



Original: French

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

Date: 1 October 2012

THE APPEALS CHAMBER

Before

Judge Erkki Kourula
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

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

Source: Office of Public Counsel for Victims

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

Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Sarah Pellet
Mr Dmytro Suprun

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 14 March 2012, Trial Chamber I (“the Chamber”) delivered its Judgment pursuant to article 74 of the Rome Statute¹ (“Judgment”) in 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 On the same date, the Chamber made an order³ inviting the parties and the participants to file observations on issues relating to reparations and the applicable procedure.⁴

2. On 5 April 2012, the Chamber rendered a decision⁵ in which it (i) instructed the Registry to appoint the Office of Public Counsel for Victims (“OPCV”) as the legal representative for any unrepresented applicants for reparations and to communicate to it any 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 in that connection, on behalf of those victims who had not submitted applications but who might fall within the scope of an order for collective reparations.⁶ On 18 April 2012, the OPCV submitted its observations concerning the principles to be applied by the Chamber with regard to reparations and the procedure applicable in that connection.⁷ The other legal

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 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.

⁶ *Idem*, para. 13.

⁷ See “Observations on issues concerning reparations”, ICC-01/04-01/06-2863, 18 April 2012.

representatives of victims filed their observations in the same matter on the same date.⁸

3. On 7 August 2012, the Chamber rendered a *Decision establishing the principles and procedures to be applied to reparations* (the “Impugned Decision”).⁹

4. On 13 August 2012, the Defence lodged an application for leave to appeal against the Impugned Decision under article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence¹⁰ (“Interlocutory Appeal OA21”). On 17 August 2012, Principal Counsel of the OPCV and the V02 team of legal representatives filed a joint response to the Defence’s application.¹¹ On 29 August 2012, the Chamber issued a decision,¹² in which it granted the Defence leave to appeal against the Impugned Decision as regards four issues.¹³

5. On 24 August 2012, Principal Counsel of the OPCV and the V02 team of legal representatives lodged an appeal against the Impugned Decision pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence¹⁴ (“Appeal A”). On 3 September 2012, the V01 team of legal representatives lodged an appeal against the Impugned Decision under article 82(4) of the Rome Statute and

⁸ See “*Observations du groupe de victimes V02 concernant la fixation de la peine et des reparations*”, ICC-01/04-01/06-2869, 18 April 2012 and 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, et a/1622/10, ICC-01/04-01/06-2864-tENG, 18 April 2012.

⁹ See *Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), ICC-01/04-01/06-2904, 7 August 2012 (the “Impugned Decision”).

¹⁰ See “Defence application for leave to appeal against the Decision establishing the principles and procedures to be applied to reparation issued on 7 August 2012”, ICC-01/04-01/06-2905-tENG, 13 August 2012.

¹¹ See “*Réponse conjointe à la “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Decision establishing the principles and procedures to be applied to reparation rendue le 7 août 2012”*”, ICC-01/04-01/06-2907, 17 August 2012.

¹² 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.

¹³ *Idem*, paras. 9, 10 and 40.

¹⁴ 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-tENG OA 21, 24 August 2012.

rule 150 of the Rules of Procedure and Evidence¹⁵ (“Appeal A2”). On 6 September 2012, the Defence lodged an appeal against the Impugned Decision under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence¹⁶ (“Appeal A3”).

6. On 10 September 2012, the Defence filed a document in support of its Interlocutory Appeal OA21.¹⁷ On 13 September 2012, Principal Counsel of the OPCV lodged an application concerning the participation of victims in Interlocutory Appeal OA21.¹⁸

7. On 17 September 2012, the Appeals Chamber delivered its *Directions on the conduct of the appeal proceedings*,¹⁹ in which it invited, *inter alia*, the OPCV to indicate who it was representing before the Appeals Chamber²⁰ and to file, by 1 October 2012, submissions on the admissibility of appeals OA21, A, A2 and A3, and the question of the making of observations on the appeals, including the following issues: (i) the nature of the Impugned Decision, and (ii) whether Mr Lubanga, claimants 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.²¹ Furthermore, the Appeals Chamber invited the OPCV to file observations on two Defence requests for suspensive effect.²²

¹⁵ 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-tENG A2, 3 September 2012.

