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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

Joint response to the “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparations rendered on 7 August 2012*”

**Source: Office of Public Counsel for Victims
V02 Team of Legal Representatives**

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

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I. PROCEDURAL BACKGROUND

1. On 14 March 2012, Trial Chamber I delivered its *Judgment pursuant to Article 74 of the Statute*,¹ by which it found Mr Thomas Lubanga Dyilo 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 Rome Statute from early September 2002 to 13 August 2003.²

2. On the same day, the Chamber issued its *Scheduling order concerning the timetable for sentencing and reparations*,³ in which it invited the parties and participants to file submissions on the principles to be applied with regard to reparations and the procedure to be followed.⁴ It also invited “other individuals or interested parties” to apply in writing for leave to file submissions on specific issues related to reparations.⁵

3. On 28 March 2012, the Office of Public Counsel for Victims (“OPCV”) submitted an application for leave to appear before the Chamber on specific issues related to reparations.⁶

4. On 5 April 2012, the Chamber issued its *Decision on the OPCV’s request to participate in the reparations proceedings*,⁷ in which it (i) instructed the Registry to appoint the OPCV as the legal representative for the unrepresented applicants and to

¹ See *Judgment pursuant to Article 74 of the Statute* (Trial Chamber I), ICC-01/04-01/06-2842, 14 March 2012.

² *Idem*, para. 1358.

³ See *Scheduling order concerning timetable for sentencing and reparations* (Trial Chamber I), ICC-01/04-01/06-2844, 14 March 2012.

⁴ *Idem*, para. 8.

⁵ *Ibid.*, para. 10.

⁶ See *Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings*, ICC-01/04-01/06-2848, 28 March 2012.

⁷ See *Decision on the OPCV’s request to participate in the reparations proceedings* (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012.

provide it with the applications for reparations received thus far, as well as any future applications from unrepresented victims; and (ii) instructed the OPCV to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed, on behalf of those victims who had not submitted applications but who might fall within the scope of an order for collective reparations.⁸

5. On 18 April 2012, the OPCV filed its submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed.⁹

6. On 7 August 2012, the Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* (“Decision of 7 August 2012”).¹⁰

7. On 13 August 2012, the Defence filed its “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparations* issued on 7 August 2012”¹¹ (“Defence Application”) under article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence.¹²

8. On 14 August 2012, the OPCV, which had not received the e-mail of 10 August 2012 referred to by the Defence in its submissions,¹³ asked the Chamber for a copy of that e-mail.¹⁴

⁸ *Idem*, para. 13.

⁹ See *Observations on issues concerning reparations*, ICC-01/04-01/06-2863, 18 April 2012.

¹⁰ See *Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), ICC-01/04-01/06-2904, 7 August 2012 (“Decision of 7 August 2012”).

¹¹ See “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparations* rendered on 7 August 2012”, ICC-01/04-01/06-2905-tENG, 13 August 2012 (the “Defence Application”).

¹² *Idem*, para. 4.

¹³ *Ibid.*, para. 3.

¹⁴ See e-mail entitled “LUBANGA CASE – Request to the Chamber” to the Chamber on 14 August 2012 at 11.40.

9. On the same day, the Legal Adviser to the Trial Division forwarded to the OPCV a copy of the e-mail of 10 August 2012.¹⁵ That e-mail read as follows: “[TRANSLATION] Dear Mr Desalliers, Further to your telephone call, decision 2904 must be considered to have been officially notified in English on Tuesday last. That decision was not an order for reparations within the meaning of rule 150.”¹⁶

10. Pursuant to regulation 65(3) of the Regulations of the Court, Principal Counsel for the OPCV¹⁷ and the V02 team of legal representatives (“Legal Representatives”) hereby submit their response to the Defence Application.

II. MAIN SUBMISSION

11. The Defence seeks authorisation to appeal against the Decision of 7 August 2012 under article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence, referring to the e-mail of 10 August 2012.¹⁸

12. As their main submission, the Legal Representatives contend that the basis of the Defence Application is erroneous and that it should be rejected *in limine*. Having regard to the content and formulation of the Decision of 7 August 2012, it constitutes an “order for reparations” rendered under article 75 of the Rome Statute within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence. Furthermore, they submit that since the Court’s texts lack any criteria defining the term “order for reparations”, it is incumbent on the Appeals Chamber, and not a Trial Chamber, to establish whether a decision rendered in relation to

¹⁵ See e-mail entitled “FW: Délai d’appel applicable à la décision rendue en vertu de l’Article 75” from the Legal Adviser to the Trial Section on 14 August 2012 at 18.32.

