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TRIAL CHAMBER II

Before: Judge Chang-Ho Chung , Presiding Judge
Judge Péter Kovács
Judge María del Socorro Flores Liera

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

**Joint Response of the Common Legal Representatives of the Victims to the
Defence Request for Leave to Appeal Trial Chamber II's Decision
No. ICC-01/04-02/06-2794 dated 25 November 2022**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Pursuant to regulation 65(3) of the Regulations of the Court, the Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives”) hereby file a joint response to the Defence Request for leave to appeal (the “Defence Request”)¹ the “Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (the “Impugned Decision”).²

2. The Legal Representatives submit that the Defence Request fails to meet the criteria under article 82(1)(d) of the Rome Statute (the “Statute”) and, accordingly, must be dismissed.

II. PROCEDURAL BACKGROUND

3. On 8 March 2021, Trial Chamber VI issued the “Reparations Order”.³ On 16 March 2021, the Presidency assigned the present case to the newly constituted Trial Chamber II (the “Chamber”).⁴

4. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeals against the Reparations Order (the “Appeals Judgment”).⁵

¹ See the “Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, [No. ICC-01/04-02/06-2797](#), 2 December 2022 (the “Defence Request”).

² See the “Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Trial Chamber II), [No. ICC-01/04-02/06-2794](#), 25 November 2022 (the “Impugned Decision”); with Public Annex 1, [No. ICC-01/04-02/06-2794-Anx1](#).

³ See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

⁴ See the “Decision assigning judges to divisions and recomposing chambers” (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

⁵ See the “Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Appeals Chamber), [No. ICC-01/04-02/06-2782 A4 A5](#), 12 September 2022 (the “Appeals Judgment”).

5. On 25 October 2022, the Chamber issued the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (the “25 October 2022 Order”), establishing, *inter alia*, the methodology and criteria for the constitution of a sample of victims and setting out a procedure and a calendar for the parties to comment thereon.⁶

6. On 8 November 2022, the Registry filed its submissions in compliance with the 25 October 2022 Order.⁷ The Registry determined *inter alia* that, in addition to victims benefitting from the interim reparation measures awarded as per the Initial Draft Implementation Plan (the “IDIP”), 92 victims’ dossiers had to be randomly selected from the group of victims of the attacks, and 12 victims’ dossiers had to be randomly selected from the group of victims of crimes against child soldiers.⁸

7. On 9 November 2022, the Common Legal Representative of the Victims of the Attacks,⁹ the Common Legal Representative of the Former Child Soldiers,¹⁰ and the Defence (the “Defence’s Submissions on the Sample”)¹¹ filed their respective submissions in compliance with the 25 October 2022 Order.

⁶ See the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Trial Chamber II), [No. ICC-01/04-02/06-2786](#), 25 October 2022 (the “25 October 2022 Order”).

⁷ See the “Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (ICC-01/04-02/06-2786)”, [No. ICC-01/04-02/06-2788](#), 8 November 2022; with Confidential *ex parte* Annexes 1 and 2.

⁸ *Idem*, para. 15.

⁹ See the “Submissions of the Common Legal Representative of the Victims of the Attacks pursuant to the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, [No. ICC-01/04-02/06-2789](#), 9 November 2022.

¹⁰ See the “Common Legal Representative of the Former Child Soldiers’ Submissions pursuant to the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, [No. ICC-01/04-02/06-2790-Conf](#), 9 November 2022; a Public Redacted version was filed on 14 November 2022 as: [ICC-01/04-02/06-2790-Red](#).

¹¹ See the “Submissions on behalf of the Convicted Person on the procedure for the constitution of the sample established by the Implementation Order”, [No. ICC-01/04-02/06-2791](#), 9 November 2022 (the “Defence’s Submissions on the Sample”), with Public Annex I, [No. ICC-01/04-02/06-2791-AnxI](#).

8. On 16 November 2022, the Chamber issued the Decision on the Trust Fund for Victims' (the "TFV") Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan (the "Decision on the Sixth and Seventh Reports"), reiterating that the Appeals Judgment had not affected the implementation of the emergency reparation measures which shall remain fully operational and that, accordingly, the 69 IDIP victims should continue to benefit from said measures and be included in the sample.¹²

9. On 25 November 2022, the Chamber issued the Impugned Decision whereby it approved the sample as assembled by the VPRS as sufficiently representative of the universe of potential victims in the case, and set out a further procedure and calendar for the parties and participants.¹³

