

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/06  
Date.: 25 February 2013

**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***

**Confidential, *ex parte*, only available to the Registry and OPCV  
With confidential *ex parte* annex, only available to the Registry and OPCV**

**Submissions on whether the Appeals Chamber should consider the  
applications for participation at the appeals stage**

**Source: Office of Public Counsel for Victims**

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

**Office of the Prosecutor**

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparations**

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**Office of Public Counsel for the Defence**

Ms Paolina Massidda

Ms Sarah Pellet

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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar and Deputy Registrar**

**Defence Support Section**

Ms Silvana Arbia and Mr Didier

Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

Fiona Mckay

## I PROCEDURAL BACKGROUND

1. On 14 March 2012, Trial Chamber I ("the Chamber") delivered its *Judgement pursuant to Article 74 of the Statute* ("the Judgement"),<sup>1</sup> by which it found Mr Thomas Lubanga Dyilo guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the *Force Patriotique pour la libération du Congo* and using them to participate actively in hostilities under articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from early September 2002 to 13 August 2003.<sup>2</sup>

2. On 10 July 2012, Trial Chamber I handed down its *Decision on Sentence pursuant to Article 76 of the Statute* ("the Decision on Sentence")<sup>3</sup> whereby it sentenced Mr Thomas Lubanga Dyilo to a total of 14 years' imprisonment.<sup>4</sup>

3. On 3 October 2012, the Defence filed a notice of appeal against the Judgement<sup>5</sup> and a notice of appeal against the Decision on Sentence.<sup>6</sup>

4. That same day, the Prosecution filed a notice of appeal against the Decision on Sentence.<sup>7</sup>

5. On 3 December 2012, the Defence filed a document in support of its appeal against the Judgement<sup>8</sup> and a document in support of its appeal the Decision on Sentence.<sup>9</sup>

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<sup>1</sup> See *Judgement pursuant to Article 74 of the Statute*, (Trial Chamber I), ICC-01/04-01/06-2842, 14 March 2012, ("Judgement").

<sup>2</sup> *Idem*, para. 1358.

<sup>3</sup> See *Decision on Sentence pursuant to Article 76 of the Statute*, (Trial Chamber I), ICC-01/04-01/06-2901, 10 July 2012, ("Decision on Sentence").

<sup>4</sup> *Idem*, para. 7.

<sup>5</sup> See "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's Judgement pursuant to Article 74 of the Statute of 14 March 2012", ICC-01/04-01/06-2934 A5, 3 October 2012.

<sup>6</sup> See "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's Decision on sentence pursuant to Article 76 of the Statute of 10 July 2012", ICC-01/04-01/06-2935 A6, 3 October 2012.

<sup>7</sup> See "Prosecution's Notice of Appeal against Trial Chamber I's 'Decision on Sentence pursuant to Article 76 of the Statute'", ICC-01/04-01/06-2933 A4, 3 October 2012.

<sup>8</sup> See "Public Redacted Version - *Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du 'Jugement rendu en application de l'Article 74 du Statut' rendu le 14 mars 2012*", n° ICC-01/04-01/06-2948-Red A5, 3 décembre 2012.", ICC-01/04-01/06-2948-Red A5, 3 December 2012.

6. On the same day, the Prosecution filed a document in support of its appeal against the Decision on Sentence.<sup>10</sup>

7. On 13 December 2012, the Appeals Chamber delivered a *Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions*.<sup>11</sup>

8. On 4 February 2013, the Defence filed a response to the Prosecution's document in support of the appeal against the Judgement.<sup>12</sup>

9. On 7 February 2013, the Registry filed a "Request for guidance regarding applicants for participation in the appeal phase".<sup>13</sup>

10. On 14 February 2013, the Chamber issued an *Order on the filing of submissions on new applications to participate as victims in the proceedings*,<sup>14</sup> in which it (i) appointed the Office of Public Counsel for Victims ("the OPCV") as the legal representative of Applicants a/0198/09, a/2899/11, a/2901/11 and a/2917/11; and (ii) requested the OPCV to file, by 4 p.m. on 25 February 2013, its submissions on whether the Appeals Chamber should consider new victim applications given the current stage of the proceedings.<sup>15</sup>

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<sup>9</sup> See "Mr Thomas Lubanga's appellate brief against Trial Chamber I's 10 July 2012 'Decision on Sentence pursuant to Article 76 of the Statute'", ICC-01/04-01/06-2949 A6, 3 December 2012.