¹⁶ See e-mail entitled “Délai d’appel applicable à la décision rendue en vertu de l’Article 75” to the Defence on 10 August 2012 at 16.53.

¹⁷ Principal Counsel represents all unrepresented applicants and, temporarily, thirty-three applicants represented by Mr. Joseph Keta. See, in that respect, “Notification of appointment of the Office of Public Counsel of Victims as legal representative of unrepresented applicants for reparations”, ICC-01/04-01/06-2903, 27 July 2012, pp. 3 and 4.

¹⁸ See Defence Application, *supra*, footnote 11, paras. 3 and 4. See also *supra*, para. 9.

reparations is covered by the appeals procedure under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

13. In the Decision of 7 August 2012, the Chamber, after having established the principles applicable to reparations,¹⁹ delegated to the Trust Fund for Victims (“TFV”) responsibility for (i) selecting and appointing the appropriate experts and overseeing their work,²⁰ (ii) determining the appropriate forms of reparations and implementing them,²¹ and (iii) identifying the victims and beneficiaries for the purposes of reparations.²² The Chamber then delegated responsibility to the Registry for deciding as to the form of victim participation in the reparations proceedings that would enable them to express their views and concerns.²³ Furthermore, the Chamber considered that (i) “a community-based approach, using the TFV’s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource intensive verification procedures”;²⁴ and (ii) “Mr Lubanga is only able to contribute to non-monetary reparations [and] [a]ny participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement.”²⁵ The Chamber approved (i) the reparations implementation plan proposed by the TFV,²⁶ and (ii) the TFV’s method of assessing the harm suffered by victims.²⁷ The Chamber reserved to a newly constituted chamber only “monitoring and oversight functions” and the possibility of being seized of “any contested issues arising out of the work and the decisions of the TFV”,²⁸ while pointing out that “[t]he Chamber will not otherwise issue, in this case, any order or instruction to the TFV on the implementation of

¹⁹ See Decision of 7 August, *supra*, footnote 10, paras. 182-259.

²⁰ *Idem*, para. 265.

²¹ *Ibid.*, para. 266.

²² *Ibid.*, para. 283.

²³ *Ibid.*, para. 268.

²⁴ *Ibid.*, para. 274.

²⁵ *Ibid.*, para. 269.

²⁶ *Ibid.*, paras. 281 and 282.

²⁷ *Ibid.*, para. 283.

²⁸ *Ibid.*, para. 286.

reparations that are to be made through the TFV and funded by any voluntary contributions.”²⁹ Lastly, the Chamber decided not to examine the individual applications for reparations received by the Registry³⁰ and ordered that they be transferred to the TFV, leaving it to the TFV’s discretion as to whether the applicants had to be part of its programmes for reparations purposes.³¹

14. The Legal Representatives submit in this connection that the Trial Chamber not only established the principles applicable to reparations but also, at that stage, used its discretion to institute measures governing all essential aspects of the reparations proceedings under article 75 of the Rome Statute, both by delegating its responsibilities with regard to reparations to the TFV and the Registry and by approving specific measures suggested by the TFV for the purposes of implementing a reparations plan. More specifically, the Chamber approved, in the instant case, collective reparations using the “community-based approach” and decided not to examine individual applications, having rejected them without an examination as to the merits. It does not appear to be the Chamber’s intention to review individual applications for reparations or intervene on any substantive issues relating to reparations, since it has delegated to the TFV responsibility for taking any material decisions in that respect, even though the role of a newly constituted chamber would be restricted to monitoring those decisions of the TFV. It follows that none of the potential decisions of a newly constituted chamber could be deemed to be an “order for reparations” under article 75 of the Rome Statute within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

15. Accordingly, the Legal Representatives submit that if the Chamber were to decide that the Decision of 7 August 2012 does not constitute an “order for reparations” but falls into the category of decisions within the scope of the procedure under article 82(1) of the Rome Statute and rule 155 of the Rules of Procedure and

²⁹ *Ibid.*, para. 287.

