisembo's subordinate therefore cannot be accepted.<sup>162</sup>

117. The Chamber must emphasize that the fact that Mr Kisembo was Chief of Staff does not preclude his giving orders directly to a child under the age of 15 years, for example, to a child serving as his bodyguard for some of his or her time in the UPC.

118. The Defence further takes issue with a claim from a potentially eligible victim that he was Chief of Staff Kisembo's subordinate until 2005, since the Judgment Handing Down Conviction<sup>163</sup> established that Mr Kisembo had defected from the UPC in December 2003.<sup>164</sup>

119. The Chamber stresses, however, that nothing in that paragraph of the Judgment allows it to be said with certainty that Mr Kisembo defected from the UPC in December 2003 after his abortive takeover.

120. Accordingly, the allegations of potentially eligible victims that they were Mr Kisembo's subordinates after December 2003 will be considered by the Chamber,

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<sup>162</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 26, 61, 69, 79; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 164, 231, 366; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 340-364, 374, 458.

<sup>163</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1324.

<sup>164</sup> Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 62.

insofar as they establish that they were part of the UPC/FPLC during the time frame of the charges.

*(iv) Commander Kasangaki*

121. The Defence argues that Commander Kasangaki left the UPC/FPLC with his troops in early March 2003 and that, therefore, applicants who claim that they were his subordinates thereafter were not part of the UPC/FPLC.<sup>165</sup>

122. Commander Kasangaki, the Chamber recalls, is named in the non-exhaustive enumeration of commanders in the UPC/FPLC's hierarchy given in the Judgment Handing Down Conviction. Moreover, that Judgment says nothing of any defection by Commander Kasangaki from the UPC/FPLC.

123. On this basis, the allegations of potentially eligible victims that they were Commander Kasangaki's subordinates after March 2003 will be taken into consideration by the Chamber, insofar as they establish that they were part of the UPC/FPLC during the time frame of the charges.

v. Military wing of the UPC

(a) Date of the FPLC's establishment

124. The Defence argues that the armed forces of the UPC/FPLC were established by September 2002, as found in the Judgment Handing Down Conviction,<sup>166</sup> and, hence, children could not have been enlisted or conscripted before then.<sup>167</sup>

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<sup>165</sup> Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, para. 147; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 148.

<sup>166</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 543.

<sup>167</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, para. 17; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 18, 32, 53, 65, 87, 99; Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 6, 16, 26, 50, 98; Annex 1 to Defence observations on the third transmission of reparations forms, 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 109, 117, 126, 139, 181, 213, 238, 291, 382; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 22, 67, 77, 93, 100, 120, 138, 166, 183, 197, 211, 220, 268; Annex 1 to Defence Observations of 22 May 2017,

125. Of note is that, whereas Trial Chamber I states in the Judgment Handing Down Conviction that the military wing of the UPC had been established by 1 September 2002, it was satisfied that recruitment and training took place in the summer of 2002.<sup>168</sup>

126. From the foregoing, the Chamber concludes that the fact that the military wing of the UPC was established by September 2002 does not preclude earlier recruitment with a view to establishing the FPLC and that it is therefore possible that children under the age of 15 years had been recruited before September 2002.

(b) The UPC as a political party

127. The Defence argues that the UPC became a political party on 2 June 2004 and no longer had an armed wing thereafter. In its view, therefore, the allegations of potentially eligible victims that they belonged to the armed forces of the UPC after that date are not credible.<sup>169</sup>

128. The Chamber notes that at trial certain witnesses whose accounts were found credible and reliable by Trial Chamber I stated that Mr Lubanga had convened

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ICC-01/04-01/06-3315-Conf-Anx1, paras. 45, 98, 129, 134, 147, 158, 267, 352, 374, 383; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 91, 107, 115, 189; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 10, 48-49, 71, 121, 132, 150, 276, 361, 464, 491; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 27, 53, 63, 85, 98, 118, 137, 160, 170, 178, 184, 229, 269, 273, 314, 321, 328, 394-395, 405-406, 425, 450, 484, 519; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 108, 180, 261, 345, 412, 442, 465, 493; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 35, 277, 284, 384, 395, 410, 459.

<sup>168</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1111.

<sup>169</sup> ICC-01/04-01/06-T-341-FRA ET WT 31-03-2011 1-45 PV T; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 106, 234, 254, 273, 278, 294, 329, 346, 384; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 5, 12, 26, 42, 49, 71, 78, 108, 116; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 19, 44, 61, 97, 122, 142, 173, 211, 301; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 64, 99, 171, 208, 286, 322; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 141, 295, 304.

meetings around July 2000 in order to create a political party, the UPC.<sup>170</sup> A witness also said:

prior to the accused's official appointment as President of the UPC/FPLC, it did not function as a political party and he suggested it only became a separate party when they took control of the city of Bunia after the RCD-ML left.<sup>171</sup>

129. Moreover, Trial Chamber I found that:

by September 2002, at the latest, the UPC had a military wing (the FPLC). The Chamber is persuaded that the UPC exercised political and military control over Bunia, and that it had clear military aims, particularly to expand its role in Ituri.<sup>172</sup>

130. The Chamber recalls that, irrespective of when the UPC became a political party, for a victim to qualify for reparations, he or she must have been conscripted or enlisted into the UPC, or the UPC/FPLC must have used the victim to participate actively in hostilities when he or she was under the age of 15 years and during the time frame of the charges – 1 September 2002 to 13 August 2003. Hence, even where the potentially eligible victims were mistaken about the date in alleging that they had belonged to the UPC/FPLC after 2 June 2004, they qualify for reparations provided that they establish, to the requisite standard of proof, that they were conscripted or enlisted or that the UPC/FPLC used them to participate actively in hostilities during the time frame of the charges, and that they were under the age of 15 years at the material time.

#### (c) Sites

131. The Defence raises the fact that one potentially eligible victim refers to names of towns that were never mentioned during the proceedings.<sup>173</sup>

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<sup>170</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 1041 and 1048.

<sup>171</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1118.

<sup>172</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 1125.

<sup>173</sup> Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 109.

132. In the Appeal Judgment on Reparations, the Appeals Chamber found that Mr Lubanga's liability for reparations extended to the sites mentioned in the specific context described in the second sentence of paragraph 915 of the Judgment Handing Down Conviction: "[t]he 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."

133. It is the Chamber's opinion that that statement does not exhaustively enumerate the sites where children under the age of 15 years may have been enlisted, conscripted or deployed by the UPC/FPLC, given Trial Chamber I's use of "and elsewhere" and "including". The Chamber does note, however, that in the Judgment Handing Down Conviction, Trial Chamber I found that:

[t]he evidence in the case demonstrates beyond reasonable doubt that during the entirety of the period covered by the charges there were a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups.<sup>174</sup>

134. The Chamber is of the view that the reference to "various different groups" involved in several armed conflicts in Ituri and the surrounding areas of the DRC during the time frame of the charges means that groups other than the UPC/FPLC were active there. That does not necessarily mean that the UPC/FPLC engaged in armed activities in Ituri and the surrounding areas, but rather that it is established that the UPC/FPLC was operating in the Ituri region, as stated several times in the Judgment.<sup>175</sup>

135. Accordingly, fairness dictates that the Chamber exclude the sites outside of Ituri from the geographic parameters under consideration in determining the scope of Mr Lubanga's liability for reparations.

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<sup>174</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 543.

<sup>175</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, *inter alia*, paras. 67-88, 543-547, 702, 707, 837, 1277, 1327, 1351, 1353, 1355.

## (d) Enlistment or conscription

136. The Defence submits that it is illogical for a potentially eligible direct victim to attribute his or her enlistment or conscription to both Mr Lubanga and Mr Katanga because they belonged to opposing militias: the UPC/FPLC and the *Force patriotique de résistance en Ituri* [Patriotic Force of Resistance in Ituri] (“FRPI”), respectively.<sup>176</sup>

137. The Chamber confirms that a potentially eligible victim cannot attribute the same enlistment or conscription to both Mr Lubanga and Mr Katanga, who were members of different militias. It cannot be ruled out, however, that a potentially eligible victim was enlisted or conscripted into, or belonged to, both militias at different times.

## vi. Training centres

## (a) Training centres enumerated

138. The Defence submits that Trial Chamber I found only a specific number of training camps to have existed and that some of the alleged camps were not, in any event, ever mentioned by the various witnesses who testified at trial.<sup>177</sup>

139. First, the Chamber would point out that the Fataki, Sota and Ndromo camps were mentioned by witnesses who testified at trial and whose accounts Trial

<sup>176</sup> Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 227-228.

<sup>177</sup> Shari, Ndrele, Fataki, Sii, Dhera, Aroko, Ndromo, Djegu, Solenyama, Mont Kawa, Sanduku, Kampdromo/a, Ameer, Nyoka/Nioka, Baudouin (Mahagi), Kasenyi, Marabo, Aru, Sota, Irumu, Mbidjo, Drodoo, Peka, Komanda, Bule, Lingo, Tchomia, Njugu, Kunda, Libila, Gama, Réthy, Katoto, Lelo-Angal (Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 361, 425; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 50, 76, 101, 200, 230, 321, 359; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 47, 64, 86, 94, 105, 115, 213, 221, 253, 279, 353, 397; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 4, 11, 46, 57, 92, 109, 129, 169, 248, 290, 298, 307, 314, 321, 335, 341, 350, 364, 385; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 11, 50, 60, 72, 131, 202, 228, 247, 312, 417, 427, 510; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 13, 185, 301, 329, 344, 364, 370, 380, 396, 415, 459, 467, 476, 492, 510, 520; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 19, 37, 101, 124, 139, 164, 188, 196, 240, 337-338, 344, 380, 393, 402, 443; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 16, 78, 114, 305, 314, 337, 345.

Chamber I found credible and reliable.<sup>178</sup> Moreover, given that the names Kampdromo and Ndromo camp are similar, the Chamber is of the opinion that they are one and the same, spelled differently in the reparations forms.

140. Second, Trial Chamber I was satisfied that, during the time frame of the charges, children under the age of 15 years were recruited into the UPC/FPLC, and that they were taken either to the UPC headquarters in Bunia or to the military camps at Rwampara, Mandro and Mongbwalu for training.<sup>179</sup>

141. The Chamber therefore considers that by using the word “either”, Trial Chamber I intended to present two possibilities only: headquarters or the three camps described as training centres. This does not preclude, however, that some children could have been deployed in other camps which were not training centres. Nor does it rule out the training of some victims outside the training centres.<sup>180</sup>

142. Ultimately, the Chamber regards the UPC/FPLC headquarters in Bunia and the military camps at Rwampara, Mandro and Mongbwalu as the sole training centres where child soldiers were trained. Allegations by potentially eligible direct victims that they were trained elsewhere than at training centres or that they were deployed in other camps will, however, be taken into consideration, where their accounts are coherent and credible as to the facts alleged.

#### (b) Closure of the Mandro camp

143. The Defence argues, with reference to the Judgment Handing Down Conviction, that the Mandro training centre closed in late October 2002 and,

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<sup>178</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 54, 786, 835.

<sup>179</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 819.

<sup>180</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 783, 1031, 1032, 1033.

therefore, the assertions of some potentially eligible direct victims that they were trained in the camp thereafter are wrong.<sup>181</sup>

144. The Chamber must emphasize, however, that in the Judgment Handing Down Conviction the date of closure of the camp was mentioned by only one Defence witness, whom Trial Chamber I treated with caution since he seemed evasive and contradicted himself in some respects.<sup>182</sup> What is more, another witness, found to be credible and reliable by Trial Chamber I, stated that he saw a number of recruits under the age of 15 years at the camp in late 2002. The witness stated that when he returned to the camp in March 2003, he saw that “the recruits had left, leaving only soldiers who had taken up combat positions in the camp, including one ‘young’ soldier who was a bodyguard for one of the commanders.”<sup>183</sup>

145. In the light of the foregoing, it is the Chamber’s view that it cannot be ruled out that potentially eligible direct victims were trained in Mandro after October 2002 inasmuch as, in the Judgment Handing Down Conviction, Trial Chamber I was satisfied that a significant number of children under the age of 15 years were trained there by the UPC/FPLC during the time frame of the charges.<sup>184</sup>

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<sup>181</sup> Annex 1 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx1, paras. 35, 74, 85; Annex 2 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx2, paras. 33, 66, 99; Annex 3 to Defence Observations of 10 April 2017, ICC-01/04-01/06-3291-Conf-Anx3, paras. 36, 46, 54, 76; Annex 1 to Defence Observations of 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, paras. 55, 66, 83, 91, 104, 132; Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 24, 77, 200, 246, 259, 269, 413; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 60, 146; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 286, 385; Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, paras. 65, 77, 137, 145, 201; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 126, 182, 192, 292, 337-338, 406, 436; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 34, 71, 110, 126, 145, 153, 179, 194, 350-351; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 18, 94, 319, 328; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, para. 89.

<sup>182</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 730.

<sup>183</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 809.

<sup>184</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 811.



