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

Date: 11 April 2012

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**IN THE CASE OF  
THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

**Public Document**

**Defence application for authorisation to appeal against the *Decision on the OPCV's request to participate in the reparations proceedings* issued on 5 April 2012**

**Source:** Defence Team for Mr Thomas Lubanga

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

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**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## BACKGROUND

1. On 14 March 2012, the Chamber issued its *Scheduling order concerning timetable for sentencing and reparations*,<sup>1</sup> whereby the Chamber ordered, *inter alia*, “individuals or interested parties” wishing to submit observations on the principles to be applied and the procedure to be followed with regard to reparations, to apply in writing for leave to participate by 28 March 2012.<sup>2</sup>
2. On 28 March 2012, the Office of Public Counsel for Victims (“OPCV”) filed an application for leave to participate in the reparations stage.<sup>3</sup> The OPCV requested, in particular, leave to appear in order to (i) assist victims concerned by the reparations proceedings not benefiting from legal representation, and (ii) to represent the general interests of victims on the issues relating to reparations proceedings.<sup>4</sup>
3. On 4 April 2012, the Defence filed its observations, whereby the Defence opposed the OPCV’s application.<sup>5</sup>
4. On 5 April 2012, the Chamber issued its decision authorising the OPCV to participate in the reparations stage<sup>6</sup> (“the Decision”).
5. The Defence informs the Chamber that it wishes to appeal against the Decision, and the following sections in particular:

10. Pursuant to Rule 97(1) of the Rules, the Court may award reparations on an individual or collective basis. Furthermore, in accordance with Rule 98(3) of the Rules, the Court may order that a collective award for reparation is made through the Trust Fund for Victims. Consequently, victims who may benefit

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<sup>1</sup> ICC-01-04-01/06-2844.

<sup>2</sup> ICC-01/04-01/06-2844, paras. 8 and 10.

<sup>3</sup> ICC-01/04-01/06-2848.

<sup>4</sup> ICC-01/04-01/06-2848, prayer for relief.

<sup>5</sup> ICC-01/04-01/06-2857.

<sup>6</sup> ICC-01/04-01/06-2858.

from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their legal representatives.<sup>7</sup>

12. In all the circumstances, the OPCV may :

[...]

b. represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules.

## SUBMISSIONS

### **1. The issues raised by the Oral Decision of the Trial Chamber against which the Defence wishes to appeal**

6. The Chamber gave a mandate to the OPCV to represent the interests of the victims who have not filed an application, but who could benefit from a collective award under rules 97 and 98.
7. By that decision, the Chamber authorised the OPCV to “represent” the “potential beneficiaries” who have never seized the Court with any application and whose existence has not even been established.
8. The Defence wishes to submit to the Appeals Chamber:
  - a. That legal representation for unidentified “potential victims” is not provided for by the Statute or the Rules and contravenes the provisions governing applications for participation or reparation. Whatever the form of reparation (individual or collective), rule 85 requires evidence of personal harm suffered by a natural person who has been clearly identified, or direct damage suffered by a clearly identified organisation or institution. For consideration by the Chamber, applications for participation and reparation submitted by applicants

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<sup>7</sup> ICC-01/04-01/06-2858, para. 10.

having “victim” status must be properly registered with the Registry and examined in accordance with the provisions of rules 89 and 94 and regulations 86 and 88 of the Regulations of the Court. Only persons recognised as victims under the terms of this procedure can properly be represented in the proceedings by a legal representative.

- b. That the Trial Chamber is not vested with the power to rule *ultra petita* when granting reparations, albeit “collective”, to persons who have not seized the Chamber with any request in this regard;
- c. That the widening of the notion of “victim” to an undifferentiated group of unidentified persons or organisations seriously infringes the rights of the Accused.

## **2. The article 82(1)(d) criteria are satisfied**

- 9. The Defence submits that the issues raised by the Decision fulfil the requirements of article 82(1)(d): the issues would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and an immediate resolution of them may materially advance the proceedings.

### **A) The Decision involves issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial**

- 10. The trial stage only comes to an end when the Trial Chamber has issued its decision pursuant to article 74 (on the guilt or innocence of the Accused) and, in the event that the Accused is found guilty, its decisions pursuant to article 75 (victims’ reparations) and article 76 (sentencing).<sup>8</sup> Without prejudice to the rights of the Accused during the entire appellate stage, the Accused’s

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<sup>8</sup> ICC-01/04-01/06-2800, para. 47.

rights are protected by article 67 until the end of the trial, including the decisions on sentencing and reparations.<sup>9</sup>

11. The Appeals Chamber has explained that the term “*fair*”, in the context of article 82(1)(d) is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated into the Statute by distinct provisions of it.<sup>10</sup>
12. The issues arising out of the Decision affect the fair and expeditious conduct of the proceedings, contravening Mr Lubanga’s fundamental rights (article 67), since Mr Lubanga could, if the Decision were to stand, be held liable for indeterminate damages, but about which he would not have been able to make any pertinent observation.
13. They also affect the outcome of the trial since the Chamber could adopt an order, pursuant to article 75, making Mr Lubanga liable for the compensation of persons whose victim status might, as the case may be, have been rejected by the Chamber if they had properly presented an application to participate in proceedings in accordance with the Statute and the Regulations.

**B) An immediate resolution by the Appeals Chamber of the issues raised may materially advance the proceedings**

14. According to the Appeals Chamber, “[a] decision [...] unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.”<sup>11</sup>

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<sup>9</sup> ICC-01/04-01/06-2800, para. 48.

<sup>10</sup> ICC-01/04-168, para. 11.

<sup>11</sup> ICC-01/04-168, para. 16.

15. The impugned Decision clearly violates the rights of the Defence provided by article 67.
16. The Defence must have, on the day the reparations stage begins, all the material necessary to respond to the applications for participation formulated by all applicants seeking victim status. Otherwise, the Defence will find it impossible to deal adequately with the claims brought against it and the observations submitted by the “potential victims” through the OPCV.
17. Resolution must be immediate in order to avoid irreparable prejudice to the Defence, which would impair the integrity of the proceedings.
18. In conclusion, those issues must be resolved at the current stage of the proceedings, before the consequences affect the fairness of proceedings definitively.
19. The Defence underlines that it was asked to submit its observations on any issues relating to reparations by 18 April 2012,<sup>12</sup> and that it intends, nevertheless to present its observations on those issues to the Chamber.

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<sup>12</sup> ICC-01/04-01/06-2844, para. 8.

**FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:**

TO AUTHORISE to the Defence to appeal against the *Decision on the OPCV's request to participate in the reparation proceedings*, issued on 5 April 2012.

[signed]  
**Ms Catherine Mabilie, Lead Counsel**

Dated this 11 April 2012, at The Hague