³⁰ *Ibid.*, para. 289(a).

³¹ *Ibid.*, paras. 284 and 289(a).

Evidence, that would mean that the reparations proceedings instituted by the Chamber itself on 14 March 2012,³² would never give full effect to the victims' entitlement to participate effectively and expeditiously in the reparations proceedings or, in particular, to appeal against an order for reparations under article 82(4) of the Rome Statute. That denial of victims' rights would be particularly damaging since according to the Court's case-law, as established thus far, victims are not entitled to seek authorisation to appeal the Decision of 7 August 2012 under article 82(1)(d) of the Rome Statute.

16. In the unlikely event that the Chamber were to allow the Defence Application on the basis of article 82(1) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence, the Legal Representatives submit the following observations in the alternative.

III. IN THE ALTERNATIVE

17. Firstly, the Legal Representatives recall that the previous jurisprudence of the Court has already established that the two criteria set out in article 82(1)(d) of the Rome Statute are complementary, and that each one has to be established cumulatively in order for leave to appeal to be granted.³³

18. More specifically, article 82(1)(d) of the Rome Statute limits the possibility of appeal to a "[d]ecision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for

³² See *Scheduling order concerning timetable for sentencing and reparations*, *supra*, footnote 3.

³³ See *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal* (Appeals Chamber), ICC-01/04-168, 13 July 2006, paras. 7-19. See also *Decision on the prosecution and defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"* (Trial Chamber I), ICC-01/04-01/06-2107, 3 September 2009, para. 27.

which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

19. In this respect, the Appeals Chamber has previously stated that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.³⁴ The Appeals Chamber further stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”³⁵ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.³⁶ The Chamber further considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’, or b) ‘the outcome of the trial.’”³⁷

20. The Legal Representatives observe that the Defence have merely advanced disparate arguments. Nevertheless, they will respond to those arguments, as advanced by the Defence.

a. Referral of this case to a newly constituted Chamber

21. The Legal Representatives support the argument advanced by the Defence that “the Trial Chamber cannot defer the present case to another newly constituted Chamber without violating articles 39(2)(b)(ii) and 74(1) [of the Rome Statute]”.³⁸ In that connection, they submit the following observations.

³⁴ See *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, *supra*, footnote 33, para. 8.

³⁵ *Idem*, para. 9.

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 10.

³⁸ See Defence Application, *supra*, footnote 11, para. 14.

22. In its Decision of 7 August 2012, the Chamber noted several times that “[r]eparations proceedings are an integral part of the overall trial process”.³⁹ That conclusion of the Chamber is consonant with article 76 of the Rome Statute, under which the reparations proceedings must be conducted either at the same time as the further hearing for the purposes of sentencing or after that hearing, but in any event, before the completion of the trial.⁴⁰ In its Decision of 22 May 2008,⁴¹ the Chamber also held:

(i) “For the duration of the trial, the position is clear that ... the functions of the Chamber shall be carried out by three judges”;⁴² (ii) “it is impossible to read into these provisions a power by which the Chamber may appoint one of the three judges to act as a single judge”;⁴³ and (iii) “the effect of the Rome Statute framework, as set out above, is to provide that all three members of the Trial Chamber must be present for each hearing and status conference during the period following the confirmation of charges and leading up to the beginning of the trial (and thereafter during the trial and the Chamber’s deliberations)”.⁴⁴

23. Thus, the Chamber itself determined that the same three judges must be present together throughout the proceedings, including the reparations proceedings. The requirement to maintain the same composition of the Chamber throughout the proceedings, including the reparations proceedings, is underpinned by the fact that when considering reparations, the Chamber must take account of all the relevant conclusions and evidence, most of which has been presented during the main stage of the proceedings, including the extent of the harm caused to victims and to members of their families, the cultural, social and economic context in which the crime was committed, the circumstances determining the seriousness of the crime, etc. Furthermore, at no stage of the preparatory works prior to adoption of the Rome

³⁹ See Decision of 7 August 2012, *supra*, footnote 10, paras. 260 and 267.

