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APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

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

Public Document

**Application by the OPCV as the Legal Representative of Victims a/0047/06,
a/0048/06, a/0050/06 and a/0052/06 to Participate in the Interlocutory Appeals Lodged
by the Prosecution and the Defence Against the Decision of 14 July 2009**

Source: The Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06
and a/0052/06

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

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**Victims Participation and Reparations
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Other

I. Procedural History

1. On 29 January 2007, Pre-Trial Chamber I issued its *Decision on the confirmation of charges*, in which it found, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the armed forces of the UPC/FPLC (“the UPC/FPLC”) and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi), 8(2)(e)(xii) and 25(3)(a) of the Rome Statute in the period between early September 2002 and 13 August 2003.¹

2. On 23 December 2008, the Prosecution submitted the public version of the amended document containing the charges against Thomas Lubanga Dyilo.²

3. On 26 January 2009, during her opening statements, Ms Bapita referred to the widespread practice of sexual violence committed systematically against children, and particularly girls, forcibly enlisted into the UPC/FPLC.³

4. At the hearing of 8 April 2009, Mr Walley informed the Chamber that the Legal Representatives of the Victims intended to submit a joint application for the implementation of regulation 55 of the Regulations of the Court, since the facts related to the recruitment of child soldiers are also linked to facts concerning sexual slavery.⁴

¹ See *Decision on the confirmation of charges* (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06-803-tEN, p. 156.

² See “Prosecution’s Provision of the Amended Document Containing the Charges”, 23 December 2008, ICC-01/04-01/06-1573, and “Annex 1”, ICC-01/04-01/06-1573-Anx1.

³ See the transcript of the hearing of 26 January 2009, ICC-01/04-01/06-T-107-FRA ET, p. 50, line 13 to p. 54, line 25.

⁴ See the transcript of the hearing of 8 April 2009, ICC-01/04-01/06-T-167-FRA ET, p. 25, line 19 to p. 26, line 2.

5. On 22 May 2009, the Legal Representatives submitted their joint application for the implementation of the procedure under regulation 55 of the Regulations of the Court⁵ (“the Joint Application”).

6. On 29 May 2009, the Prosecution filed its response to the Joint Application.⁶ And on 12 June 2009, following an oral decision of the Trial Chamber,⁷ it filed further observations on the matter.⁸

7. On 19 June 2009, the Defence filed its response to the Joint Application and to the Prosecution’s further observations.⁹ On 26 June 2009, the Legal Representatives of the Victims filed their Observations on said response.¹⁰

8. On 14 July 2009, Trial Chamber I issued its *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*¹¹ (“the Decision”).

9. On 17 July 2009, the Presiding Judge of Trial Chamber I issued his *Minority opinion on the ‘Decision giving notice to the parties and participants that the legal*

⁵ See “Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the *Regulations of the Court*”, 22 May 2009, ICC-01/04-01/06-1891-tENG.

⁶ See “Prosecution’s Response to the Legal Representatives’ *‘Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour’*”, 29 May 2009, ICC-01/04-01/06-1918.

⁷ See transcript of the hearing of 3 June 2009, ICC-01/04-01/06-T-185-CONF-ENG RT, pp. 1-2 and 53-54.

⁸ See “Prosecution’s Further Observations Regarding the Legal Representatives’ Joint Request Made Pursuant to Regulation 55”, 12 June 2009, ICC-01/04-01/06-1966.

⁹ See “*Réponse de la Défense à la ‘Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour’ datée du 22 mai 2009 et à la ‘Prosecution’s Response to the Legal Representatives’ Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour’ datée du 12 juin 2009*”, 19 June 2009, ICC-01/04-01/06-1975.

¹⁰ See “*Observations des représentants légaux des victimes sur la Réponse de la Défense datée du 19 juin 2009*”, 26 June 2009, ICC-01/04-01/06-1998.