## (c) Rwampara camp

146. The Defence submits that some potentially eligible victims could not have been taken to or have reported to the Rwampara camp, located in Bunia, or the Bunia camp before 9 August 2002, because it is established that the city of Bunia was under the control of Governor Molondo Lompondo and his armed forces (APC) until then.<sup>185</sup>

147. The Chamber nevertheless stresses that nothing allows it to be said with certainty that the Rwampara camp was under APC control before 9 August 2002.<sup>186</sup>

## (d) Mr Lubanga's visits to the camps

148. In the Defence's view it is illogical for potentially eligible victims to claim that they saw Mr Lubanga at the Mandro, Rwampara and Marabo camps on certain dates outside those established in the Judgment Handing Down Conviction.<sup>187</sup>

149. The Chamber first remarks that paragraph 1241 of the Judgment Handing Down Conviction referred to by the Defence makes no mention of Mr Lubanga's visit to the Mandro camp.

150. Moreover, it must point out that the fact that it is established in the Judgment Handing Down Conviction that Mr Lubanga visited the Mandro and Rwampara camps on certain dates does not mean that he did not go there at other times or that he did not visit other camps.

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<sup>185</sup> Annex 2 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 190; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 465-466; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 407-408; Annex 1 to Defence Observations of 30 June 2017, ICC-01/04-01/06-3335-Conf-Anx1, paras. 369-370, 413-414, 466-467; Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 36-37, 460-461.

<sup>186</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 1084-1116.

<sup>187</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 1241-1242; Annex 1 to Defence observations on the second transmission of reparations forms, 24 April 2017, ICC-01/04-01/06-3299-Conf-Anx1, para. 34; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 248; Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, para. 67.

## vii. Photograph of children in soldier's uniform

151. The Defence disputes the probative value of a photograph of children in soldier's uniform, as, in its view, it does not meet the requisite standard of proof to establish that the potentially eligible victim was enlisted in the armed forces of the UPC between 1 September 2002 and 13 August 2003.<sup>188</sup>

152. The Chamber considers that, while a photograph depicting children in soldier's uniform does not suffice to meet the requisite standard of proof and prove that a potentially eligible direct victim belonged to the UPC/FPLC, that is not so where the photograph is corroborated by a coherent and credible account establishing recruitment into the UPC/FPLC during the time frame of the charges.

## viii. Sudanese presence in the militia

153. The Defence maintains that the UPC never had Sudanese nationals in its ranks, contrary to the allegations of a potentially eligible victim.<sup>189</sup>

154. Upon examination of the dossiers concerned, the Chamber considers that the potentially eligible direct victims do not make explicit reference to a Sudanese presence in the militia, but rather use the word "*Soudanais*" [Sudanese] in the same way as they refer to the names of commanders.<sup>190</sup> For that matter, the Chamber notes there is no reference in the Judgment Handing Down Conviction to any Sudanese presence. Accordingly, the Chamber does not consider that the reference to "*Soudanais*" casts doubt on the credibility of the account given by the victims concerned.

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<sup>188</sup> Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 117.

<sup>189</sup> Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 21.

<sup>190</sup> See ICC-01/04-01/06-3287-Conf-Anx5-Red; ICC-01/04-01/06-3304-Conf-Anx3-Red and ICC-01/04-01/06-3312-Conf-Anx31-Red.

ix. The Chamber's determination

155. From its analysis of the 385 dossiers of potentially eligible direct victims using the aforementioned criteria, the Chamber has come to the conclusion that 36 of them have not established that they were conscripted or enlisted into the armed wing of the UPC/FPLC or that Mr Lubanga used them to participate actively in hostilities in a non-international armed conflict between 1 September 2002 and 13 August 2003. Accordingly, they are not eligible for the reparations awarded in the case.<sup>191</sup>

**3. Potentially eligible indirect victims**

156. The Chamber holds that in the case of potentially eligible indirect victims it must be proven on a balance of probabilities that (a) the direct victim was a child soldier<sup>192</sup> and (b) the indirect victim had a close personal relationship with the direct victim.

**a. Direct victims' child-soldier status**

157. The Defence points out that most of the potentially eligible indirect victims do not present any civil status record to prove their identity or age<sup>193</sup> or the death of direct victims.<sup>194</sup> The Defence also argues that the redactions to their statements prevent it from ascertaining the identity of the indirect victim or the person acting as a witness.<sup>195</sup>

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<sup>191</sup> See, below, para. 301, for the Trust Fund's assistance mandate.

<sup>192</sup> See above, paras. 78-154, for the child-soldier status of direct victims.

<sup>193</sup> Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 161 and 163, 346-348-350, 385-386 and 388, 402-405, 410-413.

<sup>194</sup> Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 168, 262, 281, 304, 341, 342; Annex 1 to Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, para. 219; Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 67.

<sup>195</sup> Annex 1 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, paras. 307, 347, 377; Annex 2 to Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, para. 259.

158. Further, it notes, in some cases, the indirect victims do not provide any indication of the date when the direct victims might have left the UPC/FPLC or even how long they might have spent in it.<sup>196</sup>

159. Lastly, the Defence points out that, in some cases, the indirect victims have done nothing to obtain confirmation of the enlistment or conscription of the direct victim, even though he or she was still alive.<sup>197</sup>

160. To begin with, the Chamber recalls its conclusions regarding the redactions made to the dossiers.<sup>198</sup>

161. Turning to the Defence submission that the indirect victims do not give any indication of the dates when the direct victims might have left the UPC/FPLC or how long they might have spent in it, the Chamber points out that it has paid particular attention to the direct victims' accounts because of the limited probative value of the supporting documentation they tendered.<sup>199</sup> In that regard, the Chamber is alive to the fact that an indirect victim is not in a position to know and describe the detailed circumstances of a child soldier's deployment or demobilization to the same level of detail as the child soldier. It is therefore the Chamber's view that indirect victims cannot be required to recount the circumstances of a direct victim's membership of the militia to the same degree of detail. Accordingly, an indirect victim is not required to provide an indication of the date when the direct victim might have left the UPC/FPLC or how long he or she spent in it. The Chamber is also of the opinion that an indirect victim cannot be required to submit a certificate of demobilization or separation in the name of a direct victim who has survived in order for his or her application for reparations to be entertained.

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<sup>196</sup> Annex 1 to Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, para. 511.

<sup>197</sup> Annex 1 to Defence Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, para. 477.

<sup>198</sup> See above, paras. 55-59.

<sup>199</sup> See above, paras. 61-64.

162. The Chamber notes, however, that many potentially eligible indirect victims have presented one or two documents containing written statements, one person's signature and identification<sup>200</sup> for a person acting as witness in order to corroborate their allegations and the direct victim's identity.

163. The Chamber considers that, as far as indirect victims are concerned, the type of supporting documentation available, considered case-by-case, could hold sufficient probative value as to the facts alleged.<sup>201</sup> In that connection, the Chamber will give particular attention to any inconsistencies between the statements of the indirect victim and the witness(es) to determine whether they cast doubt on the credibility of the indirect victim's account.

164. As to deceased direct victims, the Chamber recalls that in *Katanga* it found one applicant's statements taken together along with the death certificate signed by a civil status registrar in the DRC to be sufficient evidence to satisfy the requisite standard of proof, and that the direct victim in question did in fact die as a child soldier; the finding was conditional upon the particularities of the circumstances under consideration.<sup>202</sup>

165. Be that as it may, the Chamber considers that in the specific circumstances of the case at bar a death certificate is unnecessary if the indirect victim's account is coherent and credible and corroborated by other evidence.

#### **b. Close personal relationship**

166. With regard to proof of a close personal relationship with a direct victim, the Defence submits that some indirect victims do not present any civil status document

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<sup>200</sup> See above, paras. 74-77, regarding identification.

<sup>201</sup> A direct victim's age and date or year of birth must also be confirmed by the statement(s) since identification for a direct victim is not provided in support of an indirect victim's application. The witnesses' statement must therefore corroborate the fact that the victim was under the age of 15 years at the material time.

<sup>202</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 119.

or a statement by two witnesses to prove the family relationship with the direct victim.<sup>203</sup>

167. The Chamber recalls that, in *Katanga*, it determined that family relationship could be proven even without a certificate of family relationship issued by the *Localité* Chief. That was so, for example, where a family relationship could be established by the fact that the parents' names on a voter card or on other identification accorded with those on a death certificate. For corroboration of the allegations, the Chamber also looked at family relationships between applicants for reparations.<sup>204</sup>

168. The Chamber moreover recalls that the concept of "family" must be understood in relation to the relevant family and social structures. In *Katanga*, it therefore treated the concept of "family" with due regard for family and social structures in the DRC and in Ituri in particular. That approach also finds application in the case at bar.

### c. Conclusion

169. Upon analysis of the 88 dossiers of potentially eligible indirect victims against the aforementioned criteria, the Chamber found that 12 indirect victims have either not established the direct victim's child-soldier status – *viz.*, that the direct victim was conscripted or enlisted into the armed wing of the UPC/FPLC, or that Mr Lubanga used the victim to participate actively in hostilities in a non-international armed conflict between 1 September 2002 and 13 August 2003 – or

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<sup>203</sup> Annex 1 to Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 47, 65, 85; Annex 2 to Defence Observations 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 191, 192, 194, 257, 258, 260-261, 276-278, 280, 298, 299, 302, 203, 307-308, 336-337, 338.

<sup>204</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 120.

have not established a close personal relationship with the direct victim. Accordingly, they cannot be awarded reparations in the case.<sup>205</sup>

#### 4. Harm alleged

##### a. Submissions of the Legal Representatives of V01 and V02 Victims, and the OPCV

170. The Legal Representatives of V01 Victims submit that the potentially eligible direct victims experienced traumatizing situations and so conclude that they have suffered general psychological harm<sup>206</sup> (symptom of traumatic stress) and specific harm of various types, such as physical harm, disfigurement, sexual harm or the loss of one or more years of education.<sup>207</sup> As regards indirect victims, the Legal Representatives of V01 Victims submit in particular that transgenerational harm, as defined in *Katanga*, should be recognized by the Chamber.<sup>208</sup> Lastly, the Legal Representatives of V01 Victims maintain that collective harm was sustained, as “[s]ome *localités* ended up with an abnormally high percentage of unqualified and even illiterate young people, resulting in dependency and anti-social behaviour such as vagrancy, bad manners and criminal activity.”<sup>209</sup>

171. The Legal Representatives of V02 Victims consider that the potentially eligible direct victims have suffered material and emotional harm.<sup>210</sup>

172. With regard to potentially eligible direct victims, the OPCV rehearses the heads of harm defined by the Appeals Chamber,<sup>211</sup> but makes a further point:

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<sup>205</sup> See below, para. 301, for the Trust Fund’s assistance mandate.

<sup>206</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 6.

<sup>207</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 7.

<sup>208</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 11.

<sup>209</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 13.

<sup>210</sup> Observations of Legal Representatives of V02 Victims of 11 September 2017, ICC-01/04-01/06-3363-tENG, para. 10.

“children of former child soldiers also suffer repercussions from the ordeals endured by their parents in connection with the crimes of which Mr Lubanga was convicted”.<sup>212</sup> The OPCV thereby brings to the fore the transgenerational aspect of the harm it wishes to see factored into the proposed reparations programmes. It further considers that the children of parents who were victims of the crimes of which Mr Lubanga was convicted themselves face hardship because their parents found themselves in such circumstances as a result of the crimes.<sup>213</sup> The OPCV submits that, for indirect victims, “the nature of the harm to be considered is different”, and recalls the heads of harm as found in the Appeals Chamber’s decision. Some persons, the OPCV goes on to say, draw attention to the lack of information on the fate of their children who were forcibly enlisted and who never returned, and it suggests that the Trust Fund should try to “address their suffering caused by this absence of information.”<sup>214</sup>

173. In its observations of 25 April 2017, the OPCV notes:

The potentially eligible victims interviewed all reported the following harm, [...]: physical injuries and/or diseases contracted and developed as a result of the extremely harsh living conditions in the militia (little food, very poor sleep conditions, extremely poor sanitary conditions – lice, dirty clothes, uncooked food, drugs, alcohol, etc.), weapons and very heavy equipment to carry, ill treatment by older soldiers, injuries sustained in training or combat); psychological trauma associated with the things they experienced or witnessed; challenges of the transition from life in the armed group and the behaviours learned there to civilian and family life; loss of crucial years of education and development, and loss of educational and occupational opportunities; low morale about their current situation and the challenges of surviving and providing for their families.<sup>215</sup>

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<sup>211</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 19, p. 9.

<sup>212</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 19, p. 9.

<sup>213</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 19, p. 9.

<sup>214</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 20.

<sup>215</sup> OPCV Observations of 25 April 2017, ICC-01/04-01/06-3293-Red-tENG, para. 28 [Emphasis omitted].



