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No.: ICC-01/04-01/06 OA 17

Date: 23 July 2010

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyung Song, Presiding Judge  
 Judge Erkki Kourula  
 Judge Anita Ušacka  
 Judge Daniel David Ntanda Nsereko  
 Judge Sanji Mmasenono Monageng

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

**Public document**

**Application by the OPCV in its Capacity as Legal Representative of Victims  
 a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to Participate in the Interlocutory  
 Appeal Lodged by the Prosecution Challenging the Oral Decision of Trial  
 Chamber I of 15 July 2010**

**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:

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor

**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 Joseph Keta Orwinyo  
Mr Jean Chrysostome Mulamba  
Nsokoloni  
Mr Paul Kabongo Tshibangu  
Mr Hervé Diakiese  
Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda  
Ms Sarah Pellet

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**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. Procedural history

1. On 8 July 2010, Trial Chamber I (“the Trial Chamber” or “the Chamber”) stayed the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* on grounds of abuse of process.<sup>1</sup>
2. On 14 July 2010, the Prosecutor sought leave to appeal this decision.<sup>2</sup>
3. At the hearing of 15 July 2010, the Chamber granted the Prosecutor leave to appeal the decision, and at the same time it also ordered the unconditional release of the accused (“the Decision”).<sup>3</sup>
4. On 16 July 2010, the Prosecutor lodged an appeal against the Decision<sup>4</sup> and requested the Appeals Chamber to order that the effect of the Decision be suspended.

## II. Preliminary issue

5. The Legal Representative of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 (“the Legal Representative”) notes that the Prosecution has asked that the effect of the Decision be suspended.
6. The Legal Representative further notes that the Appeals Chamber ordered the Defence to respond by 4:00 p.m. on 22 July 2010 to the Prosecution’s application for suspensive effect in relation to the Decision.<sup>5</sup>

<sup>1</sup> See *Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (Trial Chamber I), No. ICC-01/04-01/06-2517-Red of 8 July 2010.

<sup>2</sup> See “Urgent Prosecution’s Application for Leave to Appeal the Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, No. ICC-01/04-01/06-2520-Red of 14 July 2010.

<sup>3</sup> See transcript of the hearing of 15 July 2010, No. ICC-01/04-01/06-T-314-ENG ET WT, page 14, line 3, to page 22, line 8.

<sup>4</sup> See “Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect”, No. ICC-01/04-01/06-2522 of 16 July 2010.

<sup>5</sup> See *Order on the filing of a response by Thomas Lubanga Dyilo to the Prosecutor’s application for suspensive effect of his appeal against Trial Chamber I’s oral decision of 15 July 2010 to release Thomas Lubanga Dyilo* (Appeals Chamber), No. ICC-01/04-01/06-2527 OA 17 of 20 July 2010.

7. In this regard, the Legal Representative submits that the issue of suspensive effect affects the personal interests of the victims whom she represents. Thus the arguments set out hereafter regarding participation in the appeal apply *mutatis mutandis* to the issue of suspensive effect, which, moreover, forms an integral part of the appeal lodged by the Prosecution. Given the Appeals Chamber's view that the victims must apply for leave to participate in each interlocutory appeal, it would therefore be appropriate, pending a decision by the Chamber on that issue, for the latter to allow the victims to file their observations on suspensive effect in accordance with rule 93 of the Rules of Procedure and Evidence before it renders its decision on the application for suspensive effect. Noting the Order of 20 July 2010,<sup>6</sup> the Legal Representative confines herself to supporting the position of the Prosecution in this regard.<sup>7</sup>

### **III. The right of victims permitted to participate in the case to participate also in the interlocutory appeal submitted by the Office of the Prosecutor**

8. Under regulation 24(2) of the Regulations of the Court, "*victims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3 and rule 89, sub-rule 1, subject to any order of the Chamber*". Regulation 64(4) and (5) of the Regulations of the Court further provide that participants may file a response to the document in support of the appeal. The term "participant" used in both provisions refers to all participants in the proceedings, including victims.<sup>8</sup>

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<sup>6</sup> *Idem*.

<sup>7</sup> See "Prosecution's Appeal against Trial Chamber I's oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect", *supra* footnote 7, paras. 8-13.

<sup>8</sup> See in this regard the Dissenting Opinion of Judge Song included in the *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), No. ICC-01/04-01/06-824 OA 7 of 13 February 2007, paras. 3 and 4. See also *Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 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"*, No. ICC-01/04-01/06-2205 OA 15 and OA 16 of 8 December 2009.

9. It should be recalled that victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 were permitted to participate in the case after Trial Chamber I had checked that their applications for participation met the four criteria under rule 85 of the Rules of Procedure and Evidence. However, regulation 86(8) of the Regulations of the Court provides that “[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case.”

10. Furthermore, the Legal Representative notes that the Appeals Chamber has already acknowledged that the issue of the release of an accused person affects the personal interests of the victims permitted to participate in the proceedings.<sup>9</sup> Consequently, the Legal Representative is of the view that the victims permitted to participate in the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* are therefore entitled, pursuant to regulation 64(4) of the Regulations of the Court, to respond to the document filed in support of the appeal to be filed shortly by the Office of the Prosecutor, without it being necessary for them to apply for leave to participate in the appeal proceedings.

