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No.: **ICC-01/04-01/06**  
Date: **5 October 2012**

**THE APPEALS CHAMBER**

**Before:** Judge Erkki Kourula  
Judge Sang-Hyun Song  
Judge Sanji Mmasenono Monageng  
Judge Anita Ušacka  
Judge Ekaterina Trendafilova

**SITUATION IN DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public Document**

**Defence response to the “Application for the participation of victims in the  
Defence interlocutory appeal”, ICC-01/04-01/06-2921**

**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 29 August 2012, Trial Chamber I authorised the Defence to appeal against the Decision on Reparations on four issues.<sup>1</sup>
2. On 10 September 2012 the Defence filed a document in support of its appeal pursuant to article 82(1)(d), rule 155, and regulation 65(4) of the Regulations of the Court.<sup>2</sup>
3. On 13 September 2012, the Office of Public Council for Victims (“OPCV”) filed an application praying the Appeals Chamber:
  - as its main submission, to review its previous stance on the participation of victims in proceedings by recognising that the personal interests of the victims who had submitted an individual application for reparations and the victims who may benefit from an order for reparations are “directly and automatically affected by any decision taken within the context of reparations proceedings”<sup>3</sup> and, consequently, that the victims do not require authorisation to participate in the Defence interlocutory appeal against the *Decision establishing the principles and procedures to be applied to reparations*;
  - in the alternative, that the victims represented by OPCV be authorised to participate in the Defence interlocutory appeal against the *Decision establishing the principles and procedures to be applied to reparations*.<sup>4</sup>
4. The Defence opposes the OPCV Application in its entirety on the following grounds:

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<sup>1</sup> ICC-01/04-01/06-2911.

<sup>2</sup> ICC-01/04-01/06-2919-tENG OA21.

<sup>3</sup> ICC-01/04-01/06-2921-tENG OA21.

<sup>4</sup> ICC-01/04-01/06-2921-tENG OA21.

## OBSERVATIONS

### 1. The need for the victims to be authorised to participate in the appellate proceedings

5. As noted by the OPCV in its observations,<sup>5</sup> the Appeals Chamber has already had several opportunities to specify the conditions under which victims' legal representatives may be allowed to submit observations in an interlocutory appeal.

6. It is therefore established that, for it to authorise participation in an appeal lodged pursuant to article 82(1)(d), regardless of the stage of the trial at which the appeal is lodged, the Appeals Chamber requires four conditions to be fulfilled:

- An application for authorisation to participate in the interlocutory appeal must be filed with the Appeals Chamber;<sup>6</sup>
- The application to participate in the interlocutory appeal must be filed by persons who have already been authorised to participate at the trial stage;<sup>7</sup>
- The application must set forth whether and how the personal interests of the victims concerned are affected by this appeal, stating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings;<sup>8</sup>

<sup>5</sup> ICC-01/04-01/06-2921-tENG, para. 14.

<sup>6</sup> ICC-01/04-450 para. 1; ICC-02/05-138, paras. 23-24; ICC-01/04-01/06-824 OA, para. 1; ICC 01/04-01/06-1452 OA 12, para. 7; ICC-01/04-01/06-2555 OA 17, para. 15.

<sup>7</sup> ICC-02/05-138, para. 51; ICC 01/04-01/06-1452 OA 12, para. 7.

<sup>8</sup> ICC-01/04-450, para. 1; ICC 01/04-01/06-1452 OA 12, para. 7; ICC-02/05-138, para. 51; ICC-02/05-129 OA, para. 1; ICC-02/05-132 OA2, para. 1; ICC-02/05-133 OA3, para. 1.

- The application must also include a statement as to why authorising participation would not be prejudicial to or inconsistent with the rights of the Defence.<sup>9</sup>

7. Accordingly, the requirement to file an application to participate in the Defence's interlocutory appeal against the *Decision establishing the principles and procedures to be applied to reparation* is clearly one of the conditions stipulated by the jurisprudence of the Appeals Chamber. The OPCV's request to the Chamber in no wise constitutes a *sui generis* situation<sup>10</sup> warranting a departure by the Appeals Chamber from the conditions it has previously set. Neither the Statute nor the jurisprudence in fact provides for a distinction to be made at the reparations stage.

8. Moreover, the procedure set out by the Appeals Chamber provides the Defence with the opportunity to exercise its rights, as appropriate, by submitting observations on the merits of the application.

9. In light of the foregoing, the OPCV has no grounds to request that the Chamber exempt it from obtaining authorisation, an action which would run counter to article 68(3).

**2. None of the victims represented by the OPCV should be authorised to participate in the proceedings arising from the Defence's interlocutory appeal**

10. The OPCV claims to be acting as the Legal Representative of the following victims<sup>11</sup>:

- Four victims whose authorisation to participate in the proceedings was withdrawn, *viz.* a/0047/06, a/0048/06, a/0050/06 and a/0052/06;<sup>12</sup>

<sup>9</sup> ICC-01/04-450, para. 1; ICC 01/04-01/06-1452 OA12, para. 7; ICC-02/05-138, para. 51; ICC-02/05-129 OA, para. 1; ICC-02/05-132 OA2, para. 1; ICC-02/05-133 OA3, para. 1.

<sup>10</sup> ICC-01/04-01/06-2921-tENG, para. 24.

<sup>11</sup> ICC-01/04-01/06-2921-tENG, footnote 23, and ICC-01/04-01/06-2928-tENG, para. 9.

<sup>12</sup> ICC-01/04-01/06-2842 (Judgment), para. 484 (Witnesses P-0010, P-0011, P-0007 and P-0008), and ICC-01/04-01/06-2928-tENG, footnote 24.

