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No.: ICC-01/04-01/06
Date: **12 October 2012**

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

Prosecution's Response to the "Requête de la Défense aux fins de faire déclarer irrecevable la 'Prosecution's Response to the Defence Appeal against the 'Decision establishing the principles and procedures to be applied to reparations'"

Source: Office of the Prosecutor

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 (“Trial Chamber”) issued its “Scheduling order concerning timetable for sentencing and reparations” in which it invited the parties and participants to file submissions on issues relevant to reparations.¹ The Prosecution submitted its observations on 18 April 2012.²
2. On 7 August 2012, the Trial Chamber issued its “Decision establishing the principles and procedures to be applied to reparations” (“Decision”).³ The Decision was notified to the Prosecution. On 10 August 2012, the Trial Chamber informed the parties that the Decision does not constitute a reparations order within the meaning of Rule 150.⁴
3. On 13 August 2012, Thomas Lubanga filed a request for leave to appeal the Decision.⁵ On 29 August 2012, the Trial Chamber granted leave to appeal the Decision on four issues.⁶ On 10 September 2012, Thomas Lubanga filed his Document in Support of Appeal.⁷ All those documents were notified to the Prosecution. On 13 September 2012, the OPCV filed a request for leave to participate in his appeal under Article 82(1)(d).⁸ On 21 September 2012, the Prosecution filed its response to the appeal.⁹ On 8 October 2012, Thomas Lubanga filed its response to OPCV’s request to participate in the appeal.¹⁰ On 9 October 2012, Thomas Lubanga filed a request to declare inadmissible the Prosecution’s response to the Article 82(1)(d) appeal, on the basis that the Prosecution does not

¹ ICC-01/04-01/06-2844, para.8.

² ICC-01/04-01/06-2867.

³ ICC-01/04-01/06-2904.

⁴ Email communication from the Legal Advisor of the Trial Division to the parties on 10 August 2012 at 16:53.

⁵ ICC-01/04-01/06-2905.

⁶ ICC-01/04-01/06-2911.

⁷ ICC-01/04-01/06-2919 OA3 (“Appellant’s Brief”).

⁸ ICC-01/04-01/06-2921.

⁹ ICC-01/04-01/06-2924.

¹⁰ ICC-01/04-01/06-2936.

have standing to respond to an appeal related to the reparations phase (the “Request”).¹¹

4. Meanwhile, on 24 August 2012, the Office of Public Counsel for Victims (“OPCV”) and legal representatives group V02 jointly filed a notice to appeal the Decision directly to the Appeals Chamber pursuant to Article 82(4).¹² On 3 September 2012, legal representatives group VO1 also filed a notice of appeal under Article 82(4).¹³ On 6 September 2012 Thomas Lubanga filed a notice to appeal the Decision under Article 82(4).¹⁴
5. On 17 September 2012, the Appeals Chamber issued “Directions on the conduct of the appeal proceedings” (the “Direction”) in which it invited the Prosecution, Thomas Lubanga, OPCV, the legal representatives of groups V01 and V02 and the Trust Fund for Victims to address preliminary issues of admissibility and standing in relation to appeals filed under Articles 82(1)(d) and 82(4).¹⁵

The Prosecution’s Submissions

6. At the outset, the Prosecution notes that the title of Thomas Lubanga’s Request refers only to the admissibility of the Prosecution’s response to his Article 82(1)(d) appeal (filing ICC-01/04-01/06-2924). However, in the relief section Thomas Lubanga expands on this and requests that the Appeals Chamber find that the Prosecution has no right to participate in any form in the context of the “appeals” filed against the Decision, apparently including the appeal filed pursuant to Article 82(4). The Prosecution maintains that the instant request can only pertain to Prosecution filing ICC-01/04-01/06-2924 given that it is the only response on the merits filed by the Prosecution to any appeals against the Decision. The only other filing by the Prosecution on the appeals was done further to an invitation by

¹¹ ICC-01/04-01/06-2937.

¹² ICC-01/04-01/06-2909.

¹³ ICC-01/04-01/06-2914.