11. However, in its *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”*, the Appeals Chamber held that “in order for victims to participate in an appeal under article 82(1)(b) of the Statute, an application seeking leave to participate in the appeal must be filed.”<sup>10</sup> This obligation on the part of the

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<sup>9</sup> See *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”* *supra* footnote 8, para. 54. See also *Decision on the participation of victims in the appeal* (Appeals Chamber), No. ICC-01/04-01/06-1452 OA 12 of 6 August 2008 and *Decision on the Participation of Victims in the Appeal against the “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”* (Appeals Chamber), No. ICC-01/04-01/06-623 OA 2 of 27 November 2010.

<sup>10</sup> *Idem*, para. 38.

victims was reiterated by the Appeals Chamber in its decision of 13 June 2007,<sup>11</sup> which also involved an appeal under article 82(1)(b) of the Rome Statute.

12. However, as explained above, the Legal Representative is of the view that victims granted leave to participate in the proceedings in the case should be entitled *a fortiori* to participate in an interlocutory appeal arising out of a decision of the Trial Chamber in the same case.

13. Nonetheless, in light of the decisions of the Appeals Chamber on the subject of victim participation in interlocutory appeals, the Legal Representative submits observations with a view to securing leave for her clients to participate in the appeal lodged by the Office of the Prosecutor.

#### **IV. Submissions for purposes of participation in the interlocutory appeal lodged by the Office of the Prosecutor**

14. In its Judgment of 13 February 2007, the Appeals Chamber stated that an application to participate in the interlocutory appeal should include submissions setting out how the personal interests of the victims are affected by the appeal, explaining why the presentation of their views and concerns is appropriate at this stage of the proceedings and demonstrating that their participation would not be prejudicial to or inconsistent with the rights of the accused.<sup>12</sup>

15. In accordance with the decisions of the Appeals Chamber regarding victim participation in interlocutory appeals,<sup>13</sup> the Legal Representative will address the following issues in turn: (1) how the personal interests of the victims are affected by the appeal, (2) why the presentation of their views and concerns is appropriate at this

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<sup>11</sup> See *Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007* (Appeals Chamber), No. ICC-01/04-01/06-925 OA 8 of 13 June 2007, para. 23.

<sup>12</sup> See *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"* *supra* footnote 8, paras. 38-55.

<sup>13</sup> *Idem*. See also *supra* para. 10 and the relevant footnotes.

stage of the proceedings, and (3) why their participation is not prejudicial to or inconsistent with the rights of the accused.

**1. The personal interests of victims are affected**

16. The jurisprudence of the Chambers has already acknowledged that the personal interests of the victims are affected by the issue of detention of suspects and accused persons.

17. Thus, as in the present case, the Appeals Chamber, ruling on the application by victims to participate in the appeal lodged by Thomas Lubanga Dyilo against the decision by Pre-Trial Chamber I to dismiss his application for interim release, expressly acknowledged that: *“the personal interests of the victims were affected by the circumstances of the current case, having regard to the nature of the appeal itself.”*<sup>14</sup>

18. Similarly, the Single Judge of Pre-Trial Chamber I expressly acknowledged that: *“the Defence Request for interim release [...] affects the personal interests of the Victims [...]”*.<sup>15</sup> This is also a view which appears to be shared by Pre-Trial Chamber I, as well as by Trial Chambers II and III, which, at the periodic reviews of their decisions to keep Mathieu Ngudjolo Chui, Germain Katanga and Jean-Pierre Bemba Gombo in detention, have always asked the victims to submit their observations on the detentions in question.<sup>16</sup>

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<sup>14</sup> See *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” supra footnote 8, para. 54.*

<sup>15</sup> See *Decision Establishing a Deadline in Relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-465 of 22 September 2006, p. 2.

<sup>16</sup> See *Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-1252 of 29 June 2009; *Decision Inviting Observations from the Participants Concerning the Detention of Germain Katanga (Rule 118(2) of the Rules of Procedure and Evidence)* (Trial Chamber II), No. ICC-01/04-01/07-942 of 5 March 2009; *Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga (Rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-748 of 13 November 2008, and *Decision concerning observations on the review of the pre-trial detention of Germain Katanga* (Pre-Trial Chamber I), No. ICC-01/04-01/07-668 of 9 July 2008. See also *Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (Règle 118-2)* (Trial Chamber II), No. ICC-01/04-01/07-1192 of 5 June 2009; *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (Rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-904 of 18 February 2009; *Decision Inviting Observations from the*

## 2. Victim participation is appropriate

19. The Legal Representative submits that participation by victims in the interlocutory appeal lodged by the Prosecution is appropriate, because their interests are affected by the outcome of the proceedings to release the accused.<sup>17</sup>

