



Original : French

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

Date.: 25 February 2013

THE APPEALS CHAMBER

Before:

**Judge Erkki Kourula
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 DOCUMENT

**Observations on the admissibility of 29 applications for participation in the
appellate proceedings in the case of *The Prosecutor v. Thomas Lubanga***

Source: Joseph Keta Orwinyo, Legal Representative of Victims

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

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Observations on the admissibility of 29 applications for participation in the appellate proceedings in the case of *The Prosecutor v. Thomas Lubanga*

I PROCEDURAL BACKGROUND

1. The Registry received new applications for participation and the requested supplementary information relating to previous applications for participation from a number of victims wishing to participate in the appellate proceedings in the case of *The Prosecutor v. Thomas Lubanga*, including 29 victims who designated Mr Joseph Keta Orwinyo as their legal representative.¹

2. Applicants in proceedings before the ICC fall outwith the Court's legal assistance scheme. This situation often impedes the work of Counsel, restricting him to contacting his clients through intermediaries, as direct contact would require conducting missions to the field to meet with them.

3. Since 2011, Mr Joseph Keta Orwinyo's requests to conduct missions to the field have been rejected by the Registry as inappropriate.

4. On 7 February 2013, the Registry submitted a request to the Appeals Chamber to ascertain whether the 29 applicants who had designated Mr Joseph Keta Orwinyo to represent them could participate in the appellate proceedings in the case of *The Prosecutor v. Thomas Lubanga*.²

5. In its decision ICC-01/04-01/06-2951, the Appeals Chamber authorised certain victims who had participated in the trial phase to participate in the appellate proceedings.

6. In its filing ICC-01/04-01/06-2959, the Registry transmitted to the Appeals Chamber a list of 120 victims who had participated in the trial phase; 63 of whom had designated Mr Joseph Keta Orwinyo as their legal representative.

¹ "Request for guidance regarding applicants for participation in the appeal phase", filed by the Registrar on 7 February 2013 (ICC-01/04-01/06-2977), page 3, para.3.

² "Request for guidance regarding applicants for participation in the appeal phase", filed by the Registrar on 7 February 2013 (ICC-01/04-01/06-2977).

7. In its decision ICC-01/04-01/06-2978 A4 A5 A6, the Appeals Chamber ordered the parties, the OPCV and Mr Joseph Keta Orwinyo each to file their submissions on the admissibility of 32 applications for participation in the appellate proceedings in the case of *The Prosecutor v. Thomas Lubanga*.

II. FACTUAL AND LEGAL ISSUES

A. ADMISSIBILITY OF THE APPLICATIONS FOR PARTICIPATION

8. In respect to the Appeals Chamber's jurisdiction, article 68(3) provides that "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate..." In the case at hand, the Appeals Chamber is entirely at liberty to rule on the applications to participate in this stage.

9. With regard to new applications, article 83(1) provides that "[f]or the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber". In its decision ICC-01/04-01/06-2951 in this case, the Appeals Chamber authorised only the victims who participated in the trial proceedings to participate in the appellate proceedings. However, the Appeals Chamber may also rule on new applications and, if these applications satisfy the requirements of rules 85 and 89 of the Rules of Procedure and Evidence, these applicants may be authorised to participate in the appellate proceedings.

10. Furthermore, regulation 86 of the Regulations of the Court provides that victims applying for participation in the trial and/or appeals proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate. In the absence of an established deadline for the receipt of the applications and considering that the applications in question were completed before the commencement of the appellate proceedings, the Legal Representative submits that it is incumbent upon the Appeals Chamber to accept these applications.

11. Prior to being authorised to participate in the proceedings, applicants are “[TRANSLATION] presumed victims”. However, according to the United Nations Handbook on Justice for Victims, the objective of victim participation in the justice process is to ensure that that all victims have access to justice and receive support throughout the judicial process, and that the justice system is designed to minimize the obstacles that victims may face in seeking justice. The structure of the judicial system must take into account the obstacles which many victims encounter in seeking such access, informing them of their rights and responsibilities as well as the developments in their case.³

12. The role of the judiciary in justice for victims is to promote judicial recognition and acknowledgement that victims have legitimate interests which must be taken into account at all stages of criminal justice proceedings. Hence, wherever possible under the law, victims should be allowed to participate and, where appropriate, to give input through the prosecutor or to testify in all stages of judicial proceedings.⁴

B. REFUSAL OF THE REPRESENTATION AGREEMENTS

13. The Legal Representative Joseph Keta Orwinyo, hereby refuses the representation agreements concerning the 29 applicants on two grounds. Firstly, these applicants fall outwith the legal assistance scheme paid by the Court, which makes it difficult to have regular contact with the applicants. Secondly, he is already representing 63 victims in this case. Therefore, there is a risk that the interests of these applicants will not be diligently represented, especially since the Registry very rarely approves missions to the field.

14. Mr Keta refers to the following provisions of the Code of Professional Conduct for counsel:

- Article 11: The agreement is established when counsel accepts a request from a client seeking representation or from the Chamber.

³ UN Handbook on Justice for Victims, 1999, paras. b and c.

⁴ UN Handbook on Justice for Victims, 1999, para. e.

- Article 13(2)(b): Counsel has a duty to refuse an agreement where counsel is incapable of dealing with the matter diligently.
- Article 15(1): Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.

15. Excluding applicants and their legal representatives from the Court's legal assistance scheme Court contravenes the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which provide:

- Paragraph 8: For the purposes of the Principles and Guidelines, the term "legal aid" includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, "legal aid" is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.
- Paragraph 9: For the purposes of the Principles and Guidelines, the individual who provides legal aid is herein referred to as the "**legal aid provider**", and the organizations that provide legal aid are referred to as the "**legal aid service providers**". The first providers of legal aid are lawyers ...

[United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, G.A. res. A/C.3/67/L.6, 3 October 2012, paragraphs 8 and 9]

16. As regards legal representation, the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990, provides that:

13. The duties of lawyers towards their clients shall include:

- (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
- (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

17. In respect to the participation and representation of victims, the Report of the Court on the revised strategy in relation to victims: past, present and future, eleventh session of the Assembly of States Parties, (ICC-ASP/11/40) provides:

- Objective 3: “Within its existing resources, the ICC system can further improve coordination between units dealing with victims so that accurate, well-coordinated and timely messages about rights to participation and reparations reach victims.
- As part of its general review of the Legal Aid Scheme, the Registry will undertake a review of the resources provided both to Defence counsel and to LRVs to ensure they have adequate resources to assimilate and respond to the increased amount of information, filings and victim applications in the judicial proceedings.”

FOR THESE REASONS

The Legal Representative respectfully prays that the Appeals Chamber:

IN THE MAIN, entertain the applications for participation from the 29 victims, declare the applications well-founded, and thus, authorise the applicants to participate in the appellate proceedings in the case of *The Prosecutor v. Thomas Lubanga*;

IN THE ALTERNATIVE, entertain the Legal Representative’s submissions on his refusal of the representation agreements concerning the 29 victims, declare the refusal well-founded, and thus, discharge him from representing the victims’ interests before the Appeals Chamber.

JUSTICE SHALL BE DONE

Dated this 25 February 2013, at Tours, France

[signed]
Legal Representative
Joseph Keta Orwinyo