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

Date: **9 October 2016**

TRIAL CHAMBER II

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

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

Public Document

**Defence Application for Leave to Appeal the “Decision on the Request of the
Defence for Thomas Lubanga Dyilo seeking his Appearance via Video-Link
at the Hearings of 11, 13 and 14 October 2016”
of 6 October 2016**

Source: Defence team for Mr Thomas Lubanga

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

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1. On 15 July 2016, Trial Chamber II (“Chamber”) issued its “Order pursuant to rule 103 of the Rules of Procedure and Evidence”,¹ in which it announced that it would be convening public hearings on 11, 13 and 14 October 2016.
2. On 20 September 2016, the Defence filed its confidential *ex parte* “Request of the Defence for Mr Thomas Lubanga seeking his appearance via video-link at the hearings of 11, 13 and 14 October 2016”² (“Request”).
3. On 27 September 2016, the Defence filed a public redacted version of its Request.³
4. On 28 September 2016, the Chamber issued its “Order setting the deadline for any response to the Request by the Defence team for Thomas Lubanga Dyilo of 20 September 2016”.⁴
5. On 30 September 2016, the Registry submitted its observations on the Request of the Defence for Mr Lubanga seeking his appearance via video link at the hearings of 11, 13 and 14 October 2016.⁵
6. On 3 October 2016, the Legal Representatives of V01 Victims filed the “Réponse du groupe de victimes V01 sur la ‘Requête de la Défense de Monsieur Thomas Lubanga aux fins de comparution de Monsieur Lubanga par vidéoconférence lors des audiences des 11, 13 et 14 octobre 2016’”.⁶
7. On 6 October 2016, the Chamber issued its “Decision on the Request of the Defence for Thomas Lubanga Dyilo seeking his Appearance via

¹ ICC-01/04-01/06-3217-tENG.

² ICC-01/04-01/06-3225-Conf-Exp-tENG.

³ ICC-01/04-01/06-3225-Red.

⁴ ICC-01/04-01/06-3231-tENG.

⁵ ICC-01/04-01/06-3233-Conf-Exp.

⁶ ICC-01/04-01/06-3236.

Video-Link at the Hearings of 11, 13 and 14 October 2016”⁷ (“Decision”).

8. On the same day, the Chamber informed the parties and participants that it would hold hearings only on 11 and 13 October 2016.⁸
9. In accordance with article 82(1)(d) and rule 155, the Defence requests leave to appeal the Chamber’s Decision of 6 October 2016 concerning the use of a video link with Kinshasa at the hearings of 11 and 13 October 2016.

I – GROUND OF APPEAL

10. The Defence intends to assert before the Appeals Chamber that, in its Decision of 6 October 2016 ruling Mr Lubanga’s presence at the hearings of 11, 13 and 14 October 2016 unnecessary, the Chamber committed an error of law adversely affecting Mr Lubanga’s rights.
11. According to article 63(1) of the Rome Statute, “[t]he accused shall be present during the trial”. Under article 67(1)(d), the right to be present at the trial is one of the fundamental rights of the accused.
12. Those provisions are necessary to guarantee the effective exercise of the defence’s rights and, in particular, the right of the accused to an adversarial hearing.
13. Part 6 of the Rome Statute, which contains articles 62-76 and is entitled “The Trial”, governs all three successive stages of the trial, which respectively conclude with a decision of acquittal or conviction (article 74), sentencing (article 76) and orders for reparations (article 75).
14. Accordingly, the term “trial” unequivocally encompasses the proceedings on guilt or innocence, sentencing and applications for reparation.

⁷ ICC-01/04-01/06-3243-tENG.

⁸ ICC-01/04-01/06-3245-tENG.

15. Trial Chamber I has ruled that the reparations stage is an integral part of the trial and that the rights of the accused under article 67 of the Statute must therefore be upheld at that stage.⁹
16. It follows that the rights of “the accused” under article 67 of the Statute are enjoyed *mutatis mutandis* by “the convicted person” against whom reparations are sought.
17. Although the core instruments of the International Criminal Court contain provisions specific to the “reparations stage”, none of those provisions denies the fundamental rights guaranteed under article 67 of the Statute or delimits the rights specific to this stage of the trial.
18. On the contrary, rule 97 provides that during the reparations stage of the trial “[i]n all cases, the Court shall respect the rights of victims and the convicted person”. Since there is no provision specifically governing the rights of the convicted person during the reparations stage, rule 97 necessarily refers *mutatis mutandis* to the rights enumerated in article 67 of the Statute, including the right to be present at the trial.
19. In the instant case, the exercise of that fundamental right was expressly covered in an Agreement with the Registry, in which the Registry gave an undertaking that Mr Lubanga could attend and participate via video link in hearings in these proceedings.¹⁰
20. It was on the basis of this undertaking by the Registry (to guarantee the effective exercise of this fundamental right) that Mr Lubanga consented to be transferred to the Democratic Republic of the Congo.
21. This agreement – duly entered into by the Registry on behalf of the International Criminal Court – further establishes Mr Lubanga’s right to be present at his trial and must be enforced in these proceedings.

⁹ ICC-01/04-01/06-2800, para. 45.

¹⁰ ICC-01/04-01/06-3188-Conf-Exp-AnxA.

22. Since the Parties are not opposed to Mr Lubanga's participation via video link and the Registry has confirmed the absence of any technical obstacles to such participation, the interference with Mr Lubanga's right to be present at the trial is wholly unjustified.
23. Accordingly, the Defence wishes to submit to the Appeals Chamber that the Decision ruling that Mr Lubanga does not have the right to be present at reparations-stage hearings contravenes the fundamental right of the accused to be present at the trial as provided for in article 67(1)(d) of the Statute.

II – THE DECISION INVOLVES ISSUES THAT WOULD SIGNIFICANTLY AFFECT THE FAIR CONDUCT OF THE PROCEEDINGS

24. As argued above, the Chamber's Decision affects the fundamental rights of the Accused and is inconsistent with the requirements of a fair hearing.
25. In its Order of 15 July 2016, the Chamber scheduled three public hearings for 11, 13 and 14 October 2016 during which the Defence was to respond to the written and oral observations of the Participants, the Legal Representatives of Victims, and the TFV with regard to the collective reparations projects.
26. For the Defence to exercise its rights effectively, Mr Lubanga must be able to attend hearings, consult with Counsel, and present observations as he sees fit.
27. It follows that the issue involved would directly affect the fair conduct of the proceedings.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER II TO:

GRANT the Defence leave to appeal Trial Chamber II's Decision of 6 October 2016.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 9 October 2016

At The Hague