¹⁶ 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-tENG A3, 6 September 2012.

¹⁷ 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-tENG OA 21, 10 September 2012.

¹⁸ See “*Requête relative à la participation des victimes à l’appel interlocutoire interjeté par la Défense à l’encontre de la Decision establishing the principles and procedures to be applied to reparations*” délivrée par la Chambre de première instance I le 7 août 2012”, ICC-01/04-01/06-2921 OA21, 13 September 2012.

¹⁹ See *Directions on the conduct of the appeal proceedings* (Appeals Chamber), ICC-01/04-01/06-2923 A A2 A3 OA21, 17 September 2012 (“Appeal Chamber Directions”).

²⁰ *Idem*, para. 1.

²¹ *Ibid.*, para. 2.

²² *Ibid.*, para. 4.

8. Accordingly, Principal Counsel of the OPCV, as legal representative of a number of victims (“Legal Representative”) hereby submits the information requested by the Appeals Chamber and her observations on the admissibility of appeals OA21, A, A2 and A3.

II. INDIVIDUALS REPRESENTED BY THE OPCV

9. For the purposes of the proceedings concerning appeals OA21, A, A2 and A3, the Legal Representative is acting on behalf of the following:²³ (i) four victims granted leave to participate in the proceedings,²⁴ whose leave was withdrawn by a majority of Trial Chamber I in the Judgment²⁵ and who have submitted applications for reparations;²⁶ (ii) two unrepresented claimants for reparations;²⁷ and (iii) victims who have not submitted applications for reparations but who might be affected by collective reparations.²⁸

²³ The Legal Representative observes that since Mr Joseph Keta’s suspension ended on 24 September 2012, the OPCV no longer represents 33 claimants represented by Mr Keta. See *Notification of the end of the period of suspension of Mr. Joseph Keta in accordance with the decision of the Disciplinary Board dated 18 June 2012* (Presidency), ICC-01/04-01/06-2925, 27 September 2012.

²⁴ The victims concerned are: a/0047/06, a/0048/06, a/0050/06 and a/0052/06. See *Corrigendum to Decision on the applications by victims to participate in the proceedings* (Trial Chamber I), ICC-01/04-01/06-1556-Corr-Anx1, 13 January 2009 (dated 15 December 2008), para. 137(a). See also the transcript of the hearing of 16 January 2009, ICC-01/04-01/06-T-104-FRA ET WT, pp. 32-34.

²⁵ See Judgment, *supra* footnote 1, paras. 484 and 1362.

²⁶ See the “First Transmission to the Trial Chamber of applications for reparations”, 01/04-01/06-2852, 28 March 2012, Annexes 1 to 4.

²⁷ The applicants concerned are: a/0198/09 and a/2917/11. See *Decision on the OPCV’s request to participate in the reparations proceedings*, *supra* footnote 5, para. 13. See also “Notification of appointment of the Office of Public Counsel of Victims as legal representative of unrepresented applicants for reparations”, ICC-01/04-01/06-2883, 23 May 2012, pp. 3 and 4.

²⁸ See *Decision on the OPCV’s request to participate in the reparations proceedings*, *supra* footnote 5, para. 13.

III. THE NATURE OF THE IMPUGNED DECISION

10. The Legal Representative submits that, having regard to its content and the way in which it is formulated, the Impugned Decision constitutes an “order for reparations” issued pursuant to article 75 of the Rome Statute within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

11. Firstly, the Trial Chamber decided not to examine the individual applications for reparations received by the Registry,²⁹ having rejected them without an examination on the merits, and ordered that they be transferred to the Trust Fund for Victims (“TFV”), leaving the issue of whether claimants had to be part of its programmes for reparations purposes at the entire discretion of the TFV.³⁰ Moreover, in the instant case, the Chamber approved the “community-based approach”³¹ to collective reparations and held that “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.”³²

12. Moreover, the Trial Chamber delegated its responsibilities with regard to reparations to two non-judicial entities. Firstly, it delegated to the TFV responsibility for (i) selecting and appointing the appropriate experts and overseeing their work,³³ (ii) determining the appropriate forms of reparations and implementing them,³⁴ and (iii) identifying the victims and beneficiaries for the purposes of reparations.³⁵ Secondly, it delegated to the Registry responsibility for deciding the manner in which victims were to participate in the reparations proceedings so as to enable them to express their views and concerns.³⁶ The Chamber also approved (i) the reparations

²⁹ See the Impugned Decision, *supra* footnote 9, para. 289(a).