20. The Legal Representative is further of the view that victims granted leave to participate in proceedings having given rise to a decision which has been appealed must be entitled *a fortiori* to participate in the interlocutory appeal in question, all the more so where, as in the present case, the interlocutory appeal involves an issue which, as explained above, directly affects their interests.<sup>18</sup>

21. Finally, it is appropriate for the victims to participate in the interlocutory appeal lodged by the Prosecution, since this accords with the requirements regarding the right for victims to be heard as set out in article 68(3) of the Rome Statute. Thus an analysis of all the articles and rules governing victim participation in the proceedings before the Court clearly shows that victim participation is not restricted to specific stages and is therefore possible at all stages in the proceedings, including interlocutory appeals.<sup>19</sup>

22. Furthermore, victim participation in the interlocutory appeal lodged by the Prosecution accords perfectly with the requirements of a fair trial, since their participation will allow the views of victims whose personal interests are undeniably

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*Participants concerning the Detention of Mathieu Ngudjolo Chui (Rule 118(2))* (Trial Chamber II), No. ICC-01/04-01/07-732 of 30 October 2008, and *Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-602 of 17 June 2008.

<sup>17</sup> See *supra* paras. 16-18.

<sup>18</sup> *Idem*.

<sup>19</sup> See the proposals submitted by France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7. See also the proposal submitted by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999 and the proposal submitted by Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. For a review of the preparatory work, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

affected by the outcome of the appeal in question to be taken into consideration in an objective and in-depth fashion.<sup>20</sup>

23. Finally, the Legal Representative recalls the right of Prosecution and Defence under regulation 24(1) of the Regulations of the Court to respond “*to any document filed by any participant in the case*”. Thus the appropriateness of victim participation in the interlocutory appeal in question is underwritten by the limits set in this regard.

**3. Victim participation is not prejudicial to or inconsistent with the rights of the accused**

24. First, the Legal Representative of the Victims is of the view that protecting the rights of the accused is a fundamental principle without which the integrity of criminal proceedings could not be safeguarded and justice would not be done.

25. The Legal Representative notes that victim participation in the proceedings before the Court is not, in itself, liable to affect the rights of the accused. As Judge Blattmann points out:

*Both 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 whilst ensuring the rights of the accused to both a fair and expeditious hearing.*<sup>21</sup>

26. In this regard, the Legal Representative also notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations on 29 November 1985, sets out the principle of access to justice for victims and the right to fair treatment.<sup>22</sup>

27. The Legal Representative would further point out that the role of the victims should not be confused with that of the Prosecution. The purpose of victim

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<sup>20</sup> See *supra* paras. 16-18.

<sup>21</sup> See the Separate and Dissenting Opinion of Judge René Blattmann appended to the *Decision on Victims’ Participation* (Pre-Trial Chamber I), No. ICC-01/04-01/06-1119, para. 26.

<sup>22</sup> See United Nations General Assembly Resolution 40/34 of 29 November 1985 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>, principles 4 to 7.

participation in the interlocutory appeal in question is thus simply to ensure that the rights afforded to them under the Rome Statute are effectively implemented, and hence has no impact on the rights of the accused.

28. Moreover, victim participation in the present interlocutory appeal cannot be prejudicial to or inconsistent with the rights of the accused, since regulation 24(1) of the Regulations of the Court allows the Defence to respond to any document submitted by the victims pursuant to such participation.<sup>23</sup>

29. The Legal Representative further submits that victim participation constitutes an integral part of the concept of a fair and just trial, since it is expressly provided for in the texts of the Court. Furthermore, this right on the part of victims is consistent with the view of international human rights law as a continuum, and is recognised in a large number of national systems. It follows that the balance of criminal trials cannot be affected by victim participation. On the contrary, taking victims' interests into consideration is one of the factors that help to balance such trials, particularly since it is the violation of the fundamental rights of the victims themselves that is involved.<sup>24</sup> Thus participation by the victims in the interlocutory appeal cannot prejudice the interests of the Defence.<sup>25</sup>

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<sup>23</sup> See *supra* para. 23.

<sup>24</sup> 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'", No. ICC-02/05-116 of 17 December 2007, para. 30, pp. 9-10.

<sup>25</sup> 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. [...] 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."

**For the reasons set out above,**

The Legal Representative, having noted the case-law of the Appeals Chamber in this regard, respectfully calls upon that 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 appeal lodged by the Office of the Prosecutor, that the presentation of their views and concerns therefore appears appropriate at this stage, and that their participation is neither prejudicial to nor inconsistent with the rights of the Defence.

The Legal Representative further requests the Appeals Chamber to grant leave to the victims to file their observations on the document to be submitted in support of the appeal, within a time limit to be set by the Chamber, and, more generally, to give the Legal Representative immediate authorisation to submit written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appellate proceedings, in accordance with the procedure laid down by the Chamber.

As regards the issue of suspensive effect, the Legal Representative requests the Chamber to order that the effect of the decision to release Thomas Lubanga Dyilo be suspended.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

**Ms Paolina Massidda**  
**Lead Counsel**

Dated this 23 July 2010

At The Hague (The Netherlands)