



Original : French

No.: ICC-01/04-01/06

Date.: 5 February 2013

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

**Document in support of the appeal against Trial Chamber I's 7 August 2012
*Decision establishing the principles and procedures to be applied to reparation***

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 INTRODUCTION

1. The *Decision establishing the principles and procedures to be applied to reparations* rendered by Trial Chamber I on 7 August 2012 ought to be set aside because it is tainted by errors of law insofar as it (i) dismisses the individual applications for reparation, without examining their merits; (ii) refers the instant case to a newly constituted chamber; and (iii) delegates the Chamber's own reparations responsibilities to the Trust Fund for Victims and the Registry.

2. The Appeals Chamber should itself implement a reparations procedure in compliance with the Court's texts.

II. BACKGROUND

3. On 14 March 2012, Trial Chamber I ("the Chamber") delivered its *Judgment pursuant to Article 74 of the Statute* ("Judgment"),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 under articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from early September 2002 to 13 August 2003.²

4. That 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 make written applications for leave to file submissions on specific issues related to reparations.⁵

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

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.

5. 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

6. 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 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

7. 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 That same day, the other legal representatives of victims also filed their submissions on this issue.¹⁰

8. On 7 August 2012, the Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* (“Impugned Decision”).¹¹

9. On 13 August 2012, the Defence filed an application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparations* of 7

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.

⁸ *Idem*, para. 13.

⁹ See “Observations on issues concerning reparations”, No: ICC-01/04-01/06-2863, 18 April 2012.

¹⁰ See “Observations of the V02 group of victims on sentencing and reparations”, ICC-01/04-01/06-2869, 18 April 2012 and the “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”, ICC-01/04-01/06-2864-tENG, 18 April 2012.

¹¹ See *Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), ICC-01/04-01/06-2904, 7 August 2012 (“Impugned Decision”).

August 2012,¹² pursuant to article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence.¹³

10. On 17 August 2012, Principal Counsel of the OPCV and the V02 team of legal representatives filed a joint response to the Defence application for leave to appeal against the 7 August 2012 *Decision establishing the principles and procedures to be applied to reparations*,¹⁴ in which they submitted that the Impugned Decision constitutes an “order for reparations” pursuant to 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

11. On 24 August 2012, Principal Counsel of the OPCV and the V02 team of legal representatives filed their “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”¹⁶ pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence (“Appeal against the Impugned Decision”).

12. On 29 August 2012, the Chamber issued its *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*,¹⁷ by which it granted the Defence leave to appeal against the Impugned Decision with respect to four issues.¹⁸

13. On 3 September 2012, the V01 team of legal representatives also filed an “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to*

¹² See “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”, ICC-01/04-01/06-2905, 13 August 2012.

¹³ *Idem*, para. 4.

¹⁴ See “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”, ICC-01/04-01/06-2907, 17 August 2012.

¹⁵ *Idem*, paras. 12-15.

¹⁶ See “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”, ICC-01/04-01/06-2909 A, 24 August 2012 (“Appeal against the Impugned Decision”).

¹⁷ See *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), ICC-01/04-01/06-2911, 29 August 2012.

¹⁸ *Idem*, paras. 9, 10 and 40.

be applied to reparations of 7 August 2012” pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.¹⁹

14. On 6 September 2012, the Defence filed an “Appeal of the Defence of Mr Thomas Lubanga against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation*, rendered on 7 August 2012” on the basis of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.²⁰

15. On 10 September 2012, the Defence filed the “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”.²¹

16. On 13 September 2012, Principal Counsel of the OPCV lodged an application concerning the participation of victims in the Defence interlocutory appeal against the Impugned Decision.²² She submitted therein that the victims should automatically be authorised to participate in the proceedings concerning the Defence appeal against the Impugned Decision and that the Appeals Chamber should review its previous practice concerning victim participation in interlocutory appeals, since the instant appeal is *sui generis*.²³ Alternatively, Principal Counsel of the OPCV requested the Appeals Chamber to authorise her to file observations on the document in support of the appeal within a time limit to be determined by the Appeals Chamber.²⁴

¹⁹ See “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 A2, 3 September 2012.

²⁰ See “Appeal of the Defence of Mr Thomas Lubanga against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation*” rendered on 7 August 2012”, ICC-01/04-01/06-2917 A3, 6 September 2012.

²¹ See “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 A 21, 10 September 2012.

²² See “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”, No: ICC-01/04-01/06-2921 A21, 13 September 2012.

²³ *Idem*, para. 13.

²⁴ *Ibid.*, pp. 14 and 15.