³⁰ *Idem*, paras. 284 and 289(a).

³¹ *Ibid.*, para. 274.

³² *Ibid.*, para. 269.

³³ *Ibid.*, para. 265.

³⁴ *Ibid.*, para. 266.

³⁵ *Ibid.*, para. 283.

³⁶ *Ibid.*, para. 268.

implementation plan suggested by the TFV,³⁷ and (ii) the TFV's method of assessing the harm suffered by victims.³⁸

13. Lastly, 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”,³⁹ 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 reparations that are to be made through the TFV and funded by any voluntary contributions.”⁴⁰

14. Accordingly, the Legal Representative submits that in the Impugned Decision, the Trial Chamber not only established the principles applicable to reparations⁴¹ but also, at this 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. It is manifestly not the Chamber's intention to review individual applications for reparations or intervene on any substantive issues relating to reparations, since it has delegated responsibility for any substantive decision in this regard to the TFV, while limiting the role of a newly constituted chamber to monitoring the decisions of the TFV. Accordingly, no decision emanating from a newly constituted chamber may be considered to be an “order for reparations” issued 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. The Legal Representative further submits that in the event that the Appeals Chamber decides that the Impugned Decision does not constitute an “order for reparations” and does not warrant appeal under article 82(4) of the Rome Statute and

³⁷ *Ibid.*, paras. 281 and 282.

³⁸ *Ibid.*, para. 283.

³⁹ *Ibid.*, para. 286.

⁴⁰ *Ibid.*, para. 287.

⁴¹ *Ibid.*, paras. 182-259.

rule 150 of the Rules of Procedure and Evidence, the reparations proceedings instituted by Trial Chamber I itself on 14 March 2012,⁴² 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.

16. As regards Trial Chamber I's finding that the Impugned Decision does not constitute an "order for reparations" within the meaning of article 82(4) of the Rome Statute,⁴³ the Legal Representative submits that it is incumbent on the Appeals Chamber, and not a Trial Chamber, to establish whether a decision delivered in relation to reparations is covered by the appeals procedure as provided for by article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

IV. VICTIM PARTICIPATION IN INTERLOCUTORY APPEAL OA21

17. In the unlikely event that the Appeals Chamber were to decide that the Impugned Decision does not constitute an "order for reparations" and is not therefore covered by the appeals procedure under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence, the Legal Representative reiterates all her observations submitted to the Appeals Chamber in her application of 13 September 2012.⁴⁴ In particular, she again submits that (i) having regard to the central role afforded to victims by the Court's texts in the context of the reparations procedure under article 75 of the Rome Statute, the Appeals Chamber has convincing reasons to depart from its previous jurisprudence as regards victim participation in interlocutory appeals which did not concern decisions delivered pursuant to that article; (ii) since the individuals whom she represents were given leave by Trial Chamber I to participate in the reparations proceedings in the context of the instant case, they should *a fortiori* automatically participate in any interlocutory appeal

⁴² See *Scheduling order concerning timetable for sentencing and reparations*, *supra* footnote 3.

⁴³ See *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*, *supra* footnote 12, para. 20.

