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

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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 Redacted Version

**Observations of the Defence for Mr Thomas Lubanga regarding applications
ICC-01/04-01/06-2993 and ICC-01/04-01/06-2994 filed on 8 March 2013**

Source: Defence team for Mr Thomas Lubanga Dyilo

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

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PROCEDURAL BACKGROUND

1. On 14 March 2012, Trial Chamber I invited individuals or interested parties wishing to file observations on the principles and the procedure to be applied to reparations to apply in writing for leave to participate in the proceedings.¹
2. On 28 and 29 March 2012, various organisations, including the Women's Initiatives for Gender Justice,² *Terre des Enfants*, *Justice Plus*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières*,³ filed applications for leave to participate in the reparations proceedings pursuant to the Chamber's order of 14 March 2012.
3. On 16 April 2012, the Defence objected to the participation of the aforementioned organisations on grounds that the applications for leave to intervene were unfounded.⁴
4. On 20 April 2012, the Trial Chamber granted Women's Initiatives for Gender, *Terre des Enfants*, *Justice Plus*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières* leave to make their observations.⁵
5. In its *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012, the Trial Chamber emphasised that it had "reviewed all the submissions by the parties and participants in these proceedings, as well as those from the Registry, the Trust Fund for Victims and the NGOs who have been granted leave to make representations".⁶
6. In response to the Defence arguments, the Chamber noted that:

The Chamber considers that although some of these organisations have already undertaken work in the context of this case, this factor does not act as an automatic bar to them making observations which are of a general nature, particularly as

¹ ICC-01/04-01/06-2844.

² ICC-01/04-01/06-2853.

³ ICC-01/04-01/06-2855, Annex 2.

⁴ ICC-01/04-01/06-2862-Red.

⁵ ICC-01/04-01/06-2870.

⁶ ICC-01/04-01/06-2904, para. 20 [emphasis added].

regards the principles and procedure to be applied to reparations. Once the Chamber has received their observations, it will disregard any part of them which are inconsistent with the Court's obligation to ensure fairness for the convicted person and the victims and beneficiaries of any potential reparations.⁷

7. On 14 December 2012, the Appeals Chamber invited the organisations which had been authorised by the Trial Chamber to file observations on the principles and procedures to be applied to reparations to request for leave to submit observations before the Appeals Chamber.⁸
8. On 8 March 2013, the Women's Initiatives for Gender Justice,⁹ *Terre des Enfants, Justice Plus, Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières*¹⁰ filed their application in accordance with the Appeals Chamber order.
9. The Defence objects to these organisations' participation through the filing of observations on the appeals concerning reparations on the following grounds:

GENERAL OBSERVATIONS

10. Pursuant to rule 103:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

11. The Appeals Chamber had the opportunity to determine that the submission of observations by a State, organisation or person, as prescribed in rule 103, is desirable for the proper administration of justice insofar as these observations "may assist the Appeals Chamber in the proper determination of the case".¹¹ The Pre-Trial Chamber indicated that the participation of amicus curiae was to provide the bench with the opportunity to obtain "experts' information on

⁷ ICC-01/04-01/06-2870, para. 21.

⁸ ICC-01/04-01/06-2953.

⁹ ICC-01/04-01/06-2993.

¹⁰ ICC-01/04-01/06-2994.

¹¹ ICC-01/04-01/06-1289, para. 8; ICC-01/04-373, para .4; etc.

relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case”.¹²

12. Moreover, in order to assist the Court at the appeals stage, all observations must substantially contribute to the legal issues before the Appeals Chamber.
13. In order to contribute to the proper administration of justice and enable the Court to rule on contested issues, it is incumbent upon amicus curiae to act objectively, impartially and independently in the performance of its duties before the Court.
14. The objectivity of amicus curiae is recognised by the established jurisprudence of the ad hoc tribunals, which confirm that amicus submissions are limited to questions of law and that submissions on questions of fact are strictly prohibited.¹³
15. The Trial Chambers of the ICTR and ICTY confirmed that amicus curiae must act impartially: “[i]mplicit in the concept of an amicus curiae is the trust that the court reposes in “the friend” to act fairly in the performance of his duties.”¹⁴
16. Furthermore, amici curiae are duty-bound to comply with the provisions of the Code of Professional Conduct for counsel involved in proceedings before the ICC.¹⁵ These rules specify that counsel practicing before the Court must act independently.¹⁶ With respect to this issue, the Defence submits that it is

¹² ICC-01/04-373, para. 4 [emphasis added].