17. On 17 September 2012, the Appeals Chamber delivered its *Directions on the conduct of the appeal proceedings*,²⁵ in which it invited, *inter alia*, the OPCV and the V02 team of legal representatives to provide it with clarification in respect of the persons whom they were representing before the Appeals Chamber²⁶ and to file, no later than 1 October 2012, submissions on the admissibility of appeals OA21, A, A2 and A3, as well as on the possibility of making observations in response to the appeals, particularly on the following issues: (i) the nature of the Impugned Decision, and (ii) whether Mr Lubanga, the applicants for reparations and any victims who might be affected by an order for collective reparations have the right to appeal against the Impugned Decision under article 82(4) of the Rome Statute.²⁷ Furthermore, the Appeals Chamber invited, *inter alia*, the OPCV and V02 team of legal representatives to file observations on two Defence requests for suspensive effect.²⁸ Finally, the Appeals Chamber stated that further directions would be given on the submission of (i) documents in support of the appeals and/or responses to the document(s) submitted in support of the appeal(s) pursuant to regulations 59 and/or 65(5) of the Regulations of the Court and (ii) requests to be filed pursuant to rule 103 (1) of the Rules of Procedure and Evidence.²⁹

18. On 28 September and 1 October 2012, the V01 team of legal representatives,³⁰ the Trust Fund for Victims,³¹ the OPCV,³² the Defence,³³ the Prosecution³⁴ and the V02

²⁵ See “*Directions on the conduct of the appeal proceedings*”, (Appeals Chamber), ICC-01/04-01/06-2923 A A2 A3 OA21, 17 September 2012.

²⁶ *Idem*, para. 1.

²⁷ *Ibid.*, para. 2.

²⁸ *Ibid.*, para. 4.

²⁹ *Ibid.*, para. 5.

³⁰ See “*Observations on the appeals against the Decision establishing the principles and procedures to be applied to reparations*”, ICC-01/04-01/06-2926 A A2 A3 OA21, 28 September 2012.

³¹ See “*Observations in response to the Direction on the conduct of appeal proceedings*”, ICC-01/04-01/06-2927 A A2 A3 OA21, 1 October 2012.

³² See “*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 A A2 A3 OA21, 1 October 2012.

³³ See “*Defence observations pursuant to the Directions on the conduct of the appeal proceedings issued on 17 September 2012*”, ICC-01/04-01/06-2929 A A2 A3 OA21, 1 October 2012.

³⁴ See “*Prosecution’s Submissions further to the Appeals Chamber’s ‘Directions on the conduct of the appeal proceedings’*”, ICC-01/04-01/06-2929 A A2 A3 OA21, 1 October 2012.

team of legal representatives³⁵ filed their observations in compliance with the *Directions on the conduct of the appeal proceedings*.

19. On 2 October 2012, the V02 team of legal representatives filed a corrigendum to their observations of 1 October 2012 in regard to the admissibility of appeals OA21, A, A2 and A3.³⁶ The Prosecution filed observations on said corrigendum on 3 October 2012.³⁷

20. On 14 December 2012, the Appeals Chamber delivered its *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*,³⁸ in which it decided that the Defence interlocutory appeal against the Impugned Decision under article 82(1)(d) of the Statute was inadmissible, whereas appeals A, A2 and A3 respectively filed by the OPCV and the V02 team of legal representatives, the V01 team of legal representatives and the Defence against the Impugned Decision pursuant to under article 82(4) of the Statute were admissible. The Appeals Chamber further held that the appeal filed by the OPCV on behalf of the unidentified individuals who have not applied for reparations but whose interests might be affected by collective reparations was inadmissible.³⁹ Furthermore, it invited, *inter alia*, the OPCV and the V02 team of legal representatives to jointly submit the respective documents – which should not exceed 100 pages – in support of the appeal against the Impugned Decision by 4.p.m. on 5 February 2013.⁴⁰ Finally, the Appeals Chamber rejected the corrigendum to the observations of the V02 team

³⁵ See “OBSERVATIONS OF THE V02 TEAM OF LEGAL REPRESENTATIVES OF VICTIMS IN ACCORDANCE WITH DIRECTIONS ICC-01/04-01/06-2923 A A3 A4 OA31”, ICC-01/04-01/06-2931 A A2 A3 OA21, 1 October 2012.

³⁶ See “CORRIGENDUM TO OBSERVATIONS OF THE V02 TEAM OF LEGAL REPRESENTATIVES OF VICTIMS IN ACCORDANCE WITH DIRECTIONS ICC-01/04-01/06-2923 A A3 A4 OA21”, ICC-01/04-01/06-2931-Corr, A A2 A3 OA21, 2 October 2012 (dated 1 October 2012).

³⁷ See “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 A2 A3 OA21, 3 October 2012 (dated 2 October 2012).

³⁸ See *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* (Appeals Chamber), ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012.

³⁹ *Idem*, pp. 3 and 4.

⁴⁰ *Ibid.*, p. 4.

of legal representatives of 1 October 2012 concerning the admissibility of appeals OA21, A, A2 and A3.⁴¹

21. Accordingly, the OPCV and the V02 team of legal representatives (“Legal Representatives”) jointly present the following submissions in support of the appeal against the Impugned Decision.