⁴⁴ See "*Requête relative à la participation des victimes à l'appel interlocutoire interjeté par la Défense à l'encontre de la Decision establishing the principles and procedures to be applied to reparations délivrée par la Chambre de première instance I le 7 août 2012*", *supra* footnote 18.

relating to a decision arising out of those proceedings, including in relation to the Impugned Decision; and (iii) if the Appeals Chamber were to apply its previous jurisprudence to the instant case, the individuals represented by the OPCV would be given leave to participate in Interlocutory Appeal OA21 because the Impugned Decision has a specific and concrete effect on their interests, their participation in that appeal is appropriate and does not affect the rights of the convicted person and/or the guarantees of a fair trial in any way.⁴⁵

18. The Legal Representative further submits that there is nothing to prevent the Appeals Chamber from using its discretion to establish the criteria for assessing procedural status in the context of an interlocutory appeal against a decision under article 75 of the Rome Statute. In this connection, the Legal Representative refers to the arguments set out in paragraphs 26 to 28 *infra* which are applicable to this case *mutatis mutandis*.

V. RIGHT OF VICTIMS TO APPEAL AGAINST THE IMPUGNED DECISION UNDER ARTICLE 82(4) OF THE ROME STATUTE

19. If, rightly, the Appeals Chamber were to decide that the Impugned Decision constitutes an “order for reparations” issued under article 75 of the Rome Statute, the Legal Representative submits that the victims who were granted leave by Trial Chamber I to participate in the reparations proceedings in this case and whose interests are affected by the Impugned Decision, should *a fortiori* be able to appeal against it in accordance with article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

20. The Legal Representative submits that in the absence of any restrictions in this connection in the Court’s texts, the term “victim” referred to in article 82(4) of the Rome Statute should be interpreted in the broad sense of the word as used throughout the Court’s legal texts,⁴⁶ that is to say, as meaning, in the instant case, any

⁴⁵ *Idem*, paras. 14-31.

⁴⁶ The Legal Representative observes that the various provisions of the Court’s texts use the general term “victim” to cover not only those who have been granted victim status by a competent Chamber but also applicants for the purposes of participation, victims who have communicated with the Court

natural or legal person claiming to have suffered harm as the result of the commission of the crimes of which Mr Thomas Lubanga Dyilo was found guilty, insofar as their personal interests are affected by the Impugned Decision.

21. In this regard, if the Appeals Chamber were to consider that the right to appeal against the Impugned Decision under article 82(4) of the Rome Statute extends only to those having been granted victim status and having been granted leave to participate in the proceedings, no one with an interest in obtaining reparations in the instant case would qualify since none of those people have ever had their victim status judicially determined in accordance with rule 85 of the Rules of Procedure and Evidence for the purpose of participating in the reparations proceedings. In fact, the Trial Chamber decided not to examine the individual applications for reparations received by the Registry,⁴⁷ having rejected them with no examination as to the merits, and having ordered them to be transferred to the TFV, while leaving it to the TFV to decide whether the claimants should be included in its reparations programmes.⁴⁸

22. Accordingly, the Legal Representative submits that the right to appeal against the Impugned Decision under article 82(4) of the Rome Statute must extend to any person claiming to be a victim whose personal interests are affected, specifically and concretely, by that decision, including claimants for reparations and victims who may be affected by collective reparations, having regard, further, to the fact that Trial

at the investigation stage, or simply any victim who has not even asked to participate in the proceedings. In fact, article 68(1) of the Rome Statute requires the Court to protect the safety, well-being, dignity and privacy of “victims” at all stages of the proceedings. Rule 93 of the Rules of Procedure and Evidence allows Chambers to seek the views of “other victims”, that is to say, other victims irrespective of their participation in the procedure, on any issue. Article 15(3) of the Rome Statute permits any “victim” to make representations at the request of the Prosecutor for the purposes of authorisation to proceed with an investigation. Article 19(3) of the Rome Statute allows any “victim” to submit observations to the Court in the event of a challenge to the Court’s jurisdiction and the admissibility of the case. Rule 92(2) of the Rules of Procedure and Evidence requires the Court to notify the Prosecutor’s decision not to proceed with an investigation or not to prosecute, *inter alia*, to victims who have communicated with the Court in respect of the situation or case in question”.

⁴⁷ See the Impugned Decision, *supra* footnote 9, para. 289(a).

⁴⁸ *Idem*, paras. 284 and 289(a).

Chamber I authorised them to participate in the reparations proceedings through the OPCV.

