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

Date: 11 May 2006

THE APPEALS CHAMBER

Before: Judge Georghios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

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

Public Document

**Response to the application by Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06
for authorization to participate in the appeal proceedings relating to the *Decision
on the confirmation of charges***

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Duty Counsel for the Defence

Ms Patricia Annick Mongo

Counsel for the Victims

Mr Luc Walley and Mr Franck Mulenda
Ms Carine Bapita Buyangandu

1. On 29 January 2007, Pre-Trial Chamber I rendered its *Decision on the confirmation of charges* (Decision).¹ The Decision confirmed that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003, and committed Thomas Lubanga Dyilo to a Trial Chamber for trial on the charges as confirmed.

2. On 5 February 2007, the Defence applied to Pre-Trial Chamber I for leave to appeal its decision of 29 January 2007 on the confirmation of the charges (Leave to Appeal).²

3. On 2 February 2007, Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 filed a joint application for leave to participate in the appeal proceedings.³

4. Consequently, the Appeals Chamber⁴ invited the Appellant and the Prosecutor, pursuant to rule 89(2) of the *Rules of Procedure and Evidence*, to file their responses to the victims' application by 9 February.

5. On 7 February 2007, the Defence filed "a confidential request for modification of time limit pursuant to regulation 35 of the *Regulations of the Court*" with the Appeals Chamber, in which it requested that time for filing pending submissions be extended by 14 days subject to the medical doctor's opinion.

6. In the absence of both a response from the Appeals Chamber to their request for modification of the time limits and the indisposed Lead Counsel's supervision, on 9 February 2007, the Defence filed unsigned observations on the joint application by

¹ ICC-01/04-01/06-796-Conf-tEN.

² ICC-01/04-01/06-807-Conf. Request for Leave to Appeal the Pre-Trial Chamber's '*Décision sur la confirmation des charges*' of 29 January 2007. The Defence filed the public redacted version of this same request on 22 February 2007: ICC-01/04-01/06-836 + ICC-01/04-01/06-836-Anx.

³ ICC-01/04-01/06-802-tEN.

⁴ *Directions of the Appeals Chamber* of 5 February 2007, ICC-01/04-01/06-805.

Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for leave to participate in the appeal proceedings.⁵ That same day, the Prosecutor filed his response,⁶ stating that he had no objection to the Defence request for modification of the time limit being granted.

7. On 16 February 2007, the Appeals Chamber rejected the unsigned Defence response as inadmissible. However, it granted the Defence an extension of time, entitling it to file its response by 23 February 2007 in view of the fact that, pursuant to regulation 35, good cause had been shown.

8. On 20 February 2007, Counsel for the Defence filed an “Application to stay all acts or proceedings in order to enable the assignment of a new Counsel for the Defence.”⁷

9. In its decision of 23 February 2007,⁸ the Appeals Chamber granted the application granting the Defence additional time to file its response to the application of Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06, expiring on Friday, 23 March 2007, at 4 p.m.

10. By decision of 23 February 2007, the Appeals Chamber⁹ rejected any stay in the proceedings. Nevertheless, it extended to 23 March 2007, the time for the Appellant to file his response to the *Directions of the Appeals Chamber* issued on 5 February 2007,¹⁰ as well as the time for filing the supplementation to the document filed by the Defence on 7 February 2007 titled “Defence submissions on the scope of the right to appeal within the meaning of article 82 (1) (b) of the Statute”.¹¹

⁵ Defence Response to Appeals Chambers Directions of 5 February 2007, ICC-01/04-01/06-816.

⁶ ICC-01/04-01/06-817.

⁷ ICC-01/04-01/06-830-Conf-tEN.

⁸ *Decision of the Appeals Chamber on the Defence application "Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense"* filed on 20 February 2007, ICC-01/04-01/06-838.

⁹ ICC-01/04-01/06-838.

¹⁰ ICC-01/04-01/06-805.

¹¹ ICC-01/04-01/06-810.

11. On 26 February 2007, Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 filed their response to the Defence appeal without having been granted prior leave to participate in the appeal proceedings by the Appeals Chamber.

12. By decision of 3 April 2007,¹² the Appeals Chamber further extended the time granted in the decision of 23 February 2007 until 4 May 2007, stating that in the event of failure to meet the time limit owing to the non-representation of the Appellant by counsel, the Registrar shall appoint duty counsel taking into account the Appellant's expressed wishes. The Appeals Chamber added that Duty Counsel's authority would be confined to representing the Appellant in the submission of observations on the victims' application for participation in the appeal proceedings, amongst other documents.

13. Consequently, the time for the filing of the documents by the appointed Duty Counsel was extended to 11 May 2007.

14. On 4 May 2007, the Registry filed its *Appointment of Ms Annick Mongo as Duty Counsel pursuant to the Appeals Chamber's Decision of 3 April 2007*¹³ with authority to file, on behalf of the Defence, amongst other documents, observations on the victims' application for participation.