⁴⁰ See article 76(2) and (3) of the Rome Statute. See also, in this sense, Schabas, W.A., “Article 76”, in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 980.

⁴¹ See *Decision on whether two judges alone may hold a hearing – and – Recommendations to the presidency on whether an alternate judge should be assigned for the trial* (Trial Chamber I), ICC-01/04-01/06-1349, 22 May 2008.

⁴² *Idem*, para. 12.

⁴³ *Ibid.*, para. 14(a).

⁴⁴ *Ibid.*, para. 15.

Statute did the negotiators envisage the possibility of deferring the reparations proceedings, even if that involved a new reparations hearing, to a Chamber other than that dealing with the principal phase of the trial.⁴⁵

24. Accordingly, the Legal Representatives submit that the Chamber's decision to refer the reparations proceedings to a newly constituted Chamber is at variance with the jurisprudence which the Chamber itself established. It is thus sowing confusion and uncertainty as regards application of the Court's jurisprudence and risks setting a precedent at odds with the intention of the drafters of the Rome Statute. That position, which is clear from the Decision of 7 August 2012, is such as to affect significantly the fair and expeditious conduct of the proceedings in this case, since the judges of a newly constituted chamber who have never dealt with this case might fail to take account of all the relevant material thus affecting, or even compromising, the entitlement of victims to reparations under article 75 of the Rome Statute. The immediate resolution of that issue by the Appeals Chamber could materially advance the proceedings in view of the fact that that Chamber decision is seriously vitiated by an error of law.

b. Delegation by the Chamber of its responsibilities as regards reparations to a non-judicial organ

25. The Legal Representatives also support the Defence's argument that "the Trial Chamber cannot delegate the authority to decide on issues governed by powers which are its sole preserve to a non-judicial organ, such as, for example, the appointment of an expert under regulation 97(2), or the determination of the loss suffered by an individual".⁴⁶ In that connection, they submit the following observations.

⁴⁵ See UN Doc. A/49/10(SUPP), 1 September 1994, pp. 133 and 134; UN Doc. A/50/22(SUPP), 6 September 1995, p. 38; UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 121; UN Doc. A/CONF.183/13 (Vol. III), 15 June - 17 July 1998, pp. 265, 288 and 300; UN Doc. A/CONF.183/13 (Vol. I), 15 June-17 July 1998, pp. 22 and 41.

⁴⁶ See Defence Application, *supra*, footnote 11, para. 14.

26. While framing a right to reparations in favour of victims and beneficiaries, article 75 of the Rome Statute requires the Court, *inter alia*, to establish principles relating to reparations, to determine the scope and extent of any damage, loss and injury to, or in respect of, victims or their beneficiaries,⁴⁷ to publish the reparations proceedings,⁴⁸ to appoint appropriate experts to assist it in determining the scope, extent of any damage loss and injury to, or in respect of, victims and to suggest various options concerning the appropriate types and modalities of reparations and to invite, as appropriate, the persons concerned to make observations on the reports of the experts.⁴⁹

27. The Legal Representatives submit that the term “Court” used in the provisions of those legal texts, while not accurately defined, can in no circumstances be construed as including the TFV and/or the Registry. It is therefore incumbent on the relevant Trial Chamber to fulfil its obligations as regards reparations within a strictly judicial framework. No provision of the applicable texts allows the competent Chamber to delegate its responsibilities as regards reparations to another organ of the Court, particularly a non-judicial organ.

28. It is further incumbent on the Court to rule on the matter of reparations, firstly, and most importantly, on the basis of an application for reparations, and secondly, and in exceptional circumstances, on its own motion.⁵⁰ The competent Chamber must order that applications submitted by victims be notified to the parties concerned and invite them to make observations in that connection.⁵¹ Lastly, the competent Chamber must examine applications for reparations submitted and

⁴⁷ See article 75(1) of the Rome Statute.

⁴⁸ See rule 96 of the Rules of Procedure and Evidence.

⁴⁹ See rule 97(2) of the Rules of Procedure and Evidence.

⁵⁰ See article 75(1) of the Rome Statute.

⁵¹ See article 75(3) of the Rome Statute and rule 94(2) of the Rules of Procedure and Evidence.