23. In that connection, the Court's texts make a clear distinction between victim participation, firstly in the context of determination of the guilt or innocence of the accused in accordance with rule 89 of the Rules of Procedure and Evidence, and secondly in the reparations proceedings in accordance with rule 94 of the Rules of Procedure and Evidence, and to that end, provide two separate channels by which victims may request to participate in two different procedures.⁴⁹ Thus, victim participation in the context of determining the guilt or innocence of the accused cannot be a determining factor for participation in the reparations proceedings. Consequently, the system applicable to victim participation in the context of determination of the guilt or innocence of the accused cannot apply to victims wishing to participate in the reparations proceedings, and even less so to victims wishing to lodge an appeal under article 82(4) of the Rome Statute.

24. For the purpose of determining victim status at the trial stage, Trial Chambers I, II and III have systematically applied the *prima facie*⁵⁰ standard of proof. The majority of Trial Chamber I, however, surprisingly⁵¹ applied the "beyond all reasonable doubt" standard of proof in order to determine the victim status of individuals having dual victim-witness status, and consequently, withdrew their status of victim-participant in the proceedings in the instant case.⁵² However, Trial Chamber I itself acknowledged that much lower and more flexible standards of proof than those applicable at the trial stage should apply for the purposes of determining

⁴⁹ See regulations 86 and 88 of the Regulations of the Court.

⁵⁰ See *Decision on victims' participation* (Trial Chamber I), ICC-01/04-01/06-1119, 18 January 2008, para. 99; *Decision on the treatment of applications for participation* (Trial Chamber II), ICC-01/04-01/07-933-tENG, 26 February 2009, para. 10; and *Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants* (Trial Chamber III), ICC-01/05-01/08-699, 22 February 2010, para. 19.

⁵¹ The Legal Representative notes that in accordance with article 66(3) of the Rome Statute, the standard of proof "beyond all reasonable doubt" applies for the purposes of determining the innocence or guilt of the accused.

⁵² See Judgment, *supra* footnote 1, paras. 247, 268, 288, 480, 484 and 1362.

victim participation in the reparations proceedings,⁵³ a conclusion entirely supported by international jurisprudence⁵⁴ and legal authorities.⁵⁵

25. The Legal Representative submits in this regard that, were the Appeals Chamber to decide that only those who had been granted victim status at the trial stage could appeal against the Impugned Decision in accordance with article 82(4) of the Rome Statute, such a decision would not only be devoid of any legal basis but would also run counter to simple common sense. Firstly, it would mean that the standard of proof applicable at the trial stage should apply *in extenso* for the purposes of determining victim participation in the reparations proceedings and *a fortiori* for the purposes of determining their standing to lodge an appeal under article 82(4) of the Rome Statute flowing from those proceedings. Secondly, as regards victims having submitted applications for reparations but who did not seek to participate in determining the guilt or innocence of the Accused, that would amount, purely and simply, to denying those victims the right to exercise their right under article 75 of

⁵³ *Idem*, paras. 251-254.

⁵⁴ See Human Rights Commission, *Elena Beatriz Vasilskis v. Uruguay*, Communication no. 80/1980, UN Doc. CCPR/C/OP/2 at 105 (1990), 18th session, para. 10.4. See also IACHR, *Cantoral-Benavides v. Peru*, Merits, Judgment of 18 August 2000, para. 47; *Castillo-Petruzzi et al.*, 30 May 1999, para. 62; *Loayza-Tamayo*, Reparations, Judgment of 27 November 1998, Series C no. 42 (1998), para. 51; *Paniagua Morales et al. v. Guatemala*, Merits, 8 March 1998, para. 72; *Blake v. Guatemala*, Merits, 24 January 1998, para. 49; *Gangaram Panday v. Surinam*, Merits, Reparations and Costs, Judgment of 21 January 1994, Series C no. 16, para. 49; and *Gangaram-Panday v. Surinam*, Merits, Reparations and Costs, Judgment of 21 January 1994, Series C no. 16, para. 49. See also the *Governing Rules of the Claims Resolution Tribunal for Dormant Accounts*, Article 17, para. 1. The document is available on the following site: <http://www.crt-ii.org/faqs.phtml>. See also the *Common guidelines for the partner organisations concerning the compensation of other personal injuries*, adopted by the Board of Trustees of the Foundation “Remembrance, Responsibility and Future” on 21 June 2001, para. 6. The document is available on the following site: www.stiftung-evz.de. See also the *International Organisation for Migration, Property Claims Commission, Supplementary Principles and Rules of Procedure*, 29 January 2002, Sections 22.1 and 22.2. The document is available on the following site: www.compensation-for-forced-labour.org. See, lastly, the *Informe de la Comision Nacional sobre Prision Politica y Tortura* (Santiago, 2005), referred to in DE GRIEF (P.), *Paper on Implementation of Reparations*, 2006. The document is available on the following site: <http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf>.