**b. The Chamber's determination**

174. The Appeals Chamber laid down that a Trial Chamber must identify the harm to direct and indirect victims caused by the crimes of which the person was convicted and that this determination must be contained in the order for reparations, as its absence infringes the right of the victims and the convicted person to meaningfully appeal an order for reparations under article 82(4) of the Statute,<sup>216</sup> specifically in that:

absent such a determination, [...] there is a real risk that the different mandates of the Trust Fund, namely its assistance mandate, 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 may be blurred in a manner prejudicial to the rights of the convicted person.<sup>217</sup>

175. For those reasons the Appeals Chamber amended the Decision on Reparations in order to define the harm to direct and indirect victims caused by the crimes of which Mr Lubanga was convicted, and in so doing was limited by Trial Chamber I's findings, made at trial and sentencing, on the harm caused to direct and indirect victims by the crimes of which Mr Lubanga was found guilty. The Appeals Chamber also commented that Mr Lubanga had appealed the Judgment Handing Down Conviction and the Determination of Sentence, and that it had affirmed both decisions.<sup>218</sup>

176. Accordingly, in the instant decision there is no legal basis for the Chamber to entertain harm not encompassed by the parameters which the Appeals Chamber set, such as the harm raised in the parties' submissions, lest it violate the convicted person's rights or risk the award of reparations for harm which did not ensue from

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<sup>216</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 181.

<sup>217</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 182 [Footnotes omitted].

<sup>218</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, paras. 186-187.

the crimes of which he was convicted.<sup>219</sup> It therefore must be reiterated that the instant decision is restricted to discharging the task given by the Appeals Chamber, *viz.* to setting the size of the reparations award for which Mr Lubanga is liable, and so is strictly circumscribed by the findings of Trial Chamber I and the Appeals Chamber.

177. In its Amended Order for Reparations, the Appeals Chamber defined the harm resulting from the crimes of which Mr Lubanga was convicted:

- 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.<sup>220</sup>

178. The Appeals Chamber therefore defined the harm suffered by the direct and indirect victims as material, physical and psychological harm.

179. It is worth recalling that the crimes of which Mr Lubanga was convicted mean that the potentially eligible direct victims have had to establish their child-soldier status and the potentially eligible indirect victims have had to establish the child-

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<sup>219</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 184.

<sup>220</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 58.

soldier status of the direct victim and that they had a close personal relationship with the latter.

180. With regard to the harm suffered, it is, in the Chamber's view, beyond doubt that any child who was conscripted or enlisted into an armed group or who participated in combat suffers psychologically, as well as in a physical and material sense, on account of his or her age and the ensuing vulnerability, and from the conditions in the militias. Also beyond doubt is that indirect victims, owing to their close personal relationship with the direct victim, have suffered personally in an emotional, a material and, in some cases, a physical sense as a result of the direct victim's enlistment.

181. The Chamber recalls that Trial Chamber I, in its Determination of Sentence, discerned trauma in the direct victims, such as mental dissociation, depression and suicidal behaviour, and the devastating and direct consequences of a child's abduction<sup>221</sup> or drug or alcohol abuse.<sup>222</sup> In the words of one expert witness:

Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps.<sup>223</sup>

182. Trial Chamber I noted, moreover, that a significant number of children had developed debilitating mental health conditions and heightened aggressiveness,<sup>224</sup>

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<sup>221</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 605.

<sup>222</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 41.

<sup>223</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 39 [Footnotes omitted].

<sup>224</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, paras. 40-41. See also Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 189.

while the indirect victims suffered psychologically from the sudden loss of a family member.<sup>225</sup>

183. Likewise, the victims have also suffered materially in many respects. Trial Chamber I noted in its Determination of Sentence that the trauma suffered “ha[s] a negative impact on their education and cognitive abilities”<sup>226</sup> and thereby “hamper[s] children’s healthy development and their ability to function fully even once the violence has ceased”.<sup>227</sup> In its decision on indirect victims, Trial Chamber I moreover recognized the situation of material deprivation that ensues from the loss of contributions from a deceased family member.<sup>228</sup>

184. Lastly, it is unquestionable that victims endure physical suffering in connection with the very nature of the armed conflicts in which they were involved. In its Determination of Sentence, Trial Chamber I noted that “[c]hildren [...] face the inevitable risk of being wounded or killed”.<sup>229</sup> That decision gave consideration to the opinion of an expert witness, who stated that the children had to endure acts of abuse, such as torture and rape.<sup>230</sup> The Trial Chamber acknowledged that an indirect victim may suffer loss, injury and damage by intervening to prevent conscription.<sup>231</sup>

185. In the light of the foregoing, the Chamber sees no need to scrutinize the specific harm alleged by each potentially eligible victim.<sup>232</sup> Instead, the Chamber sees fit to apply a presumption of harm to each direct and indirect victim once child-soldier status (in the case of a direct victim) and a close personal relationship with a

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<sup>225</sup> Trial Chamber I, “Decision on ‘indirect victims’”, dated 20 January 2009, [French] translation registered on 11 February 2014, ICC-01/04-01/06-1634-Conf, para. 50. A redacted [French] version of ICC-01/04-01/06-1813 was filed on 22 April 2015 (“Decision on Indirect Victims of 22 April 2015”).

<sup>226</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901 para. 41 [Footnote omitted].

<sup>227</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 39.

<sup>228</sup> Trial Chamber I, Decision on Indirect Victims of 22 April 2015, ICC-01/04-01/06-1813, para. 50.

<sup>229</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 40.

<sup>230</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 39.

<sup>231</sup> Trial Chamber I, Decision on indirect victims of 22 April 2015, ICC-01/04-01/06-1813, para. 51.

<sup>232</sup> Upon examination of the potentially eligible victims’ allegations of the harm suffered, the Chamber notes nevertheless that they correspond exactly to the harm defined by the Appeals Chamber.

child soldier (in the case of an indirect victim) have been established on a balance of probabilities.<sup>233</sup> The Chamber determines that, for both direct and indirect victims, said presumed harm consists of a material component, a physical component and a psychological component.

#### **5. Causal nexus between the harm suffered and the crimes of which Mr Lubanga was convicted**

186. The Appeals Chamber held that the standard of causation is a but-for relationship between the harm and the crime. There is a further requirement that the crimes of which the person was convicted must be the “proximate cause” of the harm for which reparations are sought.<sup>234</sup> The Appeals Chamber made plain, moreover, that the causal nexus between the crime and the harm must be determined in view of the characteristics of the case under consideration.<sup>235</sup>

187. The Chamber recalls that potentially eligible direct victims must establish that they were conscripted or enlisted into the UPC/FPLC or used by the UPC/FPLC to participate actively in hostilities during the time frame of the charges. Potentially eligible indirect victims must establish not only the direct victim’s child-soldier status, but also a close personal relationship with the direct victim. Accordingly, it is a precondition to qualify for reparations as a victim, direct or indirect, to establish on a balance of probabilities that a child under the age of 15 years was conscripted or enlisted into the armed forces of the UPC or was used by the UPC/FPLC to participate actively in hostilities, for instance in battle, during the time frame of the charges.

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<sup>233</sup> See *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728, paras. 123-129, where, in a similar fashion, the Chamber made a finding of psychological harm connected to the experience of the attack on Bogoro of 24 February 2017 (See also *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728, paras. 57-61).

<sup>234</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 59.

<sup>235</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 80, and Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 11.

188. The Chamber further recalls that it has presumed the existence of harm in the case of those potentially eligible direct victims who proved their child-soldier status and in the case of those potentially eligible indirect victims who proved the direct victim's child-soldier status and their close personal relationship with the direct victim.

189. Since the victims in the sample were considered because they met the above-mentioned criteria (child-soldier status and close personal relationship, or child-soldier status), and since, on that basis, the Chamber presumed the existence of harm, the Chamber finds that the causal nexus between the harm and the crimes of which Mr Lubanga was convicted is also established.

#### **F. Findings on the eligibility of the 473 victims**

190. The Chamber recalls that it received 473 dossiers, of which 385 are from persons alleging that they are direct victims and 88 are from persons alleging that they are indirect victims. The Chamber has undertaken an analysis of each of the dossiers on the basis of the criteria and the method laid out above. As said, the analysis is tabulated in Annex II hereto. The Chamber is satisfied that 425 of the 473 potentially eligible victims in the sample have shown on a balance of probabilities that they are victims – direct or indirect – of the crimes of which Mr Lubanga was convicted and, accordingly, are entitled to reparations awarded in the case. The Chamber has found that 48 persons have not proven on a balance of probabilities that they qualify as victims for the purposes of reparations in the case.

191. However, the persons who presented dossiers are not the sum-total of the victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted, but are a sample of potentially eligible victims. In Sections V-VII, the Chamber will look at additional evidence and the submissions of the parties on the total number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted. In making its determination (Section VIII), the

Chamber will also take into account the factors derived from the circumstances of the case *sub judice*.<sup>236</sup>

### G. The victims to receive collective reparations

192. At this juncture, the Chamber finds it appropriate to recall the principle educed by the Appeals Chamber: “When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis.”<sup>237</sup>

193. The Chamber also recalls its determination in *Katanga* that, to receive collective reparations, a group or category of persons may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court. Collective reparations may, therefore, benefit a group, including an ethnic, racial, social, political or religious group which predated the crime, but also any other group bound by collective harm and suffering as a consequence of the crimes of the convicted person.<sup>238</sup>

194. The Chamber therefore holds that for reparations to be collective in character they must benefit a group or category of persons who have characteristics in common and/or have suffered shared harm.<sup>239</sup> The Chamber notes that the 425 victims in the sample constitute such a group, which was subjected to harm as a consequence of the crimes committed by Mr Lubanga, even though each individual did not suffer the same harm. They will receive service-based collective reparations once the implementation of that type of award has commenced.<sup>240</sup>

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<sup>236</sup> See, below, para. 235.

<sup>237</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 33.

<sup>238</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 274.

<sup>239</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 275.

<sup>240</sup> See, below, paras. 288 and 294.

## V. DOCUMENTS RECEIVED FROM THE GOVERNMENT OF THE DRC

195. The Chamber recalls that on 24 January 2017 the Registry provided to it a document received from the Executive Unit of the National DDR Programme containing a list of children who separated from the armed group – the UPC/FPLC – and had been recruited between 1 September 2002 and 13 August 2003,<sup>241</sup> i.e. during the time frame of the charges. The list names 282 children who were 9-17 years old at the time of recruitment or conscription and gives the following particulars: first and family name, sex, date and place of birth, date of recruitment and age at date of separation.

196. The Chamber also recalls that on 20 February 2017 the Registry provided to it a further document from the Executive Unit of the National DDR Programme<sup>242</sup> containing a second list similar to the first.<sup>243</sup> The Chamber notes that the second list includes only those children in the first list who separated from the armed group – the UPC/FPLC – and who were under the age of 15 years at the time of recruitment or conscription; the youngest was 9 years old.

197. The Chamber observes in the first place that there is no overlap between, on the one hand, the names of children under the age of 15 years recruited by the UPC between September 2002 and August 2003 (i.e. direct victims) enumerated in the two lists, and, on the other hand, the names of the potentially eligible victims forming the sample. The Chamber further notes that the two aforementioned lists contain a smaller number of direct victims than the sample. Of further note is that these lists do not factor in the child soldiers who self-demobilized. The Chamber notes in this connection that, according to the United Nations and the NGOs that participated in the disarmament, demobilization and reintegration programmes

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<sup>241</sup> Annex III to Registrar's Report of 25 January 2017, ICC-01/04-01/06-3272-Conf-AnxIII.

<sup>242</sup> Registrar's Report of 20 February 2017, ICC-01/04-01/06-3274-tENG.

<sup>243</sup> Annex to Registrar's Report of 20 February 2017, ICC-01/04-01/06-3274-Conf-Exp-AnxI.



(“DDR programmes”), the number of child soldiers who self-demobilized was considerable.<sup>244</sup>

198. Furthermore, the Chamber notes that these lists do not include child soldiers who were enlisted or conscripted before 1 September 2002 but who, before the age of 15 years, participated in hostilities during the time frame of the charges, or child soldiers who, before demobilizing themselves, joined other armed groups. In addition, the Chamber notes that both lists appear to cover only a relatively short period in the demobilization process, which was pursued for some considerable time in an effort to reach the child soldiers concerned, and that, accordingly, it cannot be ruled out that some child soldiers may have demobilized themselves subsequently.

199. As a result, these two lists are a first indication that the total number of victims affected by the crimes of which Mr Lubanga was convicted is far greater than the number of persons in the sample who have established that they are victims for the purposes of reparations.

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<sup>244</sup> See, below, para 220.

## VI. SUBMISSIONS OF THE PARTIES ON THE TOTAL NUMBER OF DIRECT AND INDIRECT VICTIMS AFFECTED BY THE CRIMES OF WHICH MR LUBANGA WAS CONVICTED

200. The Chamber recalls that on 8 and 11 September 2017 and 2 October 2017, at its behest,<sup>245</sup> the Legal Representatives of V01<sup>246</sup> and V02<sup>247</sup> Victims, the OPCV<sup>248</sup> and the Defence<sup>249</sup> filed submissions on the evidence admitted in the present proceedings with a view to setting the size of the reparations award for which Mr Lubanga is liable.