<sup>10</sup> See "Prosecution's Document in Support of Appeal against the 'Decision on Sentence pursuant to Article 76 of the Statute' (ICC-01/04-01/06-2901)", ICC-01/04-01/06-2959 A4, 3 December 2012.

<sup>11</sup> See *Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions* (Appeals Chamber), ICC-01/04-01/06-2951 A4 A5 A6, 13 December 2012.

<sup>12</sup> See "*Réponse de la Défense au 'Prosecution's Document in Support of Appeal against the 'Decision on Sentence pursuant to Article 76 of the Statute' déposé le 3 décembre 2012'*", ICC-01/04-01/06-2967 A4, 4 February 2013.

<sup>13</sup> See "Request for guidance regarding applicants for participation in the appeal phase", ICC-01/04-01/06-2977 A4 A5 A6, 7, February 2013.

<sup>14</sup> See *Order on the filing of submissions on new applications to participate as victims in the proceedings* (Appeals Chamber), ICC-01/04-01/06-2978 A4 A5 A6, 14 February 2013.

<sup>15</sup> *Idem*, p. 3.

11. On 15 February 2013, the Defence sought leave to reply to the Prosecution's responses to the Defence appeals against the Judgement and the Decision on Sentence.<sup>16</sup>

12. On 19 February 2013, the Prosecution filed a response to the Defence document in support of its appeal against the Judgment<sup>17</sup> and a response to the Defence document in support of its appeal against the Decision on Sentence.<sup>18</sup>

13. On 20 February 2013, the Prosecution filed a response to the Defence request for leave to file a reply.<sup>19</sup>

14. On 21 February 2013, the Appeals Chamber granted the Defence leave to file a reply to the Prosecution's responses to the Defence documents in support of its appeals against the Judgement and the Decision on Sentence, by 4 p.m. on 28 February 2013.<sup>20</sup>

15. Accordingly, Principal Counsel of the OPCV submits the following observations on whether the Appeals Chamber should consider the applications to participate in the appellate proceedings.

16. These submissions are filed as confidential, *ex parte* Registry and OPCV, because they make reference to internal communications between the Registry and the OPCV. A public redacted version will be filed simultaneously. The annex to the

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<sup>16</sup> See "*Requête de la Défense aux fins de solliciter l'autorisation de déposer une réplique à la 'Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74' et à la 'Prosecution's Response to the 'Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Décision relative à la peine, rendue en application de l'article 76 du Statut' rendu par la Chambre de première instance I le 10 juillet 2012'*", déposées le 4 février 2013", ICC-01/04-01/06-2979 A5 A6, 15 February 2013.

<sup>17</sup> See "Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74", ICC-01/04-01/06-2969-Red A5, 19 February 2013.

<sup>18</sup> See "Prosecution's Response to the "*Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Décision relative à la peine, rendue en application de l'article 76 du Statut' rendu par la Chambre de première instance I le 10 juillet 2012'*", No. ICC-01/04-01/06-2968-Red A6, 19 February 2013.

<sup>19</sup> See "Prosecution's Response to Thomas Lubanga's Request to File a Reply", ICC-01/04-01/06-2980 A5 A6, 20 February 2013, (of 19 February 2013).

<sup>20</sup> See *Order on the filing of a reply under regulation 60 of the Regulations of the Court* (Appeals Chamber), ICC-01/04-01/06-2982 A5 A6, 21 February 2013, p. 3.

present submission is filed as confidential, *ex parte* Registry and OPCV, because it contains an e-mail exchange between the Registry and the OPCV.