10. On 2 December 2022, the Defence submitted an application for leave to appeal in respect of four issues purportedly arising out of the Impugned Decision, namely that the Chamber erred by: (i) assembling a sample of potential victims and finding nonetheless that it is representative in light of its purpose (the "First Purported Issue");¹⁴ (ii) approving a sample of 173 potential victims assembled by the VPRS at its request, which includes 67 priority participating victims previously determined to be eligible for reparations by the TFV in the context of the IDIP, and 106 potential victims selected randomly, representing 5% of the so-called universe of potential victims (the "Second Purported Issue");¹⁵ (iii) approving a sample comprising 173 potential victims – 167 participating potential victims and 6 non-participating potential victims – and finding that it "[...] is fully satisfied that, from a quantitative and a qualitative point of view, the assembled sample is sufficiently representative of the universe of potential victims in the

¹² See the "Decision on the TFV's Sixth and Seventh Update Reports on the Implementation of the Initial Draft Implementation Plan", No. ICC-01/04-02/06-2792-Conf, 16 November 2022, reclassified as public on 24 November 2022: [No. ICC-01/04-02/06-2792](#), paras. 8-10 (the "Decision on the Sixth and Seventh Reports").

¹³ See the Impugned Decision, *supra* note 2, pp. 23-24.

¹⁴ See the Defence Request, *supra* note 1, para. 18.

¹⁵ *Idem*, para. 19.

case” (the “Third Purported Issue”);¹⁶ and (iv) finding that 5% of the potential victims drawn from the so-called universe of potential victims – in addition to the 67 potential participating victims determined to be eligible by the TFV in the context of the IDIP – was sufficient for the sample assembled to be representative of the universe of potential victims, thereby ignoring the expert conclusions submitted by the Defence and failing to provide any scientific basis for its finding (the “Fourth Purported Issue”).¹⁷

III. SUBMISSIONS

A. The criteria under article 82(1)(d) of the Statute

11. The Legal Representatives note that article 82(1)(d) of the Statute limits the possibility to request leave to appeal to “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

12. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Statute, as well as the necessity to show their cumulative existence in order for leave to appeal to be granted.¹⁸

13. In this regard, the Appeals Chamber determined 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

¹⁶ *Idem*, para. 20.

¹⁷ *Idem*, para. 21.

¹⁸ See, *inter alia*, the “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), [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8 and 14. See also, *inter alia*, the “Decision on the request for leave to appeal the Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-281](#), 9 February 2021, para. 17; the “Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-206](#), 24 May 2019, para. 10; and the “Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)” (Trial Chamber IX), [No. ICC-02/04-01/15-1331](#), 5 September 2018, para. 8.

state such an issue for consideration by the Appeals Chamber”.¹⁹ The Appeals Chamber also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,²⁰ 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”.²¹ Accordingly, the Legal Representatives underline that questions over which there is a mere disagreement or conflict of opinion do not define an appealable subject,²² an appealable issue cannot be based on a misunderstanding of the decision,²³ or on the re-litigation of previously settled arguments.²⁴

14. The Appeals Chamber also 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’”.²⁵

15. Consequently, it must first be determined whether the purported “issue” identified in the Defence Request is an “appealable issue” arising from the Impugned Decision within the meaning of article 82(1)(d) of the Statute, as interpreted by the

¹⁹ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 18, para. 8.

²⁰ *Idem*, para. 9.

²¹ *Ibid.*

²² See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 18, para. 9. See also the “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-915](#), 24 May 2007, para. 70; the “Decision on Defence request for leave to appeal the ‘Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules’” (Trial Chamber VI), [No. ICC-01/04-02/06-1784](#), 13 February 2017, para. 12; the “Decision on the Yekatom Request Seeking Leave to Appeal the Decision on the Request for Reconsideration of the Order on Reclassification” (Pre Trial Chamber II), [No. ICC-01/14-01/18-211](#), 27 May 2019, para. 9; and the “Decision on Defence Request for Leave to Appeal the ‘Decision on Defence Request for a Stay of Proceedings’” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-202](#), 9 November 2020, para. 10.

²³ See the “Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008” (Trial Chamber I), [No. ICC-01/04-01/06-1191](#), 26 February 2008, para. 25.

²⁴ See also the “Public redacted version of ‘Decision on Defence request for reconsideration, or leave to appeal, “Decision on Defence request in relation to P-0626’” (Trial Chamber X), [No. ICC-01/12-01/18-1295-Red](#), 10 February 2021, paras. 11-14.