III. THE LEGAL REPRESENTATIVES’ SUBMISSIONS

22. The Legal Representatives appealed against the Impugned Decision on the following three grounds:

- (1) The Trial Chamber erred in law by dismissing the individual applications for reparations without considering them on their merits;
- (2) The Trial Chamber erred in law by deciding to refer the case to a newly constituted chamber at the reparations stage; and
- (3) The Trial Chamber erred in law by deciding to delegate its own reparations responsibilities to two non-judicial entities.⁴²

1. The Trial Chamber erred in law by dismissing the individual applications for reparations without considering them on their merits

23. The Legal Representatives submit that the Trial Chamber erred in law by dismissing the individual applications for reparations without considering them on their merits.

24. Article 75 of the Rome Statute grants victims the right to reparations and the right to submit applications for reparations to the Court. The Rome Statute requires the Court to give full effect to all rights and guarantees enshrined therein. With respect to reparations proceedings, it is incumbent upon the Court to rule, first and foremost, on the basis of an application for reparations and secondly, in exceptional circumstances, on its own motion.⁴³ When victims submit applications for reparations

⁴¹ *Ibid.*, pp. 4 and 5.

⁴² See “Appeal against the Impugned Decision”, *supra*, footnote 16, paras. 16-26.

⁴³ See Article 75(1) of the Rome Statute.

in accordance with the prescribed procedure, it is incumbent upon the competent chamber to order the notification of these applications to interested persons and invite them to submit observations in this respect.⁴⁴ Finally, it falls to the competent chamber to examine the applications for reparations submitted and “in its decision [...] determine the scope and extent of any damage, loss and injury to, or in respect of, victims and [...] state the principles on which it is acting”.⁴⁵

25. In the Impugned Decision, the Trial Chamber decided not to examine the individual applications for reparations it received and transmitted them to the Trust Fund for Victims,⁴⁶ although this is not an option contemplated in the Court’s texts. In fact, prior to the decision tasking the Trust Fund for Victims to implement the reparations order,⁴⁷ the Chamber is obliged pursuant to rules 94 and 95 of the Rules of Procedure and Evidence to rule on the victims’ applications for reparations, or at the very least, allow them to make observations which the Chamber will take into account before acting *sua sponte* pursuant to article 75(1).⁴⁸ By adopting this approach, the Chamber *de facto* deprived those victims having submitted claims for reparations of the realisation 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 *sua sponte* on the matter of reparations in accordance with article 75(1) of the Rome Statute rather than on the basis of the applications for reparations submitted.

26. In this respect, under international human rights jurisprudence as established by the European Court of Human Rights (“ECHR”) and the Inter-American Court of Human Rights (“IACHR”), the requirements of a fair trial obligate competent courts to determine all applications before it, or at the very least, examine specific

⁴⁴ See Article 75(3)(d) of the Rome Statute and rule 94(2) of the Rules of Procedure and Evidence.

⁴⁵ See Article 75(1) of the Rome Statute.

⁴⁶ See the Impugned Decision, *supra*, footnote 11, paras. 284 and 289(b).

⁴⁷ See *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*, *supra*, footnote 38, paras. 53-55.

⁴⁸ See also the arguments in the third ground of the appeal, *infra*, paras. 45-47.

complaints, addressing issues that are relevant to the outcome of the case⁴⁹ and give the reasons for its decision.⁵⁰ The ECHR held, in particular, that:

[t]he purpose of the Convention [European Convention on Human Rights] being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the right to a fair hearing can only be seen to be effective if the requests of the parties are actually “heard”, that is, duly considered by the court”, and that [...] “without requiring a detailed answer to every argument put forward by a complainant, [the obligation to give reasons for its decision] [...] presupposes that the injured party can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question.⁵¹

27. Finally, by referring the individual applications for reparations to the Trust Fund without considering them on their merits, the Trial Chamber deprived the victims of the opportunity to participate and contribute to reparations proceedings as individuals in a specific and concrete manner, as opposed to *generatim*, as members of a community.

28. In fact, victim participation in the reparations proceedings is necessary to ensure the efficiency and effectiveness of these proceedings. In this regard and as expressed by certain authors, the Legal Representatives submit that:

participation [of victims in reparations proceedings] should not only be seen as a means of understanding victims’ situations and needs, nor as simply an opportunity to explain to victims the good intentions behind reparations efforts. It should be something that contributes, in a definitive way, to ensuring that the persons receive real benefits that are a help to them in their lives; that is, victims should derive a substantive benefit from participation. They should be able to see their experience reflected there, at least in some way.⁵²

And

⁴⁹ See ECHR, *Luka v. Romania*, Application no. 34197/02, 21 July 2009, paras. 58-61; *Kalkanov v. Bulgaria*, Application no: 19612/02, 9 October 2008, paras. 24-28; *Pronina v. Ukraine*, Application no. 63566/00, 18 July 2006, paras. 23 and 25; *Higgins et al. v. France*, Application no: 20124/92, 19 February 1998, paras. 26 and 43; *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, para. 29.

