

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 A A2 A3 OA 21

Date: 14 December 2012

THE APPEALS CHAMBER

Before:

Judge Erkki Kourula, Presiding Judge

Judge Sang-Hyun Song

Judge Sanji Mmasenono Monageng

Judge Anita Ušacka

Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims V01
Mr Luc Walley
Mr Franck Mulenda

Trust Fund for Victims
Mr Pieter de Baan

Legal Representatives of Victims V02
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

Organisations granted leave to make submissions before the Trial Chamber
Women's Initiatives for Gender Justice
International Center for Transitional Justice
United Nations Children's Fund
Avocats sans frontières
Fondation Congolaise pour la Promotion des Droits humains et la Paix

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

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

And in the appeal filed, on 10 September 2012, by Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 (ICC-01/04-01/06-2904) pursuant to the “Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations” of 29 August 2012 (ICC-01/04-01/06-2911),

After deliberation,

Renders unanimously the following

DECISION AND DIRECTIONS

1. The appeal under article 82 (1) (d) of the Statute filed by Mr Thomas Lubanga Dyilo against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 is rejected as inadmissible.
2. The appeals under article 82 (4) of the Statute filed by the Legal Representatives of Victims V02 jointly with the Office of Public Counsel for victims (ICC-01/04-01/06-2909), by the Legal Representatives of Victims V01 (ICC-01/04-01/06-2914), and by Mr Thomas Lubanga Dyilo (ICC-01/04-01/06-2917) are admissible, subject to paragraph 3.

3. To the extent that the Office of Public Counsel for victims filed its appeal on behalf of unidentified individuals who have not applied for reparations but whose interests might be affected by collective reparations, the appeal is rejected as inadmissible.
4. The Legal Representatives of Victims V02 jointly with the Office of Public Counsel for victims, the Legal Representatives of Victims V01 and Mr Thomas Lubanga Dyilo may submit their respective documents in support of the appeals by 16h00 on 5 February 2013. The documents in support of the appeals should not be longer than 100 pages each.
5. Mr Thomas Lubanga Dyilo may, by 16h00 on 8 April 2013, submit a consolidated response to the documents in support of the appeals to be submitted by the Legal Representatives of Victims V02 jointly with the Office of Public Counsel for victims, as well as by the Legal Representatives of Victims V01. The consolidated response should not be longer than 140 pages.
6. The Legal Representatives of Victims V02 jointly with the Office of Public Counsel for victims, as well as the Legal Representatives of Victims V01 may, by 16h00 on 8 April 2013, submit responses to the document in support of the appeal to be submitted by Mr Thomas Lubanga Dyilo. The responses should not be longer than 100 pages each.
7. The Trust Fund for Victims is invited to submit observations on the appeals by 16h00 on 8 April 2013. Those observations should not be longer than 100 pages.
8. Any request for leave under rule 103 of the Rules of Procedure and Evidence to make observations on the appeals must be filed by 16h00 on 8 March 2013, stipulating the specific issues to be addressed, on the basis of the documents in support of the appeals.
9. The request for suspensive effect with respect to the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 is granted.
10. The "Corrigendum to the Observations of the V02 team of legal representatives of victims in accordance with directions ICC 01/04



01/06 2923 A A2 A3 OA21” of 1 October 2012 (ICC-01/04-01/06-2931-Corr-tENG) is rejected.

REASONS

I. PROCEEDINGS BEFORE THE TRIAL CHAMBER

1. On 14 March 2012, Trial Chamber I (hereinafter: “Trial Chamber”) in the case of *Prosecutor v. Thomas Lubanga Dyilo* rendered the “Judgment pursuant to Article 74 of the Statute”¹ (hereinafter: “Conviction Decision”), in which it, *inter alia*: 1) found Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the *Force Patriotique pour la Libération du 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;² 2) withdrew, by majority, the right of six witnesses to participate in the proceedings as victims;³ and 3) withdrew the right of three victims to participate in the proceedings.⁴

2. Also on 14 March 2012, the Trial Chamber issued a scheduling order establishing the timetable for sentencing and reparations (hereinafter: “Reparations Scheduling Order”),⁵ in which it, *inter alia*, invited the parties and participants as well as the Trust Fund for Victims (hereinafter: “Trust Fund”) and the Registry to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed by the Chamber by 18 April 2012.⁶

3. On 28 March 2012, the Registrar filed the “First Report to Trial Chamber on applications for reparations”,⁷ in which she recommended that “the [Office of Public Counsel for victims] be appointed to represent the unrepresented applicants for

¹ ICC-01/04-01/06-2842.

² Conviction Decision, para. 1358.

³ Conviction Decision, para. 1362.

⁴ Conviction Decision, para. 1363.

⁵ “Scheduling order concerning timetable for sentencing and reparations”, ICC-01/04-01/06-2844.

⁶ Reparations Scheduling Order, paras 8-9.

⁷ ICC-01/04-01/06-2847.

reparations and any new applicant that may apply for reparations”.⁸ The Registrar also transmitted the requests for reparations received to date to the Trial Chamber.⁹

4. On 5 April 2012, the Trial Chamber instructed the Registry to appoint the Office of Public Counsel for victims (hereinafter: “OPCV”) as the legal representatives for all unrepresented applicants and instructed the OPCV to file submissions on their behalf.¹⁰ The Trial Chamber also decided that the OPCV may “represent the interest of victims who have not submitted applications but who may benefit from an award for collective reparations” and instructed OPCV to file observations on their behalf.¹¹

5. On 28 March 2012, five organisations, namely the Women’s Initiatives for Gender Justice, the Center for Transitional Justice, the United Nations Children’s Fund, the *Fondation Congolaise pour la Promotion des Droits humains et la Paix* and *Avocats sans frontières*, the latter also representing four other organisations, requested leave to file submissions in the reparations proceedings.¹² On 20 April 2012, the Trial Chamber granted the aforementioned organisations leave to make submissions.¹³

⁸ ICC-01/04-01/06-2847, para. 20.

⁹ “First Transmission to the Trial Chamber of applications for reparations”, 28 March 2012, ICC-01/04-01/06-2852.

¹⁰ “Decision on the OPCV’s request to participate in the reparations proceedings”, ICC-01/04-01/06-2858 (hereinafter: “Decision on OPCV’s Request to Participate”), para. 13. This decision was taken in response to the “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings”, 28 March 2012, ICC-01/04-01/06-2848.

¹¹ Decision on OPCV’s Request to Participate, paras 12-13.

¹² “Women’s Initiatives for Gender Justice request for leave to participate in reparations proceedings”, 28 March 2012, ICC-01/04-01/06-2853; “Request for leave to file submission on reparations issues”, 28 March 2012, ICC-01/04-01/06-2854; “Request for leave to file submissions on the reparations proceedings”, 28 March 2012, ICC-01/04-01/06-2855-Anx1-tENG; “Demande d’autorisation d’intervenir comme Amicus Curiae dans l’Affaire le Procureur c. Thomas Lubanga Dyilo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour”, 28 March 2012, ICC-01/04-01/06-2855-Conf-Anx2; Annex 3 to “Registry transmission of communications received in the context of reparations proceedings”, 28 March 2012, ICC-01/04-01/06-2855-Anx3. The final three submissions were transmitted to the Trial Chamber from the Registry. See “Registry transmission of communications received in the context of reparations proceedings”, 28 March 2012, ICC-01/04-01/06-2855. On 3 April 2012, the Registry, *per* the Trial Chamber’s instruction, reclassified the submission numbered ICC-01/04-01/06-2855-Conf-Anx2 as “Public”. See “Application for leave to intervene as Amicus Curiae in the case of *Prosecutor v. Thomas Lubanga Dyilo*, pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-2855-Anx2-tENG.

¹³ “Decision granting leave to make representations in the reparations proceedings”, 20 April 2012, ICC-01/04-01/06-2870, para. 22.

6. On 18 April 2012, the OPCV,¹⁴ the Legal Representatives of Victims V01,¹⁵ the Registrar,¹⁶ Mr Lubanga,¹⁷ the Prosecutor,¹⁸ and the Legal Representatives of Victims V02¹⁹ submitted observations on the reparations proceedings. On 25 April 2012, the Trust Fund submitted its observations²⁰ after having sought an extension of time to do so.²¹ On 10 May 2012, four of the five organisations that had been granted leave submitted their respective observations on reparations.²²

7. On 25 May 2012, Mr Lubanga submitted his response to the submissions of the parties and participants in relation to the principles and procedures on reparations.²³ On the same day, the Legal Representatives of Victims V02 submitted their response to the submissions on reparations made by the other parties and participants.²⁴

8. On 7 August 2012, the Trial Chamber rendered the “Decision establishing the principles and procedures to be applied to reparations”²⁵ (hereinafter: “Impugned Decision”), in which it, *inter alia*: 1) issued principles on reparations pursuant to article 75 (1) of the Statute; 2) decided not to examine the individual application forms for reparations and instructed the Registry to transfer all the

¹⁴ “Observations on issues concerning reparations”, 18 April 2012, ICC-01/04-01/06-2863.

¹⁵ “Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10”, 18 April 2012, ICC-01/04-01/06-2864-tENG.

¹⁶ “Registrar’s observations on reparations issues”, 18 April 2012, ICC-01/04-01/06-2865.

¹⁷ “Defence submissions on the principles and the procedure to be applied with regard to reparations”, 18 April 2012, ICC-01/04-01/06-2866-tENG.

¹⁸ “Prosecution’s Submissions on the principles and procedures to be applied in reparations”, 18 April 2012, ICC-01/04-01/06-2867 (hereinafter: “Prosecutor’s Submissions on Principles and Procedures to be applied to Reparations”).

¹⁹ “Observations of the V02 group of victims on sentencing and reparations”, 18 April 2012, ICC-01/04-01/06-2869-tENG.

²⁰ “Observations on Reparations in Response to the Scheduling Order of 14 March 2012”, 25 April 2012, ICC-01/04-01/06-2872.