## II. SUBMISSIONS CONCERNING THE ASSESSMENT OF APPLICATIONS FOR PARTICIPATION AT THE APPEALS STAGE

### a. *Applicable principles*

17. Article 68(3) of the Rome Statute establishes the right of victims to participate in proceedings before the Court by presenting their views and concerns to a relevant Chamber where their personal interests are affected, at stages of the proceedings determined to be appropriate and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Rule 89(1) of the Rules of Procedure and Evidence provides that all victims who wish to present their views and concerns to the Court shall submit a written application to the Registrar. According to regulation 86(3) of the Regulations of the Court, victims applying for participation in the trial and/or appeal proceedings shall “to the extent possible”, make their application to the Registrar, before the commencement of stage of the proceedings in which they want to participate. Finally, pursuant to rule 89(2) of the Rules of Procedure and Evidence, a victim whose application has been rejected may submit a new application at a subsequent stage in the proceedings.

18. Principal Counsel submits that neither the aforementioned provisions nor any other provisions of the Court's texts contain restrictions on the phase of the proceedings in which victims may participate, neither are there strict time limits for filing applications for participation. Accordingly, any victims whose personal interests are affected may seek to participate in any phase of the proceedings before the Court, in other words, in one, several or all of the phases and at any point in the proceedings. It is thus logical that the standard form for participation requires the victim to provide, *inter alia*, “information on the stage of the proceedings in which

[the victim] wishes to participate",<sup>21</sup> thereby granting victims unfettered latitude to decide on the phase in which they wish to participate.

19. *Ergo*, a victim who, for example, has never participated in the pre-trial or the trial phases cannot be denied the right to participate in the appellate phase - if that victim submits an application to this effect - solely because their victim status had yet to be determined at the earlier phase of the proceedings. Similarly, a victim cannot be denied the right to participate in the appellate phase solely on the basis that their application was rejected at the earlier phase of the proceedings, for example, the trial phase, if the victim submits a new application to this effect.

20. In this regard, should the Appeals Chamber consider that the right to participate in the appellate phase under article 81 of the Rome Statute applies only to persons who have been granted the status of victim authorised to participate in the trial phase, then no one seeking to participate in the appellate phase or whose application for participation was submitted at the end of the trial phase and/or was transmitted by the Registry to the Appeals Chamber after the trial phase, for whatever reason would qualify in this respect, since their victim status would never have been subject to judicial determination in accordance with rule 85 of the Rules of Procedure and Evidence.

21. Furthermore, article 68(3) of the Rome Statute imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text ("*la Cour permet*") makes it quite clear that the victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.<sup>22</sup>

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<sup>21</sup> See regulation 86(2) of the Regulations of the Court.

<sup>22</sup> See *Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6*, Pre-Trial Chamber I, ICC-01/04-101, 17 January 2006, para. 71. See also in this regard, Donat-Cattin (D.), "Article 68. Protection of victims and witnesses and their participation in the proceedings", in Triffterer (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, Verlag C.H. Beck, Munich, 2008, pp. 1288 and 1289 (24 and 25).



Accordingly, the Rome Statute requires the Registry to transmit any application for participation submitted by a victim to the "relevant Chamber",<sup>23</sup> and requires the relevant Chamber to examine applications for participation transmitted to it in accordance with article 68(3).<sup>24</sup>

22. According to Principal Counsel, those provisions require the relevant Chamber to examine victims' applications for participation without excluding or restricting the possibility, in particular, of the Appeals Chamber being seized of an application for participation in accordance with rule 89 of the Rules of Procedure and Evidence or that Chamber's power to determine such applications under article 68(3) of the Rome Statute.

23. Principal Counsel notes that according to the Appeals Chamber's jurisprudence to date, in principle, that Chamber need not embark on a determination of the victim status of persons wishing to participate in an appeal.<sup>25</sup> However, that jurisprudence concerns the participation of victims in interlocutory appeals under article 82 of the Rome Statute, whereas in this case the Appeals Chamber is, for the first time, seized of appeals under article 81 of the Rome Statute. Notwithstanding, the Appeals Chamber is not precluded from departing from that jurisprudence and establishing, at its discretion, the criteria for determining victim status at the appellate stage pursuant to article 81 of the Rome Statute, regard being had to its obligation under article 68(3) of the Rome Statute.