⁵⁰ See ECHR, *Antica and company R v. Romania*, Application no. 26732/03, 2 March 2010, paras. 32-39; *Hirvisaari v. Finland*, Application no. 49684/99, 27 September 2001, paras. 30-33; *Georgiadis v. Greece*, Application no. 21522/93, 29 May 1997, paras. 37-43, *H v. Belgium*, Application no 8980/80, 30 November 1987 paras. 37-48. See also IACHR, *Lopez Mendoza v. Venezuela*, merits, reparations and costs, 1 September 2011, para. 146 and footnote 244; *Apitz Barbera et al. v. Venezuela*, Preliminary objections, merits, reparations and costs, 5 August 2008, para. 90 and footnote 100.

⁵¹ See ECHR, *Gheorghe v. Romania*, Application no. 19215/04, 15 March 2007, para. 43.

⁵² See Correa (C.), Guillerot (J.) and Magarrell (L.), “Reparations and Victim Participation: A Look at the Truth Commission Experience”, in Ferstman (C.), Goetz (M.) and Stephens (A.) (Ed.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity*, Brill Academic Publishers, 2009, p. 10.

“A first step is to know the experience, situation and needs of victims. It is very important to gather this information directly from the victims, without prejudice to additionally organising consultations with the victims’ organizations. The direct testimonies from the victims about their condition are a fundamental input for designing a reparations programme. This is information that victims are well-placed to give, whereas they may be less able to offer concrete policy suggestions about how to define specific measures or policy directives”.⁵³

29. Furthermore, the participation of victims in the reparation proceedings as individuals is intended to ensure that the true and real expectations of victims are adequately considered.⁵⁴ *A contrario*, failing or neglecting to consult individual victims about their needs and/or expectations is bound to affect significantly or undermine the very objective of the reparations proceedings.⁵⁵

30. Accordingly, the Legal Representatives submit that the Chamber’s decision to dismiss the individual applications for reparations without examining their merits is vitiated by a material error in law and should thus be reversed.

2. The Trial Chamber erred in law by deciding to refer the case to a newly constituted Chamber at the reparations stage

31. The Legal Representatives aver that the Trial Chamber erred in law by deciding to refer the case to a newly constituted chamber at the reparations stage.

32. Pursuant to articles 39(2)(b)(ii) and 74(1) of the Rome Statute and Rule 39 of the Rules of Procedure and Evidence, “[t]he functions of the Trial Chamber shall be

⁵³ *Idem*, p. 14.

⁵⁴ See The Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice*, 2009, p. 15, available at: http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf. See also ICTJ, *Unfulfilled Expectations. Victims’ Perceptions of Justice and Reparations in Timor-Leste*, 2010, pp. 11-13, available at: <http://www.ictj.org/publication/unfulfilledexpectations-victims-perceptions-justice-and-reparations-timor-leste>.

⁵⁵ The South African experience is eloquent in this regard. According to experts: “[...] by failing to consult with survivor groups before deciding on the final amount for reparations, government wasted an opportunity to learn about the different survivor needs, which would have helped in designing a more comprehensive reparation policy with potential to optimize its effectiveness. The report also characterizes that failure as a lost opportunity for government to mend a difficult relationship between itself and survivor groups, including NGOs and other stakeholders lobbying for reparations”. See Makhalemele (O.), *Still not talking: Government’s exclusive reparations policy and the impact of the R30000 financial reparations on survivors*, Center for the Study of Violence and Reconciliation, 2004.

carried out by three judges of the Trial Division”⁵⁶, “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations”⁵⁷ and [t]he Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending”⁵⁸ but “[w]here an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74(1), he or she shall sit through all proceedings and deliberations of the case”.⁵⁹ Under article 76(2) and (3) of the Rome Statute, reparations proceedings must be conducted during any additional hearing or at the same time as the sentencing hearing, and in any event, “before the completion of the trial”.⁶⁰

33. It is evident from these provisions that since the same three judges must sit through all the proceedings and deliberations of the case, and the reparations proceedings are an integral part of the trial, the judges assigned to the Trial Chamber must continue to sit throughout the trial and the reparations proceedings, unless the Presidency has assigned one or more alternate judges to sit throughout the proceedings and deliberations of the case.

34. The need to maintain the same composition of the Trial Chamber throughout the trial and reparations proceedings is buttressed by the fact that when considering reparations, the Chamber must take into account all the relevant submissions and evidence, most of which have been presented during the main stage of the proceedings, *inter alia*, the extent of the harm caused to victims and members of their families, the cultural, social and economic context in which the crime was committed,

⁵⁶ See Article 39(2)(b)(ii) of the Rome Statute.

⁵⁷ See Article 74(1) of the Rome Statute.

⁵⁸ *Idem*. See also regulation 16 of the Regulations of the Court.