201. The Chamber notes that each party puts forward a different estimate of the number of direct and indirect victims. The Legal Representatives of V01 Victims submit that the figure is between 20,000 and 25,000, while the Legal Representatives of V02 Victims put it at approximately 1,000. The OPCV advances a figure of 1,500 whereas the Defence estimates it at about 200. As noted, for planning purposes the Trust Fund proposed a figure of 3,000 potentially eligible victims in its draft implementation plan.<sup>250</sup>

202. The Chamber comes now to the various estimates advanced by the parties.

203. The Legal Representatives of V01 Victims submit that neither they nor their clients know the total number of children under the age of 15 years recruited into the UPC militia. They go on to say that, in view of their age then and the time elapsed since, the victims would not even be able to give a reliable estimate of the number of children of that age in the camps in which they often found themselves.<sup>251</sup> The Legal

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<sup>245</sup> Decision of 13 July 2017, ICC-01/04-01/06-3339, Order of 21 July 2017, ICC-01/04-01/06-3345.

<sup>246</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG.

<sup>247</sup> Observations of Legal Representatives of V02 Victims of 11 September 2017, ICC-01/04-01/06-3363-tENG.

<sup>248</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG.

<sup>249</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG.

<sup>250</sup> See, above, para. 34.

<sup>251</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 68.

Representatives of V01 Victims are also of the opinion that the figure of 3,000 proposed by the Trust Fund probably underestimates the number of indirect victims, especially in view of the concept of indirect victim developed in *Katanga*, which takes into consideration not only a deceased child's parents but also "a host of other family members".<sup>252</sup> Consequently, they submit, a child's recruitment "create[s] eight indirect victims within the close family and as many as 30 in the more distant family circle."<sup>253</sup> On that basis, they argue that the number of direct and indirect victims could be between 20,000 and 25,000.<sup>254</sup>

204. At the outset, the Chamber notes that the estimate of the number of victims advanced by the Legal Representatives of V01 Victims is contradicted by the other Legal Representatives and the Trust Fund. Although the estimates given by the Legal Representatives of V02 Victims (1,000 or so), the OPCV (1,500) and the Trust Fund (3,000) differ, they agree insofar as they all put the total number of victims in the case within the range of one thousand to several thousand, which rules out the tens of thousands of victims suggested by the Legal Representatives of V01 Victims. Regarding the number of indirect victims proposed by the Legal Representatives of V01 Victims, the Chamber recalls that the definition of an indirect victim may extend to all members of a direct victim's family and even to persons who are not relatives of a direct victim, provided that the person in question can show that he or she had a close personal relationship with the direct victim and that, by dint of that relationship, he or she suffered harm. In its analysis of the sample, the Chamber has found that 18% of the persons who have established that they are victims for the

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<sup>252</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 71.

<sup>253</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 72.

<sup>254</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 73.

purposes of reparations are indirect victims.<sup>255</sup> In a consistent vein, the OPCV puts the proportion of indirect victims at no more than 25%.<sup>256</sup> Accordingly, the Chamber concludes that the proposal of the Legal Representatives of V01 Victims regarding the number of direct victims, and by extension the total number of victims, is manifestly disproportionate and cannot be relied upon.

205. Like the estimate advanced by the Legal Representatives of V01 Victims, the estimate proposed by the Defence cannot be relied upon. The Defence, drawing on a number put forward by the Prosecution, states the figure of 200 victims as “the highest estimate that may be taken into account for reparations purposes”.<sup>257</sup>

206. However, in view of the footnotes supporting that claim, the Chamber sees that the Defence has misinterpreted the paragraphs to which it refers. The figure of 200 victims pertains to a single item of evidence only; the Prosecution itself states that that figure is well under the final count.<sup>258</sup> The Chamber would also point out that the number of persons in the sample who have established that they are victims for the purposes of reparations far exceeds the figure advanced by the Defence.

207. The Legal Representatives of V02 Victims, for their part, regard the Trust Fund’s estimate as too high and put theirs at 1,000 direct and indirect victims.<sup>259</sup>

208. The Chamber observes, however, that the Legal Representatives of V02 Victims advance no justification for their figure of 1,000 victims. It nonetheless notes that this estimate could be loosely based on the submissions of the OPCV and on the

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<sup>255</sup> Moreover, in the case at bar, these persons are generally mothers or fathers alleging that they suffered from the recruitment of their child (close personal relationship).

<sup>256</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 42 and footnote 58.

<sup>257</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, paras. 70-72.

<sup>258</sup> Appeals Chamber, “Prosecution’s Document in Support of Appeal against the ‘Decision on Sentence pursuant to Article 76 of the Statute’ (ICC-01/04-01/06-2901)”, 3 December 2012, ICC-01/04-01/06-2950, and one public annex, para. 43: “This evidence alone identifies approximately 200 child soldiers in the UPC/FPLC, though this is well under the final count”.

<sup>259</sup> Observations of Legal Representatives of V02 Victims of 11 September 2017, ICC-01/04-01/06-3363-tENG, para. 29.

400 clients with whom the Legal Representatives of V02 Victims say they are in contact. In that regard, in their submissions of 6 October 2016, the Legal Representatives of V02 Victims state that, in addition to the victims who were authorized to participate at the trial phase, other victims were admitted in the DRC situation and they may be eligible. They also state that they counted, via their intermediaries, 400 other potential victims who had been in a transit and orientation centre and who might qualify.<sup>260</sup> Furthermore, the Chamber notes, in their request for an extension of time of 30 March 2017, the Legal Representatives of V02 Victims report that, during a visit to the DRC in March 2017, one of the three counsel had been able to meet 47 potentially eligible victims, leaving him some 20 more to interview in [REDACTED].<sup>261</sup> They go on to explain that the other two counsel had been unable to travel there, specifically to [REDACTED], as planned in January and February 2017, and so it had been impossible to meet 40 or so victims in that connection. Lastly, they reiterate their intention to meet shortly with more than 400 potentially eligible victims whom they represent.<sup>262</sup>

209. For its part, the OPCV provides a total estimate of 1,500 victims, direct and indirect. It comments that “this figure may be revised during the implementation”.<sup>263</sup>

210. The Chamber notes that this estimate is derived mainly from the various documents the OPCV provided throughout the proceedings. Specifically, in its request of 20 March 2017, the OPCV points out that “213 applications have already been transmitted to the Victims Participation and Reparations Section and the 100 or

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<sup>260</sup> “Observations de l’équipe V02 de représentants légaux sur les écritures ICC-01/04-01/06-3222 du Bureau du conseil public pour les victimes et ICC-01/04-01/06-3223-Conf (+ annexe confidentielle) du Fonds au profit des victimes”, 6 October 2016, ICC-01/04-01/06-3244-Conf, para. 12.

<sup>261</sup> Legal Representatives of V02 Victims, “Request for an Extension of the Time Limit fixed at 31 March 2017 for the Transmission of Victim Applications to the Chamber”, dated 29 March 2017, [French original] reclassified as “confidential” on 30 March 2017, ICC-01/04-01/06-3284-Conf-tENG, para. 17 (“Observations of Legal Representatives of V02 Victims of 30 March 2017”).

<sup>262</sup> Observations of Legal Representatives of V02 Victims of 30 March 2017, ICC-01/04-01/06-3284-Conf-tENG, paras. 18-19.

<sup>263</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 42.

so collected during the Fourth Mission will be transmitted in the forthcoming days” and that “about 300 additional applicants have already been identified”.<sup>264</sup> Moreover, the OPCV states in its submissions that it is representing 392 victims and that “[its] teams were unable to meet at least an equivalent number of potential beneficiaries residing in areas to which they did not have time to travel”.<sup>265</sup> In the OPCV’s view, that figure should be doubled to give the total number of victims.

211. Having regard to the Defence’s figures, clearly too low, and those of the Legal Representatives of V01 Victims, excessively high, the Chamber discerns from the submissions a consensus within the range of 1,000-1,500 victims. However, in the Chamber’s view, these estimates may reflect only the number of victims whom, on the basis of their experience and work in situ, the Legal Representatives of V02 Victims and the OPCV expect to represent, rather than the sum-total of victims of the crimes of which Mr Lubanga was convicted.

212. In any event, the aforementioned submissions and the explanations in the related documents indicate that the number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted far exceeds the 425 persons who have established that they are victims for the purposes of reparations and that there are hundreds and possibly thousands more victims.

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<sup>264</sup> “Second Request for an Extension of the Time Limit for Filing Additional Applications for Reparations of Potential Beneficiaries”, 20 March 2017, ICC-01/04-01/06-3279-Red-tENG, para. 16.

<sup>265</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 48.

## VII. ADDITIONAL DOCUMENTS ENTERED ON RECORD

### A. Introduction

213. The Chamber recalls that on 21 July 2017, as authorized by articles 69(3) and 75 of the Statute, it instructed the Registry to enter into the record some public documents from official sources and/or the public domain, such as the UN and various governmental and non-governmental organizations (“Annexes to Order of 21 July 2017” or “Additional Documents Entered on Record”).<sup>266</sup> The Chamber was satisfied that the Additional Documents Entered on Record were also “relevant for determining the amount of Mr Lubanga’s liability for reparations”.<sup>267</sup> It further instructed the parties to consider those documents in their submissions made further to the Order of 13 July 2017.<sup>268</sup>

214. The Defence submits that the great majority of those documents, namely Annexes 3-5, 7, 9-24 and 26 to the Order of 21 July 2017, “are immaterial in that they refer either to events outside the time frame of the charges or to facts concerning the Democratic Republic of the Congo as a whole and not the UPC/FPLC in Ituri”.<sup>269</sup> The Defence goes on to say that:

Annexes 1, 2, 6, 8 and 25 [to the Order of 21 July 2017] relate to matters concerning the UPC/FPLC during the time frame of the charges but cannot be relied upon in their current form. Some of these reports do not specify the ages of the children classified as former child soldiers. Others provide an estimate of the numbers of minors under the age of 18 allegedly enlisted into the UPC/FPLC, but fail to measure specifically the recruitment of children under the age of 15.<sup>270</sup>

215. The Defence further submits that “the information in these reports is to be treated with utmost circumspection given its low level of reliability”.<sup>271</sup>

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<sup>266</sup> Order of 21 July 2017, ICC-01/04-01/06-3344-tENG.

<sup>267</sup> Order of 21 July 2017, ICC-01/04-01/06-3344-tENG, para. 3.

<sup>268</sup> Order of 21 July 2017, ICC-01/04-01/06-3344-tENG, p. 7.

<sup>269</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, para. 34.

<sup>270</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, para. 35.

<sup>271</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, para. 37.

216. From the outset, the Chamber must underscore that the Additional Documents Entered on Record are relevant and that they are by way of illustration. It notes that the documents in question supply a wealth of contextual information about the situation in Ituri and the use of child soldiers, in the DRC in general and by the UPC/FPLC in particular. It is to be noted in this regard that the results the Chamber has presented, which are based on the entirety of the Additional Documents Entered on Record, appear fairly consistent with one another as regards the widespread use of child soldiers in Ituri.<sup>272</sup> Accordingly, the Chamber sees no need to engage in a detailed analysis of the reliability of each Annex.<sup>273</sup>

217. The Chamber notes that some of the documents state that armed groups in the DRC generally have about 35-40% children under the age of 18 years,<sup>274</sup> which seems consonant with Trial Chamber I's findings, namely that there was significant recruitment of child soldiers by the UPC/FPLC.<sup>275</sup>

218. The Chamber is satisfied that the Additional Documents Entered on Record can provide an indication or approximate idea of the number of children under the age of 18 years recruited in the DRC during the first decade of the twenty-first century. The Chamber notes first of all that certain documents speak of the total number of militia members in the UPC/FPLC at the time. For instance, according to a Human Rights Watch report, Mr Lubanga himself put the strength of his forces at 15,000 in total.<sup>276</sup>

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<sup>272</sup> See Annex III hereto.

<sup>273</sup> However, the Chamber imparts its findings on the most significant points in the following paragraphs and in Annex III hereto.

<sup>274</sup> Annex 1 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx1, p. 51; Annex 2 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx2, p. 51; Annex 10 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx10, p. 1; Annex 8 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx8, p. 26; Annex 15 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx15, p. 11.

<sup>275</sup> See, below, paras. 31 and 33.

<sup>276</sup> Annex 1 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx1, p. 51.



219. The Chamber also sees that the documents from the Government of the DRC containing estimates of the capacities of the various Transit and Orientation Centres (“CTOs”) give a figure in the order of 15,000 combatants.<sup>277</sup>

220. The Chamber observes, from the Additional Documents Entered on Record and the dossiers in the sample, that a substantial number of victims did not go through the official demobilization programmes set up at the time. In this connection, UNICEF reports that 25% of the children concerned did not undergo the official demobilization process.<sup>278</sup> This explains why a substantial number of victims do not have a certificate of separation from an armed militia. To be specific, at the time, they did not wish to receive any documents that might put them at risk, despite the benefits that demobilization could offer, such as demobilization kits and a certain amount of money. It is also possible that they were not informed about “official” demobilization or that they did not qualify for it.