²⁵ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 18, para. 10.

jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.²⁶

16. Moreover, pursuant to the constant jurisprudence of the Court, *“the mere fact that an issue is of general interest [...] or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”*,²⁷ and *“[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”*.²⁸

17. Furthermore, a Chamber presented with an application for leave to appeal must not examine or consider *“arguments on the merits or the substance of the appeal”*, since these arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.²⁹

18. According to the established jurisprudence, in analysing whether an appealable issue would ‘significantly affect’ the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Statute, the notion of ‘fairness’ must be understood as

²⁶ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 30 November 2012 (dated 29 November 2012), para. 70.

²⁷ See the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-983](#), 24 September 2013, para. 20; and the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), [No. ICC-01/04-01/07-2375-tENG](#), 8 September 2010, para. 4. See also the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58”, *supra* note 18, para. 21.

²⁸ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 7; and the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *supra* note 27, para. 4.

²⁹ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 22.

referring to situations “*when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.³⁰ In turn, ‘expeditiousness’ must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, [...] namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.³¹

19. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.³²

B. Application of the criteria under article 82(1)(d) of the Statute to the Defence Request

1. The purported ‘issues’ do not arise from the Impugned Decision

20. The Legal Representatives submit that the Defence fails to identify an ‘issue’ that arises from the Impugned Decision, as required by article 82(1)(d) of the Statute. The four ‘issues’ raised by the Defence pertain to the methodology and criteria for the constitution of the sample of victims.

21. However, these questions were addressed by the Chamber in detail in its 25 October 2022 Order³³ as well as in the Decision on the Sixth and Seventh Reports,³⁴ and not in the Impugned Decision, which merely implemented the 25 October 2022

³⁰ See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

³¹ *Idem*, paras. 17-18.

³² See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 18, para. 13.

³³ See the 25 October 2022 Order, *supra* note 6, paras. 4-34.

³⁴ See the Decision on the Sixth and Seventh Reports, *supra* note 12, paras. 8-10.

Order. In the Impugned Decision, the Chamber considered whether the manner in which the VPRS assembled the sample of victims was in compliance with the methodology and criteria set in its 25 October 2022 Order and confirmed so.

22. In its Submissions on the Sample, the Defence criticised the 25 October 2022 Order insofar it concerns, *inter alia*, the procedure for the constitution of the sample,³⁵ the composition of the sample,³⁶ the size of the sample,³⁷ and the proposed sampling method.³⁸ However, the Defence did not seek leave to appeal the 25 October 2022 Order on any of said matters, but instead proposed an alternative methodology for the constitution of the sample based on an expert's conclusions.³⁹ The Defence cannot now be allowed to remedy its failure to seek leave to appeal said Order through a back door, for instance by formulating its Second and Third 'issues' as arising from the Chamber's approval of a sample assembled by the VPRS. In fact, the total number of 173 victims included into the sample was achieved as a result of the implementation of the 25 October 2022 Order, *i.e.* as a result of the application by the VPRS of the methodology and criteria set out by the Chamber in its 25 October 2022 Order. This number could have been reasonably anticipated in light of the methodology and criteria set out in the 25 October 2022 Order and based on the available number of participating victims,⁴⁰ the number of forms collected from new potential beneficiaries,⁴¹ and the number of victims benefitting from the IDIP.⁴²

23. In its attempt to demonstrate that the purported 'issues' constitute appealable issues, the Defence acknowledges that they arise from the Chamber's "*determination of how this examination of the sample will take place*",⁴³ as opposed to the manner in which

³⁵ See the Defence's Submissions on the Sample, *supra* note 11, paras. 16-22.

³⁶ *Idem*, paras. 23-32.

³⁷ *Idem*, paras. 33-36.

³⁸ *Idem*, paras. 37-41.

³⁹ *Idem*, para. 22.

⁴⁰ See the 25 October 2022 Order, *supra* note 6, para. 5.

⁴¹ *Idem*, para. 13.

⁴² *Idem*, para. 19.

⁴³ See the Defence Request, *supra* note 1, para. 23.

the methodology and criteria set out by the Chamber were effectively implemented by the Registry. Rather than criticising the outcome achieved by the VPRS, the Defence takes issue with the way in which the Chamber constituted the sample,⁴⁴ alleging in particular that the sample cannot be considered representative of the total number of beneficiaries,⁴⁵ and that the size of the sample is insufficient.⁴⁶ The Defence was entitled to challenge the manner in which the Chamber constituted the sample through seeking leave to appeal the 25 October 2022 Order, but it opted not to do so.