¹¹ See *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*, 14 July 2009, ICC-01/04-01/06-2049 (“the Decision”).

characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'.¹²

10. On 11 August the Defence submitted an "Application for Leave to Appeal the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court rendered on 14 July 2009".¹³

11. On 12 August 2009, the Prosecution filed an "Application for Leave to Appeal the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'".¹⁴

12. On 17 August 2009, the Legal Representatives of the Victims filed a Joint Response to the Applications of the Defence and the Prosecutor for Leave to Appeal the *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* rendered on 14 July 2009, dated 11 and 12 August 2009 respectively.¹⁵

¹² See *Minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'*, 17 July 2009, ICC-01/04-01/06-2054. See also *Decision issuing a corrigendum to the "Minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' of 17 July 2009"*, 21 July 2009, ICC-01/04-01/06-2061 and *Decision issuing a second corrigendum to the "Minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' of 17 July 2009"*, 31 July 2009, ICC-01/04-01/06-2069.

¹³ See "Application for Leave to Appeal the *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* rendered on 14 July 2009", 11 August 2009, ICC-01/04-01/06-2073-Conf-tENG.

¹⁴ See "Prosecution's Application for Leave to Appeal the *'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'*", 12 August 2009, ICC-01/04-01/06-2074.

¹⁵ See "*Réponse conjointe des représentants légaux des victimes aux demandes de la Défense et du Procureur d'interjeter appel de la 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court rendue le 14 juillet 2009' datées respectivement des 11 et 12 août 2009"*, 17 August 2009, ICC-01/04-01/06-2079.

13. On 27 August 2009, the majority of Trial Chamber I issued its *Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*.¹⁶

14. On 31 August 2009, the Prosecution filed its "Prosecution's Submissions to Trial Chamber I's "Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'".¹⁷

15. On 3 September 2009, Trial Chamber I issued its *Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*.¹⁸

16. On 10 September 2009, the Defence filed its "Defence Appeal Against the Decision Entitled *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court of 14 July 2009"*.¹⁹

17. On 14 September 2009, the Prosecution filed its "Document in Support of Appeal against the 'Decision giving notice to the parties and participants that the

¹⁶ See *Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'*, 27 August 2009, ICC-01/04-01/06-2093.

¹⁷ See "Prosecution's Submissions to Trial Chamber I's "Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", 31 August 2009, ICC-01/04-01/06-2095.

¹⁸ See *Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, 3 September 2009, ICC-01/04-01/06-2107.

¹⁹ See "Defence Appeal Against the Decision Entitled *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court of 14 July 2009"*, 10 September 2009, ICC-01/04-01/06-2112-t-ENG.

legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and urgent request for suspensive effect".²⁰

18. The Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 ("the Legal Representative") is of the opinion that the victims authorised to participate in the proceedings of a case should *a fortiori* be authorised to participate in any interlocutory appeal resulting from a decision taken by the Pre-Trial Chamber in the same case.

19. However, in light of the jurisprudence of the Appeals Chamber concerning victim participation in interlocutory appeals, in particular the decision of 13 February 2008, in which the Appeals Chamber held that, in order to participate in an appeal pursuant to article 82(1)(d) of the Statute, victims must file an application for leave to do so,²¹ the Legal Representative now submits observations in order that her clients may be authorised to participate in the appeals lodged by the Prosecution and the Defence.

20. The Legal Representative notes that both the Prosecution and the Defence have asked for the Decision to be given suspensive effect. In this regard, the Legal Representative submits that such effect might affect the personal interests of the victims she represents. Thus the arguments set out below concerning participation in the instant appeals apply *mutatis mutandis* to the issue of suspensive effect, which is, moreover, an integral element of the Prosecution and Defence appeals. It would therefore be appropriate for the Chamber to defer its ruling on suspensive effect before issuing its decision on victims' participation in the appeal. In the alternative,

²⁰ See "Document in Support of Appeal against the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and urgent request for suspensive effect", 14 September 2009, n° ICC-01/04-01/06-2120.

²¹ See *Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representatives' request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor* (Appeals Chamber), 13 February 2008, ICC-01/04-450, para. 1.

the Chamber could grant the victims leave to file their observations on suspensive effect in accordance with rule 93 of the Rules of Procedure and Evidence prior to issuing a decision on their participation.

21. In its Judgment of 13 February 2007, the Appeals Chamber stated that any application for participation in the interlocutory appeal must contain a statement of how the personal interests of the victims are affected by the appeal, indicating why it is appropriate for their views and concerns to be presented at that stage and showing that such participation would not be prejudicial to or inconsistent with the rights of the Defence.²² Furthermore, the Appeals Chamber stated that “in future cases and until such time as the matter is regulated in the constituent documents of the Court, applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal”.²³

22. Hence, the Legal Representative submits the following observations concerning the participation of her clients in the appeals against the Decision of 14 July 2009.