221. Lastly, the Chamber notes that some child soldiers died while or after serving in the UPC/FPLC, as a result of wounds sustained in combat. Disease, often beyond cure in the midst of a civil war, also claimed the lives of a considerable number of victims. As the sample reveals, a substantial number of child soldiers went missing in service; their relatives, generally, have no specific information about when or where they probably died. A report by the United Nations Mission in the DRC points to mortality in the order of 25%.<sup>279</sup>

222. Ultimately, upon compilation and analysis of these data, coefficients and statistics, the Chamber sees that the Additional Documents Entered on Record seem to place the number of direct victims in the range of 2,451 to 5,938. The Chamber

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<sup>277</sup> Annex 6 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx6, para. 7.

<sup>278</sup> UNICEF seems to be a reference point; many documents rely on its reports (see Annexes 4, 7, 8, 9, 13, 17 and 19 to the Order of 21 July 2017). See also Annex 4 to the Order of 21 July 2017, ICC-01/04-01/06-3344-Anx4, p. 4.

<sup>279</sup> Annex 25 to Order of 21 July 2017, ICC-01/04-01/06-3344-Conf-Anx25, p. 10.

refers to Annex III hereto for a description of the various calculation methods possible and the different variants which undergird those figures.

### **B. Example of the application of data by the Chamber**

223. The Chamber notes that any attempt to determine the number of victims in the above situation from the Additional Documents Entered on Record is a complex exercise requiring reliance on reasoned assumptions. Accordingly, the Chamber sees fit to clarify the reasoning that guided its use of the documents, by way of an example. The Chamber will set out its method of reasoning by expounding on method C23.<sup>280</sup> This reasoning may be applied *mutatis mutandis* to each of the variants listed in Annex III hereto.

224. Generally speaking, the method applies various coefficients to adjust a “crude” figure; the coefficients are derived from the Additional Documents Entered on Record. In the case of variant C23, analysed in Annex III, the baseline figure of 12,008 demobilized child soldiers comes from UNICEF<sup>281</sup> for the period from 2003 to June 2011, as set out in Annex 23 to the Order of 21 July 2017,<sup>282</sup> and it is corroborated by the information provided in Annexes 11, 13 and 26 to the Order of 21 July 2017,<sup>283</sup> which incorporate the figures for the series of demobilization phases contained in the reports by the Congolese authorities.<sup>284</sup>

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<sup>280</sup> See Annex III hereto.

<sup>281</sup> The Government of the DRC delegated to UNICEF the task of establishing a unified system of statistics and management of data on the demobilization of child soldiers.

<sup>282</sup> Annex 23 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx23-tENG, p. 21.

<sup>283</sup> Annex 11 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx11, para. 144; Annex 13 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx13, para. 102; Annex 26 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx26, tables 1 (p. 10), 2 (p. 12), 3 (p. 13), 5 (p. 14) and 10 (p. 27).

<sup>284</sup> On p. 27 of Annex 13 to Order of 21 July 2017, the Government of the DRC gives the total number of Children Associated with Armed Forces and Groups (“CAAFGs”) demobilized via CTOs in the DRC as 30,594. It also states that 9,448 of those CAAFGs were demobilized in Orientale Province (at the time, all CTOs in Orientale Province were in Ituri). The Chamber has taken this figure of 9,448 (the number of children demobilized in Orientale Province by 2007, derived, *inter alia*, from Annexes 11 and 13 to the Order of 21 July 2017) and added 2,889 (the number of children demobilized between 2008 and 2011 in Orientale Province from Annex 26 to Order of 20 July 2017. According to

225. The Chamber then applies a coefficient corresponding to the percentage of child soldiers under the age of 15 years, as the figures generally used in the reports are for the number of child soldiers under the age of 18 years, and not under 15 years as required by article 8 of the Statute. The coefficient is derived from the first list provided by the Executive Unit of the National DDR Programme, which contains the names of 282 demobilized child soldiers under the age of 18 years,<sup>285</sup> and from the second list, which contains the names of 202 demobilized child soldiers under the age of 15 years.<sup>286</sup> On basis of the lists, 71% of the total number of children demobilized were under the age of 15 years and hence the coefficient is 0.71.

226. The Chamber has already pointed out that a large number of child soldiers did not undergo the official demobilization process and so were not recorded in the official statistics. The percentage of self-demobilizers is found, for example, in Annex 4 to the Order of 21 July 2017,<sup>287</sup> which states that approximately 25% of children self-demobilized. Moreover, the Chamber has before it a separate, tangible piece of evidence consonant with the present decision, namely the contents of the sample of victims provided, which it has analysed. The Chamber can therefore rely on the self-demobilization rate of 25% stated in the Annexes to give a corresponding coefficient of 1.25.

227. A figure for mortality must also be set, as some victims died during or in the aftermath of combat. The Chamber takes the 25% mortality from Annex 25<sup>288</sup> to the Order of 21 July 2017 and adjusts it in consideration of the following factors: (a) there is no evidence that all child soldiers were replaced; (b) the exact date on which a

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that report, 1,090 boys and 806 girls were demobilized in 2009; 642 boys and 187 girls were demobilized in 2010; and 133 boys and 31 girls were demobilized in 2011, amounting to a total of 2,889 child soldiers demobilized over that period. The sum-total is 12,337 CAAFGs.

<sup>285</sup> Annex III to Registrar's Report of 25 January 2017, ICC-01/04-01/06-3272-Conf-AnxIII.

<sup>286</sup> Annex to Registrar's Report of 20 February 2017, ICC-01/04-01/06-3274-Conf-Exp-AnxI.

<sup>287</sup> Annex 4 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx4, p. 4; Annex 5 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx5.

<sup>288</sup> Annex 25 to Order of 21 July 2017, ICC-01/04-01/06-3344-Conf-Anx25, p. 10.

child soldier died is often impossible to determine; (c) a child soldier previously under Mr Lubanga's command may have died or been fatally wounded while still serving in a UPC/FPLC unit, but post-Lubanga and under a different commander-in-chief; and (d) a child soldier who had previously served in the UPC/FPLC may have died or have been fatally wounded while belonging to another militia and was therefore no longer under Mr Lubanga's command. The coefficient can accordingly be set at 1.15, that is, 15% mortality.

228. The Chamber makes allowance for the fact that the figures for soldiers and child soldiers generally do not give a detailed breakdown by militia. So as best to reflect reality and the UPC component in the statistics, the Chamber sees fit to set an ethnic proportion reflecting the Hema population in Ituri. With all due circumspection in the absence of census data, the proportion of Hema in Ituri is put, generally, at about 20%. A coefficient of 0.2 can be derived from Annexes 6 and 25<sup>289</sup> to the Order of 21 July 2017.

229. The Chamber's calculation is therefore:

baseline figure (12,008) x proportion of ethnic Hema (0.2) x  
 proportion of child soldiers under the age of 15 years (0.71) x  
 proportion of "self-demobilized" child soldiers (1.25) x mortality  
 (1.15) = approximately 2,451 victims of Mr Lubanga's crimes.

### C. Conclusion

230. The Chamber has thus determined that one possible calculation method returns a figure of 2,451 victims. Other calculation methods in Annex III hereto give up to 5,938 victims.

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<sup>289</sup> Annex 6 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx6, p. 13; Annex 25 to Order of 21 July 2017, ICC-01/04-01/06-3344-Conf-Anx25, pp. 1-2.

231. The Additional Documents Entered on Record therefore indicate, as do the other evidence and the submissions of the parties, that the sample alone does not represent the sum-total of the victims affected by the crimes committed by Mr Lubanga, and that there are in fact hundreds and possibly thousands more victims.

## VIII. NUMBER OF VICTIMS WHO SUFFERED HARM AS A CONSEQUENCE OF THE CRIMES OF WHICH MR LUBANGA WAS CONVICTED

232. Trial Chamber I, it must be recalled, “ha[d] not reached conclusions [...] beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years”<sup>290</sup> and there was “uncertainty as to the number of victims of the crimes in this case”.<sup>291</sup>

233. Having pondered Trial Chamber I’s relevant findings on the number of victims, and having examined the additional evidence entered on record at the reparations phase and the parties’ submissions thereon, the Chamber is likewise unable to arrive at a precise number of victims of the crimes of which Mr Lubanga was convicted.

234. In the Chamber’s view, although the individual identification of a greater number of victims to set the size of the reparations award would have been desirable, the necessary consultations would have unduly prolonged the proceedings, prejudicing not only Mr Lubanga’s right to notice within a reasonable time of his obligations arising from the reparations,<sup>292</sup> but also the right of the victims to receive prompt reparations.<sup>293</sup> In that connection, the Chamber recalls that it must strike a fair balance between the rights and interests of the victims and those of the convicted person.<sup>294</sup>

235. In its opinion, the specific circumstances of the case *sub judice* mean that the number of dossiers it might have obtained, even by way of an “exhaustive” victim identification process, would not have been fully representative of the true extent of

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<sup>290</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 50.

<sup>291</sup> Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 219.

<sup>292</sup> “Decision on Requests for the Extension of Time submitted by the Office of Public Counsel for Victims, the Registry and the Legal Representatives of V02 Victims”, 6 April 2017, ICC-01/04-01/06-3290-tENG, para. 12.

<sup>293</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 44.

<sup>294</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 18. See also articles 64(2) and 68(1) of the Statute.

the harm caused by Mr Lubanga. In other words, the number of victims who might have come forward through a screening process would have remained well below the actual number of victims affected by the crimes of which Mr Lubanga was convicted.

236. In particular, in the Chamber's view, the following factors, arising from the circumstances of the case, may have affected the victims' inclination to make themselves known and seek reparations:<sup>295</sup> the time elapsed since the crimes were committed and the very protracted course of the proceedings since the time they were instituted against Mr Lubanga; the scattering of victims across large geographical areas; the fact that victims may have been displaced or may have settled elsewhere,<sup>296</sup> say, to seek employment, or the fact that unrest, stigmatization and discrimination may have prompted their departure;<sup>297</sup> a loss of interest in reparations on the part of some potential victims; social and cultural factors deterring a significant number of victims from disclosing their child-soldier past on account of the attendant stigmatization and social pressure; the fact that young girls and women wish to be inconspicuous, in particular because they seldom participated in the DDR programmes as former child soldiers;<sup>298</sup> and the fact that

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<sup>295</sup> The Trust Fund shares this view (see Trust Fund Project of 13 February 2017 for Service-based Collective Reparations, ICC-01/04-01/06-3273, para. 37).

<sup>296</sup> See e.g. Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 41; Registry Report on Mapping of Victims, ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red, p. 56; and Redress, "Moving Reparation Forward at the ICC: Recommendations", November 2016, p. 3 ([https://redress.org/wp-content/uploads/2017/12/1611REDRESS\\_ICCReparationPaper.pdf](https://redress.org/wp-content/uploads/2017/12/1611REDRESS_ICCReparationPaper.pdf)), accessed on 14 December 2017.

<sup>297</sup> See e.g. Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, paras. 17 and 41; Trust Fund Filing of 31 May 2016, ICC-01/04-01/06-3208, paras. 46 and 75; Observations of V01 Group of Victims on the Draft Implementation Plan for Reparations filed by the Trust Fund for Victims (ICC-01/04-01/06-3177), 1 February 2016, ICC-01/04-01/06-3194-tENG, paras. 23-24; Annex 23 to Order of 21 July 2017, ICC-01/04-01/06-3344-Anx23-tENG, p. 31.

<sup>298</sup> OPCV Observations of 25 April 2017, ICC-01/04-01/06-3293-Red-tENG, para. 16. See also Registry Report on Mapping of Victims, ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red, p. 8. See also Annexes to Order of 21 July 2017, ICC-01/04-01/06-3344-tENG: ICC-01/04-01/06-3344-Anx4, p. 12; ICC-01/04-01/06-3344-Anx5, p. 9; ICC-01/04-01/06-3344-Anx10, p. 9; ICC-01/04-01/06-3344-Anx13, para. 77; ICC-01/04-01/06-3344-Anx16, para. 58; ICC-01/04-01/06-3344-Anx17, p. 16; ICC-01/04-01/06-3344-

some potential victims belong to at-risk groups, for instance, persons with disabilities or severe mental trauma.<sup>299</sup> The Chamber also has in mind the political factors at play in some regions, especially in those where communities continue to support Mr Lubanga.<sup>300</sup> The Legal Representatives of V01 and V02 Victims and the OPCV cannot readily reach such communities. And so, it would appear a complex and nigh on impossible undertaking for them to identify all of the potentially eligible victims in those areas. Lastly, the Chamber notices that some of the children under the age of 15 years recruited by the UPC were orphans and, since they died while or after serving in the UPC, there are no surviving relatives in a position to claim reparations.<sup>301</sup>

237. In that connection, the Chamber further observes that certain international courts and tribunals have, in the course of their work, also had recourse to approximations or minimum estimates in appraising victim numbers.<sup>302</sup> Of further

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Anx18, para. 7(k); ICC-01/04-01/06-3344-Anx22, para. 25; ICC-01/04-01/06-3344-Anx23-tENG, p. 31; and “Child Soldiers International’s Rule 103 Submission in Relation to Reparations”, 5 October 2016, ICC-01/04-01/06-3240-Conf-Exp-Anx, para. 5.