⁵⁹ See Rule 39 of the Rules of Procedure and Evidence.

⁶⁰ See Article 76(2) of the Rome Statute. See also in this regard, the *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*, *supra*, footnote 38, para. 86. See also Schabas (W.A.), “Article 76”, in Triffterer (O.) (Ed.), “Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, Second Edition”, Verlag C.H. Beck Hart Nomos Munich, 2008, p. 1413.

the circumstances determining the seriousness of the crime, etc. *Ulterius*, at no stage of the preparatory works preceding the adoption of the Rome Statute did the negotiators contemplate the possible deferral of the reparations proceedings to a Chamber other than the one dealing with the principal phase of the trial,⁶¹ even if it was geared towards a specific audience.

35. In this respect, the Legal Representatives also recall regulation 56 of the Regulations of the Court which provides that “[t]he Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial”. However, acting pursuant to this regulation, Trial Chamber I in its decision regarding the participation of victims at the trial held that:

The objective of [regulation 56 of the Regulations of the Court] is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.⁶²

36. It is thus evident that the Chamber itself considered that it was seized of the issue of reparations and was mindful that it has a responsibility to remain seized of the issue until the end of the reparations proceedings. It is equally evident that Trial Chamber I did not anticipate that the reparations proceeding would end upon the issuance of its Impugned Decision. If that was the case, the Chamber would not have delegated authority to the Trust Fund of Victims and the Registry.

⁶¹ 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.

⁶² See *Decision on victim participation*, Trial Chamber I, No: ICC-01/04-01/06-1119, 18 January 2008, See also *Decision on the Modalities of Victim Participation at Trial*, Trial Chamber II, No: ICC-01/04-01/06-1788, 22 January 2010, para. 60, as well as *Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings*, Trial Chamber III, No: ICC-01/05-01/08-807-Corr, 12 July 2010, para. 28.

37. The Legal Representatives further recall that Trial Chamber I itself recommended that the Presidency not appoint an alternate judge in this case after highlighting that “there being no known personal circumstances relating to any of the judges of the Chamber which raise any concerns that one of more of them will be unable to complete this trial”.⁶³

38. Accordingly, Trial Chamber I’s decision to relinquish the case at the reparations stage directly contravenes the provisions of articles 39(2)(b)(ii), 74(1) and 76 of the Rome Statute and contradicts the Chamber’s own prior decision concerning the possibility of designating an alternate judge, as well as its decision concerning the presentation of evidence in respect to reparations during the trial.⁶⁴

39. *Autem*, the Impugned Decision deviates from the jurisprudence established by the Chamber itself.

40. Indeed, in the Impugned Decision, the Chamber declared several times that “[r]eparations proceedings are an integral part of the overall trial process”.⁶⁵ In its decision of 22 May 2008,⁶⁶ Trial Chamber I also held that:

(i) “it is clear beyond doubt that during the trial the three judges shall function in *banco*”⁶⁷; (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”⁶⁸; 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)”.⁶⁹

41. *Ergo*, the Chamber itself adjudged that the same three judges must sit together throughout the proceedings, including the reparations proceedings. The Chamber’s

⁶³ 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*, 22 May 2008, ICC-01/04-01/06-1349, paras 22 and 23.

⁶⁴ See *Decision on victim participation*, *supra*, footnote 62.

⁶⁵ See the Impugned Decision, *supra*, footnote 11, paras. 260 and 267. See also in this regard, the *Decision on victim participation*, *supra*, footnote 62, paras 121 and 122.

⁶⁶ 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*, *supra*, footnote 63.

⁶⁷ *Idem*, para. 12.

⁶⁸ *Ibid.*, para 14(a).

⁶⁹ *Ibid.*, para. 15.

decision to relinquish the reparations proceedings to a newly constituted Chamber is therefore inconsistent with its own previous decisions and consequently not only propagates confusion and ambiguity in regard to the application of the Court's jurisprudence but also risks setting a precedent which is contrary to the intention of the drafters of the Rome Statute.

42. Finally, this decision may affect, or undermine, the victims' right to reparations under article 75 of the Rome Statute, since a new bench of judges who have not previously heard the instant case risk overlooking relevant submissions and evidence, most of which were presented during the main stage of the proceedings, *inter alia* on the extent of the harm caused to the victims and their families; the cultural, social and economic context in which the crime was committed; and the circumstances determining the gravity of the crime.

43. The Legal Representatives contend that this decision is tainted by a material error in law and should therefore be reversed.

3. The Trial Chamber erred in law by deciding to delegate its own reparations responsibilities to two non-judicial entities

44. The Legal Representatives aver that the Trial Chamber erred in law by deciding to delegate its responsibilities to two non-judicial entities: the Trust Fund for Victims and the Registry.