24. Principal Counsel further submits that the Appeals Chamber is accorded all the necessary powers to effectively fulfil its obligation under article 68(3) of the Rome Statute. Indeed, according to article 83(1) of the Rome Statute, "[f]or the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber". Furthermore, pursuant to rule 149 of the Rules of

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<sup>23</sup> See rule 89(1) of the Rules of Procedure and Evidence.

<sup>24</sup> See rule 89(2) of the Rules of Procedure and Evidence.

<sup>25</sup> See *Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation"* (Appeals Chamber), ICC-01/04-01/06-1335 OA9 OA10, 16 May 2008, para. 40.



Procedure and Evidence, “[p]arts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber”.

25. While pursuant to those provisions the Appeals Chamber has the power to establish, at its discretion, the criteria for determining victim status at the appellate phase pursuant to article 81 of the Rome Statute, Principal Counsel submits that the Appeals Chamber cannot, in this regard, apply a higher standard of proof than that systematically applied by the Pre-Trial and Trial Chambers in determining victim status during the pre-trial and trial stages of the proceedings, *videlicet*, a *prima facie* determination.<sup>26</sup>

26. In light of its powers under rule 91(1) of the Rules of Procedure and Evidence to “modify a previous ruling under rule 89”, the Appeals Chamber is not in principle bound by the Trial Chambers’ determination of victim status with respect to any victim whose application was rejected at the previous stage of the proceedings, for example at trial, but who submitted a new application to participate in the appellate phase.

27. In this respect, the Appeals Chamber has held that “[i]t cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance”.<sup>27</sup> As further held by the Appeals Chamber,

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<sup>26</sup> See *Decision on victims’ participation* (Trial Chamber I), ICC-01/04-01/06-1119, 18 January 2008, para. 99; *Decision on the treatment of applications for participation* (Trial Chamber II), ICC-01/04-01/07-933-tENG, 26 February 2009, para. 10; *Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants* (Trial Chamber III), ICC-01/05-01/08-699, 22 February 2010, para. 19; *Decision on the Registry Report on six applications to participate in the proceedings* (Trial Chamber IV), ICC-02/05-03/09-231, 17 October 2011, para. 20; *Decision on victims’ representation and participation* (Trial Chamber V), ICC-01/09-01/11-460, 3 October 2012, para. 37; and *Decision on victims’ representation and participation* (Trial Chamber V), ICC-01/09-02/11-498, 3 October 2012, para. 36.

<sup>27</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”*, 13 February 2007, ICC-01/04-01/06-824 (OA 7), para.43.

"[The Appeals Chamber therefore reads] regulation 86(8) to be confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation. The Appeals Chamber notes, in any event, that regulation 86(8) is subordinate to article 68(3) (see articles 21(1)(a) and 52(1) of the Statute and regulation 1(1) of the Regulations of the Court). Any contrary reading of its provisions to that set out above would conflict with the requirements of article 68(3) that it is for the Appeals Chamber to determine whether the participation of victims in a particular interlocutory appeal is appropriate."<sup>28</sup>

28. Principal Counsel submits that the Appeals Chamber's holdings must apply *mutatis mutandis* to victim participation in the appellate phase pursuant to article 81 of the Rome Statute.

29. Accordingly, Principal Counsel submits that in order to fulfil her obligations vis-à-vis the victims in accordance with article 68(3) of the Rome Statute and in conformity with the applicable provisions of the Court's texts, as analysed *supra*, the Appeals Chamber is duty-bound to examine all applications to participate in the appellate phase pursuant to rule 89 of the Rules of Procedure and Evidence.

*b. Application of the principles to applicants represented by the OPCV*

30. Principal Counsel argues that in accordance with the aforementioned principles, the Appeals Chamber must assess new applications for participation.

31. Applicants, a/0198/09, a/2899/11, a/2901/11 and a/2917/11 have all sought to participate in all the phases of these proceedings, including the appeals phase.

32. Applications a/2899/11 and a/2901/11 were compiled on 18 April 2011 and transmitted to the seat of the Court on 27 May 2011, while application a/2917/11 was compiled on 14 May 2011 and transmitted to the seat of the Court on 1 July 2011.