15. On 9 May 2007, Ms Annick Mongo filed a request for extension of time.¹⁴ In his response thereto of 10 May 2007, the Prosecutor stated that he was not opposed to the extension of time, on the understanding that the time limit for the Prosecution to supplement its response would be extended accordingly.¹⁵

¹² ICC-01/04-01/06-857.

¹³ ICC-01/04-01/06-882-tEN.

¹⁴ ICC-01/04-01/06-892-tEN.

¹⁵ ICC-01/04-01/06-894.

16. At the time of filing these observations, the Appeals Chamber has still not responded to this request which has prevented the Duty Counsel from making in-depth observations.

17. To supplement this submission, the Defence appends¹⁶ the observations it considers an integral part of this written submission.

SUBMISSIONS

I. AS TO THE LAW

18. According to article 68(3) of the Statute:

Where 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 by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

19. While article 68 of the Statute entitles victims to participate at every stage in the proceedings and to present their views and concerns, it is clear from the same article 68 that this option is available to victims only where their personal interests are affected.

20. Similarly, rule 89 of the *Rules of Procedure and Evidence* which pertains to applications for victim participation in the proceedings provides that:

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. [...] Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

21. Pursuant to regulation 86(8) of the *Regulations of the Court*, “a decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case,

¹⁶ See the enclosed annex 1.

subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.” Rule 91(1) provides that “[a] Chamber may modify a previous ruling under rule 89.”

22. As a result, reference by the victims to regulation 86(8) of the *Regulations of the Court* in an attempt to bind the Appeals Chamber by a decision on the participation of victims at the pre-trial stage has no merit.

i. On the increase in applications for participation from victims

23. It is significant to note that, since the start of the proceedings, the victims have systematically filed applications for participation even though the case is still before the Pre-Trial Chamber.

24. Clearly, the victims intend to intervene during the entire case without really discerning whether their personal interests are affected, or perhaps they believe that their personal interests are affected at every stage of the proceedings.

25. They now demonstrate a desire to secure the status of party to the trial through a broad interpretation of article 68(3), a status not granted to them by the instruments governing the Court. Each Chamber must therefore remain vigilant as far as this issue is concerned and must conduct a strict interpretation of the concept of *personal interests of the victims*.

ii. On the concept of personal interests of victims

26. Reparation is the only personal interest of a victim in a case pending before the Court.

This conclusion is dictated by the provisions of article 75 which stipulates that: “*The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may,*

either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

27. Rule 94 sets out the procedure to be followed where requests for reparations are made by victims.

28. This implies that the personal interests of a victim reside in reparations. However, reparations are dealt with at the trial phase, not at proceedings before the Pre-Trial Chamber, much less in an appeal from a decision of the Pre-Trial Chamber.

29. The arguments of the victims that they are affected by the confirmation of the charges in that failure to confirm the charges would deprive them of a trial and therefore of reparations is erroneous insofar as it is up to the Prosecution to prosecute the charges, not the victims.

30. This argument blatantly exposes the unavowed desire of the victims to set themselves up as parties to the trial.

iii. On the prejudice suffered by the Defence and the rights of the Defence

31. The Defence has already made this argument several times. As more and more victims are authorised to take part in the proceedings, this increases the workload of the Defence considerably, which is concretely faced with two prosecutions, by the Prosecutor, and by the victims.

32. This aggravates the already difficult situation of the Defence, which has wholly insufficient human resources to enable it to ensure that the interests of Mr Lubanga are defended in a fair trial.

33. Moreover, participation by the victims will also result in delaying the proceedings insofar as the Defence will also be required to respond to the

observations of the victims, which calls into question Mr Lubanga's right to an expeditious trial.

iv. Only parties may intervene at the appeals stage

34. Article 82 of the Statute states *in limine* that "either party may appeal any of the following decisions in accordance with the *Rules of Procedure and Evidence*."

35. Nowhere in article 82 of the Statute is there any mention of participants. Only parties are mentioned. This implies that victims are not entitled to participate in the proceedings at the appeals stage involving decisions other than those concerning guilt and sentencing.

v. On the rejection of the submissions of the victims without obtaining prior leave from the Appeals Chamber

36. It is important to stress here that the Chamber has already had to reject observations filed by the victims who had not been authorised to participate in the proceedings.¹⁷

37. Although it is true that the decision rendered on 28 July 2006 by the Pre-Trial Chamber granted the victims the right to participate in the proceedings, they should not assume, incorrectly, that they have an automatic right to participate in appeal proceedings.

38. The Defence argument that the observations of the victims do not comply with the basic instruments of the Court is grounded on article 68(3) as well as rule 89.

RELIEF SOUGHT

FOR THESE REASONS,

¹⁷ *Decision of the Appeals Chamber of 12 December 2006 – ICC-01/04-01/06-(OA7)*

May it please Pre-Trial Chamber I to:

1. Declare that the observations of the victims do not comply with the basic instruments of the Court;
2. Sanction this behaviour which goes against the basic instruments of the Court by rejecting their observations;
3. Reject the application of the victims for the right to participate in the appeal proceedings concerning the decision on the confirmation of the charges.

[signed]

Ms Patricia Annick Mongo

Dated 11 May 2007

At The Hague