⁵⁵ In this sense, see Lewis, P. and Friman, H., “Reparations to Victims”, in LEE, R.S. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., New-York, 2001, pp. 483 and 484; McCarthy, C., *Reparations and Victim Support in the International Criminal Court*, Cambridge: CUP, 2012, Chapter VIII; Niebergall, H., *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in FERSTMAN, C., Goetz, M. and Stephens, A. (ed.), *Reparations for Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff, 2009; van Jacomijn Haersolte and van Hof, *Innovations to Speed Mass Claims: New Standards of Proof*, in *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, 2006, pp. 14-22.

the Rome Statute to participate, effectively and expeditiously, in the reparations proceedings, and, in particular, to appeal against an order for reparations in accordance with article 82(4) of the Rome Statute, even when the Impugned Decision has a specific and concrete effect on their interests. The same conclusion also applies to victims who have not submitted applications for reparations but who could be affected by collective reparations. Lastly, as regards victims initially granted leave to participate in the proceedings and who had that status withdrawn by the Judgment, it would mean firstly approving the application of the highest standard of proof, that of “beyond all reasonable doubt”, for the purposes of determining victim status in the proceedings, and secondly placing those individuals in a clearly unfair, even discriminatory situation in relation to other victims whose status was determined on the basis of the *prima facie* standard. In this regard, the Legal Representative relies on the dissenting opinion of Judge Odio Benito attached to the judgment⁵⁶ and repeats all the observations of 23 March 2012 submitted to Trial Chamber I.⁵⁷

26. The Legal Representative notes that according to the jurisprudence of the Appeals Chamber, that Chamber, in principle, would not itself make first-hand determinations with respect to the victim status of persons wishing to participate in an appeal.⁵⁸ That jurisprudence concerns the participation of victims in an interlocutory appeal, while no appeal has as yet been lodged before the Appeals Chamber under article 82(4) of the Rome Statute. The Legal Representative submits that nothing prevents the Appeals Chamber from departing from that jurisprudence and, at its discretion, establishing criteria for determining procedural status under that article. More particularly, it should be incumbent upon the Appeals Chamber only to determine whether the legal representative of victims whose interests are

⁵⁶ See *Separate and Dissenting Opinion of Judge Odio Benito*, ICC-01/04-01/06-2842, 14 March 2012, pp. 608-624.

⁵⁷ See “Request for reconsideration of Trial Chamber I’s decision to withdraw the status of participating victims in the proceedings to a/0047/06, a/0048/06, a/0050/06 and a/0052/06”, ICC-01/04-01/06-2845, 23 March 2012, paras. 11-22.

⁵⁸ See *Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation”* (Appeals Chamber), ICC-01/04-01/06-1335 OA9 OA10, 16 May 2008, para. 40.

affected by the impugned Decision has the right to appeal against that decision under article 82(4) of the Rome Statute, irrespective of whether or not they have been granted victim status in the context of determination of the guilt or innocence of the accused.

27. The Legal Representative submits that victims who submitted applications for reparations in the instant case should therefore be entitled to appeal against the Impugned Decision under article 82(4) of the Rome Statute since that decision has a specific and concrete effect on their personal interests. In fact, the Trial Chamber decided to reject all applications for reparations that had been submitted to it without an examination on the merits.⁵⁹ Furthermore, procedural status under article 82(4) of the Rome Statute should also extend to victims who did not submit applications for reparations but who could be affected by collective reparations, since the Impugned Decision has a specific and concrete effect on their personal interests, with particular regard to the Trial Chamber's decision to delegate to the TFV all its responsibilities in relation to reparations, issues concerning the applicable standard of proof and the decision to relinquish jurisdiction in favour of a newly constituted Chamber.