“determine the scope and extent of any damage, loss or injury to, or in respect of, victims [or their beneficiaries] and ... state the principles on which it is acting”.⁵²

29. The Legal Representatives submit that in its Decision of 7 August 2012, the Chamber decided not to examine the individual reparations applications submitted to it and to transfer them to the TFV, even though no such option is contemplated in the Court’s texts. In doing so, the Chamber *de facto* deprived those victims having submitted claims for reparations of their right to seek reparations and to have their applications duly examined in accordance with article 75 of the Rome Statute. Furthermore, the Chamber did not specify the exceptional circumstances which led it to rule on the matter of reparations on its own motion rather than on the basis of the applications for reparations submitted, in accordance with article 75(1) of the Rome Statute.

30. Accordingly, the Legal Representatives submit that, firstly, delegation by the Chamber of its responsibilities as regards reparations to a non-judicial organ and, secondly, its refusal to examine and decide as to the individual reparations applications submitted are “issues” which are clearly covered by the Decision of 7 August 2012 and are such as to affect significantly the fair and expeditious conduct of the proceedings in this case, since the Chamber’s approach placed the reparations proceedings outside any judicial context and will result in a denial of the victims’ right to participate, effectively and expeditiously, in the reparations proceedings in accordance with the legal framework of the Court. An immediate decision by the Appeals Chamber could materially advance the proceedings given that the aforementioned Chamber decision is seriously vitiated by an error of law and a procedural error.

⁵² See article 75(1) of the Rome Statute.

c. Beneficiaries and reparations

31. The Defence submits that reparations can only be awarded to victims having demonstrated “the existence of harm that is personal, has actually come into being, is current and certain and for which no reparations have already been issued”⁵³ and that victims not having submitted an application for reparations cannot assert the right to seek reparations in this case.⁵⁴ The Defence challenges the “proximate cause” criterion adopted by the Chamber to determine whether causation exists between the crime committed and the harm suffered⁵⁵ and the standard of proof adopted by the Chamber for the purpose of determining factual issues arising in the applications for reparations submitted by victims.⁵⁶

32. The Legal Representatives submit that that part of the Defence application fails to satisfy the criteria of article 82(2)(d) of the Rome Statute since it does not demonstrate the existence of any “issue” that could be the subject-matter of an appeal.

33. The Legal Representatives submit in that regard that the Court’s texts set out clearly the power of the Chamber to award not only individual reparations, that is, reparations directed at specifically identified victims, but also collective reparations⁵⁷ and the Chamber’s power *proprio motu* to award reparations in respect of victims.⁵⁸ Collective reparations are, by their nature, directed at a potentially sizeable number of victims. International case-law merely confirms that “collective” reparations do not require that the victims concerned be specifically identified when a reparations decision is delivered or that they submit an application for reparations.

⁵³ See Defence Application, *supra*, footnote 11, para. 9(c).

⁵⁴ *Idem*, paras. 6-8, 9(a) and 9(b).

⁵⁵ *Ibid.*, para. 9(d).

⁵⁶ *Ibid.*, paras. 22-24.

⁵⁷ See rule 97(1) of the Rules of Procedure and Evidence.

⁵⁸ See article 75(1) of the Rome Statute and rule 95 of the Rules of Procedure and Evidence.

34. Traditionally, “collective reparations” are defined as being intended for a collectivity as such and not specific individuals.⁵⁹ The Inter-American Court of Human Rights defines “collective reparations” as being intended for a specific group of individuals without those individuals having to be named.⁶⁰ The “class action” mechanisms adopted in turn used simple assumptions to identify victims and determine the circumstances of the case.⁶¹ Lastly, “satisfaction” type collective reparations are intended to commemorate all suffering victims without however singling them out by name.⁶²

35. Accordingly, by ruling in its Decision of 7 August 2012 that “it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations”,⁶³ the Chamber merely highlighted the possibility of awarding collective reparations to those who have not submitted applications for reparations and who are not specifically identified, a possibility which is perfectly consonant with the Court’s texts. Furthermore, the “community-based approach” approved by the Chamber as the approach adopted for collective reparations⁶⁴ means that in the instant case, the reparations measures are directed at collectivities as such and not specific individuals who are members of those collectivities, an interpretation which is broadly accepted

⁵⁹ See, in this connection, McCarthy, C., *Reparations and Victim Support in the International Criminal Court*, Cambridge: CUP, 2012, Chapter V. See also Rosenfeld, F., “Collective Reparation for Victims of Armed Conflict”, *International Review of the Red Cross*, 2010, p. 732.