33. Application a/0198/09 is quite different. In fact, it was compiled on 9 March 2009 and transmitted to the seat of the Court on 24 March 2009. In April 2012, further to a decision of Trial Chamber I, the OPCV was appointed Legal Representative for

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<sup>28</sup> *Idem.*

applicants in respect of reparations,<sup>29</sup> including, Applicant a/0189/09. Upon verifying the application and being unable to contact the applicant directly, the OPCV sought clarification from the Registry. On 12 June 2012, in response to that query regarding the reasons for this transmission, which was at the very least late, the Registry informed the OPCV that “[TRANSLATION] [I]t appears that due to a registration error, this application was not processed by VPRS as an application for participation. To date, the application has not been transmitted to the Chamber or to the parties.”<sup>30</sup>

34. Principal Counsel submits that as a result, Applicant a/0198/09 was unmitigatedly denied any opportunity to participate at the trial phase, albeit having expressly requested such participation in his application submitted at the very beginning of the trial.

35. Indeed, on 2 November 2011 the Registry submitted an application to Trial Chamber I seeking instructions on how to proceed with respect to the twenty-seven applications for participation that the Registry had received but had not yet transmitted to the Chamber,<sup>31</sup> particularly stating that “these applications were not processed and filed due to the lack of available resources at the time”.<sup>32</sup>

36. In its Order on 27 January 2012,<sup>33</sup> Trial Chamber I ruled that given that the evidence and the submissions in the trial had concluded and the Chamber had embarked on deliberation, “there is no opportunity for the victims who have applied to participate to express their views and concerns under Article 68(3) of the Rome Statute”,<sup>34</sup> and accordingly decided that these applications were not to be presented to the Chamber at this stage of the proceedings.<sup>35</sup> The Chamber, however,

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<sup>29</sup> See *Decision on the OPCV's request to participate in the reparations proceedings* (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012, para. 13(a).

<sup>30</sup> See Annex to this submission.

<sup>31</sup> See “Request for instructions on victim's applications for participation and reparations received by the Registry”, ICC-01/04-01/06-2817, 2 November 2011.

<sup>32</sup> *Idem*, p. 4.

<sup>33</sup> See *Order on the applications by victims to participate and for reparations* (Trial Chamber I), ICC-01/04-01/06-2838, 27 January 2012.

<sup>34</sup> *Idem*, para. 5.

<sup>35</sup> *Ibid.*

emphasised that “if there is a sentencing and substantive reparations phase in this case, these applications by victims to participate are to be provided to the Chamber for those purposes.”<sup>36</sup>

37. On 14 March 2012, Trial Chamber I invited, *inter alia*, the legal representatives of victims to file, by 18 April 2012, written submissions on the procedure to be adopted for sentencing under article 76 of the Rome Statute and the principles to be applied to that end,<sup>37</sup> and further decided that a separate sentencing hearing would be fixed in due course.<sup>38</sup> The Chamber decided to hold the hearing on sentence on 13 June 2012,<sup>39</sup> and the legal representatives of the victims were allowed to participate in said hearing.

38. Principal Counsel submits in this connection that it would appear that despite Trial Chamber I's instructions in its Order of 27 January 2012, the Registry has failed to send the Chamber any of the hitherto untransmitted applications for participation for the purposes of determining whether they have standing to participate in the hearing on sentence.

39. As a result, Applicants a/0198/09, a/2899/11, a/2901/11 and a/2917/11 were quite simply denied any opportunity whatsoever to participate in the sentencing proceedings, which form an integral part of the trial phase,<sup>40</sup> even though they had expressly requested such participation in their respective applications which were submitted well ahead of the commencement of the proceedings. Meanwhile, Applicant a/0198/09 is further prejudiced for reasons hardly attributable to him.

40. Furthermore, the Registry sought the Appeals Chamber's instructions on the manner in which to proceed with respect to the untransmitted applications for

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<sup>36</sup> *Ibid.*, para. 6.

<sup>37</sup> See *Scheduling order concerning timetable for sentencing and reparations*, ICC-01/04-01/06-2844, 14 March 2012, para. 3.

<sup>38</sup> *Idem*, para. 4.