45. In Trial Chamber I's Impugned Decision, the responsibilities were delegated to two entities. The Trust Fund for Victims were tasked with the responsibility for (i) selecting and appointing the appropriate experts and overseeing their work;⁷⁰ (ii) determining the appropriate forms of reparations and implementing them;⁷¹ and (iii) identifying the victims and beneficiaries for the purposes of reparations;⁷² and the Registry was tasked with the responsibility of deciding the form of victim

⁷⁰ See the Impugned Decision, *supra* footnote 11, para. 265.

⁷¹ *Idem*, para. 266.

⁷² *Ibid.*, para 283.

participation in the reparations proceedings which would enable them to express their views and concerns.⁷³

46. The Legal Representatives submit that in granting the right to reparations to victims and beneficiaries, article 75 of the Rome Statute requires the Court to, *inter alia*, establish principles relating to reparations, determine the scope and extent of any damage, loss and injury to, or in respect of, victims or their beneficiaries,⁷⁴ publish the reparations proceedings,⁷⁵ appoint appropriate experts to assist it in determining the scope and 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 invite, as appropriate, the persons concerned to make observations on the expert's reports.⁷⁶

47. According to the Legal Representatives, while the term "Court" used in the provisions of those legal texts is not precisely defined, it can in no circumstances be construed as including the Trust Fund for Victims and/or the Registry.⁷⁷ *A propos*, the Legal Representatives observe that had the drafters of the Rules of Procedure and Evidence intended to impose these obligations on the Trust Fund for Victims and/or the Registry, they would have expressly referred to these entities.⁷⁸ It is therefore incumbent on the relevant Trial Chamber to fulfil its obligations in regard to reparations within the strict judicial framework provided for by the Court's texts. On the contrary, article 39(2) of the Rome Statute expressly provides that "[t]he judicial functions of the Court shall be carried out in each division by Chambers."

48. In this respect, the Trust Fund for victims was created "for the benefit of the victims of crimes within the jurisdiction of the Court and their families"⁷⁹ in order to

⁷³ *Ibid.*, para 268.

⁷⁴ See Article 75(1) of the Rome Statute and rules 94 and 95 of the Rules of Procedure and Evidence.

⁷⁵ See Rule 96 of the Rules of Procedure and Evidence.

⁷⁶ See Rule 97(2) of the Rules of Procedure and Evidence.

⁷⁷ The Legal Representative observes that unlike the Registry, the Trust Fund for Victims is not an organ of the Court under the terms of article 34 of the Rome Statute.

⁷⁸ See, for example, rules 94(2), 95(1) and 98(3) of the Rules of Procedure and Evidence.

⁷⁹ See Article 79(1) of the Rome Statute.

fulfil its double mandate entailing, firstly, the implementation of court-ordered reparations pursuant to article 75 of the Rome Statute and, secondly, the establishment of programmes to assist in the physical and psychological rehabilitation of victims and/or provide the material support they need.⁸⁰ It follows that, as far as reparations awarded under article 75 of the Rome Statute are concerned, the Trust Fund for Victims can only carry out tasks with a view to implementing court-ordered reparations rendered by the Chamber; it has neither the power nor the mandate to replace the Chamber in reparations proceedings or even to exercise certain judicial functions in this regard. The functions of Trust Fund for Victims in the context of its second mandate cannot be used as a relevant basis to allow it to usurp in any manner the duties of a Trial Chamber under article 75 of the Rome Statute, because the exercise of this mandate is subject to the availability of “other resources of the Fund”⁸¹ which “refers to resources other than those collected from awards for reparations, fines and forfeitures”.⁸² Accordingly, there is no nexus whatsoever between the second mandate and the reparations awarded by the Court.⁸³

49. Furthermore, rule 98(2), (3) and (4) of the Rules of Procedure and Evidence outline three situations in which the Court can order the payment of reparations through the Trust Fund for Victims. The provisions clearly state that in respect of Court ordered reparations, none of these three scenarios affords the Trust Fund control over the definition of reparations and that its role is limited to the execution of a reparations order, thereby acting as an intermediary between the Court and the victims. In fact, the Trust Fund for Victims is not listed under article 75(3) of the Rome Statute among the persons or entities from whom the Court may seek

⁸⁰ See Rule 98 of the Rules of Procedure and Evidence. See also Regulations of the Trust Fund for Victims, adopted at the 4th plenary meeting on 3 December 2005, No. ICC-ASP/4/Res.3.

⁸¹ See Rule 98(5) of the Rules of Procedure and Evidence.

⁸² See Article 47 of the Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3. See also, in this regard, “Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims”, ICC-01/04-439, 24 January 2008, paras. 5-17.

⁸³ See *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*, Trial Chamber I, ICC-01/04-492, 11 April 2008, p 7.

observations for the purposes of issuing an order pursuant to that article. However, the Chamber may, under article 79(2) of the Rome Statute and rule 148 of the Rules of Procedure and Evidence invite the representatives of the Trust Fund to submit observations on the transfer of fines or forfeitures to the Fund.