²¹ See “Request for extension of time to respond to the invitation for observations in the Chamber’s Scheduling order concerning timetable for sentencing and reparations of 14 March 2012”, 4 April 2012, ICC-01/04-01/06-2856.

²² “Observations of the Women’s Initiatives for Gender Justice on Reparations”, 10 May 2012, ICC-01/04-01/06-2876; “Observations on the reparations regime”, 10 May 2012, ICC-01/04-01/06-2877-tENG; “Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations”, 10 May 2012, ICC-01/04-01/06-2878; “Submission on reparations issues”, 10 May 2012, ICC-01/04-01/06-2879. The *Fondation Congolaise pour la Promotion des Droits humains et la Paix* did not submit observations.

²³ “Defence response to all the observations filed by the parties and the participants in relation to the procedure and principles to be applied at the reparations stage”, 25 May 2012, ICC-01/04-01/06-2885-tENG.

²⁴ “Response of the V02 group of victims to the observations of the amicus curiae, parties and participants on reparations”, 25 May 2012, ICC-01/04-01/06-2886-tENG.

²⁵ ICC-01/04-01/06-2904.

application forms to the Trust Fund; 3) stated that the Chamber “[r]emains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions” including considering collective reparations proposals to be submitted to the Trial Chamber “for its approval”; and 4) “otherwise decline[d] to issue specific orders” to the Trust Fund “on the implementation of reparations” funded by the Trust Fund’s voluntary contributions.²⁶

9. In relation to rule 97 of the Rules of Procedure and Evidence, the Trial Chamber stated that, “in discharging its powers under Rule 97(2) of the Rules”, it “delegates to the [Trust Fund] the task of selecting and appointing appropriate multidisciplinary experts, and the [Trust Fund] is to oversee their work”.²⁷ The Trial Chamber found that “the [Trust Fund] is well placed to determine the appropriate forms of reparations and to implement them” (footnotes omitted).²⁸ The Trial Chamber decided that “the assessment of harm is to be carried out” by the Trust Fund and that, “in the circumstances of this case, the identification of the victims and beneficiaries (Regulations 60 to 65 of the Regulations of the [Trust Fund])” should be done by the Trust Fund.²⁹ The Trial Chamber “endorse[d] the five-step implementation plan” of the Trust Fund, of which “the final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval”.³⁰ The Trial Chamber stated that Mr Lubanga had been declared indigent and that he was therefore “only able to contribute to non-monetary reparations” and that any “participation on his part in symbolic reparations [...] is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order”.³¹ The Trial Chamber held that the Court was “able to draw on the logistical and financial resources of the Trust Fund in implementing the award.”³² The Trial Chamber also considered that it was “unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations proceedings. Therefore, reparations in this case will be dealt with principally by the [Trust Fund], monitored

²⁶ Impugned Decision, para. 289.

²⁷ Impugned Decision, para. 265.

²⁸ Impugned Decision, para. 266.

²⁹ Impugned Decision, para. 283.

³⁰ Impugned Decision, paras 281-282.

³¹ Impugned Decision, para. 269.

³² Impugned Decision, para. 270.

and overseen by a differently composed Chamber”.³³ “During the implementation process”, this newly composed Chamber would be “in a position to resolve any contested issues arising out of the work and the decisions of the [Trust Fund]”.³⁴

10. On 13 August 2012, Mr Lubanga requested leave to appeal the Impugned Decision pursuant to article 82 (1) (d) of the Statute on the basis of eight issues (hereinafter: “Leave to Appeal Request”).³⁵ On 29 August 2012, the Trial Chamber rendered the “Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations”³⁶ (hereinafter: “Decision Granting Leave to Appeal”), granting the requested leave to appeal on four of the eight issues raised.³⁷

11. In the Decision Granting Leave to Appeal, the Trial Chamber stated:

The Chamber repeats and emphasises that the Decision of 7 August 2012 does not constitute an “order for reparations” in the sense of Article 82(4), given reparations were not ordered in the Decision. Rather, the Decision establishes principles and procedures relating to reparations, pursuant to Article 75(1).³⁸

II. PROCEEDINGS BEFORE THE APPEALS CHAMBER

12. On 24 August 2012, the OPCV and the Legal Representatives of Victims V02 jointly filed an appeal pursuant to article 82 (4) of the Statute against the Impugned Decision (hereinafter: “OPCV and V02 Appeal”).³⁹

13. On 3 September 2012, the Legal Representatives of Victims V01 filed an appeal pursuant to article 82 (4) of the Statute against the Impugned Decision (hereinafter: “V01 Appeal”).⁴⁰

³³ Impugned Decision, para. 261.


³⁴ Impugned Decision, para. 262.

³⁵ “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparation* issued on 7 August 2012”, 13 August 2012, ICC-01/04-01/06-2905-tENG.

³⁶ ICC-01/04-01/06-2911 (OA 21).

³⁷ Decision Granting Leave to Appeal, paras 30, 32-33, 35-36, 38-40.

³⁸ Decision Granting Leave to Appeal, para. 20.

³⁹ “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”, 24 August 2012, ICC-01/04-01/06-2909-tENG (A). The Appeals Chamber notes that, at the time of the filing of this document, one of the legal representatives, Mr Joseph Keta Orwinyo, was suspended and that the OPCV was representing his clients. As of 24 September 2012, Mr Keta Orwinyo has resumed his practice before the Court; *see* Registrar, “Notification of the end of the period of suspension of Mr. Joseph Keta in accordance with the decision of the Disciplinary Board dated 18 June 2012”, 27 September 2012, ICC-01/04-01/06-2925 (A). 

14. On 6 September 2012, Mr Lubanga filed an appeal against the Impugned Decision pursuant to article 82 (4) of the Statute (hereinafter: “Lubanga Appeal”).⁴¹

15. On 10 September 2012, Mr Lubanga filed the document in support of his appeal under article 82 (1) (d) of the Statute⁴² (hereinafter: “Document in Support of the Appeal OA 21”). On 13 September 2012, the OPCV filed a request regarding victim participation in this appeal (hereinafter: “OPCV Request”),⁴³ submitting that the victims should be automatically allowed to participate and requesting that the Appeals Chamber revise its prior practice in relation to victim participation in appeals under article 82 (1) (d) of the Statute.⁴⁴ On 5 October 2012, Mr Lubanga responded, requesting that the Appeals Chamber deny the OPCV Request.⁴⁵

16. On 17 September 2012, the Appeals Chamber issued the “Directions on the conduct of the appeal proceedings”⁴⁶ (hereinafter: “Directions”), directing the potential parties and participants to the proceedings to respond to certain questions in relation to “whether the appeals are admissible and who should make submissions or submit observations on the appeals”.⁴⁷ The Appeals Chamber set the time limit for these submissions to 1 October 2012 and instructed the potential parties and participants that any submissions filed must comply with regulation 37 of the Regulations of the Court, particularly in relation to not exceeding 20 pages each.⁴⁸

17. The Directions instructed the Legal Representatives of Victims V01, the Legal Representatives of Victims V02, as well as the OPCV to indicate “who they represent in the present proceedings and, in particular, whether they appear before the Appeals

⁴⁰ “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012”, ICC-01/04-01/06-2914-tENG (A 2).

⁴¹ “Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* rendered on 7 August 2012”, 6 September 2012, ICC-01/04-01/06-2917-tENG (A 3).

⁴² “Defence document in support of the appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation*, rendered on 7 August 2012”, ICC-01/04-01/06-2919-tENG (OA 21).

⁴³ “Application for the participation of victims in the Defence interlocutory appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”, 13 September 2012, ICC-01/04-01/06-2921-tENG (OA 21).

⁴⁴ OPCV Request, para. 13.

⁴⁵ “Defence response to the ‘Application for the participation of victims in the Defence interlocutory appeal’, ICC-01/04-01/06-2921”, 5 October 2012, ICC-01/04-01/06-2936-tENG (A A 2 A 3 OA 21) (hereinafter: “Lubanga Response to OPCV Request”).

⁴⁶ ICC-01/04-01/06-2923 (A A 2 A 3 OA 21).

⁴⁷ Directions, p. 3.

⁴⁸ Directions, p. 4.

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Chamber only on behalf of those individuals who have claimed reparations”.⁴⁹
Finally, the Directions stated that:

- (5) Subject to the decision of the Appeals Chamber on the above-mentioned issues, further directions will be given with regard to the time limits for:
- a) the submission of the documents in support of the appeals and/or responses to the document(s) in support of the appeal(s) to be filed pursuant to regulations 59 and/or 65 (5) of the Regulations of the Court;
 - b) requests to be filed pursuant to rule 103 (1) of the Rules of Procedure and Evidence.⁵⁰

18. On 21 September 2012, the Prosecutor filed a response to the Document in Support of the Appeal OA 21 (hereinafter: “Prosecutor’s Response”).⁵¹ On 8 October 2012, Mr Lubanga requested that the Appeals Chamber find the Prosecutor’s Response inadmissible (hereinafter: “Lubanga Request”).⁵² On 12 October 2012, the Prosecutor filed a response to the Lubanga Request (hereinafter: “Prosecutor’s Response to Lubanga Request”).⁵³

19. On 28 September 2012, the Legal Representatives of Victims V01 filed observations further to the Directions (hereinafter: “V01 Legal Representatives’ Observations”).⁵⁴ On 1 October 2012, the Prosecutor,⁵⁵ the Trust Fund,⁵⁶ Mr Lubanga,⁵⁷ and the OPCV⁵⁸ filed their observations further to the Directions

⁴⁹ Directions, pp. 3-4.

⁵⁰ Directions, pp. 4-5.

⁵¹ “Prosecution’s Response to the Defence Appeal against the ‘Decision establishing the principles and procedures to be applied to reparations’”, ICC-01/04-01/06-2924 (OA 21).