¹³ Information on the submission of amicus curiae briefs, ICTY Practice Directive IT/122, 27 March 1997; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74; *Decision on the request by the government of the Republic of Croatia for leave to appear as amicus curiae*, 11 October 2006, p. 5; *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, *Decision on the Kingdom of Belgium’s application to file an amicus curiae brief and on the defence application to strike out the observations of the Kingdom of Belgium concerning the preliminary response by the defence*, 9 February 2011, para. 8 in the French version and para. 10 in the English version; *The Prosecutor v. Kallon*, case no. SCSL-2003-07, *Decision on the Application of the Redress Trust and Lawyers Committee for Human Rights for leave to file Amicus Curiae Brief and to present Oral Submissions*, Appeals Chamber, 1 November 2003, para. 8.

¹⁴ *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, *Decision concerning an amicus curiae*, 10 October 2002, *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2005-87-1, *Decision on the Amicus Curiae Request of the Defence of Gaspard Kanyarukiga*, 14 September 2007, para. 6.

¹⁵ ICC-ASP/4/32.

¹⁶ Article 6.

essential that all amicus briefs from individuals, a State or an organisation specify any relationship between amici and a party or participant in the case.¹⁷

17. Additionally, an amicus brief must not solely seek to present the views or objectives of the applicant. More importantly, the Chamber must not allow amici curiae to use to their advantage the issues for determination to the detriment of the Defence.
18. Admitting to the proceedings applicants seeking to showcase the views and aims of their organisation, rather than enlighten the bench as to an issue of law, would seriously prejudice the fairness of proceedings.
19. Such participation would be contrary to articles 64(2), 67(1) and 149, which provide that the Appeals Chamber shall satisfy itself that the filing of observations under rule 103 is compatible with full respect for the rights of the accused.
20. Finally, it is imperative that an organisation seeking authorisation to participate in the proceedings demonstrate that it possesses the relevant expertise to submit observations on legal issues which may assist the Appeals Chamber.¹⁸

SPECIFIC OBSERVATIONS

1. The application from the NGO Women's Initiatives for Gender Justice

21. This is the third time in the instant case that the activist organisation Women's Initiatives for Gender Justice is seeking leave to participate as in the proceedings as amicus curiae.¹⁹
22. According to this organisation's mandate:

¹⁷ Such is the situation before the ICTY. See: Information on the submission of *amicus curiae* briefs, ICTY Practice Directive IT/122, 27 March 1997.

¹⁸ *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-I, *Decision on Amicus Curiae Request by Ibuka and Avega*, 22 February 2008, para. 4.

¹⁹ ICC-01/04-01/06-403; ICC-01/04-01/06-480; ICC-01/04-01/06-2853; ICC-01/04-01/06-2993. Additionally, the application to participate in the situation in the Democratic Republic of the Congo, ICC-01/04-313.

The Women's Initiatives for Gender Justice is an international women's human rights organisation advocating for gender justice, in particular through the International Criminal Court (ICC). Amongst other activities, the organisation works globally to ensure justice for women and an independent and effective ICC, and seeks to insure that sexualized violence and gender-based crimes are effectively investigated and prosecuted by the Court²⁰ [emphasis added].