<sup>299</sup> See Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 17; “Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler pursuant to Rule 103 of the Rules of Procedure and Evidence”, dated 30 September 2016, reclassified as public on 6 October 2016, ICC-01/04-01/06-3240-Anx9, para. 13.

<sup>300</sup> See, *inter alia*, “Consolidated response to the submissions filed on 31 March and 7 June 2016 by the Trust Fund for Victims”, 1 July 2016, ICC-01/04-01/06-3212-tENG, para. 41; “Demande de réexamen de la ‘Décision portant sur les demandes de prorogation de délai présentées par le Bureau du conseil public pour les victimes, le Greffe et les Représentants légaux du groupe de victimes V02’ (ICC-01/04-01/06-3290)”, 12 April 2017, ICC-01/04-01/06-3292, paras. 17-18; Trust Fund Filing of 31 May 2016, ICC-01/04-01/06-3208, para. 46; Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 42; and Registry Report on Mapping of Victims, ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red, p. 55.

<sup>301</sup> See e.g. Registry Report on Mapping of Victims, ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red, p. 55.

<sup>302</sup> See e.g. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Judgement, 24 March 2016, IT-95-5/18-T, para. 780: “The Chamber therefore finds that hundreds of Bosnian Muslim men, including the elderly were detained by Serb Forces at the Vuk Karadžić School in May 1992”; para. 1465: “In total, approximately 4,000 to 8,000 Bosnian Muslims were loaded onto 22 train cars, used to transport cattle [...]”; para. 1774: “Finally, the Chamber finds that a large number of non-Serbs were killed by Serb Forces at Omarska [...]”; para. 6047: “Thousands of civilians were the victims of persecution, murder, and extermination and continue to suffer from the impact of these crimes to this day”; and para. 6049: “The implementation of the common plan of the Srebrenica joint criminal enterprise resulted in the killing of at least 5,115



Bosnian Muslim men and the forcible transfer of 30,000 Bosnian Muslim women.” [Emphases added]. See also International Criminal Tribunal for Rwanda, *Prosecutor v. Jean Kambanda* (“ICTR”), Case No. ICTR-97-23-S, Judgement and Sentence, 4 December 1998, para. 42: “The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact.” [Emphasis added]. See, further, Special Court for Sierra Leone (“SCSL”), *Prosecutor v. Alex Tamba Brima, Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Judgement, 20 June 2007, para. 1824: “The magnitude of commission of the three enslavement crimes by AFRC troops indicates their systemic nature. The Trial Chamber notes that the Brigade included a position in which an individual was appointed specific responsibility for abducted civilians. Although the Trial Chamber is unable to make a finding on the total number of civilians abducted and forced to undergo military training, the example provided by Colonel Iron that one battalion at ‘Colonel Eddie Town’ consisted of approximately 150 trained soldiers supplemented by approximately 200 abducted civilians corroborates the evidence of fact-based witnesses that these crimes were committed on a large scale.” [Emphasis added]. See also SCSL, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgement, 18 May 2012, para. 143: “The Trial Chamber is accordingly satisfied that the Prosecution have proved beyond a reasonable doubt that a further unknown number of children under 15 years were conscripted into the RUF, an armed force in May 2000 at Makeni”; para. 295: “The Trial Chamber found that until the end of the Indictment Period, attacks by the RUF/AFRC against the civilian population continued, affecting large numbers of civilians throughout the north and east of Sierra Leone. Through July 1999, there was violence against civilians in areas northeast of Freetown, including Masiaka, Port Loko, the Occra Hills and other locations in Port Loko District such as Songo, Mangarama, Masumana, Matteh, Melikeru and Tomaju. The civilian population was subjected to killings, mutilations, abductions, sexual abuse, large-scale property destruction and the contamination of fresh water sources”; and para. 805: “In August 1999, the villages of Landomah, Bonkoleke, Roists, Tenkabereh and Wonfinfer in Port Loko District were looted and civilians displaced. From September until the end of the year, attacks upon civilians increased, particularly along the Lungi-Port Loko axis where summary executions, instances of physical violence, looting, mutilations, sexual abuse, abductions and harassment were reported. In May 2000, approximately 40 civilians had the letters ‘RUF’ carved into their bodies in Kabala” [Emphasis added]. See also European Court of Human Rights (“ECtHR”), *Janowiec and Others v. Russia*, Judgment of 21 October 2013, Applications nos. 55508/07 and 29520/09, 21 October 2013, para. 73: “On 26 November 2010 the State Duma, the lower chamber of the Russian Parliament, adopted a statement entitled ‘On the Katyn tragedy and its victims’ which read, in particular, as follows: ‘Seventy years ago, thousands of Polish citizens held in the prisoner-of-war camps of the NKVD of the USSR and in prisons in the western regions of the Ukrainian SSR and Belorussian SSR were shot dead [...]’”; ECtHR, *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, Applications nos. 34044/96, 35532/97 and 44801/98, para. 13: “Between 1949 and 1961 approximately two and a half million Germans fled from the German Democratic Republic (GDR) to the Federal Republic of Germany (FRG). In order to staunch the endless flow of fugitives, the GDR built the Berlin Wall on 13 August 1961 and reinforced all the security measures along the border between the two German States, in particular by installing anti-personnel mines and automatic-fire systems (*Selbstschussanlagen*). Many people who tried to cross the border to reach the West subsequently lost their lives, either after triggering anti-personnel mines or automatic-fire systems or after being shot by East German border guards. The official death toll, according to the FRG’s prosecuting authorities, was 264. Higher figures have been advanced by other sources, such as the ‘13 August Working Party’, which speaks of 938 dead. In any event, the exact number of persons killed is very difficult to determine, since incidents at the border were kept secret by the GDR authorities.” [Emphasis added].

note is that other Chambers of this Court have described the number of victims in indeterminate or approximate terms: “many”,<sup>303</sup> “numerous”, “hundreds”.<sup>304</sup>

238. For this reason, the Chamber recalls the facts as found beyond reasonable doubt by Trial Chamber I in the Judgment Handing Down Conviction: “a significant number of children under the age of 15 were used by the UPC/FPLC as escorts and bodyguards for the main staff and the commanders, between September 2002 and 13 August 2003”;<sup>305</sup> “the armed wing of the UPC/FPLC was responsible for the

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Lastly, see Inter-American Court of Human Rights, (“IACtHR”), *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, para. 96: “While the exact number of persons detained, tortured, executed and/or missing in the Mapiripán Massacre has not been established, it has been accepted that they were approximately 49. It is possible that some of the missing or executed individuals were part of the floating population of the municipality”; and para. 253: “First of all, the Court considers that the approximately 49 individuals executed or missing, regarding whose death the State has acknowledged its international responsibility, are ‘injured parties’, as victims of violation of the rights embodied in Articles 4(1), 5(1), 5(2), 7(1) and 7(2) of the American Convention, in combination with Article 1(1) of that same Convention.” [Emphasis added]. See also IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Judgment, 29 April 2004, paras. 42 and 48: “The IACTHR recognized at the merits stage that ‘complexities and difficulties faced in identifying [victims] lead to the presumption that there may be victims yet to be identified’. The Court decided thus to recognize as victims also persons that may be identified subsequently. This should be understood to mean victims that could have been identified after the issuance of the judgment on the merits, but no later than the issuance of its judgment on reparations.” [Emphasis added].

<sup>303</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, public redacted version, 23 January 2012, ICC-01/09-02/11-382-Red, dated 23 January 2012, [French] translation registered on 11 December 2014, para. 271: “In addition to the acts of forcible circumcision and penile amputation, the Chamber also considers that there is sufficient evidence to demonstrate that, as part of the attack, many surviving victims endured mutilations and other severe injuries to their bodies.” [Emphasis added].

<sup>304</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber II, “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3343, dated 21 March 2016, [French] translation registered on 3 October 2016, para. 566: “Victims of pillaging were often left with nothing. The consequences were far-reaching. For example, P73 was unable to pay for medical treatment, V2’s business has never recovered from the loss of necessary equipment, and many victims were left without, *inter alia*, their savings, foam mattresses, and clothes, which they had worked hard to obtain”; para. 662: “As set out above, the armed conflict commenced with hostilities between General Bozizé’s rebels and the forces supporting President Patassé. [...] The armed conflict covered a large geographical area of the CAR, lasted more than four and a half months, and was characterised by regular hostilities, resulting in numerous casualties, including hundreds killed and wounded in action.” [Emphasis added].

<sup>305</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 857.

widespread recruitment of young people, including children under the age of 15”;<sup>306</sup> “a special ‘Kadogo Unit’ was formed, which was comprised principally of children under the age of 15”; and “commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards”.<sup>307</sup> Trial Chamber I and the Appeals Chamber also made plain that the small number of victims participating in the proceedings was not indicative of the likely number of child soldiers.<sup>308</sup>

239. The Chamber recalls that it has received 473 dossiers throughout the reparations phase, and that 425 of the 473 persons in question have shown on a balance of probabilities that they are victims, direct or indirect, of the crimes of which Mr Lubanga was convicted.

240. However, as it has stated,<sup>309</sup> the Chamber regards the 425 persons who have established that they are victims for the purposes of reparations as forming only a sample of the potentially eligible victims, and that other victims were affected by the crimes of which Mr Lubanga was convicted.

241. On that matter, the Chamber would first reiterate that there is no overlap between the sample and the second list enumerating 202 names of children under the age of 15 years recruited between September 2002 and August 2003 (i.e. direct victims) extracted from DRC databases. This is therefore a first general indication that the number of victims exceeds the number in the sample. In this connection, it is worth remembering that the DRC databases contain only data on former child soldiers who were demobilized by the government of the DRC’s demobilization programmes. The Chamber further recalls that the official demobilization lists do not

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<sup>306</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 911.

<sup>307</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 915. See also Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 49. The finding on the widespread nature of the involvement of individuals under the age of 15 years was undisturbed on appeal (Appeals Chamber, Appeal Judgment Affirming Sentence, paras. 99-104).

<sup>308</sup> Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 219; Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 153.

<sup>309</sup> Decision of 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 9. See also, para. 36, above.

factor in the phenomenon of “self-demobilization” by child soldiers, which is difficult to quantify but constitutes a further consideration which lends support to the Chamber’s finding that the total number of victims exceeds the number in the sample.

242. The Chamber refers again to the parties’ estimates of the number of victims. Disregarding the Defence’s figures, clearly too low, and those of the Legal Representatives of V01 Victims, excessively high, the Chamber discerns from the submissions a consensus within the range of 1,000-1,500 victims. In the Chamber’s view, however, these estimates may reflect only the number of victims whom, on the basis of their experience and work in situ, the Legal Representatives of V02 Victims and the OPCV expect to represent, and not necessarily the sum-total of the victims of Mr Lubanga’s crimes.

243. The Chamber also recalls that the documents analysed in Annex III hereto to appear to indicate that between 2,451 and 5,938 children (under the age of 15 years) served in the UPC’s ranks at some point during the time frame of the charges which were laid against Mr Lubanga.

244. From the foregoing, the Chamber finds it established to the requisite standard of proof that, along with the 425 victims in the sample, hundreds and possibly thousands more victims were affected by the crimes of which Mr Lubanga was convicted.

**IX. MONETARY VALUE OF THE HARM SUFFERED BY THE PERSONS IN THE SAMPLE WHO HAVE ESTABLISHED THAT THEY ARE VICTIMS FOR THE PURPOSES OF REPARATIONS**

245. Having disposed of the question of the number of victims, the Court comes now to the monetary assessment of the harm suffered by the victims.

246. At the outset, it is recalled that only collective reparations were ordered in the case, owing, *inter alia*, to uncertainty as to the number of victims of the crimes of which Mr Lubanga was convicted.<sup>310</sup>

247. As it has said, the Chamber has not scrutinized the specific harm alleged by each potentially eligible victim. Instead it has applied a presumption of average harm to each direct and indirect victim once a direct victim's child-soldier status in the UPC/FPLC during the time frame of the charges and an indirect victim's close personal relationship with a child soldier have been established on a balance of probabilities.<sup>311</sup> That harm encompasses material, physical and psychological components, which reflect the types of harm defined by the Appeals Chamber and the fact that each victim suffered them in different combinations.

248. Lastly, the Chamber recalls that it has considered only a sample of potentially eligible victims and that other victims may be identified at the implementation stage of the collective reparations. The precise ingredients of the harm individually suffered by all of the potentially eligible victims therefore remain as yet unknown.

249. For the foregoing reasons, the Chamber does not see fit to engage in a separate monetary assessment of each type of harm suffered by each victim. On that subject, it notes that the Legal Representatives of V01 Victims comment on the

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<sup>310</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 132.

