



Original: **French**

No.: ICC-01/04-01/06
Date: 13 October 2009

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

Defence Response to the “Application for Participation by the Legal Representatives in the Appeals Proceedings relating to the *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*” filed on 15 September 2009

Source: Defence Team for Mr Thomas Lubanga Dyilo

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese
Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

BACKGROUND

1. On 14 July 2009, Trial Chamber I issued the *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* (hereafter “the Decision”).¹
2. On 11 and 12 August 2009, the Defence and the Prosecutor sought leave to appeal the Decision.²
3. On 3 September 2009, Trial Chamber I granted leave to the Prosecutor and the Defence to appeal the Decision on two questions.³
4. On 15 September 2009, the Legal Representatives sought leave to participate in the appeal filed by the Defence.⁴

OBSERVATIONS

5. In order to assess the merits of the victims’ application for participation in the appeal, the Appeals Chamber must satisfy itself that such participation is appropriate and is not prejudicial to or inconsistent with the rights of the accused and the principle of a fair and impartial trial.
6. The Appeals Chamber will note that the participation of the victims in the proceedings on the questions submitted to the Appeals Chamber would be

¹ ICC-01/04-01-06-2049.

² ICC-01/04-01/06-2073-tENG and ICC-01/04-01/06-2074.

³ ICC-01/04-01/06-2107:

- Question 1: Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.

- Question 2: Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, viz. to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.

⁴ ICC-01/04-01/06-2121-tENG OA15.

contrary to the provisions of the Statute and to the principle of a fair and impartial trial for the reasons set out below.

7. The questions submitted to the Appeals Chamber relate exclusively to the possibility that, during the trial, more serious charges may be brought on the basis of new facts revealed in the course of the trial.
8. Under article 61(9), however, the Prosecutor alone has the right to request an amendment of the charges. No provision in the Statute or Rules authorises the victims to participate in proceedings relating to the charges.
9. It is not for the victims to request the trial or appeals judges, directly or indirectly, to aggravate the charges against the accused.
10. It follows that the victims' application for leave to participate in the appeal is manifestly inadmissible.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO REJECT the application for participation filed by the victims.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 13 October 2009

At The Hague, the Netherlands