23. One of the objectives of the Women's Initiatives for Gender Justice's is to "[i]ntroduce or strengthen reparations and compensation mechanisms for victims of serious crimes including sexualized and gender-based violations".²¹
24. Needless to say, an organisation whose primary mission is to advocate for accountability for sexual violence in cases before the ICC lacks the objectivity and impartiality to act as amicus curiae.
25. Additionally, in a press release issued on 21 August 2012, the Prosecutor announced the appointment of Ms Brigid Inder as her Special Gender Advisor.²² As stated in the press release, Ms Brigid Inder is also the Executive Director of the Women's Initiatives for Gender Justice.²³
26. It is in her capacity as Executive Director of Women's Initiatives for Gender Justice that Ms Inder signed the application²⁴ and the observations²⁵ the organisation submitted to the Trial Chamber. Ms Inder also signed, on behalf of this organisation, the letter to the Office of the Prosecutor requesting the amendment of charges against the Appellant to include sexual violence; this letter was annexed to the organisation's first application for leave to participate as amicus curiae in this case.²⁶

²⁰ ICC-01/04-01/06-403-Anx1-Corr, p. 1.

²¹ http://www.iccwomen.org/whatwedo/projects/complementarity_project.php.

²² http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr833.aspx.

²³ According to the information on the organisation's website, Ms Brigid Inder is still the Executive Director of Women's Initiatives for Gender Justice.

²⁴ ICC-01/04-01/06-2853.

²⁵ ICC-01/04-01/06-2876.

²⁶ ICC-01/04-01/06-403-Anx1-Corr.

27. The close collaboration between the Women's Initiatives for Gender Justice and the Office of the Prosecutor is such that the organisation lacks the requisite independence and impartiality to act as *amicus curiae* in this case.
 28. The Defence further submits that the organisation has not demonstrated that it possesses the relevant legal expertise to submit observations on points of law which may assist the Appeals Chamber.²⁷
 29. Finally, the Defence points out that to date, the Women's Initiatives for Gender Justice continues to make reference in its commentaries and observations issued after the *Judgment* to testimonies that were expressly dismissed by the Trial Chamber in its judgment.²⁸ Such repetitive practice is not only highly prejudicial to Mr Lubanga,²⁹ but also demonstrates the organisation's determination to promote its ideologies rather than the willingness to contribute objectively, through its expertise, to the work of the ICC.
 30. In these circumstances, it would be highly unfair to the Appellant if the representatives of this organisation were authorised to submit *amicus* observations on the appeal.
- 2. The application from the NGOs *Terre des Enfants, Justice Plus, Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières***
31. The Defence submits that none of the above-mentioned organisations possess such legal expertise as would assist the Court in the "determination of the case".³⁰
 32. The observations hereunder demonstrate that these organisations lack the necessary objectivity, independence and impartiality, particularly because of

²⁷ *Supra*, para. 20.

²⁸ See, for example, ICC/01/04-01/06-2876, footnotes 24 and 45; and commentaries on the judgment at <http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html>. The organisation has in particular referred to testimonies from Witnesses P-0007, P-0299, P-00298, P-0294, P-0213, etc. which were expressly dismissed by the Chamber in its judgment.

²⁹ ICC-01/04-01/06-2891-Red, para. 128.

³⁰ ICC-01/04-01/06-1289, para. 8; ICC-01/04-373, para. 4, etc.

their close collaboration with the Office of the Prosecutor, victims authorised to participate in the proceedings, or witnesses who testified in this case.

- Terre des Enfants

33. [REDACTED],³¹ [REDACTED].³²
34. [REDACTED].³³ [REDACTED].³⁴
35. [REDACTED].³⁵ [REDACTED].³⁶
36. [REDACTED],³⁷ [REDACTED].³⁸
37. [REDACTED],³⁹ [REDACTED].⁴⁰ [REDACTED].⁴¹ [REDACTED].⁴²
38. [REDACTED].

- Avocats Sans Frontières

39. *Avocats Sans Frontières* emphasises that it offered legal assistance to approximately sixty victims authorised to participate in proceedings before the Court.⁴³ The organisation further adds that, from the beginning of the investigation leading up to the Lubanga trial, it contributed to the identification of victims, assisted them to access the proceedings and ensured the intervention of lawyers to represent them.⁴⁴

³¹ ICC-01/04-01/06-2994.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ ICC-01/04-01/06-2855-Anx2-tENG, para. 11.