<sup>311</sup> See, above, para. 180.

difficulty of individuating, for example, the emotional harm suffered by the direct victims, as each one's experience of the UPC/FPLC is personal.<sup>312</sup>

250. For the same reasons, the Chamber does not see fit to distinguish between direct and indirect victims for the purposes of determining the monetary value of the harm suffered.

251. The Chamber now turns to the assessment of the average harm suffered by each victim.

252. As regards the monetary value of the average harm suffered by each victim, the Chamber notes the submission of the Legal Representatives of V01 Victims that “[i]t would [...] be reasonable and proportionate to estimate th[e] harm (material and emotional combined) at a minimum of EUR 10,000 per direct victim”.<sup>313</sup>

253. The Legal Representatives of V02 Victims, for their part, advance an approximate figure of 1,000 victims and consider that “a total amount of USD 6,000,000 will be sufficient to repair all the harm”.<sup>314</sup> On the basis of these submissions, the average harm would come to USD 6,000.

254. The OPCV, relying on the estimate of 3,000 direct and indirect victims made by the Trust Fund for planning purposes, submits that:

the overall amount of at least USD 6,000,000 to implement the collective reparations programmes for the potential beneficiaries seems reasonable. This figure is based on the needs observed in connection with the harm made out in the present case; a survey of domestic and international case law; the actual expenses and costs of the initiatives under consideration in Ituri; and the Court's recent rulings in other cases that have reached the reparations stage.<sup>315</sup>

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<sup>312</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 62.

<sup>313</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 63.

<sup>314</sup> Observations of Legal Representatives of V02 Victims of 11 September 2017, ICC-01/04-01/06-3363-tENG, para. 29.

<sup>315</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 50.

255. From the OPCV's submissions, therefore, the average value of the harm suffered by each victim would be USD 2,000.

256. The Chamber also notes the OPCV's reference to certain recent decisions of the Congolese military tribunals where the harm connected to inhumane treatment and outrages upon personal dignity was assessed at USD 2,000 to USD 5,000 and harm connected to deprivation of liberty at USD 3,000.<sup>316</sup>

257. In addition to the submissions of the Legal Representatives of V01 and V02 Victims, the submissions of the OPCV and the relevant Congolese decisions, the Chamber recalls its finding in *Katanga*, where the crimes were also perpetrated in Ituri, that each victim, direct and indirect, had suffered psychological harm connected to the experience of the attack on Bogoro of 24 February 2003, which it reckoned *ex æquo et bono* at USD 2,000.<sup>317</sup> In respect of the indirect victims, the Chamber also made a finding of psychological harm connected to the death of a family member, where alleged and established by said victims. As noted by the Legal Representatives of V01 Victims, the Chamber reckoned the harm suffered by an indirect victim at USD 4,000 for the loss of a distant relative<sup>318</sup> and USD 8,000 for the loss of a near relative.<sup>319</sup>

258. Lastly, the Chamber recalls that in *Katanga* it assessed the extent of the harm suffered by the 297 persons who had established that they were victims for the purposes of reparations at a total monetary value of USD 3,752,620, which comes to an average of USD 12,635 per victim.

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<sup>316</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 27.

<sup>317</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 236.

<sup>318</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 65.

<sup>319</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 232.

259. Having regard to the submissions of the Legal Representatives of V01 and V02 Victims and the OPCV (which arrive at an average of USD 6,000 per victim),<sup>320</sup> the Congolese decisions (which suggest comparable values), the Chamber's findings in *Katanga* and in the instant case, and the results of the sample, the Chamber reckons *ex æquo et bono* the harm suffered by each victim, direct or indirect, at USD 8,000.

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<sup>320</sup> The Defence maintains that it "does not have the information it needs to make an informed response to the ... assessments" put forward by the parties to the present proceedings (Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, para. 96).



## X. SIZE OF THE REPARATIONS AWARD FOR WHICH MR LUBANGA IS LIABLE

### A. Submissions of the Trust Fund and the parties

260. The Chamber recalls that the Appeals Chamber directed the Trust Fund:

to provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted, based on information gathered during the consultation period leading up to the submission of the draft implementation plan”.<sup>321</sup>

Despite the Appeals Chamber’s instructions, the Trust Fund did not specify the anticipated amount.<sup>322</sup> The reasons it gave were that “setting this anticipated monetary amount for Mr Lubanga’s financial liability is highly challenging and [...] the determination is within the discretion of the Court”.<sup>323</sup>

261. The Legal Representatives of V02 Victims, for their part, report: “The Legal Representatives of Victims arrived at an agreed estimate [...] and believe that a total amount of USD 6,000,000 will be sufficient to repair all the harm”.<sup>324</sup> However, they submit that “[c]onsidering the convicted person’s indigence, it would be fitting for the [Trust Fund] to state the amount it will be able to assume in the reparations process.”<sup>325</sup>

262. The OPCV submits that:

in the light of the specific circumstances of the case – i.e. the nature of the crimes involved as well as Mr Lubanga’s confirmed role in their perpetration – and the Court’s recent case law regarding reparations and personal liability, [...] Mr Lubanga should be held liable in full for the proposed award of USD 6,000,000.<sup>326</sup>

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<sup>321</sup> See, above, para. 5.

<sup>322</sup> Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 214.

<sup>323</sup> Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 214.

<sup>324</sup> Observations of Legal Representatives of V02 Victims of 11 September 2017, ICC-01/04-01/06-3363-tENG, para. 29.

<sup>325</sup> Observations of Legal Representatives of V02 Victims of 11 September 2017, para. 30.

<sup>326</sup> OPCV Observations of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 58, referring to *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, “Reparations Order”, 17 August 2017, ICC-01/12-01/15-236, paras. 110-111.

263. The Legal Representatives of V01 Victims argue in a similar vein

that it is more reasonable to find [the convicted person] liable for the full amount of the reparations. After all, at least one of the persons who, according to the Court, made a crucial contribution to the commission of the crimes – namely Mr Bosco Ntaganda – is also at trial before the Court but is yet to be convicted. A decision to assess the relative contribution to be made by Mr Lubanga in relation to the other co-accused could therefore infringe on their rights. In addition, Mr Lubanga exercised hierarchical authority over the other persons who are liable, making his role specific and decisive. Finding him liable will not prevent the Court from finding anyone else jointly and severally liable for all or part of the harm.<sup>327</sup>

264. The Defence does not quantify the reparations award for which Mr Lubanga should be found liable, but “defers to the fairness of the Chamber’s equitable judgement”.<sup>328</sup> However, it does submit that Mr Lubanga’s indigence must be considered in determining of the size of the reparations award to be made against him.<sup>329</sup>

265. The Defence also submits that the Chamber must take into account Trial Chamber I’s express reference to the existence of a plurality of co-perpetrators, and that, accordingly, Mr Lubanga “cannot be held liable for the full amount of any reparations ultimately awarded by this Chamber”.<sup>330</sup>

266. Furthermore, the Defence submits that regard must also be had to “the indirect and third-degree form of criminal intent [...] ascribed to Mr Lubanga”, which it says Pre-Trial Chamber I, sitting in its previous composition, described as “as the most indirect form of criminal intent”.<sup>331</sup>

267. Lastly, the Defence submits that the specific circumstances of the case must be taken into account.<sup>332</sup>

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<sup>327</sup> Observations of Legal Representatives of V01 Victims of 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 81.

<sup>328</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, para. 104.

<sup>329</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, para. 28.

<sup>330</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, paras. 107-109.

<sup>331</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, paras. 110-112 [Footnote omitted].

<sup>332</sup> Defence Observations of 2 October 2017, ICC-01/04-01/06-3374-tENG, paras. 123-127.

## B. Determination of the size of the reparations award for which Mr Lubanga is liable

268. An order for reparations, it is worth recalling, is intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence.<sup>333</sup>

269. Furthermore, the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established vis-à-vis the convicted person and on the specific elements of that responsibility.<sup>334</sup> In sum, the Appeals Chamber enunciated the principle applicable to determining the scope of a person's liability for reparations as follows: "A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case".<sup>335</sup> However, Mr Lubanga's current financial situation cannot be regarded as material to the determination of the size of the reparations award for which he is liable.<sup>336</sup>

270. As to the gravity of the crimes of which Mr Lubanga was convicted, the Chamber recalls that, in its Determination of Sentence, Trial Chamber I held:

37. The crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole. [...]

44. Against this general background the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, *inter alia*, to the extent of the damage caused, and in particular "the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person."<sup>337</sup>

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<sup>333</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 65. See also *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, footnote 348.

<sup>334</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 118.

<sup>335</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 21; Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 118.

<sup>336</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 246.

<sup>337</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, paras. 37 and 44.

271. Trial Chamber I also drew attention to the large-scale and widespread perpetration of the crimes:

49. The Chamber concluded in the Judgment that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.<sup>338</sup>

272. Turning now to Mr Lubanga's participation in the commission of the crimes of which he was convicted, the Chamber notes that Trial Chamber I in its Judgment Handing Down Conviction found Mr Lubanga guilty as a co-perpetrator of the crimes of conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute between 1 September 2002 and 13 August 2003.<sup>339</sup>

273. In this regard, the Chamber must point out that the Appeals Chamber, after stating that the Statute differentiates between two main forms of criminal responsibility, *viz.* principal and accessorial, went on to hold that:<sup>340</sup>

this distinction is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons.<sup>341</sup>

274. However, as the Appeals Chamber held, the Chamber must first and foremost consider, *vis-à-vis* the specific circumstances of the case, Mr Lubanga's participation in the commission of the crimes of which he was convicted. Accordingly, the Chamber will proceed to examine the factual and legal elements of that participation, as determined by Trial Chamber I in the Judgment Handing Down

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<sup>338</sup> Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 49.

<sup>339</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, p. 591.

<sup>340</sup> Appeals Chamber, Appeal Judgment Affirming Conviction, ICC-01/04-01/06-3121-Red, para. 462.

<sup>341</sup> Appeals Chamber, Appeal Judgment on Judgment Handing down Conviction, ICC-01/04-01/06-3121-Red, para. 462.

Conviction and confirmed by the Appeals Chamber in its Appeal Judgment Affirming Conviction, so as to set the size of the reparations award for which he is liable.<sup>342</sup>

275. In that connection, the Chamber rehearses the findings made by Trial Chamber I:

1351. The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.

[...]

1354. [...] The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion.

[...]

1356. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. [...] The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.<sup>343</sup>

276. Also worthy of note is the present Chamber's holding in *Katanga*:

[I]n cases coming before the Court, a plurality of persons potentially bear responsibility for having contributed to the commission of the crimes which caused harm to victims. That said, it must be emphasized that the competence over such crimes of a chamber tasked with overseeing the conduct of a case is circumscribed by the charges confirmed against an accused person and the evidence tendered by the parties at trial, and so the bench is not in a position to determine the responsibility of every person who had a part in the crimes at issue.<sup>344</sup>

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<sup>342</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 257.

<sup>343</sup> Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, paras. 1351, 1354 and 1356.

<sup>344</sup> *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 263.

277. As regards the case at bar, to the Chamber's knowledge no convictions have been returned against other persons for the crimes that occasioned the harm suffered by the victims in the case *sub judice*. In any event, the Chamber's decision is confined to determining Mr Lubanga's individual liability for reparations.

278. In that regard, in making its determination the Chamber relies in particular on the fact that, as aforementioned, Mr Lubanga was President of the UPC/FPLC and both Commander-in-Chief of its army and its political leader.<sup>345</sup> It also relies on the fact that Mr Lubanga's contributions were essential to a common plan, which he and his co-perpetrators shared and which resulted in the conscription and enlistment of girls and boys under the age of 15 years into the UPC/FPLC and in the use of these children to participate actively in hostilities.<sup>346</sup> Lastly, the Chamber relies on the gravity of the crimes in question and the fact that they were perpetrated, as earlier said, on a large scale and in a widespread manner.<sup>347</sup> Mr Lubanga's individual responsibility, so adjudged, informs the Chamber's assessment of the harm suffered by the victims taken as a whole.

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

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

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<sup>345</sup> See, above, para. 275.

<sup>346</sup> See, above, para. 275.

<sup>347</sup> See, above, paras. 270 and 271.

