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No.: ICC-01/04-01/06
Date: 1 November 2016

TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Péter Kovács

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

URGENT

Public Document

**Decision rejecting the application of the Defence for Thomas Lubanga Dyilo
for leave to appeal the Decision of 6 October 2016**

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

Office of the Prosecutor

Counsel for Thomas Lubanga Dyilo

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of V01 Victims

Mr Luc Walley

Mr Franck Mulenda

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

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REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Trust Fund for Victims

Mr Pieter de Baan

TRIAL CHAMBER II (“the Chamber”) of the International Criminal Court, acting pursuant to article 82(1)(d) of the Rome Statute (“the Statute”), issues the following decision.

I. Procedural background

1. On 15 July 2016, the Chamber issued an order inviting the States concerned, as well as any organisations which might so wish, to submit their observations on current or past collective projects for former child soldiers in the east of the Democratic Republic of the Congo and to present it with proposals for collective projects to support the setting up of a range of collective reparation projects for the former child-soldier victims of Thomas Lubanga Dyilo¹ (“Mr Lubanga”). In this connection, the Chamber informed the parties, the TFV and the Registry of its plans to hold a public hearing in their presence on 11, 13 and 14 October 2016² (“the Hearing”).

2. On 6 October 2016, the Chamber issued a decision denying the request of the Defence for Mr Lubanga³ (“the Defence”) that it order Mr Lubanga’s appearance at the Hearing via video-link⁴ (“the Decision of 6 October 2016”). On the same day, the Chamber issued an order on the conduct of the Hearing.⁵

¹ “Order pursuant to rule 103 of the Rules of Procedure and Evidence”, 15 July 2016, ICC-01/04-01/06-3217-tENG (“the Order of 15 July 2015”).

² Order of 15 July 2015, para. 11.

³ “Requête de la Défense de Monsieur Thomas Lubanga aux fins de comparution de Monsieur Lubanga par video-link lors des audiences des 11, 13 et 14 octobre 2016”, dated 20 September 2016 and registered on 21 September 2016, ICC-01/04-01/06-3225-Conf-Exp (a public redacted version was filed on 27 September 2016) and one confidential *ex parte* annex (“Annex A”).

⁴ “Décision relative à la requête de l’équipe de défense de Thomas Lubanga Dyilo sollicitant sa comparution lors des audiences prévues les 11, 13 et 14 octobre 2016 au moyen d’une liaison vidéo”, 6 October 2016, ICC-01/04-01/06-3243.

⁵ “Order on the conduct of the hearing to be held on 11 and 13 October 2016”, 6 October 2016, ICC-01/04-01/06-3245-tENG.

3. On 10 October 2016, the Defence filed an application for leave to appeal the Decision of 6 October 2016 pursuant to article 82(1)(d) of the Statute and rule 155 of the Rules of Procedure and Evidence⁶ (“the Application”).

4. The Defence submits that it intends to assert before the Appeals Chamber that, in ruling Mr Lubanga’s presence at the Hearing unnecessary, the Chamber committed an error of law adversely affecting Mr Lubanga’s rights.⁷

5. In the Defence’s view, it is clear that the term “trial” encompasses the reparations stage and that, consequently, a convicted person against whom reparations are sought enjoys the rights granted to the accused under article 67 of the Statute, including the right of the accused to be present at the trial.⁸ The Defence submits, moreover, that, since there is no provision specifically governing the rights of the convicted person, rule 97(3) of the Rules of Procedure and Evidence necessarily refers to the rights enumerated in article 67 of the Statute.⁹

6. The Defence recalls the Registry’s undertaking that Mr Lubanga could appear via video-link at reparations stage hearings.¹⁰ It also recalls that the parties are not opposed to Mr Lubanga’s participation in the Hearing, and that the Registry has confirmed the absence of any technical obstacles to this. Accordingly, the Defence submits that the interference with Mr Lubanga’s right to be present at the trial is wholly unjustified.¹¹

7. On 11 October 2016, at the Hearing, the Chamber rejected the Application and announced that it would issue a reasoned decision at the earliest opportunity.¹²

⁶ “*Requête de la Défense sollicitant l’autorisation d’interjeter appel de la ‘Décision relative à la requête de l’équipe de défense de Thomas Lubanga Dyilo sollicitant sa comparution lors des audiences prévues les 11, 13 et 14 octobre 2016 au moyen d’une liaison vidéo’ rendue le 6 octobre 2016*”, dated 9 October 2016 and registered on 10 October 2016, ICC-01/04-01/06-3246.

⁷ Application, paras. 10 and 23.

⁸ *Ibid.*, paras. 11-16.

⁹ *Ibid.*, para. 18.

¹⁰ *Ibid.*, paras. 19-20.

¹¹ *Ibid.*, para. 22.

¹² ICC-01/04-01/06-T-367-FRA, 11 October 2016, p. 6, lines 10-15.

II. Analysis

8. As previously noted by this Chamber,¹³ it has not yet been determined whether article 82(1)(d) of the Statute is applicable to reparations proceedings.¹⁴ However, the Chamber notes that the Defence has not raised this question.

9. The Chamber recalls that the reparations stage is distinct from the criminal proceedings.¹⁵ However, the Chamber considers that the term “proceedings” in article 82(1)(d) of the Statute refers, in principle, to the judicial proceedings before the Court *in their entirety*¹⁶ and, consequently, the reparations proceedings are not excluded. Moreover, it seems appropriate that article 82(1)(d) of the Statute, the object of which is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings,¹⁷ should also apply to the reparations stage.