⁵² “Defence application to have the “Prosecution’s Response to the Defence Appeal against the ‘Decision establishing the principles and procedures to be applied to reparations’”, ICC-01/04-01/06-2924, declared inadmissible”, ICC-01/04-01/06-2937-tENG (A A 2 A 3 OA 21).

⁵³ “Prosecution’s Response to the “Requête de la Défense aux fins de faire déclarer irrecevable la ‘Prosecution’s Response to the Defence Appeal against the ‘Decision establishing the principles and procedures to be applied to reparations’”, 12 October 2012, ICC-01/04-01/06-2939 (A A 2 A 3 OA 21).

⁵⁴ “Observations on the appeals against the Decision establishing the principles and procedures to be applied to reparations”, ICC-01/04-01/06-2928-tENG (A A 2 A 3 OA 21).

⁵⁵ “Prosecution’s Submissions further to the Appeals Chamber’s ‘Directions on the conduct of the appeal proceedings’”, ICC-01/04-01/06-2930 (A A 2 A 3 OA 21).

⁵⁶ “Observations in response to the *Direction on the conduct of appeal proceedings*”, ICC-01/04-01/06-2927 (A A 2 A 3 OA 21).

⁵⁷ “Defence observations pursuant to the *Directions on the conduct of the appeal proceedings* issued on 17 September 2012”, ICC-01/04-01/06-2929-tENG (A A 2 A 3 OA 21).

(hereinafter: “Prosecutor’s Observations”, “Trust Fund’s Observations”, “Mr Lubanga’s Observations”, “OPCV’s Observations”, respectively).

20. Also on 1 October 2012, the Legal Representatives of Victims V02 filed observations (hereinafter: “V02 Legal Representatives’ Observations”),⁵⁹ a document that was 11 pages single spaced. On 2 October 2012, the Appeals Chamber received the V02 Legal Representatives’ corrigendum to the Observations (hereinafter: “V02 Legal Representatives’ Corrigendum”) with an Annex setting out the reasons for its submission.⁶⁰ On 3 October 2012, the Prosecutor filed a submission, in which she objected to the V02 Legal Representatives’ Corrigendum for exceeding the proper scope of a corrigendum.⁶¹

III. PRELIMINARY MATTERS

21. In relation to the V02 Legal Representatives’ Observations, the Appeals Chamber recalls that regulation 36 (3) of the Regulations of the Court sets out how documents filed with the Court shall be formatted, including that such documents shall have 1.5 line spacing.⁶² Given that the V02 Legal Representatives’ Observations were single spaced, the document did not comply with regulation 36 (3) of the Regulations of the Court. However, it nonetheless appears to the Appeals Chamber that the document, which was eleven pages long, would not, if properly spaced, have exceeded the page limit of 20 pages as set out in regulation 37 of the Regulations of the Court. In this specific case, the Appeals Chamber considers that, despite its non-compliance with regulation 36 (3) of the Regulations of the Court, it is in the interests of justice to accept the document in the circumstances described (regulation 29 (1) of the Regulations of the Court).

⁵⁸ “Observations on issues concerning the admissibility of appeals lodged by the Defence, the OPCV and the V01 and V02 teams against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations*, rendered on 7 August 2012”, ICC-01/04-01/06-2928-tENG (A A 2 A 3 OA 21).

⁵⁹ “Observations de l’équipe V02 de représentants légaux de victimes, conformément aux directives ICC 01/04 01/ 06 2923 A A3 A4 OA31”, ICC-01/04-01/06-2931 (A A 2 A 3 OA 21).

⁶⁰ “Corrigendum aux observations de l’équipe V02 de représentants légaux de victimes, conformément aux directives ICC 01/04 01/ 06 2923 A A2 A3 OA21”, ICC-01/04-01/06-2931-Corr.

⁶¹ “Prosecution’s Submission on the Corrigendum to the Observations of Legal Representatives Group V02 filed on 1 October 2012”, ICC-01/04-01/06-2932 (A A 2 A 3 OA 21), para. 3.

⁶² See also Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the ‘Observations de la Défense relatives à l’irrecevabilité du “Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July to stay the proceedings for abuse of process”, daté du 26 juillet 2010””, 30 July 2010, ICC-01/04-01/06-2543 (OA 18).

22. The Appeals Chamber notes that the Legal Representatives of Victims V02 subsequently filed the V02 Legal Representatives' Corrigendum, in part to cure certain defects of the Observations. Further, the V02 Legal Representatives' Corrigendum added to the substantive arguments contained in the V02 Legal Representatives' Observations.⁶³ The Appeals Chamber recalls that it has previously held that the purpose of corrigenda is to correct typographical errors and that corrigenda may not be used to add to or alter the substance of the submissions made in a document.⁶⁴ Therefore, the V02 Legal Representatives' Corrigendum exceeds the scope of a corrigendum and the Appeals Chamber rejects it.

IV. SUBMISSIONS ON APPEAL

A. Submissions of Mr Lubanga

23. Mr Lubanga submits that the Impugned Decision must be considered to be a decision taken under article 75 (1) of the Statute, which is subject to appeal pursuant to article 82 (4) of the Statute.⁶⁵ First, he argues that the content and conclusions of the Impugned Decision relate to the provisions of article 75 (1) of the Statute concerning the "principles relating to reparations".⁶⁶ Second, Mr Lubanga submits that the Trial Chamber confirmed that it will render no further decision or order for reparations in the present case.⁶⁷ Third, he argues that the Trial Chamber has entrusted the implementation of the Impugned Decision to the Trust Fund, a non-judicial organ without the power to issue orders for reparations.⁶⁸ Accordingly, Mr Lubanga submits that the Impugned Decision is the only decision capable of being qualified as an "order for reparations" pursuant to the provisions of the Statute and the Rules of Procedure and Evidence.⁶⁹

⁶³ See, for example, paras 24, 26.

⁶⁴ See *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), paras 37-39. See also *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 12.

⁶⁵ Mr Lubanga's Observations, para. 7.

⁶⁶ Mr Lubanga's Observations, para. 8.

⁶⁷ Mr Lubanga's Observations, para. 9.

⁶⁸ Mr Lubanga's Observations, para. 10.

⁶⁹ Mr Lubanga's Observations, paras 10-11.

24. Mr Lubanga submits that he has standing to raise an appeal against the Impugned Decision because article 82 (4) of the Statute expressly provides him, as the convicted person, a right to appeal.⁷⁰ In this respect, he submits that the right under article 82 (4) of the Statute of a convicted person to appeal an “article 75 decision” is not predicated upon that “decision” being rendered directly against the convicted person.⁷¹ Additionally, Mr Lubanga argues that the Statute and the Rules of Procedure and Evidence provide him, as a convicted person, the status of a “party” to the reparations proceedings and therefore his right to appeal “cannot seriously be called into question”.⁷² Finally, Mr Lubanga submits that he is “necessarily” affected by an order for reparations whether or not it is made directly against him and whether or not he is able to contribute to the funding of any reparations award.⁷³ He submits that whether an order for reparations affects his proprietary interests is “immaterial” because his “moral rights are unarguably affected” as reparations proceedings involve allegations of a “new and separate ‘civil’ charge” of harm caused by his actions.⁷⁴ In support of this contention, Mr Lubanga refers to the Decision Granting Leave to Appeal, which stated that an order for reparations is the “expression of the Court’s disapproval and condemnation of the wrongdoing of the convicted person” and therefore “Mr Lubanga is affected by the reparations awards [...]”.⁷⁵ Mr Lubanga submits that the Trust Fund may fund general projects for the benefit of victims in Ituri, however those need to be separated and separable from the implementation of reparations ordered by the Court.⁷⁶

25. With respect to the issue of a victim’s right to appeal the Impugned Decision and to intervene in the appeals, Mr Lubanga argues that article 68 of the Statute and rules 89 and 94 of the Rules of Procedure and Evidence show that only those victims who were expressly authorised by a decision to participate in the reparations proceedings, who requested reparations pursuant to rule 94 of the Rules of Procedure and Evidence, and whose identities have been disclosed to him should be allowed to

⁷⁰ Mr Lubanga’s Observations, para. 12.

⁷¹ Mr Lubanga’s Observations, para. 12.

⁷² Mr Lubanga’s Observations, paras. 15-18.

⁷³ Mr Lubanga’s Observations, paras 20, 26.

⁷⁴ Mr Lubanga’s Observations, para. 21.

⁷⁵ Mr Lubanga’s Observations, para. 22.

⁷⁶ Mr Lubanga’s Observations, para. 25.

participate in appeal proceedings.⁷⁷ In accordance with this argument, Mr Lubanga submits that those victims whose status had been withdrawn or rejected and those who “may benefit from an award for collective reparations” should not be allowed to participate in the proceedings.⁷⁸

26. In each of the appeals that he files against the Impugned Decision, Mr Lubanga requests suspensive effect in similar terms. He seeks suspension of the Impugned Decision pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence.⁷⁹ By reference to the Decision Granting Leave to Appeal, he contends that the implementation of the Impugned Decision would directly affect his rights.⁸⁰ He argues that “the irreversibility of the effects” of implementing the Impugned Decision, namely implementing the orders for reparations, “could be irretrievably prejudicial to the convicted person”.⁸¹ He therefore seeks suspension so as to avoid “irremediable harm to the Accused”.⁸²

B. Submissions of the OPCV

27. The OPCV submits that, in light of its content and the way in which it is formulated, the Impugned Decision constitutes an “order for reparations” issued pursuant to article 75 of the Statute.⁸³ In this respect, the OPCV submits that the Trial Chamber decided not to review individual claims for reparations received by the Registry and ordered their transfer to the Trust Fund, while allowing full discretion to the Trust Fund as to whether applicants should be integrated into programmes for reparations.⁸⁴ In addition, the OPCV submits that the Trial Chamber approved collective forms of reparations based on a “community-based approach”.⁸⁵ The OPCV also points out that the Trial Chamber delegated its responsibilities with regard to reparations to two non-judicial entities, namely the Trust Fund and the Registry.⁸⁶ Finally, the OPCV notes that the Trial Chamber allocated “only monitoring and

⁷⁷ Mr Lubanga’s Observations, paras 27, 31, 33-47.