⁴⁴ <http://www.asf.be/blog/2012/07/11/lubanga-trial-a-missed-opportunity-for-the-victims/>.

40. Two *Avocats Sans Frontières* advisors – Mr Luc Walley⁴⁵ and Mr Frank Mulenda⁴⁶ – act as Legal Representatives of victims authorised to participate in this case. In this capacity, they had the opportunity to present their views and concerns on the issue of reparations, notably by appealing against the *Decision on Reparations* on 5 February 2013.⁴⁷
41. One of the advisers of *Avocats Sans Frontières*, [REDACTED] Witnesses P-0298 and P-0299 [REDACTED].⁴⁸ These two witnesses, who were represented by two members of *Avocats Sans Frontières*,⁴⁹ were authorised to participate in the proceedings as victims under applicant number a/0002/06. However, the Trial Chamber concluded that it could not rely on Witness P-0298, as it had real doubt about his honesty and reliability.⁵⁰ Consequently, the Trial Chamber withdrew the right of P-0298 and P-0299 to participate in these proceedings.⁵¹
42. [REDACTED].⁵²
43. Therefore, the participation in the case of an organisation which contributed to the search for victims and represented them before the Court is inconsistent with the duty of objectivity, independence and impartiality which is incumbent upon an organisation acting as *amicus curiae*.

- *Justice Plus*

44. The founder of Justice Plus, Mr Honoré Musoko,⁵³ was employed by the Office of the Prosecutor between 30 September 2003 and 27 August 2004, during which time he was initially assigned to the investigations team and was

⁴⁵ Mr Walley is a member of the Board of Directors of *Avocats Sans Frontières*; <http://www.asf.be/about-asf/contact-2/>.

⁴⁶ <http://www.ressources-solidaires.org/Audience-de-confirmation-des>

⁴⁷ ICC-01/04-01/06-2973.

⁴⁸ [REDACTED].

⁴⁹ Mr Walley and Mr Mulenda.

⁵⁰ *Judgment*, para. 441.

⁵¹ *Judgment*, para. 484.

⁵² [REDACTED].

⁵³ <http://grandkasai.canalblog.com/archives/communiquer/p40-0.html>.

subsequently transferred to the Complementarity and Cooperation Division of the Office of the Prosecutor.⁵⁴

45. In these circumstances, given the apparent relationship between *Justice Plus* and the Office of the Prosecutor and the apparent relationship between *Justice Plus* and the other organisations referred to in these observations, authorising this organisation to make amicus observations in this appeal would be highly unfair to the Appellant.

- *Fédération des Jeunes pour la Paix Mondiale*

46. The *Fédération des Jeunes pour la Paix Mondiale* publicly acknowledges its role as an organisation which contributed to the identification of applicants seeking victim status before the Court.⁵⁵
47. In these circumstances, given the apparent relationship between *Fédération des Jeunes pour la Paix Mondiale* and the other organisations referred to in these observations, it would be highly unfair to the Appellant to authorise their representatives to submit amicus observations in this appeal.

The confidential nature of these observations

48. The Defence files its observations, in accordance with article 68, as confidential so as not to disclose confidential information. The Defence intends to file a public redacted version shortly.

⁵⁴ ICC-01/04-01/06-T-30-EN-CT, p. 105, line 23 to p. 106, line 10.

⁵⁵ <http://www.iccnw.org/?mod=newsdetail&news=3572&lang=fr>.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

TAKE NOTE of the present observations;

and

DISMISS the applications filed on 8 March 2013 by the Women's Initiatives for Gender Justice and the organisations *Terre des Enfants*, *Justice Plus*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières*.

[signed]

Ms Catherine Mabilie, Lead Counsel

Done this 9 April 2013, at The Hague