²² See, *inter alia*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo” (Appeals Chamber), 13 February 2007, ICC-01/04-01/06-824. See also Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007 (Appeals Chamber), 18 June 2008, ICC-01/04-01/06-138, paras. 49, 51 and 53-59. See also Decision on the participation of victims in the appeal (Appeals Chamber), ICC-01/04-01/06-1452, 6 August 2008, paras. 7-8, and Decision of the Appeals Chamber on the OPCV’s request for clarification and the legal representatives’ request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor (Appeals Chamber), 13 February 2008, ICC-01/04-450, para. 1.

²³ See Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007, *idem*, para. 26. See also Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007 (Appeals Chamber), 30 June 2008, ICC-01/04-503, para. 39.

II. Submissions for purposes of participation in the interlocutory appeals lodged by the Prosecution and the Defence

23. Pursuant to the Appeals Chamber jurisprudence on victim participation in interlocutory appeals,²⁴ the Legal Representative successively addresses the following issues: (1) how the personal interests of the victims are affected by the appeals; (2) why the presentation of their views and concerns is appropriate at this stage; and (3) why such participation is not prejudicial to or inconsistent with the rights of the Defence.

1. The personal interests of the victims are affected

24. The appeals lodged by the Prosecution and the Defence in the present case concern the interpretation by the majority of Trial Chamber I of regulation 55 of the Regulations of the Court and, more generally, the operation of that regulation.

25. It should first of all be noted that it was the Legal Representatives of the victims authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo* who raised the matter of the implementation of the said regulation by the Chamber.²⁵ The Legal Representative accordingly submits that the personal interests of the victims whom she represents are affected by the operation of that regulation. Moreover, these victims are former child soldiers who were forcibly recruited into the UPC/FPLC when they were under the age of 15, and were subsequently sent to training camps where they underwent military training. During that training, all of these victims suffered inhuman and/or cruel treatment, and a/0050/06 also suffered various acts of sexual violence.

26. The Legal Representative further submits that the personal interests of her clients are also affected, since , in addition to their victim status, all of them have the status of Prosecution witnesses. Hence the issue of the operation of regulation 55 of

²⁴ See *supra*, footnote 22.

²⁵ See "Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the *Regulations of the Court*", *supra*, footnote 5.

the Regulations of the Court has a particular impact on their personal interests, since they might be called again to appear at trial pursuant to regulation 55(3)(b) of the Regulations of the Court.

27. Accordingly, there can be no doubt that these victims have a direct and personal interest in the present matter.

2. The victims' participation is appropriate

28. The Legal Representative submits that it is appropriate for the victims whom she represents to participate in the interlocutory appeals lodged by the Prosecution and the Defence, since their interests are affected by the outcome of the proceedings on the implementation of regulation 55 of the Regulations of the Court.²⁶

29. The Legal Representative is also of the opinion that the victims authorised to participate in the proceedings which gave rise to the decision under appeal must *a fortiori* be authorised to participate in the appeals in question, especially since these appeals concern an issue which, as stated above, directly affects their interests.²⁷

30. Lastly, the victims' participation in the interlocutory appeals lodged by the Prosecution and the Defence is appropriate because it meets the requirements regarding their right to be heard pursuant to article 68(3) of the Rome Statute. An analysis of all of the articles and rules governing victims' participation in the proceedings before the Court clearly shows that their participation is not confined to specific stages and is therefore possible at all stages of the proceedings, including interlocutory appeals.²⁸

²⁶ See *supra*, paras. 24-27.

²⁷ *Idem*.