⁷⁸ Mr Lubanga’s Observations, paras 33-35.

⁷⁹ Lubanga Appeal, para. 12; Document in Support of the Appeal OA 21, para. 72.

⁸⁰ Lubanga Appeal, para. 13; Document in Support of the Appeal OA 21, para. 73.

⁸¹ Lubanga Appeal, para. 14; Document in Support of the Appeal OA 21, para. 74.

⁸² Lubanga Appeal, para. 15; Document in Support of the Appeal OA 21, para. 75.

⁸³ OPCV’s Observations, para. 10.

⁸⁴ OPCV’s Observations, para. 11.

⁸⁵ OPCV’s Observations, para. 11.

⁸⁶ OPCV’s Observations, para. 12.

oversight functions” to a newly constituted Trial Chamber and confirmed that it will not issue “any order or instructions to the Trust Fund on the implementation of reparations that are to be made through the Trust Fund [...]”.⁸⁷

28. As a result of these aspects, the OPCV submits that, in the Impugned Decision, the Trial Chamber not only established the principles applicable to reparations, but has already made arrangements for all essential aspects of the reparations proceedings under article 75 of the Statute.⁸⁸ The OPCV argues that the role of a newly constituted Chamber would be limited to the supervision of decisions taken by the Trust Fund; therefore, no decision made by a newly constituted Chamber could be considered to be an “order for reparations” under article 75 of the Statute within the meaning of article 82 (4) of the Statute and rule 150 of the Rules of Procedure and Evidence.⁸⁹

29. The OPCV divides its submissions as to the participation of victims into whether the proceedings take place pursuant to article 82 (1) (d) of the Statute or pursuant to article 82 (4) of the Statute. With respect to the former, it reiterates its submissions made in the OPCV Request, namely that the Appeals Chamber should depart from its previous jurisprudence as regards victims’ participation in interlocutory appeals because the Impugned Decision relates to reparations proceedings in which victims have a different role.⁹⁰ With respect to appeals pursuant to article 82 (4) of the Statute, the OPCV states that the term “victim” should be understood broadly as referring to “any natural or legal person claiming to have suffered harm as the result of the commission of the crimes of which Mr Thomas Lubanga Dyilo was found guilty, insofar as their personal interests are affected by the Impugned Decision”.⁹¹ This would include, in the OPCV’s submission, all persons who were granted leave by the Trial Chamber to participate in the reparations proceedings, who requested reparations, as well as any person who could be affected by reparations, including by collective reparations.⁹² The OPCV argues that victim status granted for the purposes of trial should not be a prerequisite for standing in reparations proceedings because there are two separate systems applicable to victim

⁸⁷ OPCV’s Observations, para. 13.

⁸⁸ OPCV’s Observations, para. 14.

⁸⁹ OPCV’s Observations, para. 14.

⁹⁰ OPCV’s Observations, paras 17-18.

⁹¹ OPCV’s Observations, para. 20.

⁹² OPCV’s Observations, paras 19, 27-28.

participation as well as different standards of proof for determining who is a victim in these two different proceedings.⁹³ Therefore, victims who have not applied for participation at trial or whose status was revoked should be able to participate in the appeal proceedings.⁹⁴ The OPCV further stresses that it should be allowed to appeal in the name of those unidentified victims who may be affected by a collective order for reparations but who have not applied for reparations.⁹⁵

30. The OPCV avers that Mr Lubanga should not have the right to appeal against the Impugned Decision because it does not have a specific and concrete effect on his rights and interests.⁹⁶

31. With respect to the requests for suspensive effect, the OPCV argues that the effect of the Impugned Decision should, in any case, be suspended.⁹⁷ The OPCV avers that victims “whose interests are affected, specifically and concretely, by that decision” might suffer irreparable damage and that therefore suspensive effect should be ordered.⁹⁸ If the appeals are admissible pursuant to article 82 (4) of the Statute, the OPCV submits that rule 150 (4) of the Rules of Procedure and Evidence has the effect of suspending the implementation of the Impugned Decision automatically.⁹⁹

C. Submissions of the Legal Representatives of Victims V01

32. The Legal Representatives of Victims V01 submit that, in light of its content and the way in which it is formulated, the Impugned Decision constitutes an “order for reparations” in the sense of article 82 (4) of the Statute and rule 150 of the Rules of Procedure and Evidence.¹⁰⁰ In this respect, they submit that, although the wording of the Impugned Decision refers to article 75 (1) of the Statute relevant to the establishment of reparations principles, the Trial Chamber also decided not to examine individual requests for reparations.¹⁰¹ As the Trial Chamber decided not to examine individual requests and instead transferred them to the Trust Fund, the Legal

⁹³ OPCV’s Observations, paras 23-24.

⁹⁴ OPCV’s Observations, para. 25.

⁹⁵ OPCV’s Observations, paras 26, 28.

⁹⁶ OPCV’s Observations, paras 30-31.

⁹⁷ OPCV’s Observations, paras 32-36.

⁹⁸ OPCV’s Observations, para. 36.

⁹⁹ OPCV’s Observations, para. 33.

¹⁰⁰ V01 Legal Representatives’ Observations, para. 10.

¹⁰¹ V01 Legal Representatives’ Observations, para. 11.

Representatives of Victims V01 argue that the Trial Chamber has ruled definitively on individual applications and therefore has issued an order for reparations.¹⁰² According to the Legal Representatives of Victims V01, if a decision granting reparations to victims is an order for reparations, a decision refusing reparations is also such an order.¹⁰³

33. The Legal Representatives of Victims V01 submit that Mr Lubanga should not have the right to appeal the Impugned Decision as the order for reparations was not directed against him.¹⁰⁴

34. The Legal Representatives of Victims V01 argue that they may appeal the Impugned Decision on behalf of all their clients because even those who have not yet applied for reparations still have an opportunity to do so.¹⁰⁵ They also argue that the victims who were allowed to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence should also have a right to participate in an appeal on reparations by filing responses.¹⁰⁶ Should the Appeals Chamber decide to declare the appeal raised under article 82 (1) (d) of the Statute admissible, they ask the Appeals Chamber not to apply its jurisprudence on victim participation in interlocutory appeals to the appeal at hand.¹⁰⁷

35. With respect to the requests for suspensive effect, the Legal Representatives of Victims V01 submit that "institution of reparations proceedings during the appellate proceedings could create legal uncertainty".¹⁰⁸ Therefore, and despite the fact that the "victims have an interest in seeing the reparations proceedings instituted as soon as possible", they would not object to the ordering of suspensive effect.¹⁰⁹

D. Submissions of the Legal Representatives of Victims V02

36. The Legal Representatives of Victims V02 argue that the Impugned Decision, owing to its content and the way in which it is formulated, constitutes an order for

¹⁰² V01 Legal Representatives' Observations, para. 12.

¹⁰³ V01 Legal Representatives' Observations, paras 11, 13.

¹⁰⁴ V01 Legal Representatives' Observations, paras 22-25.

¹⁰⁵ V01 Legal Representatives' Observations, paras 26-29.

¹⁰⁶ V01 Legal Representatives' Observations, paras 30-31.

¹⁰⁷ V01 Legal Representatives' Observations, paras 32-33.

¹⁰⁸ V01 Legal Representatives' Observations, para. 38.

¹⁰⁹ V01 Legal Representatives' Observations, para. 38.

reparations in the sense of article 82 (4) of the Statute and rule 150 of the Rules of Procedure and Evidence.¹¹⁰ In this respect, the Legal Representatives of Victims V02 point out that the Trial Chamber delegated its responsibilities with regard to reparations to two non-judicial entities, namely the Trust Fund and the Registry¹¹¹ and allocated to a newly constituted Chamber only “monitoring and oversight functions” as well as the possibility of being seized of “any contested issues arising out of the work and the decisions of the [Trust Fund]”.¹¹² The Legal Representatives of Victims V02 submit that these aspects of the Impugned Decision constitute an order for reparations in that the decision is an order rendered against Mr Lubanga and which refers to the Trust Fund the execution of tasks that fall within a Trial Chamber’s discretion.¹¹³

37. The Legal Representatives of Victims V02 argue that all persons who have requested reparations as well as those who have not requested reparations but could benefit from collective reparations, should have a right to participate in appeals arising from reparations proceedings before the Trial Chamber.¹¹⁴ This includes, in their submission, all victims who participated in the proceedings before the Trial Chamber.¹¹⁵ In addition, the Legal Representatives of Victims V02 submit that victims who requested reparations and those who were allowed to participate in the proceedings should have a right to appeal.¹¹⁶

38. The Legal Representatives of Victims V02 submit that Mr Lubanga’s appeal pursuant to article 82 (4) of the Statute is inadmissible as the Trial Chamber did not issue an order for reparations against him.¹¹⁷ In this respect, the Legal Representatives of Victims V02 argue that Mr Lubanga’s appeal would be admissible if the Impugned Decision had contemplated the payment of reparations from his assets or property;

¹¹⁰ V02 Legal Representatives’ Observations, para. 17.

¹¹¹ V02 Legal Representatives’ Observations, paras 19-22.

¹¹² V02 Legal Representatives’ Observations, para. 23.

¹¹³ V02 Legal Representatives’ Observations, para. 24.

¹¹⁴ V02 Legal Representatives’ Observations, paras 33-40, 42-46.

¹¹⁵ V02 Legal Representatives’ Observations, paras 42, 46.

¹¹⁶ V02 Legal Representatives’ Observations, para. 41.