¹⁴ ICC-01/04-01/06-2917.

¹⁵ ICC-01/04-01/06-2923 0A21.

the Appeals Chamber on issues of standing and admissibility. As to that, the Court may determine if a party or participant has a sufficient interest in the outcome of a particular controversy to justify that person's appearance and ability to make submissions, or that such submissions are necessary for a proper determination of the issues. In this instance, the Appeals Chamber's invitation for submissions constitutes a determination that the Prosecution has standing sufficient, at a minimum, to respond to that invitation.

7. Turning to the Appellant's submissions, the Prosecution firstly submits that issues of admissibility and standing in respect of the appeals against the Decision are pending before the Appeals Chamber. These determinations will impact the instant appeal. Assuming for the present filing that the Appeals Chamber holds that the Decision is interlocutory such that Article 82(1)(d) is the appropriate appeal mechanism and that Thomas Lubanga has standing to appeal, then the Prosecution has a corresponding right to respond and its substantive response has been filed.
8. Thomas Lubanga's contention that the Prosecution has no standing to respond to an appeal brought under Article 82(1)(d) - simply because the appeal occurs in the context of the reparations phase of the case - is without merit. First, under the express language of the Regulations of the Court, the Prosecution is entitled to "file a response to *any* document filed by *any* participant in the case" (emphasis added).¹⁶ Second, Article 81(2)(d) expressly confers on "either *party*" (emphasis added) the right to request leave to appeal from an interlocutory order. In this context, the Statute implicitly confirms that, absent the most unusual circumstances, the Appeals Chamber would similarly consider the submissions of the other parties, particularly from parties whose views on the underlying

¹⁶ Regulation 24 (1) (emphasis added). The term "participants" in the Regulations covers both parties as well as other participants in the proceedings who are not parties, such as victims' legal representatives.

application for leave to appeal were accepted and considered by the Chamber that issued the impugned decision.

9. Rather, Thomas Lubanga bases his request on the absence of the Prosecution as a named party to *Article 82(4)* appeals, or in other provisions relevant to reparations.¹⁷ The Prosecution freely acknowledges that it does not have the right to appeal a reparation order under Article 82(4), or that it does not otherwise feature expressly in the Court's basic texts in respect to the reparations phase. Nonetheless, the Trial Chamber invited observations by the Prosecution on the procedures and principles to be applied to reparations and the Appeals Chamber invited observations by the Prosecution on the issues of admissibility and standing in relation to both Article 81(2)(d) and Article 82(4) appeals of the Decision related to reparations. Even without the clear language of Article 81(2)(d), in the instant case the Prosecution has been engaged by both Chambers on issues relevant to reparations.
10. Thomas Lubanga further claims, without explanation, that participation by the Prosecution in his appeal under Article 82(1)(d) is prejudicial to him.¹⁸ The Prosecution acknowledges that it may be easier to win a one-sided appeal in which contrary positions are not presented. But the denial of that advantage, particularly when the Court recognized that the other party or participant had sufficient standing to merit consideration of its views, does not in itself constitute unfair prejudice.
11. In that regard, the Prosecution finally notes that if Thomas Lubanga wished to challenge the Prosecution's participation on the legal principle of standing, it should have done so before the Trial Chamber or more promptly before the Appeals Chamber; the timing of the Defence objection suggests that it is based on

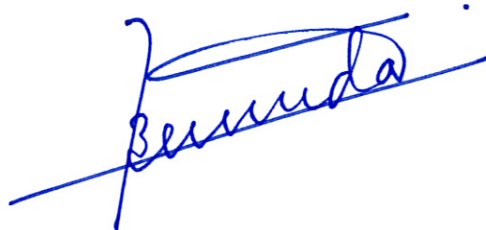
¹⁷ ICC-01/04-01/06-2937, paras.9 and 12.

¹⁸ ICC-01/04-01/06-2937, paras.10-11.

the substance of the Prosecution's arguments and not its legal standing to make them.

Relief Sought

12. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber dismiss the Request.



Fatou Bensouda
Prosecutor

Dated this 12th day of October 2012
At The Hague, The Netherlands