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

Date: **6 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

**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**

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

Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

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 (“Chamber”) of the International Criminal Court decides the following.

I. Procedural history

1. On 15 July 2016, the Chamber issued an order inviting the States concerned, as well as any organizations 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 Mr Lubanga.¹ In that connection, the Chamber informed the parties, the Trust Fund for Victims and the Registry of its plans to hold a public hearing in their presence on 11, 13 and 14 October 2016² (“Hearing”).
2. On 20 September 2016, the Defence team for Thomas Lubanga Dyilo (“Defence” and “Mr Lubanga”, respectively) filed a request asking the Chamber to order Mr Lubanga’s appearance at the Hearing via video-link³ (“Request”).
3. On 30 September 2016, in accordance with the Chamber’s instructions,⁴ the Registry submitted its observations on the feasibility of the Request.⁵
4. On 3 October 2016, the Legal Representatives of Victim Group V01 filed observations on the Request. In their observations, they informed the Chamber that they did not oppose the Request.⁶

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

² Order of 15 July 2015, para. 11.

³ “Request of the Defence for Mr Thomas Lubanga seeking his appearance via video-link at the hearings of 11, 13 and 14 October 2016”, dated 20 September 2016 and registered on 21 September 2016, ICC-01/04-01/06-3225-Conf-Exp-tENG (a public redacted version was filed on 27 September 2016) and one confidential *ex parte* annex (“Annex A”).

⁴ “Order relating to the request of the Defence team for Thomas Lubanga Dyilo of 20 September 2016”, 26 September 2016, ICC-01/04-01/06-3230-Conf-Exp-tENG, p. 4.

⁵ “Registry’s observations on the ‘*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*’”, 30 September 2016, ICC-01/04-01/06-3233-Conf-Exp.

II. Analysis

5. The Defence submits that, at the time of his transfer, Mr Lubanga expressed a wish to participate actively in these proceedings, and that, accordingly, under the agreement reached with the Registry for his transfer, Mr Lubanga was given assurances that he would appear via video-link at his case hearings.⁷

6. The Chamber considers that, notwithstanding the agreement between the Registry and Mr Lubanga concerning his transfer, it is for the Chamber to determine whether the person concerned by the reparations proceedings has a right to be present at Court hearings.

7. In support of its Request, the Defence cites articles 63(1) and 67(1)(d) of the Statute, concerning the presence of the accused during the trial.⁸ The Defence submits that, under article 67(1)(d) of the Statute, presence at the trial is a right guaranteed to the accused and subject to exception only in the event of continued disruption to the conduct of the trial.⁹ The Defence then states that these proceedings are at the reparations stage and contends that the reparations stage “is an integral part of the trial stage”.¹⁰

8. The Chamber first recalls that, contrary to the Defence’s contention, the reparations stage is a distinct stage of the proceedings.¹¹ The Appeals Chamber has

⁶ “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’”, 3 October 2016, ICC-01/04-01/06-3236.

⁷ Request, paras. 13-14, citing Annex A.

⁸ Request, paras. 5-6.

⁹ Request, paras. 7-8.

¹⁰ Request, paras. 10-11.

¹¹ “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, para. 12, citing Appeals Chamber, “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, para. 70. See also the Annex to the “Decision replacing two judges in Trial Chamber II”, ICC-01/04-01/07-3468-AnxI, paras. 6 and 8, in which the Presidency noted that the differences between reparations proceedings and criminal proceedings are numerous – spanning many aspects of substance and procedure – and concluded that there is no requirement for reparations proceedings to constitute a stage of the trial *stricto sensu*.

accordingly noted that the rules applicable during the criminal proceedings against an accused are not necessarily applicable to the reparations stage.¹²

9. The Chamber considers, moreover, that the Defence has not presented any compelling arguments to show that the guarantees afforded by article 67(1)(d) of the Statute also apply to the reparations stage.

10. The Chamber observes that the Statute and the Rules of Procedure and Evidence (“Rules”), as they stand, provide explicitly for the person concerned to be present at confirmation hearings¹³ and for the accused to be present during the trial.¹⁴ The Chamber further observes that rules 134 *bis*-134 *quater* of the Rules, concerning presence through the use of video technology, refer only to “[a]n accused subject to a summons to appear”.

11. In any case, the Chamber notes that the European Court of Human Rights has held that the fair-hearing guarantees enshrined in article 6(1) of the European Convention on Human Rights¹⁵ “are not necessarily the same”¹⁶ and that “as regards cases [...] concerning civil rights [the requirements of article 6] are less onerous than they are for criminal charges”.¹⁷

12. In the light of the above, the Chamber notes that Mr Lubanga will be represented by his Counsel, that the Hearing will consider only “current or past collective projects for former child soldiers in the East of the Democratic Republic of

¹² Appeals Chamber, “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, para. 70.

¹³ Articles 60(1) and 61(1) of the Statute; rules 121-123 of the Rules. The Chamber likewise notes that the person concerned may waive his or her right to be present at the confirmation hearing under article 61(2) of the Statute.

¹⁴ Article 63(1) of the Statute.

¹⁵ See European Court of Human Rights (ECHR), *Da Luz Domingues Ferreira v. Belgium*, Judgment of 24 August 2007, Application No. 50049/99, in which the ECHR noted that “[TRANSLATION] the duty to guarantee *the accused* the right to be present in the courtroom [...] ranks as one of the essential requirements of article 6 [of the European Convention on Human Rights]”. See also ECHR, *Sejdovic v. Italy*, Judgment of 1 March 2006, Application No. 56581/00, para. 81.

¹⁶ ECHR, *Dombo Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, Application No. 14448/88, para. 32; See also ECHR, *Levages Prestations Services v. France*, Judgment of 23 October 1996, Application No. 21920/93, para. 46.

¹⁷ ECHR, *König v. Germany*, Judgment of 28 June 1978, Application No. 6232/73, para. 96.

the Congo, whether carried out by public or private actors”¹⁸ as well as “proposals for future collective projects to support the setting up of a range of collective reparation projects for the former child-soldier victims of Mr Lubanga”,¹⁹ and that Mr Lubanga will have access to all documents after the Hearing. The Chamber considers that the above factors guarantee Mr Lubanga a fair hearing and that his presence at the Hearing is therefore unnecessary.

FOR THESE REASONS, the Chamber

DENIES the Request.

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 6 October 2016

At The Hague, Netherlands

¹⁸ Order of 15 July 2016, para. 8.

¹⁹ *Idem.*