¹¹⁷ V02 Legal Representatives’ Observations, paras 48-49.

however, as Mr Lubanga was found to be indigent, he is not affected by the Impugned Decision.¹¹⁸

E. Submissions of the Prosecutor

39. The Prosecutor submits that the Impugned Decision is not an order for reparations, but is, rather, an interim decision.¹¹⁹ The Prosecutor submits that the Impugned Decision “defines the parameters by which reparations will be considered”, does not make any determinations as to awards to be granted, and anticipates further steps before the Court renders a final order for reparations.¹²⁰ In this respect, the Prosecutor notes the Trial Chamber’s own view of the Impugned Decision in the Decision Granting Leave to Appeal.¹²¹ Beyond the Trial Chamber’s own characterisation, the Prosecutor submits that such a conclusion is supported by a “plain reading” of the Impugned Decision, which demonstrates the “interlocutory effect” of the decision.¹²² The Prosecutor submits that the Impugned Decision only provides guidance as to measures that are to be taken to initiate a plan which culminates in proposals for collective reparations that “will be presented to the Chamber for its approval”.¹²³

40. In respect of Mr Lubanga’s submission that the Impugned Decision is final on the basis that it does not allow Mr Lubanga to further participate in the reparations proceedings, the Prosecutor argues that the Impugned Decision does allow Mr Lubanga to raise issues concerning the work of the Trust Fund.¹²⁴ Even accepting that Defence participation had been excluded, however, the Prosecutor submits that this does not make the Impugned Decision a final order for reparations.¹²⁵ The Prosecutor also contests Mr Lubanga’s argument that a final decision cannot be made by the Trust Fund (being a non-delegable judicial function) and that therefore, as argued by Mr Lubanga, the Impugned Decision must be a final decision.¹²⁶ Instead, the Prosecutor points to the fact that the Trial Chamber maintains oversight and has, in

¹¹⁸ V02 Legal Representatives’ Observations, para. 50.

¹¹⁹ Prosecutor’s Observations, para. 18.

¹²⁰ Prosecutor’s Observations, para. 18.

¹²¹ Prosecutor’s Observations, para. 19.

¹²² Prosecutor’s Observations, para. 20.

¹²³ Prosecutor’s Observations, para. 21.

¹²⁴ Prosecutor’s Observations, para. 22.

¹²⁵ Prosecutor’s Observations, para. 22.

¹²⁶ Prosecutor’s Observations, para. 23.

fact, yet to issue a final judicial decision “with respect to the proposals of the [Trust Fund]”.¹²⁷

41. In relation to the Trial Chamber deciding not to order Mr Lubanga to make symbolic reparations, the Prosecutor argues that this is merely a “principle” that will be reflected in a future and final order.¹²⁸ Further, the Prosecutor argues that the Impugned Decision is not final in respect of individual claims for reparations by submitting that, even if the Impugned Decision is final as far as the particular issue of individual reparations is concerned, this element of “finality” of an interlocutory decision does not make it appealable as of right under articles 81 (1) and (2) or 82 (4) of the Statute.¹²⁹ Moreover, the Prosecutor submits that the Impugned Decision cannot be considered final because, while expressing a view about individual victims, the Trial Chamber has delegated the ultimate decision to the Trust Fund “with the express aim of including those who establish valid claims in a reparations award”.¹³⁰

42. The Prosecutor argues that Mr Lubanga should not have standing to appeal the Impugned Decision as the Trial Chamber did not issue an order for reparations against him.¹³¹ She disagrees with the Trial Chamber’s Decision Granting Leave to Appeal insofar as a “reparations award *not coming from the perpetrator*” cannot be considered as an additional form of reproach sufficient to confer standing to appeal.¹³² She submits that, even if the Trial Chamber’s analysis were correct, the Appeals Chamber should determine the appropriate threshold of prejudice from an impugned decision required for standing to appeal.¹³³ The Prosecutor submits that victims should not have a right to appeal the decision under article 82 (4) of the Statute as it is not an order for reparations.¹³⁴ The phrase “either party” in article 82 (1) of the Statute does not, in her submission, refer to victims and thus victims could not appeal under that article either.¹³⁵ Should the Appeals Chamber nevertheless consider that the appeals are admissible, the Prosecutor argues that only victims who were granted the

¹²⁷ Prosecutor’s Observations, para. 23.

¹²⁸ Prosecutor’s Observations, para. 24.

¹²⁹ Prosecutor’s Observations, para. 26.

¹³⁰ Prosecutor’s Observations, para. 26.

¹³¹ Prosecutor’s Observations, paras 27-29.

¹³² Prosecutor’s Observations, para. 29.

¹³³ Prosecutor’s Observations, para. 30.

¹³⁴ Prosecutor’s Observations, para. 31.

¹³⁵ Prosecutor’s Observations, para. 31.

right to participate in the trial, and whose right was not revoked, should be allowed to appeal.¹³⁶ This is based on the argument that, at this early stage of the reparations proceedings, only those victims are “at least ‘likely’ to be awarded reparations”.¹³⁷

43. The Prosecutor submits that the request for suspensive effect should not be granted as the implementation of the Impugned Decision will not have any irreparable consequences and because Mr Lubanga did not demonstrate irreparable prejudice, should the Appeals Chamber reverse the Impugned Decision.¹³⁸

F. Submissions of the Trust Fund

44. In its submissions, the Trust Fund argues that the Impugned Decision constitutes an order for reparations based on “its content and the context in which it was issued” as well as its substance.¹³⁹ In this respect, the Trust Fund submits that the Impugned Decision “contains the necessary constitutive elements of an order for reparations”¹⁴⁰ in that the corresponding regulations of the Regulations of the Trust Fund triggered by the Impugned Decision “presuppose that an order for reparations in the sense of Article 75 of the Statute has been made and that the implementation phase of reparations has thus begun”.¹⁴¹

45. The Trust Fund submits that four considerations inform this conclusion. First, the dissolution of the Trial Chamber and its view “that it is unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations proceedings”.¹⁴² On the basis that reparations are an “integral part of the trial process”, the Trust Fund submits that the Impugned Decision “constitutes the only comprehensive decision by the trial judges on the principles as well as substance of reparations applicable in the present case” and therefore must be “understood as the order for reparations”.¹⁴³ Secondly, the Trust Fund submits that the Impugned Decision sets out a “generally defined order for reparations, activating the

¹³⁶ Prosecutor’s Observations, paras 33-38.

¹³⁷ Prosecutor’s Observations, para. 36.

¹³⁸ Prosecutor’s Observations, paras 39-40.

¹³⁹ Trust Fund’s Observations, paras 12, 16.

¹⁴⁰ Trust Fund’s Observations, para. 16.

¹⁴¹ Trust Fund’s Observations, paras 18-19.

¹⁴² Trust Fund’s Observations, para. 14.

¹⁴³ Trust Fund’s Observations, para. 15.

implementation phase”.¹⁴⁴ Thirdly, the Trust Fund submits that, while the Trial Chamber did not examine individual applications for reparations, its delegation of this function to the Trust Fund is nonetheless an order in this respect.¹⁴⁵ Fourthly, the Trust Fund points to several practical consequences that might arise if the Impugned Decision is not an order for reparations within the meaning of article 82 (4) of the Statute, including that the victims would be deprived of standing in appeals proceedings, and thus their entitlement to participate effectively would be confined.¹⁴⁶

46. The Trust Fund submits that Mr Lubanga should have the right to appeal as the principle of individual criminal responsibility “underlies reparations as set out in Article 75 of the Statute”. In this context, it argues that “the question of whether and how he can contribute to their implementation is secondary” because “the reparations order is directed against him as the ‘convicted person’ and personally concerns him”.¹⁴⁷

47. The Trust Fund submits that all those who requested reparations should be allowed to appeal the Impugned Decision.¹⁴⁸ In relation to the interests of those unidentified victims affected by a collective order for reparations, the Trust Fund submits that their interests should be represented through counsel, upon the Appeals Chamber’s own motion.¹⁴⁹ The Trust Fund proposes that the victims whose status was withdrawn should, subject to a case-by-case decision of the Appeals Chamber, also have the opportunity to participate in the appeal.¹⁵⁰

48. The Trust Fund supports the requests for suspensive effect because the appeals raise fundamental and complex legal and practical issues related to the determination of the final scope and form of the reparations awards.¹⁵¹ It avers that it would be unfortunate if any consultation with practitioners for advising on the design of the implementation plan and engagement with victims and their communities would

¹⁴⁴ Trust Fund’s Observations, para. 16.

¹⁴⁵ Trust Fund’s Observations, para. 21.

¹⁴⁶ Trust Fund’s Observations, paras 23-27.

¹⁴⁷ Trust Fund’s Observations, paras 28-29.

¹⁴⁸ Trust Fund’s Observations, paras 33-34.

¹⁴⁹ Trust Fund’s Observations, para. 42.

¹⁵⁰ Trust Fund’s Observations, paras 35-39.

¹⁵¹ Trust Fund’s Observations, para. 44.

commence, and then have to be halted or revised at a later stage.¹⁵² An interrupted or (partially) reversed implementation process could result in re-traumatisation of victims and affected communities.¹⁵³ The Trust Fund further refers to rule 150 of the Rules of Procedure and Evidence to state that it could be argued that “reparations are to be considered not final in the present case where appeals have been filed”.¹⁵⁴ The Trust Fund notes however that it is aware of how the suspensive effect may affect the expectations and draw upon the patience of victims and their communities, considering also the amount of time that has passed since the crimes for which charges have been brought were committed.¹⁵⁵ It submits that it intends to be prepared to immediately make reparations to victims once all legal matters are clarified.¹⁵⁶ Furthermore, the Trust Fund requests the Appeals Chamber to clarify, should it deem it appropriate, whether a potential appeal against the conviction may have suspensive effect on reparations proceedings in the present case; and, if so, whether this would also result in a suspension of certain activities of the Trust Fund.¹⁵⁷ The Trust Fund submits that an appeal against the conviction would directly affect the implementation of an order for reparations because of the principle of individual criminal responsibility.¹⁵⁸ Once granted, reparations would hardly be reversible should the conviction be overturned.¹⁵⁹

V. ANALYSIS

A. The nature of the Impugned Decision and the admissibility of the appeals

49. The Appeals Chamber is seized of three appeals pursuant to article 82 (4) of the Statute (which provides for an “appeal against the order for reparations”) and one appeal pursuant to article 82 (1) (d) of the Statute (which provides for an appeal “against a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”, subject to leave being granted by the Chamber) against the same Impugned Decision. An “order for

¹⁵² Trust Fund’s Observations, para. 45.