<sup>39</sup> See *Order fixing the date for the sentencing hearing* (Trial Chamber I), ICC-01-04-01/06-2871, 24 April 2012, para. 8.

<sup>40</sup> See article 76(2) of the Rome Statute.

participation only on 7 February 2013, despite having received applications a/0198/09, a/2899/11, a/2901/11 and a/2917/11 well in advance of the appellate phase of this case.

41. Principal Counsel is fully aware that the appellate phase of this case is already well advanced. Nonetheless, she submits that the right of the victims to participate in proceedings before the Court as enshrined in article 68(3) of the Rome Statute can under no circumstances be affected by factors beyond their control.

42. Principal Counsel submits that in light of the Court's obligation vis-à-vis victims in accordance with article 68(3) of the Rome Statute, the Appeals Chamber must determine the victim status of Applicant's a/0198/09, a/2899/11, a/2901/11 and a/2917/11 in accordance with the Court's applicable texts.<sup>41</sup>

43. Where the Appeals Chamber finds that these applicants satisfy the requirements of article 68(3) of the Rome Statute and rule 85 of the Rules of Procedure and Evidence, that Chamber must allow them to present submissions at the appellate phase through their legal representatives and within a set time limit, *scilicet*, submissions in response to the Prosecution and Defence documents in support of their appeals against the Judgment and Decision on Sentence, in order to ensure that the participation of these applicants in the proceedings before the Court is effective and significant as opposed to purely symbolic.<sup>42</sup>

44. By way of subsidiary remark, Principal Counsel notes that the four applicants she represents conform to the criteria established by rule 85 of the Rules of Procedure and Evidence as interpreted by the Court in its jurisprudence.

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<sup>41</sup> See *supra*, paras. 17-29.

<sup>42</sup> See *Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06-1432 OA9 OA10, 27 August 2008 (dated 11 July 2008), para 97. See also *Decision on victims' representation and participation*, Trial Chamber V), ICC-01/09-01/11-460, 3 October 2012, para. 10; *Decision on victims' representation and participation* (Trial Chamber V), ICC-01/09-02/11-498, 3 October 2012, para. 9; *Decision on common legal representation of victims for the purpose of trial* (Trial Chamber III), ICC-01/05-01/08-1005, 1 December 2010 (dated 10 November 2010), para. 9(a).

45. Concerning the criteria under article 68(3) of the Rome Statute, Principal Counsel submits firstly that the personal interests of the applicants she represents are affected by the appellate phase in the same way as the personal interests of the victims authorised to participate in the trial phase and subsequently in the current appellate phase. In fact, all victims affected by the present case have an obvious personal interest in seeing Mr Thomas Lubanga Dyilo convicted and sentenced and in seeing the conviction and sentence become final.

46. It is befitting for these victims to participate in the current appellate phase because this phase directly affects their personal interest in seeing Mr Lubanga convicted and sentenced. Moreover, such participation is appropriate because it is incumbent upon the Court, the Appeals Chamber in this instance, to give full effect to the right of any victim to participate in the phase of the proceedings of their choice. Lastly, despite the advanced stage of the present appellate phase such participation is apposite, inasmuch as although the applications for participation were submitted in due time, they were not transmitted in a timely manner due to circumstances beyond the applicants' control.

47. Finally, the participation of these applicants in the current appellate phase affects neither the rights of the Defence nor the requirements of a fair and impartial trial, since the Defence will have the opportunity to make submissions on these applications for participation as well as any arguments arising from their submissions on the appeals.

**For these reasons, Principal Counsel respectfully requests the Appeals Chamber to:**

**Adjudge** that the Chamber has jurisdiction to assess the new applications for participation, given the appellate stage of the proceedings;

Accordingly,

- **rule** on the applications for participation and authorise the applicants to participate in the appellate proceedings;
- **authorise** the applicants to present, through their legal representatives and within a time limit to be determined by the Appeals Chamber, their submissions in response to the Prosecution and Defence documents in support of their appeals against the Judgement and the Decision on Sentence.

[signed]  
Paolina Massidda  
Principal Counsel

At The Hague, The Netherlands  
Dated this 25 February 2013