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

## XI. HOW EFFECT IS TO BE GIVEN TO THE PRESENT DECISION

### A. Funding of reparations

283. The Appeals Chamber, it is recalled, stated that, where on account of indigence the convicted person is not in a position to comply with an order for reparations forthwith, the Trust Fund may decide to complement the resources collected through awards for reparations by disbursing the necessary amount from its “other resources”, as foreseen by regulation 56 of the Regulations of the Trust Fund.<sup>348</sup>

284. In that connection, the Appeals Chamber ruled that the Trust Fund was to specify, in its draft implementation plan for reparations, the monetary amount that it would advance, should its Board of Directors so decide, to give effect to the Amended Order for Reparations.<sup>349</sup>

285. In its Filing on Draft Implementation Plan of 3 November 2015, the Trust Fund sought from the Chamber a determination as to whether Mr Lubanga should be considered indigent for the purposes of reparations.<sup>350</sup> The Trust Fund also stated that it was prepared to disburse one million euros from its reparations reserve as complementary funding for the collective reparations programme.<sup>351</sup>

286. The Board of Directors of the Trust Fund nonetheless noted that:

the complement figure [wa]s merely an indication at this stage and that it ha[d] not yet taken a final decision on the issue. As discussed in the [Trust Fund Filing on Draft Implementation Plan of 3 November 2015], such final decision is contingent on a formal declaration of Mr. Lubanga’s indigence for the purposes of reparations by the Court, and the endorsement of the Draft Implementation Plan [of 3 March 2016].<sup>352</sup>

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<sup>348</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 115; Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 62. See also Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, adopted at the 4th plenary meeting on 3 December 2005 by consensus. However, the Trust Fund’s involvement does not absolve the convicted person of his or her liability; the convicted person remains liable and must reimburse the Trust Fund.

<sup>349</sup> Appeals Chamber, Appeal Judgment on Reparations, ICC-01/04-01/06-3129, para. 240.

<sup>350</sup> Filing on Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Red, para. 108.

<sup>351</sup> Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-AnxA, para. 174.

<sup>352</sup> Draft Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-AnxA, para. 175.



287. In view of the Appeals Chamber's ruling and the Trust Fund's request, the Chamber instructed the Registrar on 20 November 2015 to review Mr Lubanga's financial situation.<sup>353</sup> On 11 January 2016, the Registrar reported to the Chamber.<sup>354</sup> Upon consideration of the Registrar's observations, the Chamber, by Order of 25 January 2016, found Mr Lubanga indigent for the purposes of reparations.<sup>355</sup>

288. The Chamber further recalls that, in its project framework of 17 September 2016 for symbolic collective reparations,<sup>356</sup> and in its project framework of 13 February 2017 for service-based collective reparations,<sup>357</sup> the Trust Fund stated that, should the Chamber approve the projects in question, its Board of Directors would be in a position to make a final and fully informed decision on the amount of complementary funds it would earmark for the implementation of reparations in the case. On 21 October 2016 and 6 April 2017, respectively, the Chamber approved the project framework of 16 September 2016 for symbolic collective reparations<sup>358</sup> and the first stage of the project framework of 13 February 2017 for service-based collective reparations.<sup>359</sup>

289. In consideration of the foregoing and its findings as to Mr Lubanga's liability for reparations, the Chamber sees fit to invite the Trust Fund Board of Directors to explore the possibility of earmarking additional funds for the implementation of

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<sup>353</sup> "Order concerning Thomas Lubanga Dyilo's financial situation", dated 18 November 2015, [French original] registered on 20 November 2015, ICC-01/04-01/06-3182-Conf-Exp-tENG.

<sup>354</sup> "Registry's report on the financial situation of Thomas Lubanga Dyilo", dated 11 January 2016, registered on 12 January 2016, ICC-01/04-01/06-3189-Conf-Exp.

<sup>355</sup> "Second order on the financial situation of Thomas Lubanga Dyilo", 25 January 2016, ICC-01/04-01/06-3192-Conf-Exp-tENG.

<sup>356</sup> "URGENT – Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals", 16 September 2016, ICC-01/04-01/06-3223-Conf, paras. 65-66.

<sup>357</sup> Trust Fund Project of 13 February 2017 for Service-based Collective Reparations, ICC-01/04-01/06-3273, para. 147.

<sup>358</sup> "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations", 21 October 2016, ICC-01/04-01/06-3251, p. 9.

<sup>359</sup> "Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims", 6 April 2017, ICC-01/04-01/06-3289, p. 9.

collective reparations in the case, in accordance with the Regulations of the Trust Fund, and/or the possibility of continuing its efforts to raise additional funds.

290. However, the Chamber also recalls that the Appeals Chamber stated that:

[s]hould 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.<sup>360</sup>

291. The Chamber hereby renews its request to the Presidency to continue monitoring Mr Lubanga's financial situation, with the Registry's assistance, and to report any changes,<sup>361</sup> in particular since Mr Lubanga will soon have served his sentence.

### **B. Other potentially eligible victims**

292. The Chamber has found that, in addition to the 425 persons who have established that they are victims for the purposes of reparations, hundreds, and possibly thousands more victims were affected by the crimes of which Mr Lubanga was convicted.

293. The Chamber further recalls that it made clear in the Decision of 13 July 2017 that persons who had not been in a position to submit a dossier by 31 March 2017 would be screened by the Trust Fund for eligibility at the implementation stage of the reparations.<sup>362</sup> In that connection, the Chamber notes the initial information on the Trust Fund's planned victim screening process and the Trust Fund's request for proposals on that process from organizations and associations applying for implementing partner status.<sup>363</sup>

<sup>360</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 61.

<sup>361</sup> "Second order on the financial situation of Thomas Lubanga Dyilo", 25 January 2016, ICC-01/04-01/06-3192-Conf-Exp-tENG, para. 6 and p. 5.

<sup>362</sup> Decision of 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 11.

<sup>363</sup> Decision of 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 12, referring to the Trust Fund Project of 13 February 2017 for Service-based Collective Reparations, paras. 42-50 and p. 56. See also "Observations on the *Requête afin de solliciter des lignes directrices de la Chambre suite à l'Ordonnance*

294. On 16 November 2017, at the Chamber's behest,<sup>364</sup> the Trust Fund filed a third report on the implementation of the collective reparations, including the symbolic collective reparations.<sup>365</sup> The Trust Fund informed the Chamber that it had selected a partner for the implementation of the project framework of 16 September 2016 for symbolic collective reparations, and that it was in the process of working with that partner to fine-tune the project framework.<sup>366</sup> The Trust Fund also informed the Chamber that the process of selecting partners for the implementation of the proposed project framework of 13 February 2017 for service-based collective reparations was still at an early stage.<sup>367</sup>

295. The Chamber recalls that in their respective submissions the OPCV and the Legal Representatives of V02 Victims say that they are in contact with tens, and possibly hundreds, of other potentially eligible victims.<sup>368</sup>

296. Considering the Trust Fund's late selection of implementing partners for the service-based collective reparations, and so as to build on the efforts of the OPCV and the Legal Representatives of V02 Victims, especially the contact they have made with potentially eligible victims, the Chamber invites the Trust Fund to study the possibility of continuing to seek and identify potentially eligible victims with their assistance, before the implementing partners are selected and the Chamber approves the second phase of the implementation of the service-based collective reparations.

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*émise le 15 juillet 2016*", 3 October 2016, ICC-01/04-01/06-3237, paras. 24-33. The Chamber recalls that for planning purposes the Trust Fund put the number of direct and indirect victims at 3,000.

<sup>364</sup> "Order Instructing the Trust Fund for Victims to Inform the Chamber of the Progress Made in the Implementation of Reparations", 7 November 2017, ICC-01/04-01/06-3376-tENG.

<sup>365</sup> "Third progress report on the implementation of collective reparations as per the Trial Chamber II orders of 21 October 2016 and 6 April 2017", dated 15 November 2017, registered on 16 November 2017, ICC-01/04-01/06-3377, and one confidential annex *ex parte* Registry, ICC-01/04-01/06-3377-Conf-Exp-AnxA ("Annex A to Trust Fund Report of 16 November 2017").

<sup>366</sup> Annex A to Trust Fund Report of 16 November 2017, ICC-01/04-01/06-3377-Conf-Exp-AnxA, pp. 3-4.

<sup>367</sup> Annex A to Trust Fund Report of 16 November 2017, ICC-01/04-01/06-3377-Conf-Exp-AnxA, p. 4.

<sup>368</sup> See, above, paras. 208 and 210.

The Trust Fund is hereby directed to keep the Chamber informed of any arrangements it makes in that regard.

297. The Chamber will make a determination in due course on the other questions relating to the implementation of the reparations.

### C. States Parties

298. States Parties, the Chamber recalls, “shall facilitate the enforcement of [orders for reparations]”,<sup>369</sup> including decisions on forfeiture measures taken pursuant to articles 75(5) and 109 of the Statute.<sup>370</sup>

299. In this connection, the Chamber notes that on 28 September 2016 the Government of the DRC made known its interest in participating in the present proceedings.<sup>371</sup> Accordingly, the Chamber directs the Trust Fund to contact the Government of the DRC with a view to establishing how it may contribute to the reparations process, and to inform the Chamber.

300. Lastly, the Chamber wishes to call attention in this regard to the donation made by one State Party, the Kingdom of the Netherlands, to help fund the award of individual reparations in *Katanga*. The Chamber encourages initiatives of this kind to benefit the victims who have suffered harm as a consequence of the crimes of persons found guilty before this Court.<sup>372</sup>

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<sup>369</sup> Rule 219 of the Rules of Procedure and Evidence. See also Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 50, and *Katanga*, Order for Reparations of 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 324.

<sup>370</sup> See also rules 217-222 of the Rules of Procedure and Evidence.

<sup>371</sup> Annex 8 to Registrar’s Report on Execution of Decision ICC-01/04-01/06-3217, dated 4 October 2016, registered on 5 October 2016, ICC-01/04-01/06-3240-Conf-Exp-Anx8. A redacted version was filed on 4 October 2016 and registered on 7 October 2016 (ICC-01/04-01/06-3240-Anx8-Red).

<sup>372</sup> *Katanga*, “Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director’s decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations”, 17 May 2017, ICC-01/04-01/07-3740, para. 49.

#### **D. Assistance mandate of the Trust Fund**

301. The Chamber recalls that the Appeals Chamber invited the Trust Fund to contemplate, in the exercise of its mandate vested in by rule 50(a) of the Regulations of the Trust Fund, the possibility of including in the assistance programmes operating in the situation area in the DRC the persons who do not qualify for the award of reparations in the case.<sup>373</sup>

#### **E. Publication of the present decision**

302. The Chamber directs the Registrar to take all the necessary measures to give adequate publicity to the present decision, including outreach activities aimed at the national authorities, the local communities and the affected populations, and measures to afford the victims detailed and timely notice and access to any reparations awards.<sup>374</sup>

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<sup>373</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 55.

<sup>374</sup> Appeals Chamber, Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 51-52.

## XII. RECONSIDERATION SOUGHT BY THE TRUST FUND

303. The Chamber recalls that in its filing of 31 May 2016 the Trust Fund, *inter alia*, moved the Chamber to reconsider its approach to the victim identification process set out in the Order of 9 February 2016.<sup>375</sup>

304. Having regard to the foregoing, the Chamber considers that there is now no reason to do so.

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<sup>375</sup> Trust Fund Filing of 31 May 2016, ICC-01/04-01/06-3208.

**FOR THESE REASONS, the Chamber**

**HANDS DOWN**, unanimously, the present decision setting the size of the reparations award for which Mr Lubanga is liable;

**FINDS** that 425 of the 473 potentially eligible victims in the sample have shown on a balance of probabilities that they are direct or indirect victims of the crimes of which Mr Lubanga was convicted;

**DECIDES**, accordingly, to award the 425 victims collective reparations approved by the Chamber in the case;

**FINDS** that those 425 victims are only a sample of the potentially eligible victims and that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted;

**SETS** the reparations award for which Mr Lubanga is liable at a total of USD 10,000,000, which consists of his liability in respect of the 425 victims in the sample, amounting to USD 3,400,000, and his liability in respect of any other victims who may be identified, amounting to USD 6,600,000;

**FINDS** Mr Lubanga indigent for the purposes of reparations at the time of this decision;

**DIRECTS** the Board of Directors of the Trust Fund to inform it, by 15 February 2018, whether it is in a position to earmark additional funds for the implementation of collective reparations in the case, in accordance with regulation 56 of the Regulations of the Trust Fund, or to continue its efforts to raise additional funds;

**DIRECTS** the Presidency to monitor, with the assistance of the Registrar, Mr Lubanga's financial situation on an ongoing basis in accordance with regulation 117 of the Regulations of the Court;

**DIRECTS** the Trust Fund to contact the Government of the DRC with a view to establishing how it may contribute to the reparations process and to keep the Chamber informed thereof;

**DIRECTS** the Trust Fund to file, by 15 January 2018, submissions on the possibility of continuing to seek and identify victims with the assistance of the OPCV and the Legal Representatives of V01 and V02 Victims;

**WILL DECIDE** in due course as to how the implementation of collective reparations is subsequently to proceed;

**INVITES** the Trust Fund to contemplate the possibility of including in the assistance programmes operating in the situation area in the DRC the persons who do not qualify for the award of reparations in the case; and

**DIRECTS** the Registrar to take all the necessary measures to give adequate publicity to the present decision.



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

[signed]

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**Judge Marc Perrin de Brichambaut**

**Presiding Judge**

[signed]

[signed]

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**Judge Olga Herrera Carbuccion**

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**Judge Péter Kovács**

Dated this 21 December 2017

At The Hague, Netherlands