¹⁵³ Trust Fund’s Observations, para. 45.

¹⁵⁴ Trust Fund’s Observations, para. 46.

¹⁵⁵ Trust Fund’s Observations, para. 47.

¹⁵⁶ Trust Fund’s Observations, para. 47.

¹⁵⁷ Trust Fund’s Observations, para. 48.

¹⁵⁸ Trust Fund’s Observations, para. 48.

¹⁵⁹ Trust Fund’s Observations, para. 48.

reparations” appealable under article 82 (4) of the Statute cannot, at the same time, be a decision that is appealable under article 82 (1) (d) of the Statute. Specific provision is made within article 82 (4) of the Statute for appeals against the “order for reparations”. If the Impugned Decision is, or is deemed to be, an “order for reparations”, any appeal against it must therefore be brought pursuant to article 82 (4) of the Statute. It is also noted that different rules and regulations apply to appeals brought under articles 82 (1) (d) and 82 (4) of the Statute.¹⁶⁰ The Appeals Chamber is therefore required to determine under which provision the Impugned Decision may be appealed.

50. At the outset, the Appeals Chamber notes that the Trial Chamber itself did not consider the Impugned Decision to be an “order for reparations” that could be appealed pursuant to article 82 (4) of the Statute.¹⁶¹ The Appeals Chamber has carefully taken into account the view of the Trial Chamber. Nevertheless, the Appeals Chamber finds that the Trial Chamber’s own characterisation of the Impugned Decision is not determinative. Where necessary, the Appeals Chamber itself has to establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis.¹⁶² Therefore, the Appeals Chamber has to assess whether the Impugned Decision is, or should be deemed to be, an “order for reparations”, in which case recourse may be had to article 82 (4) of the Statute, or whether it is a decision that may be appealed under article 82 (1) (d) of the Statute.

51. The Appeals Chamber notes that the Impugned Decision, as is apparent from its title, consists of two parts. First, it establishes principles relating to reparations as referred to in article 75 (1) of the Statute. Second, it sets out, in a comparatively short part, the “procedure” to be applied in relation to reparations. It is this latter part of the Impugned Decision that persuades the Appeals Chamber, for the reasons that follow, that the Impugned Decision should be deemed to be an order for reparations and recourse may therefore be had to article 82 (4) of the Statute.

¹⁶⁰ See, *inter alia*, rules 150 and 155 of the Rules of Procedure and Evidence and regulations 57-59 and 65 of the Regulations of the Court.

¹⁶¹ See Decision Granting Leave to Appeal, para. 20.

¹⁶² See, in a different context, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the ‘Urgent Request for Directions’ of the Kingdom of the Netherlands of 17 August 2011”, 26 August 2011, ICC-01/04-01/06-2799 (OA 19), para 8.

52. The Appeals Chamber recalls that the explanatory note to the Rules of Procedure and Evidence states that they are “an instrument for the application of the Rome Statute”.¹⁶³ The Appeals Chamber recalls further that the Assembly of States Parties adopted the Regulations of the Trust Fund in 2005, “wishing to ensure the proper and effective functioning of the Trust Fund”.¹⁶⁴ Therefore, the Appeals Chamber considers that the provisions of the Statute, read in conjunction with these instruments, determine whether the Impugned Decision is, or should be deemed to be, “an order for reparations” within the meaning of article 82 (4) of the Statute.

53. The Appeals Chamber considers that, under the statutory framework for reparations, which is addressed further below, reparations proceedings can be divided into two distinct parts: 1) the proceedings leading to the issuance of an order for reparations; and 2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out.

54. The proceedings before the Trial Chamber leading to the issuance of an order for reparations are regulated in particular by articles 75 and 76 (3) of the Statute and by rules 94, 95, 97, and 143 of the Rules of Procedure and Evidence. During this first part of the proceedings, the Trial Chamber may, *inter alia*, establish principles relating to reparations to, or in respect of, victims. This first part of the reparations proceedings concludes with the issuance of an order for reparations under article 75 (2) of the Statute or a decision not to award reparations.¹⁶⁵

55. The second part of the reparations proceedings consists of the implementation phase, which is regulated primarily by article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence. If the Trial Chamber has ordered that reparations be made through the Trust Fund pursuant to rules 98 (3) and 98 (4) of the Rules of Procedure and Evidence, or that the award for reparations be deposited with the Trust Fund pursuant to rule 98 (2) of the Rules of Procedure and Evidence, the Trust Fund plays an important role in this phase and the Regulations of the Trust Fund apply. In

¹⁶³ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3-10 September 2002, ICC-ASP/1/3, footnote *; *see also* article 51 (5) of the Statute.

¹⁶⁴ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, 28 November to 3 December 2005, ICC-ASP/4/Res.3.

¹⁶⁵ Whether the decision not to award reparations is appealable under article 82 (4) of the Statute does not have to be, and is not, addressed in the present decision.

this respect, the Appeals Chamber notes that, under the Regulations of the Trust Fund, an order for reparations has to be issued in order to seize the Trust Fund and allow it to undertake implementation activities in relation to reparations. This is stipulated in regulation 50 (b) of the Regulations of the Trust Fund, which provides that:

50. For the purposes of these regulations, the Trust Fund shall be considered to be seized when:

[...]

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

56. The Appeals Chamber also notes that the Regulations of the Trust Fund contemplate oversight and a certain degree of intervention by the Trial Chamber during the implementation phase of reparations. In this regard, the Appeals Chamber recalls regulations 54, 55, 57 and 58 of the Regulations of the Trust Fund, which are part of Chapter II, Section III entitled “If the activities and projects of the Trust Fund are triggered by a decision of the Court”, and regulation 69 of the Regulations of the Trust Fund which is part of Chapter IV entitled “Collective awards to victims pursuant to rule 98(3)”. They provide as follows:

54. When the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4, of the Rules of Procedure and Evidence, the Secretariat shall prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors.

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

57. The Trust Fund shall submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award.

58. The Trust Fund shall provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with the Chamber’s order. At the end of the implementation period, the Trust Fund shall submit a final narrative and financial report to the relevant Chamber.

69. Where the Court orders that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate, in accordance with rule 98, sub-rule 3, of the Rules of Procedure and Evidence, the draft implementation plan shall set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation. Determinations made in this regard should be approved by the Court.

57. In the view of the Appeals Chamber, the judicial “approval” of the draft implementation plan, pursuant to regulations 57 and 69, if applicable, of the Regulations of the Trust Fund is not an initial order for reparations.¹⁶⁶ Rather, as stated above,¹⁶⁷ pursuant to regulation 50 (b) of the Regulations of the Trust Fund, an “order for reparations” in terms of article 82 (4) of the Statute must be issued under article 75 of the Statute *prior* to any implementation activities by the Trust Fund.

58. Turning to the Impugned Decision, the Appeals Chamber notes that, under the part on “procedure”, the Trial Chamber addressed aspects that relate, under the statutory scheme for reparations, to the steps to be taken both before and after the issuance of an order for reparations.

59. With respect to the first part of the reparations proceedings, the Appeals Chamber takes note of the Trial Chamber’s delegation of its functions under rule 97 of the Rules of Procedure and Evidence to the Trust Fund, especially the hearing of experts pursuant to rule 97 (2) of the Rules of Procedure and Evidence.¹⁶⁸

60. In respect of the implementation phase, the Appeals Chamber notes that the Impugned Decision requires the Trust Fund to determine the appropriate forms of reparations¹⁶⁹ and to execute a five-step implementation plan,¹⁷⁰ including by presenting proposals for collective reparations to a differently composed Trial Chamber for approval.¹⁷¹ The Trial Chamber further ruled that the assessment of harm and the identification of victims and beneficiaries were to be carried out by the Trust

¹⁶⁶ Whether the judicial approval of an implementation plan may also amount to an order for reparations appealable under article 82 (4) of the Statute is a question that the Appeals Chamber does not have to, and does not, decide in the context of the present decision.

¹⁶⁷ See above, paragraph 55.

¹⁶⁸ See Impugned Decision, para. 265.

¹⁶⁹ Impugned Decision, para. 266.

¹⁷⁰ Impugned Decision, paras 281-282.

¹⁷¹ Impugned Decision, para. 282.

Fund,¹⁷² which was to update a newly constituted Chamber in relation to the implementation of the five-step plan on a regular basis.¹⁷³ Thus, the Trial Chamber mandated the Trust Fund to take steps in relation to the implementation phase. As set out above, under the statutory scheme for reparations, the Trust Fund can only undertake activities in relation to implementation following the issuance of an order for reparations.

61. The Appeals Chamber also recalls the Trial Chamber's statement that:

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

262. During the implementation process, as indicated below, the Chamber will be in a position to resolve any contested issues arising out of the work and the decisions of the [Trust Fund].¹⁷⁴

62. The contemplated role for the newly composed Trial Chamber therefore appears to be that of monitoring and oversight, which corresponds to a Trial Chamber's role under the Regulations of the Trust Fund during the implementation phase.

63. In this regard, the Appeals Chamber considers that the practical effect of this is that the Impugned Decision represents the final judicial decision in respect of reparations, apart from such monitoring and oversight required of the Trial Chamber under the Regulations of the Trust Fund *after* an order for reparations has been issued, such as the "approval" of the draft implementation plan under regulations 57 or 69 of the Regulations of the Trust Fund.