28. The Legal Representative considers that while the potential beneficiaries of collective reparations have not yet been identified, it is important that their interests be represented adequately at this stage of the proceedings. In that regard, Trial Chamber I has already considered that it is important to safeguard the rights of potential beneficiaries of collective reparations and to represent their interests in the reparations proceedings in the instant case.⁶⁰ Furthermore, the Chamber considered that the principle governing issues relating to reparations in the legal context of the Court apply to all victims and not just to those who have submitted an application in

⁵⁹ See the Impugned Decision, *supra* footnote 9, paras. 284 and 289(a).

⁶⁰ See *Decision on the OPCV's request to participate in the reparations proceedings*, *supra* footnote 5, paras. 11 and 12(b).

that respect,⁶¹ especially as potential claimants did not have the possibility of submitting applications for reparations, given the swiftness of the proceedings. Lastly, in order to give full effect to victim participation in the reparations proceedings in this case, the Registry recently rightly considered that it was in the interest of the victims concerned not to change their legal representatives and, accordingly, decided that the OPCV should continue to represent victims who may ultimately benefit from reparations,⁶² which representation is in line with the OPCV's mandate to represent the general interests of victims in proceedings before the Court.

VI. THE RIGHT OF VICTIMS TO SUBMIT OBSERVATIONS IN RESPONSE TO APPEALS AGAINST THE IMPUGNED DECISION IN ACCORDANCE WITH ARTICLE 82(4) OF THE ROME STATUTE

29. The Legal Representative submits that victims who have been granted leave by Trial Chamber I to participate in the reparations proceedings in the context of this case and whose interests are affected by the Impugned Decision should *a fortiori* be able to submit observations in response to any appeal lodged under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence, having regard to the same arguments as those advanced in part V *supra*.

VII. THE RIGHT OF THE DEFENCE TO APPEAL AGAINST THE IMPUGNED DECISION IN ACCORDANCE WITH ARTICLE 82(4) OF THE ROME STATUTE

30. If, rightly, the Appeals Chamber were to decide that the Impugned Decision constitutes an “order for reparations” rendered in accordance with article 75 of the Rome Statute, the Legal Representative submits that the Defence could not appeal against that decision under article 82(4) of the Rome Statute, since that decision does not have a specific and concrete effect on the rights and interests of the convicted person.

⁶¹ See *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*, *supra* footnote 12, para. 28. See also the Impugned Decision, *supra* footnote 9, para. 255.

⁶² See “Notification of appointment of the legal representatives of victims and applicants for reparations”, ICC-01/04-01/06-2910, 27 August 2012, pp. 4 and 5.

31. The Trial Chamber has ruled that Mr Lubanga has no assets or property that could be used for the purposes of reparations and that he is only able to contribute to non-monetary reparations, and then only with his agreement.⁶³ The Chamber has also ruled that any reparations measure should be implemented via the TFV using a “community-based approach” with voluntary contributions.⁶⁴ However, orders awarding collective reparations cannot be made directly against the convicted person and may only be executed through the TFV.⁶⁵ Lastly, the scenario suggested by the Chamber that property and assets belonging to Mr Lubanga could be identified and used for the purposes of potential orders for reparation in this case⁶⁶ is purely theoretical as it has no actual basis.

VIII. DEFENCE APPLICATIONS FOR SUSPENSIVE EFFECT

32. The Legal Representative observes that the Defence uses exactly the same arguments in support of both its applications for suspensive effect of the Impugned Decision.⁶⁷ However, the Defence’s applications arise out of two separate procedures: the interlocutory appeal procedure under article 82(1)(d) of the Rome Statute and the appeal procedure under article 82(4) of the Rome Statute, which are governed by two different legal regimes.