24. Assuming *arguendo* that the issues identified by the Defence do arise from the Impugned Decision, at this stage, rather than focusing on the criteria under article 82(1)(d) of the Statute, the Defence is merely reiterating the substantive observations it had already made in its Submissions on the Sample. In the Impugned Decision, the Chamber further explained its approach set out in the 25 October 2022 Order,⁴⁷ addressed each of the Defence's submissions and found that they are either misconceived or based on a misrepresentation of the facts and an apparent misunderstanding of the reasons for the constitution of a sample in the current circumstances with reference to the practice in the *Lubanga* case.⁴⁸ By reiterating its previous submissions, the Defence demonstrates a mere disagreement with the Chamber's decision and attempts to re-litigate the matters previously set in the 25 October 2022 Order.

25. In particular, in respect of the First Purported Issue, the Defence appears to complain about the entire methodology adopted by the Chamber. Said issue is framed in such vague terms that the Legal Representatives fail to decipher what the specific issue raised by the Defence is and submit that it does not in any way constitute "*an*

⁴⁴ *Idem*, para. 25.

⁴⁵ *Ibid.*

⁴⁶ *Idem*, para. 26.

⁴⁷ See the Impugned Decision, *supra* note 2, paras. 9-22.

⁴⁸ *Idem*, para. 13.

*identifiable subject or topic requiring a decision for its resolution, [but rather] merely a question over which there is disagreement or conflicting opinion”.*⁴⁹

26. Turning to the Second Purported Issue, it is unclear to the Legal Representatives whether the Defence takes issue with the size of the sample (5% of the universe of potential victims in addition to the IDIP victims) or with the fact that the sample includes the IDIP victims. With regard to the size of the sample, it was known since the 25 October 2022 Order and the Defence should have sought leave to appeal said Order. In any event, the Defence made extensive observations in this respect in its Submissions on the Sample and these were addressed and rejected by the Chamber.⁵⁰ Thus, at best, the Defence is demonstrating a mere disagreement with the Impugned Decision and therefore the Second Purported Issue does not qualify as an issue within the meaning of article 82(1)(d) of the Statute. Should the Defence’s purported issue relate to the fact that the sample comprises the IDIP victims, this issue is likewise untimely, as this was made clear not only in the 25 October 2022 Order but also in the Decision on the Sixth and Seventh Reports which the Defence did not seek to appeal.⁵¹

27. In respect of the Third Purported Issue, it is unclear to the Legal Representatives in which sense this issue differs from the previous ones and this lack of clarity demonstrates as such that this purported issue does not qualify in any way as an appealable issue. That being said, should the Defence’s point be that non-participating victims were selected to be part of the sample, this was equally made clear as early as in the 25 October 2022 Order, and in any event addressed in detail in the Impugned Decision.⁵² Therefore, this issue is untimely and should be rejected.

⁴⁹ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 18, para. 9.

⁵⁰ See the Impugned Decision, *supra* note 2, paras. 19-20.

⁵¹ See the 25 October 2022 Order, *supra* note 6 and the Decision on the Sixth and Seventh Reports, *supra* note 12.

⁵² See the Impugned Decision, *supra* note 2, para. 16 (and para. 17 concerning the non-inclusion of victims already admitted to participate in the *Lubanga* case).

28. Lastly, the Legal Representatives fail to understand how the Fourth Purported Issue differs from the Second Purported Issue concerning the size of the sample and reiterate that not only said size was known since the 25 October 2022 Order but also that it was further addressed in the Impugned Decision.⁵³

29. Consequently, noting as underlined *supra* that the criteria of article 82(1)(d) of the Statute are cumulative in nature, since the four purported ‘issues’ raised by the Defence appear to constitute an untimely attempt to seek leave to appeal the 25 October 2022 Order, or at best, mere disagreements or differences of opinions with the Impugned Decision, therefore not constituting appealable issues under article 82(1)(d) of the Statute, it is unnecessary to assess the other criteria under said article. Nonetheless, should the Chamber be mindful to entertain them, the Legal Representatives will briefly address *infra* the other criteria of article 82(1)(d) of the Statute.

2. The purported ‘issues’ do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their litigation before the Appeals Chamber will not materially advance the proceedings

30. If, by extraordinary, the Chamber were to find that one or several of the four purported ‘issues’ identified by the Defence arise(s) from the Impugned Decision, the Legal Representatives submit that none of them have an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Statute.

31. In analysing whether an appealable issue would “*significantly affect*” the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the*

⁵³ See the Impugned Decision, *supra* note 2, paras. 19-20.

observations and evidence submitted to the Court that might influence its decision".⁵⁴ In turn, 'expeditiousness' must be read as "closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned".⁵⁵ The Appeals Chamber stated that in order to determine whether an issue would significantly affect the 'outcome of the trial' under article 82(1)(d) of the Statute, "[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".⁵⁶ Furthermore, it is imperative that the party requesting leave to appeal is able to clearly demonstrate how the identified issues have actually – as opposed to speculatively – affected the fair and expeditious conduct of the proceedings.⁵⁷

32. The Legal Representatives submit that, as demonstrated *supra*, none of the four purported 'issues' identified by the Defence arise from the Impugned Decision, but instead might have arisen from the 25 October 2022 Order which the Defence did not deem necessary to challenge. Allowing a re-litigation of the matters already set in a final decision would as such prejudice the very essence of the principles of fairness and expeditiousness of the proceedings and will significantly delay the proceedings.