10. The Chamber may grant either party leave to appeal under article 82(1)(d) of the Statute when the following three cumulative criteria are met:

1. whether the matter is an appealable issue;
2. whether the issue at hand could significantly affect:
 - (i) the fair and expeditious conduct of the proceedings; or
 - (ii) the outcome of the trial; and

¹³ “Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016”, 4 March 2016, ICC-01/04-01/06-3202-tENG (“the Decision of 4 March 2016”), para. 11.

¹⁴ The Appeals Chamber rejected an appeal brought by Mr Lubanga under article 82(1)(d) of the Statute on the grounds that, owing to the nature of the impugned decision, the previously constituted Trial Chamber could grant leave to appeal only under article 82(4) of the Statute; see “Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations”, 29 August 2012, ICC-01/04-01/06-2911 and “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, 14 December 2012, ICC-01/04-01/06-2953.

¹⁵ Decision of 4 March 2016, para. 11. See also the Decision of 6 October 2016, para. 8.

¹⁶ See, in this respect, the Situation in the Democratic Republic of the Congo, Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, dated 13 July 2006, ICC-01/04-168 (OA3), para. 12 (“the Judgment of 13 July 2006”). See also the Situation in the Republic of Kenya, Pre-Trial Chamber II, “Decision on the Government of Kenya’s Application for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute”, dated 29 May 2012, ICC-01/09-86 (“the Decision of 29 May 2012”), para. 11.

¹⁷ Judgment of 13 July 2006, para. 19.

3. whether, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. The Chamber recalls that the Pre-Trial or Trial Chamber is vested with the power to certify the existence of an appealable issue and to decide whether that issue must receive the immediate attention of the Appeals Chamber.¹⁸ Moreover, the Chamber recalls that it is up to the applicant to demonstrate that the cumulative criteria deriving from article 82(1)(d) of the Statute are fulfilled.¹⁹ Consequently, the failure to fulfil one or more of those criteria is fatal to an application for leave to appeal.²⁰

12. The Chamber notes that most of the arguments submitted by the Defence relate to the issue of whether the Chamber committed an error of law in its Decision of 6 October 2016. The Defence argues, to that effect, that the error in question affects the fair conduct of the proceedings.

¹⁸ Situation in the Democratic Republic of the Congo, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March Decision Denying Leave to Appeal”, dated 13 July 2006, ICC-01/04-168 (OA3), para. 20. See also *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Appeals Chamber, “Judgment on Mr Mangenda’s appeal against the ‘Decision on request for compensation for unlawful detention’”, 8 August 2016, ICC-01/05-01/13-1964, para. 12; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’”, 18 December 2015, ICC-02/11-01/15-369, para. 18; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Appeals Chamber, “Decision on the ‘Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015’”, 23 December 2015, ICC-01/05-01/13-1533, para. 16; *The Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, ICC-02/11-01/11-572 (OA5), para. 63, in which the Appeals Chamber held that “it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent”; Trial Chamber I, “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’”, dated 12 August 2011 and reclassified as “Public” on 25 October 2015, ICC-01/04-01/06-2779, para. 10.

¹⁹ Decision of 29 May 2012, para. 9, referring to the Decision of 19 August 2005, para. 15; Situation in Uganda, Pre-Trial Chamber II, “Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, dated 19 December 2007, ICC-02/04-112, para. 16.

²⁰ Decision of 2 September 2016, para. 9; Decision of 26 January 2011, para. 24.

13. Here, the Chamber recalls that it is under no obligation to rationalise or defend the correctness of the impugned decision,²¹ and that it is for the Appeals Chamber to entertain, where applicable, the arguments as to the merits of the appeal.²² Moreover, the Chamber considers that an application for leave to appeal must not be used to develop the arguments which the party intends to advance before the Appeals Chamber, but should be limited to the fulfilment of the criteria deriving from article 82(1)(d) of the Statute.

14. The Chamber notes that the Defence identifies one issue which could, in principle, form the subject matter of an interlocutory appeal.

15. With regard to the second criterion, however, the Chamber considers that the issue raised does not significantly affect the fair and expeditious conduct of the proceedings. The Chamber recalls, firstly, that the sole purpose of the Hearing was to hear the observations of the parties, the TFV and the Amici Curiae on the types of collective reparations projects that could potentially be implemented. The issue of Mr Lubanga's liability for reparations was not within the scope of the Hearing. Although the reparations stage is an integral part of the proceedings – and the convicted person enjoys certain rights accordingly – it must be distinguished from the criminal proceedings held to determine guilt and sentencing. Moreover, the convicted person's rights must be weighed against those of the victims, and in particular against the victims' right to a fair and expeditious resolution of this final stage of the proceedings, in which they are key actors. The Chamber also recalls that, as Mr Lubanga's conviction under article 74 of the Statute was confirmed by the Appeals Chamber, no issue raised during the reparations proceedings may affect the outcome of the trial.

²¹ Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta*, Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)""", dated 18 August 2011, ICC-01/09-02/11-253, para. 29.

²² Judgment of 8 August 2016, para. 22; Decision of 4 August 2011, para. 10; Decision of 19 August 2005, para. 22.

16. Lastly, the Chamber notes that the Defence presents no arguments with regard to the third criterion deriving from article 82(1)(d) of the Statute. In any event, the Chamber considers that, at this stage, the intervention of the Appeals Chamber on the issue of Mr Lubanga's presence at the Hearing, which lasted two days and had a very limited scope, could substantially delay the final stage of these proceedings.

FOR THESE REASONS, the Chamber

REJECTS the Application.

Done in both English and French, the French version being authoritative.

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera-Carbuccia

[signed]

Judge Péter Kovács

Dated this 1 November 2016

At The Hague, the Netherlands