50. Upon reading the relevant provisions of the Regulations of the Trust Fund for Victims, it can also be inferred that the responsibilities of the Fund are restricted to implementing reparations orders issued by the Chamber and it has no autonomous powers on the matter. Article 43 of these regulations provides that “the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s)”.⁸⁴ Furthermore, article 45 of the regulations provides that, “[t]he Board of Directors may seek further instructions from the relevant Chamber on the implementation of its orders”. This substantiates the argument that the Trust Fund of Victims is merely an executor of the Trial Chamber’s reparation orders.⁸⁵

51. Finally, the Legal Representatives note that the Trust Fund for Victims operates under the authority of a Board of Directors which shall “in accordance with the provisions of the Rome Statute, the Rules of Procedure and Evidence, and the criteria to be determined by the Assembly of States Parties, establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by the Court.”⁸⁶ Nevertheless, these activities are clearly limited to managing the resources and the implementation of activities and projects.

⁸⁴ See Article 43 of the Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3

⁸⁵ In this regard, see Saabel (E.), “Article 79 of the Trust Fund for Victims”, in Fernandez (J.) and Pacreau (X.) (Ed.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, Editions Pedrone, Paris, 2012, pp. 1703 and 1704.

⁸⁶ See Resolution ICC-ASP/1/Res.6, adopted on 9 September 2002 on the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims, annex, para. 6.

52. With respect to the Registry, there is no basis for it to exercise certain judicial functions pertaining to reparations, as its responsibilities are restricted to “non-judicial aspects of the administration and servicing of the Court”.⁸⁷

53. The Legal Representatives observe that the Registry’s role as the “main administrative body” was clearly established in the draft statute produced by the International Law Commission in 1994,⁸⁸ and this point was never called into question in the subsequent preparatory works. Moreover, the wording of article 43 reflects almost exactly the Statutes of the ad hoc Tribunals by adopting the expression “non-judicial aspects”, particularly to emphasise that the Registry must maintain its neutrality and should not interfere with judicial functions.⁸⁹

54. Accordingly, the Legal Representatives submit that by deciding to delegate its reparations responsibilities to two non-judicial entities, the Trial Chamber has posited the reparations proceedings in this case outside any judicial context. In so doing, the Trial Chamber has denied the victims their right to participate, effectively and efficiently, in the reparations proceedings in accordance with the legal framework of the Court’s basic documents, thereby depriving those victims of the opportunity to exercise their right to seek reparations and to have their applications duly examined in accordance with article 75 of the Rome Statute.

55. In this case, only 85 victims submitted individual applications for reparations pursuant to article 75(1) of the Rome Statute, notwithstanding that in view of their magnitude and prevalence, the crimes of which Mr Thomas Lubanga was found guilty, engendered a “*significant number*” of victims.⁹⁰

⁸⁷ See Article 43(1) of the Rome Statute.

⁸⁸ See commentary (1) under article 5 regarding the organs of the Court and article 13 of the Report of the ILC on the work of its 46th session, 2 May-22 July 1994, supplement no. 10 (A/49/10), Yearbook of the ILC, Vol. II-2, pp 30 and 35.

⁸⁹ In this regard, see Cathala (B.), “Article 43: The Registry” in Fernandez (J.) and Pacreau (X.) (Ed.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, Editions Pedone, Paris, 2012, pp. 1038 and 1039.

⁹⁰ See Judgment, *supra*, footnote 1, paras. 857, 911 and 915. See also *Decision on Sentence pursuant to Article 76 of the Statute*, Trial Chamber I, ICC-01/04-01-06-2901, 10 July 2012, paras. 49 and 50.

56. It was incumbent upon the Trial Chamber to give full effect to the victims' rights to reparations, especially by ensuring that all necessary measures are taken to give adequate publicity to reparation proceedings⁹¹ in order to enable any victims concerned to submit an application for reparations pursuant to article 75(1) of the Rome Statute. The Chamber's responsibility in this matter is particularly important as this is the first case before the Court, hence the ignorance on the part of the majority of victims concerned of their rights as enshrined in the Rome Statute.

57. By failing to discharge its obligations, the Chamber has altogether denied a majority of the concerned victims the opportunity to participate in or contribute in one way or another to the reparations proceedings, even though individual victim participation in the reparations proceedings is necessary to ensure the efficiency and effectiveness of these proceedings.⁹² The Chamber's failure is all the more egregious in that it delegated to the Trust Fund the very few individual applications for reparations submitted to it in this case. Finally, such failure has resulted in the creation of a perverse situation where a large majority of the victims concerned in this case continue to lack the *locus standi* to exercise any of the rights or prerogatives granted in the Court's texts. Thus, described by the Appeals Chamber as "unidentified individuals" they do not have the right to participate in the appeals against the Impugned Decision,⁹³ despite the fact that this decision specifically and materially affects their rights and interests as "victims who have not submitted applications but who may benefit from an award for collective reparations",⁹⁴ particularly with respect to the Chamber's decision to delegate to the Trust Fund for Victims all its responsibilities with regard to reparations, issues concerning the applicable standard of proof and the decision to relinquish jurisdiction in favour of a newly constituted Chamber

⁹¹ See rule 96 of the Rules of Procedure and Evidence.