²⁸ See France's proposals, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also Costa Rica's proposal, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and Colombia's proposal, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the *travaux préparatoires*, see BITTI, G. and FRIMAN, H., "Participation of Victims in the Proceedings", in LEE, R.S. (ed.), *The International*

31. Moreover, participation by the victims in the interlocutory appeals of the Prosecution and the Defence is wholly in line with the requirements of a fair trial, since such participation would allow for an objective and thorough consideration of the views of the victims, whose personal interests are undeniably affected by the outcome of the appeals in question.²⁹

32. Lastly, the Legal Representative recalls that it is open to the Prosecutor and to the Defence, under regulation 24(1) of the Regulations of the Court, to file a response “to any document filed by any participant in the case”. Hence, the appropriateness of the participation of the victims in this interlocutory appeal is assured by the restrictions placed upon it.

3. The victims’ participation is not inconsistent with or prejudicial to the rights of the Defence

33. First, the Legal Representative of the Victims believes that the protection of the rights of the Defence constitutes a fundamental principle, in the absence of which the integrity of criminal proceedings cannot be guaranteed and justice cannot be done.

34. The Legal Representative notes that the participation of victims in proceedings before the Court is not in itself liable to affect the rights of the Defence. Indeed, as Judge Blattmann emphasised:

[B]oth the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims’ participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding.³⁰

35. In this respect, the Legal Representative further notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the

Criminal Court: Element of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

²⁹ See *supra*, paras. 24-27.

³⁰ See the separate and dissenting opinion of Judge René Blattmann included in the *Decision on victims’ participation* (Trial Chamber I), ICC-01/04-01/06-1119, para. 26, p. 61.

United Nations General Assembly on 29 November 1985 lays down the principle of victims' access to justice and their right to fair treatment.³¹

36. Furthermore, the Legal Representative recalls that the role of victims should not be confused with that of the Prosecution. Hence, the participation of victims in the instant interlocutory appeal simply concerns the effective exercise of the rights granted to them in the Rome Statute, and thus has no impact on the rights of the Defence.

37. Furthermore, the participation of the victims in this interlocutory appeal would be neither inconsistent with nor prejudicial to the rights of the Defence, since under regulation 24(1) of the Regulations of the Court, the Defence may file a response to any resultant document filed by the applicants.³²

38. Moreover, the Legal Representative submits that the participation of victims is an integral part of the concept of a fair and impartial trial, since it is expressly embodied in the Court's texts. Furthermore, this right granted to victims is consistent with international human rights law and is recognised in many national systems. Consequently, the equilibrium within criminal trials cannot be affected by the participation of victims. On the contrary, taking their interests into account constitutes one of the contributory factors in balancing the proceedings, especially since the proceedings concern a violation of the fundamental rights of the victims themselves.³³ Hence, the participation of the victims in this interlocutory appeal cannot prejudice the interests of the Defence.³⁴

³¹ See United Nations General Assembly resolution 40/34 of 29 November 1985, available at the following URL: <http://www2.ohchr.org/english/law/victims.htm>, principles 4 to 7.

³² See *supra*, para. 32.

³³ See "Response of the Legal Representatives of Victims to the Prosecution's Application and the OPCD's Request for Leave to Appeal the 'Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0027/07 to a/003/07 and a /0035/07 to a/0038/07'", ICC-02/05-116, 17 December 2007, para. 30, pp. 9-10.

³⁴ See DONAT-CATTIN, D., "Article 68", in TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verl. Ges., Baden-Baden, 1999, pp. 876-877: "The victims' genuine wish is that the truth be established and the case solved. [...]"

For the foregoing reasons,

The Legal Representative respectfully requests the Appeals Chamber to rule that the personal interests of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 are affected by the interlocutory appeals lodged by the Prosecution and the Defence, that the presentation of their views and concerns appears appropriate at this stage, and that such participation is neither inconsistent with nor prejudicial to the rights of the Defence.

The Legal Representative further requests the Appeals Chamber to grant the victims leave, within a time limit to be determined by the Chamber, to file their observations on the documents filed in support of the appeals, including on the matter of suspensive effect, and to now generally grant the Legal Representatives leave to submit, in the manner determined by the Chamber, written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appeal proceedings.

As regards the matter of suspensive effect, the Legal Representative alternatively requests, in the event that the Chamber were to decide to rule on that issue prior to ruling on the application for participation, that it authorise the filing of observations in accordance with rule 93 of the Rules of Procedure and Evidence before ruling on the victims' application for participation in the instant appeals.

The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute".

[signed]

Ms Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Dated this 15 September 2009
At The Hague, The Netherlands