- Victim a/0198/09, who filed an application for reparations under rule 94 but did not file an application for participation;<sup>13</sup>
- Victim a/2917/11, who filed an application for participation/reparations<sup>14</sup> but was not expressly authorised to participate in the proceedings as a victim by a decision of the Trial Chamber;
- Victims who did not file applications but who “may benefit from an award for collective reparations”.<sup>15</sup>

11. The Defence submits that that none of these victims should be authorised, in any way whatsoever, to participate in the proceedings arising from the Defence’s interlocutory appeal in accordance with the views it has already advanced in its 1 October 2012 observations.<sup>16</sup>

12. In particular, the Defence notes the following:

**a. The four victims whose right to participate was withdrawn by the Trial Chamber in its judgment<sup>17</sup>**

13. Firstly, as concerns those individuals whose right to participate in the proceedings was withdrawn, the Defence is of the view that the Chamber’s findings confirm unambiguously that they do not fulfil the criteria to be considered “victims” within the meaning of rule 85. Moreover, the Chamber found that the testimony of those individuals was wholly devoid of credibility or reliability.<sup>18</sup> In these circumstances, any further participation of those individuals in the proceedings in any manner whatsoever is groundless and would adversely affect Mr Lubanga’s rights.

<sup>13</sup> This information appears at footnote 27 of document ICC-01/04-01/06-2928-tENG.

<sup>14</sup> This information appears at footnote 23 of document ICC-01/04-01/06-2921-tENG and at footnote 27 of document ICC-01/04-01/06-2928-tENG.

<sup>15</sup> ICC-01/04-01/06-2858 and ICC-01/04-01/06-2928-tENG, para. 9.

<sup>16</sup> ICC-01/04-01/06-2929.

<sup>17</sup> ICC-01/04-01/06-2842 (Judgment), para. 484 (Witnesses P-0010, P-0011, P-0007 and P-0008), and ICC-01/04-01/06-2928-tENG, footnote 24.

<sup>18</sup> See ICC-01/04-01/06-2842, paras. 484 and 502.

**b. The victims who were never authorised to participate in the proceedings**

14. The Defence notes that Victims a/0198/09 and a/2917/11 were never expressly authorised to participate in the reparations stage or in any other stage of the proceedings. Consequently, they cannot now be authorised to participate in the interlocutory appeal by filing observations.
15. Authorising an alleged victim's intervention before the Appeals Chamber at the reparations stage when the victim has never been authorised to participate in the proceedings not only runs counter to the conditions set by the Appeals Chamber but would also deprive the rule 89 procedure of meaning. This procedure allows the Defence to exercise its rights by filing its observations on the persons submitting an application for participation. However, in the matter at hand, Victim a/0198/09, who has never submitted an application for participation, and Victim a/2917/11, whose application was transmitted to the Defence on 14 March 2002,<sup>19</sup> cannot have been the subjects of observations by the Defence. Accordingly, authorising them to participate in the proceedings would be patently prejudicial to the rights of the Defence

**c. The victims who did not file applications but who "may benefit from an award for collective reparations"<sup>20</sup>**

16. The Defence submits that the rules governing the participation of victims in the proceedings in no wise contemplate the representation of the general interests of unidentified victims. On the contrary the reparations stage, like the trial stage, deals with the specific interests of victims authorised to participate in the proceedings.<sup>21</sup>
17. Accordingly, the OPCV has no standing to act at the interlocutory appeal stage if it is not in a position to provide concrete details of the specific interests concerned by its intervention.

<sup>19</sup> ICC-01/04-01/06-2841-Conf-Exp-Anx47.

<sup>20</sup> ICC-01/04-01/06-2858 and ICC-01/04-01/06-2928-tENG, para. 9.

<sup>21</sup> ICC-01/04-01/06-1432, para. 61.

**d. All the victims whose identity has not been disclosed to the Defence**

18. Finally, the Defence wishes to highlight more generally that only victims whose identity has been disclosed to it should be allowed to present observations on the interlocutory appeal.
19. This position is consistent with the Trial Chamber's decision of 18 January 2008 which stated: "The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself".<sup>22</sup> The Chamber specified that in this respect, it would scrutinise the precise circumstances and the potential prejudice to the parties and other participants by the anonymous participation of the victims. Finally, on 26 February 2008, the Chamber emphasised that it would take into account the anonymity of a victim in determining the extent of his or her participation in order to safeguard the fairness of the proceedings.<sup>23</sup>
20. Yet, at the reparations stage, their participation must necessarily be subject to the disclosure of their identity to the Defence in full respect of the Defence's rights (article 68).
21. In fact, the Defence is not privy to the identity of any of the victims represented by the OPCV.<sup>24</sup>
22. Hence, since none of the victims represented by the OPCV has revealed his or her identity, the OPCV has no standing to request that they be allowed to present their observations.

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

DENY the OPCV application; and

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<sup>22</sup> ICC-01/04-01/06-1119, para. 131.

<sup>23</sup> ICC-01/04-01/06-1191, para. 37.

<sup>24</sup> Save for Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, who are no longer authorised to participate in the proceedings.



ADJUDGE and DECLARE that:

- The victims whose right to participate was withdrawn by Trial Chamber I in its judgment, viz. Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, cannot participate in any way whatsoever in the proceedings in the case at bar;
- Only the victims who have been expressly authorised by a decision of the Chamber, who have filed a reparations form and whose identity has been disclosed to the Defence may participate in the proceedings in the case at bar;
- The OPCV has no standing to intervene in the Defence's 10 September 2012 appeal against the 7 August 2012 Decision on Reparations.

[signed]

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Ms Catherine Mabile, Counsel

Dated this 5 October 2012

At The Hague, The Netherlands