64. For the above reasons, and without prejudice to any final decision on the merits, the Appeals Chamber concludes that the Impugned Decision is deemed to be an order for reparations, which may be appealed pursuant to article 82 (4) of the Statute. Accordingly, Mr Lubanga's appeal under article 82 (1) (d) of the Statute is rejected as

¹⁷² Impugned Decision, para. 283.

¹⁷³ Impugned Decision, para. 286.

¹⁷⁴ Impugned Decision, paras 261-262.

inadmissible. The Appeals Chamber will therefore not address the other various filings¹⁷⁵ submitted in the appeal *Lubanga OA 21* any further.

B. The right to appeal the Impugned Decision

65. Under article 82 (4) of the Statute, appeals against an order for reparations may be brought by “[a] legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75”. The Appeals Chamber notes that Mr Lubanga’s right to appeal the Impugned Decision has been challenged on the ground that the decision did not order him to make reparations and therefore did not negatively affect him.¹⁷⁶ Further, the right of several groups of victims to appeal has been challenged by Mr Lubanga and by the Prosecutor respectively.¹⁷⁷

66. As to the appeal brought by Mr Lubanga, the Appeals Chamber notes that article 82 (4) of the Statute gives the convicted person the right to appeal orders for reparations. This right is unencumbered. Furthermore, the Appeals Chamber does not have to determine, in the present case, whether an appeal by the convicted person is inadmissible if he or she is not adversely affected by an impugned decision. This is because, at this stage and for the purposes of the admissibility of his appeal, it appears possible that Mr Lubanga is adversely affected by the Impugned Decision. The Impugned Decision is intrinsically linked to his conviction, with the Trial Chamber finding that reparations should be awarded for the crimes for which Mr Lubanga was convicted in the case brought against him. The Appeals Chamber does not agree with the submissions that monetary contributions to reparations awards by the convicted person are the only basis for determining whether or not that individual is affected by an order for reparations. Consequently, the Appeals Chamber considers that Mr Lubanga is entitled to appeal the Impugned Decision under article 82 (4) of the Statute.

67. As to the appeals brought by the legal representatives of victims and by the OPCV, the Appeals Chamber notes at the outset that, under article 82 (4) of the

¹⁷⁵ Prosecutor’s Response; Lubanga Request; Prosecutor’s Response to Lubanga Request; OPCV Request; and Lubanga Response to OPCV Request.

¹⁷⁶ See OPCV’s Observations, paras 30-31; V01 Legal Representatives’ Observations, paras 22-25; V02 Legal Representatives’ Observations, paras 47-50; Prosecutor’s Observations, paras 27-29.

¹⁷⁷ Mr Lubanga’s Observations, paras 27 *et seq.*; Prosecutor’s Observations, paras 27 *et seq.*

Statute, victims are entitled to bring an appeal. They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68 (3) of the Statute, may present their views and concerns where their personal interests are affected. Furthermore, the Appeals Chamber notes that the right to appeal lies with the victims, not with the legal representatives of victims. In this regard, article 82 (4) of the Statute provides that victims may only appeal with the assistance of a legal representative, as is the case in these appeals.

68. The Appeals Chamber observes that the Legal Representatives of Victims V01 and Victims V02, as well as the OPCV, are appealing on behalf of those individuals whom they represented in the reparations proceedings before the Trial Chamber.¹⁷⁸ This includes individuals who participated in the trial as victims and requested reparations under rule 94 of the Rules of Procedure and Evidence (including some whose right to participate was later withdrawn by the Trial Chamber), as well as individuals whose application for participation in the trial had been rejected, but who nevertheless requested reparations. It also includes individuals who participated in the trial, but did not apply for reparations. Furthermore, the OPCV states that, in addition to individuals who have applied for reparations, it also brings its appeal on behalf of “victims who have not submitted applications for reparations but who might be affected by collective reparations”.¹⁷⁹

69. The question before the Appeals Chamber is therefore whether all those individuals are victims for the purpose of article 82 (4) of the Statute. The Appeals Chamber considers that the term “victim” in article 82 (4) of the Statute has to be understood in its context – it allows individuals to appeal an order for reparations rendered by a Trial Chamber as a result of the reparations proceedings. In this respect, the Appeals Chamber agrees with the OPCV¹⁸⁰ that the term “victim” is not defined as those victims who were granted the right to participate in the proceedings in relation to the accused person’s guilt or innocence or the sentence. The Appeals Chamber finds that this term may also include individuals who did not participate in

¹⁷⁸ V01 Observations, para. 26; OPCV Observations, para. 9; V02 Observations, para. 41 (it is noted that the appeal by the Legal Representatives of Victims V02 is raised on behalf of a smaller group of individuals than those indicated in paragraph 16 of the V02 Observations, which also refers to individuals whose applications for participation were rejected and who did not apply for reparations).

¹⁷⁹ OPCV’s Observations, para. 9.

¹⁸⁰ OPCV’s Observations, paras 20 *et seq.*

those proceedings, but who claim to have suffered harm as a result of the crimes in relation to which the accused was convicted and who request reparations. This is because a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence is not dependent upon either the filing of an application for participation pursuant to rule 89 of the Rules of Procedure and Evidence or being granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence.

70. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber decided not to consider the individual applications for reparations that it had received but instead decided to refer them to the Trust Fund.¹⁸¹ Whether this decision of the Trial Chamber was correct may have to be determined on the merits of the appeals, but it follows that those individuals who requested reparations and who now seek to appeal the Impugned Decision are entitled to do so, because the Impugned Decision contained a ruling that affected them. The same ruling affected those claimants for reparations whose request for participation in the proceedings in relation to the accused person's guilt or innocence or the sentence was rejected or whose right to participate was withdrawn in the Conviction Decision. This is because the reparations proceedings are a distinct stage of the proceedings and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings.

71. Further, in the reparations proceedings, the Trial Chamber invited submissions from victims who did not request reparations, even though they participated in the proceedings in relation to Mr Lubanga's guilt or innocence.¹⁸² Thus, the Trial Chamber accorded to those victims a role in the reparations proceedings, which the victims accepted by making submissions. This also demonstrates their interest in the reparations proceedings. For these reasons, the Appeals Chamber finds that it is possible that they are affected by the Impugned Decision, in particular because the Impugned Decision was the result of reparations proceedings in which they participated and made submissions. In this regard, the Appeals Chamber has also taken note of the submissions of the Legal Representatives of Victims V02 explaining

¹⁸¹ See Impugned Decision, paras 284, 289.

¹⁸² See Reparations Scheduling Order, para. 8, *see supra*, paragraph 6.



that not all individuals that they represent have applied for reparations, at least in part because the legal representatives have been unable to contact them in relation to submitting a request for reparations.¹⁸³

72. The Appeals Chamber recalls that the OPCV, in the reparations proceedings before the Trial Chamber, acted as legal representative of specific individuals who had applied for reparations. In addition, the OPCV made submissions in relation to “the interests of [unidentified] victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules”.¹⁸⁴ Subsequently, the OPCV has appealed on behalf of both categories of victims.¹⁸⁵ The Appeals Chamber determines that, in the circumstances of the present case, the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a legal representative. However, the Appeals Chamber considers that the unidentified individuals referred to above cannot have a right of appeal because at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist. Accordingly, to the extent that the OPCV has appealed the Impugned Decision on behalf of those unidentified individuals, the appeal must be rejected as inadmissible. This is without prejudice to the OPCV potentially being invited to make submissions on behalf of such individuals at a later stage in the proceedings (see paragraph 76 below).

VI. DIRECTIONS ON THE FURTHER CONDUCT OF THE PROCEEDINGS

73. The Appeals Chamber notes that, in its Directions, it indicated that, subject to its decision on the admissibility of the appeals, it would give further directions with regard to the time limits for the filing of the documents in support of the appeals. Having determined that the appeals brought under article 82 (4) of the Statute are admissible, it notes that of the 90 days available for the filing of the documents in support of the appeal pursuant to regulation 58 of the Regulations of the Court, 40 days had already passed before the issuance of the Directions. Therefore, as of the day of notification of this decision, the appellants (the Legal Representatives of Victims V02 jointly with the OPCV, the Legal Representatives of Victims V01, and

¹⁸³ V02 Legal Representatives’ Observations, para. 16 (d).

¹⁸⁴ Decision on the OPCV Request to Participate, para. 12(b).

¹⁸⁵ OPCV’s Observations, para. 9.

Mr Lubanga) have another 50 days to submit their respective documents in support of the appeal.

74. Under regulation 59 of the Regulations of the Court, “[a] participant may file a response within 60 days of notification of the document in support of the appeal described in regulation 58”. In light of this provision, the Appeals Chamber decides that the Legal Representatives of Victims V01 and the Legal Representatives of Victims V02 jointly with the OPCV may file responses to the document in support of the appeal submitted by Mr Lubanga, and *vice versa*. The two responses to Mr Lubanga’s document in support of the appeal must not be longer than 100 pages each. Mr Lubanga shall file a consolidated response to the two documents in support of the appeals filed on behalf of the participating victims, which, by analogy to regulation 63 of the Regulations of the Court, must not be longer than 140 pages. The Prosecutor, not being a party to the appellate proceedings, is not invited to submit a response to the documents in support of the appeals.

75. Given the subject matter of the appeals, the Appeals Chamber considers that it is desirable for the proper determination of the case to invite observations from the Trust Fund on the documents in support of the appeals. These observations are to be submitted at the same time as the responses to the documents in support of the appeals are due and shall not be longer than 100 pages.

76. The Appeals Chamber notes that, if appropriate, it may give further directions as to the conduct of the proceedings, including whether and by when responses to the Trust Fund’s observations may be submitted. Such directions may also include invitations for submissions from other organs, entities or individuals on specific issues arising in these appeal proceedings.