⁶⁰ See for example IACHR, *Juvenile Institute v. Paraguay*, Preliminary Objections, merits, reparations and Costs, Series C no. 112, 2 September 2004; and *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objections, merits, Reparations and Costs, Series C no. 150, 5 July 2006.

⁶¹ See the *Governing Rules of the Claims Resolution Tribunal for Dormant Accounts*, article 17, para. 1, available at: <http://www.crt-ii.org/faqs.phtml>. See also the *Common guidelines for the partner organisations concerning the compensation of other personal injuries, decided by the Board of Trustees of the Foundation “Remembrance, Responsibility and Future”* on 21 June 2001, para. 6, available at: www.stiftung-evz.de. See, lastly, International Organization for Migration, *Property Claims Commission, Supplementary Principles and Rules of Procedure*, 29 January 2002, section 22.1, available at: www.compensation-for-forced-labour.org.

⁶² See, in this sense, Schonsteiner, J., “Dissuasive Measures and the Society as a Whole: A Working Theory of Reparations in the Inter-American Court of Human Rights” in *American University International Law Review*, Volume 23, 2007, p. 127. See also IACHR, *Trujillo-Oroza v. Bolivia*, Reparations and Costs, Series C no. 92, 27 February 2002, para. 110.

⁶³ See Decision of 7 August, *supra*, footnote 10, para. 187.

⁶⁴ *Idem*, para. 274.

in international law.⁶⁵ The reparations measures adopted by virtue of that approach are, perforce, likely to affect larger groups of people than those having suffered harm directly linked to the crimes for which Mr Lubanga has been found guilty, hence the Chamber's concern that the specific needs of victims in particularly vulnerable situations, for example, victims of sexual violence, be addressed.⁶⁶

36. If the Chamber were to consider that the issue concerning the beneficiaries of reparations, as advanced by the Defence, raises an "issue" under article 82(1)(d) of the Rome Statute, the Legal Representatives submit that that issue in no way affects the fair and expeditious conduct of the reparations proceedings nor the outcome thereof.

37. In its decision of 7 August 2012, the Chamber ruled that Mr Lubanga had no property or assets that could be used for the purposes of reparations and that he could only contribute to non-financial forms of reparations, and then only with his agreement.⁶⁷ The Chamber further ruled that all reparations measures should be implemented through the TFV on the basis of the "community-based approach" using voluntary contributions.⁶⁸ However, collective reparations orders cannot be made directly against the convicted person and may only be enforced through the TFV.⁶⁹

38. Having regard to the Chamber's aforementioned conclusions, it is unclear – and the Defence provides no explanation – whether and how the Chamber's interpretation of the term "victim" able to benefit from reparations in this case, and of the applicable criteria in this regard, can affect the rights of the convicted person and/or the safeguards of a fair trial, which, moreover, has already come to an end.

⁶⁵ See *supra*, para. 34.

⁶⁶ See Decision of 7 August 2012, *supra*, footnote 10, para. 200.

⁶⁷ *Idem*, para. 269.

⁶⁸ *Ibid.*, para. 274.

⁶⁹ See rule 98 of the Rules of Procedure and Evidence.

Accordingly, the Legal Representatives respectfully ask the Trial Chamber:

AS THE MAIN SUBMISSION:

- To dismiss the Defence Application *in limine*.

IN THE ALTERNATIVE:

- To grant the Defence leave to appeal against the Decision of 7 August 2012 on the following two issues: (i) referral of the case to a newly constituted chamber, and (ii) delegation by the Chamber of its responsibilities as regards reparations to a non-judicial organ; and
- To reject the remainder of the Defence Application.

[signed]
Paolina Massidda

[signed]
Carine Bapita Buyangandu

[signed]
Paul Kabongo Tshibangu

Done this 17 August 2012

At The Hague, The Netherlands, and Kinshasa, Democratic Republic of the Congo