33. With regard to the interlocutory appeal lodged by the Defence under article 82(1)(d) of the Rome Statute, the Legal Representative submits that the issue of suspensive effect is covered by article 82(3) of the Rome Statute and rule 156(5) of the Rules of Procedure and Evidence. However, with regard to the appeal lodged by the Defence under article 82(4) of the Rome Statute, the issue of suspensive effect cannot be examined on the same basis but is covered by the rule 150(4) of the Rules of

⁶³ See the Impugned Decision, *supra* footnote 9, para. 269.

⁶⁴ *Idem*, para. 274.

⁶⁵ See rule 98 of the Rules of Procedure and Evidence.

⁶⁶ See the Impugned Decision, *supra* footnote 9, paras. 276-280.

⁶⁷ 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”, *supra* footnote 16, paras. 12-15. See also “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”, *supra* footnote 17, paras. 72-75.

Procedure and Evidence, which provides that if no appeal is lodged against the order for reparations in accordance with article 82(4) of the Rome Statute, that order shall become final. It follows that if an appeal is lodged against the order for reparations under article 82(4) of the Rome Statute, that order cannot become final – and therefore enforceable – until the appeal has been examined by the Appeals Chamber. In other words, the lodging of an appeal against the order for reparations under article 82(4) of the Rome Statute entails automatic suspension of that order, without an application to that effect being required.

34. The Legal Representative submits that because in the instant case the Defence, the OPCV and the V01 and V02 teams have appealed against the Impugned Decision in accordance with article 82(4) of the Rome Statute, that decision should be considered automatically suspended, pursuant to rule 150(4) of the Rules of Procedure and Evidence.

35. In the unlikely event that the Appeals Chamber were to decide that the Impugned Decision does not constitute an “order for reparations” and is not therefore covered by the appeal procedure under article 82(4) of the Rome Statute, and rule 150 of the Rules of Procedure and Evidence, the Legal Representative would support the Defence’s application, lodged in the context of its interlocutory appeal,⁶⁸ for suspensive effect of the Impugned Decision, but it does not however share the Defence’s reasoning in support of its application. In that connection, she repeats her observations made in Part VII *supra*, that the Impugned Decision does not have a specific and concrete effect on the rights and interests of the convicted person, and in any event, not in the way suggested by the Defence.⁶⁹

36. Accordingly, the Legal Representative submits that the Impugned Decision should be subject to suspensive effect in order to prevent irreparable damage to victims whose interests are affected, specifically and concretely, by that decision.

⁶⁸ 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”, *supra* footnote 17, paras. 72-75.

⁶⁹ *Idem*.

Consequently, the Legal Representative respectfully requests the Appeals Chamber:

- **To rule** that the Impugned Decision constitutes an “order for reparations” and is covered by the appeals procedure under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence;
- **To rule, accordingly,** that (i) victims who have submitted applications for reparations, and victims who have not submitted applications for reparations but who could be affected by collective reparation, represented by the OPCV, are entitled to appeal against the Impugned Decision pursuant to article 82(4) of the Rome Statute, and to make observations in response to any appeal lodged pursuant to that article; (ii) the Defence cannot appeal against the Impugned Decision pursuant to article 82(4) of the Rome Statute; and (iii) the Impugned Decision is automatically suspended pursuant to rule 150(4) of the Rules of Procedure and Evidence.

In the alternative, were the Appeals Chamber to find that the Impugned Decision does not constitute an “order for reparations” and is covered by the interlocutory appeals procedure under article 82(1)(d) of the Rome Statute and Rule 155 of the Rules of Procedure and Evidence, **the Legal Representative respectfully requests the Appeals Chamber:**

- **To rule** that (i) the personal interests of victims who have submitted applications for reparations, and victims who have not submitted applications for reparations but who could be affected by collective reparations are affected by the interlocutory appeal, that the expression of their views and concerns is appropriate and that their participation is neither inconsistent with or prejudicial to the rights of the Defence; and (ii) the Impugned Decision must be subject to suspensive effect pursuant to article 82(3) of the Rome Statute and rule 156(5) of the Rules of Procedure and Evidence.

[signed]
Paolina Massidda
Principal Counsel

Dated this 1 October 2012

At The Hague, The Netherlands