77. Finally, the Appeals Chamber notifies those organisations which were granted leave to submit observations before the Trial Chamber that they may, pursuant to rule 103 (1) of the Rules of Procedure and Evidence, request leave to submit observations before the Appeals Chamber. The Appeals Chamber directs that such requests must be filed within 30 days of the notification of the documents in support of the appeals and must state on which issue, arising from the documents in support of the appeals,

observations are proposed to be submitted. The Appeals Chamber further directs that such requests must not include the substance of the proposed observations.

VII. REQUEST FOR SUSPENSIVE EFFECT

A. The legal basis for granting a request for suspensive effect

78. The Appeals Chamber notes that Mr Lubanga requests that his appeal pursuant to article 82 (4) of the Statute be given suspensive effect pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence.¹⁸⁶

79. The Appeals Chamber does not accept the submission that, pursuant to rule 150 (4) of the Rules of Procedure and Evidence,¹⁸⁷ if an appeal is filed pursuant to article 82 (4) of the Statute, the order for reparations is not final and is therefore automatically suspended.¹⁸⁸ If that argument were correct, there would be no need to have a provision governing suspensive effect in relation to appeals under, *inter alia*, articles 82 (1) (a), (b) or (c) of the Statute either, because rule 154 (3) of the Rules of Procedure and Evidence makes rule 150 (4) applicable to those appeals as well.¹⁸⁹ Yet, article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence provide for and regulate requests for suspensive effect in respect of those appeals and, indeed, the Appeals Chamber has addressed requests for suspensive effect in relation to such appeals.¹⁹⁰ Furthermore, there is a difference between an order for reparations becoming final and the suspension of an order for reparations pending the outcome of an appeal against it. An order being final provides legal certainty in that it is known that it will not be the subject of a further appeal (and therefore will not potentially be reversed or amended). Suspensive effect, on the other hand, means that the order for reparations cannot be enforced during the period of its

¹⁸⁶ Lubanga Appeal, para. 12.

¹⁸⁷ Rule 150 (4) of the Rules of Procedure and Evidence provides: "If an appeal is not filed as set out in sub-rules 1 to 3, the decision, the sentence or the reparation order of the Trial Chamber shall become final."

¹⁸⁸ See OPCV's Observations, paras 33-34; see also Trust Fund's Observations, para. 46.

¹⁸⁹ Rule 154 (3) of the Rules of Procedure and Evidence provides: "Rule 150, sub-rules 3 and 4, shall apply to appeals filed under sub-rules 1 and 2 of this rule".

¹⁹⁰ See, by way of example, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision on the requests of Mr Ruto and Mr Sang for suspensive effect", 29 February 2012, ICC-01/09-01/11-391 (OA 3 OA 4) (hereinafter: "*Ruto, Kosgey and Sang OA 3 OA 4 Decision*"); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect", 29 February 2012, ICC-01/09-02/11-401 (OA 4) (hereinafter: "*Muthaura, Kenyatta and Ali OA 4 Decision*"); and *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of the Prosecutor for Suspensive Effect", 3 September 2009, ICC-01/05-01/08-499 (OA 2).

suspension. As the order for reparations is under appeal, there remains the possibility that it will be reversed or amended.

80. The Appeals Chamber notes that article 82 (4) of the Statute, which provides for appeals against orders for reparations, appears within the same article of the Statute as article 82 (3), which gives the Appeals Chamber power to order suspensive effect “in accordance with the Rules of Procedure and Evidence”.¹⁹¹ The Rules of Procedure and Evidence contain, in rule 156 (5), a provision on requests for suspensive effect.¹⁹² This provision, however, deals with appeals regulated by rules 154 and 155 of the Rules of Procedure and Evidence and is as such not applicable to appeals under article 82 (4) of the Statute, which are regulated by rules 150 to 153 of the Rules of Procedure and Evidence. There is no other provision in the legal texts that specifically regulates suspensive effect in relation to appeals against orders for reparations, including article 81 (4) of the Statute.¹⁹³ Therefore, because of its placement in article 82 of the Statute and the need for the Appeals Chamber to be able to order suspensive effect when an order for reparations is appealed, the Appeals Chamber considers that it has the power to grant a request for suspensive effect under article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence when seized of such a request in relation to an appeal under article 82 (4) of the Statute. Accordingly, the legal basis for dealing with Mr Lubanga’s request for suspensive effect is indeed article 82 (3) of the Statute.

B. The merits of Mr Lubanga’s request for suspensive effect

81. In relation to the nature of suspensive effect, the Appeals Chamber recalls that it has previously stated that “[s]uspension involves the non-enforcement of a decision,

¹⁹¹ Article 82 (3) of the Statute provides: “An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.”

¹⁹² Rule 156 (5) of the Rules of Procedure and Evidence provides: “When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.”

¹⁹³ Article 81 (4) of the Statute provides: “Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.”

the subject of an appeal”.¹⁹⁴ In relation to when suspensive effect will be granted, the Appeals Chamber has previously explained:

Article 82 (3) of the Statute provides that an appeal shall not have suspensive effect “unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.” [...] The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.¹⁹⁵

82. The Appeals Chamber has summarised the circumstances in which it has exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the [...] appeal”.¹⁹⁶ [Footnotes omitted.]

83. In the present case, the Appeals Chamber finds that implementing the Impugned Decision, which may be reversed or amended on appeal, could result in considerable time being spent and resources being allocated by the Trust Fund, as well as raised expectations of victims.¹⁹⁷ In this connection, the Appeals Chamber finds persuasive the argument put forward by the Trust Fund that it would be undesirable for engagement with victims and their communities to commence, only to have to be halted or revised as a result of a later determination of the Appeals Chamber, potentially leading to re-traumatisation of victims.¹⁹⁸ Given the prejudice which the

¹⁹⁴ *Prosecutor v. Joseph Kony a.o.*, “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’”, 13 July 2006, ICC-02/04-01/05-92 (OA), para. 3.

¹⁹⁵ See, for the most recent examples, *Ruto, Kosgey and Sang OA 3 OA 4 Decision*, para. 8; *Muthaura, Kenyatta and Ali OA 4 Decision*, para. 8. See also, among other Appeals Chamber authorities, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo”, 23 July 2010, ICC-01/04-01/06-2536 (OA 17), para. 7, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 6 and the footnotes referred to therein.

¹⁹⁶ See, for example, *Ruto, Kosgey and Sang OA 3 OA 4 Decision*, para. 9; *Muthaura, Kenyatta and Ali OA 4 Decision*, para. 9.

¹⁹⁷ See Trust Fund’s Observations, paras 24-25.

¹⁹⁸ See Trust Fund’s Observations, para. 45.

foregoing could cause, which could create a situation that would be difficult to correct, the Appeals Chamber finds that suspensive effect should be ordered.

84. In reaching the above conclusion, the Appeals Chamber has taken into account the fact that suspending the Impugned Decision may cause delay in respect of reparations. In this regard, the Appeals Chamber has noted the submission of the Legal Representatives of Victims V01 that “victims have an interest in seeing the reparations proceedings instituted as soon as possible” and that some victims applied for reparations over six years ago.¹⁹⁹ The Trust Fund also refers to being “crucially aware” of how suspensive effect may “draw upon the patience of victims and their communities, considering also the amount of time that has passed since the crimes for which charges have been brought”.²⁰⁰ However, the Appeals Chamber notes that none of the legal representatives of the victims has objected to suspensive effect being granted.²⁰¹ Notwithstanding the potential for delay, the Appeals Chamber finds that, in the present circumstances, there is a clear need to suspend the enforcement of the Impugned Decision.

85. The decision to suspend the Impugned Decision is without prejudice to the other activities that the Trust Fund could have undertaken independently of the Impugned Decision having been issued, including any such activities being pursued by the Trust Fund in the Democratic Republic of the Congo pursuant to its mandate under regulation 50 (a) of the Regulations of the Trust Fund.²⁰²

86. Finally, the Appeals Chamber notes that, given that Mr Lubanga has also appealed the Conviction Decision,²⁰³ an order for reparations could not, in any event, have been executed, unless and until Mr Lubanga’s conviction had been confirmed by the Appeals Chamber. This is because of article 81 (4) of the Statute, which expressly

¹⁹⁹ V01 Legal Representatives’ Observations, para. 38.

²⁰⁰ Trust Fund’s Observations, para. 47.


²⁰¹ For a summary of the submissions of the legal representatives in this regard, *see supra* paras 31 (OPCV) and 35 (the Legal Representatives of Victims V01). The Appeals Chamber notes that the Legal Representatives of Victims V02 did not make submissions regarding suspensive effect. The Appeals Chamber notes, in addition, that the Trust Fund made submissions in favour of ordering suspensive effect, *see supra* para. 48.

²⁰² *See, in this connection, Situation in the Democratic Republic of the Congo, “Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund”, 11 April 2008, ICC-01/04-492.*

²⁰³ “Acte d’appel de la Défense de M. Thomas Lubanga à l’encontre du « Jugement rendu en application de l’article 74 du Statut » rendu par la Chambre de première instance I le 14 mars 2012”, 3 October 2012, ICC-01/04-01/06-2934 (A 5).

provides that: “[...] execution of the decision [of conviction] [...] shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings”. Given that an order for reparations depends upon there having been a conviction,²⁰⁴ if the decision on conviction cannot be executed unless and until it is confirmed on appeal, it follows that an order for reparations also cannot be executed until that time. As the Appeals Chamber has decided to grant Mr Lubanga’s request for suspensive effect, it is unnecessary for the Appeals Chamber, in the present decision, to comment further upon the extent, or other implications, of the application of article 81 (4) of the Statute in the absence of a request for suspensive effect.

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



Judge Erkki Kourula
Presiding Judge

Dated this 14th day of December 2012

At The Hague, The Netherlands

²⁰⁴ See article 75 of the Statute, article 82 (4) of the Statute’s reference to “the convicted person” being able to appeal the order under article 75 of the Statute, as well as the references to “a convicted person” in rule 98 (1), (2) and (3) of the Rules of Procedure and Evidence and regulations 50 (b), 54, 59, 69 and 73 of the Regulations of the Trust Fund.