⁹² See *supra*, para. 28.

⁹³ See *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*, *supra* footnote 38, para. 72.

⁹⁴ 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, para. 12(b).

58. The Legal Representatives aver that the Trial Chamber's decision to delegate its own reparations responsibilities to two non-judicial entities is vitiated by a material error in law and should thus be set aside. Any other interpretation would not only be contrary to the letter of the founding documents of the Court but would also violate the rights granted to victims in these documents.

IV. RELIEF SOUGHT

59. Article 83 of the Rome Statute regulates appellate proceedings provided for in article 81 of the Statute, particularly, appeals against a conviction or sentence. There are no provisions in the Rome Statute for appeals against reparations orders, although this lacuna is addressed by rule 153 of the Rules of Procedure and Evidence.⁹⁵

60. Rule 153(1) of the Rules of Procedure and Evidence provides that, "[t]he Appeals Chamber may confirm, reverse or amend a reparation order made under article 75". Therefore, the Appeals Chamber can substitute its own finding for that of the Trial Chamber in respect of reparations orders.

61. The Legal Representatives submit that since the Trial Chamber failed to discharge its reparations obligations in this case, it would not be sufficient for the Appeals Chamber simply to issue a new reparations order without initiating fresh reparations proceedings in accordance with the legal requirements.

62. In this regard, the Legal Representatives submit that even though rule 153 of the Rules of Procedure and Evidence does not expressly set out the powers of the Appeals Chamber to request the presentation of evidence for the purposes of determining an appeal against a reparations order, the Appeals Chamber has the power pursuant to rule 149 of the Rules of Procedure and Evidence to request the submission of "all evidence that it considers necessary for the determination of the

⁹⁵ See Brady (H.), "Appeal and Revision", in Lee (R.S.) (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 587.

truth”.⁹⁶ Indeed, rule 149 of the Rules of Procedure and Evidence provides that “[p]arts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber”.

63. In the Impugned Decision, the Trial Chamber restricted itself to establishing the principles applicable to reparations, but it neither established nor implemented any procedures for determining “the scope and extent of any damage, loss and injury to, or in respect of, victims or their beneficiaries”, as it is required to by article 75 of the Rome Statute.

64. The Legal Representatives submit that given the Trial Chamber’s failure to discharge its responsibilities as regards reparations, it is incumbent upon the Appeals Chamber, pursuant to rule 153 of the Rules of Procedure and Evidence, to discharge the Court’s reparations responsibilities under article 75 of the Rome Statute in lieu of the Trial Chamber.

65. In particular, the Legal Representatives submit that the Appeals Chamber should implement the reparations proceedings and, in particular, (1) examine the individual reparations applications already submitted and issue a decision on the merits of these applications; (2) give full effect to the victims’ rights to reparations as enshrined in the Court’s texts by allowing every interested victim to submit an application for reparations pursuant to article 75 of the Rome Statute, establishing a time limit, *inter alia*, to enable them to submit any evidence or any supporting documents substantiating their applications; (3) establish a time limit for victims to file applications and submit evidence, where necessary, including on the appointment of qualified experts to assist the Appeals Chamber in determining the scope and extent of any damage, loss and injury to, or in respect of, victims and

⁹⁶ See Article 69(3) of the Rome Statute in conjunction with Rule 149 of the Rules of Procedure and Evidence. See also, in this regard, Brady (H.), “Appeal and Revision”, in Lee (RS) (Ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 588. See, in particular, the joint proposal by Australia and France on the provisions for appeal proceedings, PCNICC/1999/WGRPE/DP.26 (29 July 1999), which subsequently served as the basis for the drafting of rule 153.

suggest various options concerning the appropriate types and modalities of reparations; and to invite, as appropriate, interested persons, including the victims, to make submissions on the reports of the experts;⁹⁷ (4) schedule a hearing on reparations pursuant to article 75 of the Rome Statute; and (5) establish a time limit for presenting final submissions on this matter.

For these reasons, the Legal Representatives respectfully request the Appeals Chamber to:

SET ASIDE the Impugned Decision insofar as it provides for (i) the dismissal of the individual applications for reparations without examining them on their merits; (ii) the relinquishment of the instant case to a newly constituted chamber; and (ii) the Chamber's delegation of its reparations responsibilities to the Trust Fund for Victims and the Registry; and

IMPLEMENT REPARATIONS PROCEEDINGS pursuant to article 75 of the Rome Statute.

[signed]
Paolina Massida

[signed]
Carine Bapita Buyangandu
for V02 Team of Legal Representatives

Dated this 5 February 2013
At The Hague, The Netherlands, and Kinshasa, Democratic Republic of the Congo

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