33. Moreover, the Defence contends that "*the sampling exercise was required to begin with an assessment of the total number of potential victims in the case, using as a starting point the information provided by VPRS in January 2021 that the total number of additional non-participating victims would be close to 1100. This would have allowed the identification of a greater number of non-participating victims [...], to then allow an appropriate percentage to be*

⁵⁴ See, *inter alia*, the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

⁵⁵ *Idem*, para. 18.

⁵⁶ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 18, para. 13.

⁵⁷ See the "Decision on Defence requests for leave to appeal the 'Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents'" (Trial Chamber I), [No. ICC-02/11-01/15-228](#), 18 September 2015, para. 26.

*drawn [...].*⁵⁸ First, the Defence fails to articulate why the estimate provided by the VPRS should have formed the starting point for the sample exercise, while widely contradictory information on the potential number of beneficiaries are available on the case-record.⁵⁹ Second, the Defence appears to have misunderstood one of the purposes of the sampling exercise, that is precisely to assist in estimating the actual number of beneficiaries.⁶⁰ In this respect, the Legal Representatives fully concur with the Impugned Decision, in which the Chamber clarified that the Defence misunderstands the practice followed in other cases.⁶¹ Third and most importantly, the approach suggested by the Defence would require that, for the purpose of the constitution of a sample, the Registry should first contact all preliminary identified new potential beneficiaries of reparations to collect relevant information about their experience and harm suffered, to be able then to extract a number of them to be included into the sample.

34. The Legal Representatives submit that this is an untenable approach as being in sharp contrast with the ‘do no harm’ principle. The Chamber made it clear that in order, *inter alia*, to avoid re-victimisation, the Registry is not expected to collect new applications for reparations and only long forms already collected should be included in the universe of victims from which the randomised part of the sample will be extracted.⁶² In any event, the Defence fails to clearly demonstrate how the inclusion of a greater number of non-participating victims would enhance the representativeness of the sample of victims.

35. Lastly, the Legal Representatives note that the Defence – similarly to the Legal Representatives – was provided a genuine opportunity to present its arguments, which

⁵⁸ See the Defence Request, *supra* note 1, para. 7.

⁵⁹ See the Reparations Order, *supra* note 3, paras. 232-235 for a summary of the contradictory information available on the record.

⁶⁰ See the Appeals Judgement, *supra* note 5, para. 346, and footnote 732.

⁶¹ See the Impugned Decision, *supra* note 2, paras. 12-14.

⁶² See the 25 October 2022 Order, *supra* note 6, para. 25.

it did at length by way of its Submissions on the Sample. The fact that the Chamber did not accept all of the Defence's arguments⁶³ does not as such affect the fair or expeditious conduct of the proceedings.

36. Besides, the Legal Representatives recall that the main purpose of the 25 October 2022 Order (and of the Impugned Decision) was to determine how to constitute a sample of victims that is representative enough "*for the purpose of making projections on the actual number of beneficiaries and the amount of the award*".⁶⁴ These rulings will be made by the Chamber, not only on the basis of the information gathered through the sample, but also with the assistance of "*other evidence*",⁶⁵ and the Defence will be able to challenge said rulings in due course.

37. The Legal Representatives therefore submit that it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of the 'issues' raised by the Defence may materially advance the proceedings, inasmuch as such a resolution would lead to undue delay of the proceedings,⁶⁶ and would in addition contravene the paramount requirements of the 'do no harm' principle.

⁶³ The Legal Representatives note in this regard that the Chamber agreed with some of the Defence's arguments (See the Impugned Decision, *supra* note 2, para. 18).

⁶⁴ See the Appeals Judgement, *supra* note 5, para. 346, and footnote 732.

⁶⁵ *Ibid.*

⁶⁶ See the "Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-530](#), 8 October 2013, para. 42.

IV. CONCLUSION

38. For the foregoing reasons, the Legal Representatives respectfully request the Chamber to:

- **REJECT** the Defence Request in its entirety.



Sarah Pellet
Common Legal Representative of the
Former Child soldiers



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks

Dated this 8th day of December 2022

At The Hague, The Netherlands