

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **French**

No.: **ICC-01/04-01/06**  
Date: **8 December 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***

**URGENT**

**Public Document**

**Decision rejecting the application for leave to appeal of the Legal Representatives  
of the  
01 Group of Victims**

**ICC-01/04-01/06**

**1/10**

**8 December 2016**

*Official Court Translation*

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 Mabilile

Mr Jean-Marie Biju-Duval

**Legal Representatives of V01**

**Victims**

Mr Luc Walleyen

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**

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**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** (“the Chamber”) of the International Criminal Court, acting pursuant to article 82(1)(d) of the Rome Statute (“the Statute”), rule 155 of the Rules of Procedure and Evidence (“the Rules”) and regulation 65(3) of the Regulations of the Court, decides the following.

## **I. Procedural Background**

1. On 21 October 2016, the Chamber approved and ordered the implementation of the plan<sup>1</sup> presented by the Trust Fund for Victims (“the TFV”) in relation to symbolic collective reparations (“the Order on Symbolic Collective Reparations”).<sup>2</sup>

2. The same day, the Chamber instructed the TFV to continue the process of identifying victims potentially eligible to benefit from collective reparations in the instant case (respectively, “the Identification Process” and “Potentially Eligible Victims”), and the Registry to begin outreach missions (“the Order on the Identification Process”).<sup>3</sup> The Chamber also authorised the Office of Public Counsel for Victims (“the OPCV”) to continue the Identification Process and to prepare files of Potentially Eligible Victims to be transmitted to the Chamber by 31 December 2016.<sup>4</sup>

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<sup>1</sup> “Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals”, 16 September 2016, ICC-01/04-01/06-3223-Conf (a redacted version was filed on 20 September 2016), and an annex marked “confidential”.

<sup>2</sup> “Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations”, 21 October 2016, ICC-01/04-01/06-3251.

<sup>3</sup> “Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016”, 21 October 2016, ICC-01/04-01/06-3252-tENG (“Order of 21 October 2016”); and “*Opinion de Mme la juge Herrera Carbuccia*”, ICC-01/04-01/06-3252-Anx.

<sup>4</sup> “Order on the Identification Process”, p. 10.

3. On 28 October 2016, the legal representatives of the V01 group of victims (“the Legal Representatives of V01 Victims”) filed an application for leave to appeal the Order on Symbolic Collective Reparations and the Order on the Identification Process under article 82(1)(d) of the Statute and rule 155 of the Rules (“the Application for Leave to Appeal”).<sup>5</sup>

4. The Legal Representatives of V01 Victims claim that the Order on Symbolic Collective Reparations and the Order on the Identification Process contain errors of law that are prejudicial to the rights of the victims<sup>6</sup> and raise issues that could affect the fair and expeditious conduct of the proceedings.<sup>7</sup> They argue that the intervention of the Appeals Chamber could materially advance the proceedings, in particular, since it could resolve the contentious issues and approve the plan in relation to collective reparations in its entirety.<sup>8</sup>

5. The Legal Representatives of V01 Victims likewise express their dissatisfaction with the approach it considers the Chamber adopted in its Order of 9 February 2016<sup>9</sup> and with the conduct of the proceedings.<sup>10</sup>

6. The Legal Representatives of V01 Victims specifically argue that the Chamber committed an error of law by ordering the implementation of the plan in relation to symbolic reparations without approving collective reparations in the form of

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<sup>5</sup> “*Requête du groupe de victimes V01 sollicitant l’autorisation d’interjeter appel de l’ordonnance ‘relative à la requête du Bureau du conseil public pour le victimes du 16 septembre 2016’ et celle ‘approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations’, rendues le 21 octobre 2016*”, 28 October 2016, ICC-01/04-01/06-3254.

<sup>6</sup> Application for Leave to Appeal, paras. 7 and 40.

<sup>7</sup> Application for Leave to Appeal, paras. 37 and 40.

<sup>8</sup> Application for Leave to Appeal, paras. 38 and 41.

<sup>9</sup> Application for Leave to Appeal, paras. 10-11.

<sup>10</sup> Application for Leave to Appeal, paras. 38 and 40.

services,<sup>11</sup> by refusing to review its Order of 9 February 2016 following problems encountered by the TFV during its implementation,<sup>12</sup> and by indefinitely adjourning approval of the plan on collective reparations in its entirety until completion of the Identification Process and determination of the amount of reparations for which Mr Lubanga is liable.<sup>13</sup>

7. On 3 November 2016, the OPCV filed a response to the Application for Leave to Appeal, in which it recommended its rejection.<sup>14</sup>

8. The OPCV argues that the Legal Representatives of V01 Victims did not identify issues that could be the subject of an interlocutory appeal.<sup>15</sup> The OPCV is of the opinion that the Legal Representatives of V01 Victims merely submit that the Application for Leave to Appeal fulfils the criteria in article 82(1)(d) of the Statute.<sup>16</sup> It further maintains that the arguments of the Legal Representatives of V01 Victims are restricted to topics on which there are points of disagreement between them and the Chamber, which, in its opinion, is a sign of a considerable misunderstanding of the Order on Symbolic Collective Reparations and the Order on the Identification Process.<sup>17</sup> According to the OPCV, the arguments developed by the Legal Representatives of V01 Victims demonstrate an overall dissatisfaction with the approach adopted by the Chamber in its Order of 9 February 2016 and consequently, they cannot constitute solid grounds for a subsequent application for leave to appeal

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<sup>11</sup> Application for Leave to Appeal, paras. 7 and 13-19.

<sup>12</sup> Application for Leave to Appeal, paras. 7, 20, 25 and 34.

<sup>13</sup> Application for Leave to Appeal, paras. 7, 15 and 34.

<sup>14</sup> “Réponse à la demande sollicitant l’autorisation d’interjeter appel des Ordonnances du 21 octobre 2016”, 3 November 2016, ICC-01/04-01/06-3257 (“OPCV’s Response”).

<sup>15</sup> OPCV’s Response, paras. 2, 26-31.

<sup>16</sup> OPCV’s Response, para. 26.

<sup>17</sup> OPCV’s Response, para. 27.

the orders of the Chamber rendered thereafter.<sup>18</sup> The OPCV argues that in the light of the cumulative application of the criteria set out in article 82(1)(d) of the Statute, and since the Application for Leave to Appeal does not identify an appealable issue, the Application must be rejected.<sup>19</sup>

9. In the alternative, the OPCV submits that the arguments presented by the Legal Representatives of V01 Victims primarily concern a disagreement about or a misunderstanding of the Order on Symbolic Collective Reparations and the Order on the Identification Process.<sup>20</sup>

10. On 16 November 2016, the legal representatives of the V02 group of victims (“the Legal Representatives of V02 Victims”) filed a response in support of the Application for Leave to Appeal and applied to the Chamber for leave to appeal the Order on Symbolic Collective Reparations and the Order on the Identification Process on that occasion.<sup>21</sup>

## **II. Analysis**

### **a. Preliminary issues**

11. The Chamber recalls that, pursuant to regulation 65(3) of the Regulations of the Court, any response to an application for leave to appeal must be filed within three days of notification of the application. The Chamber notes that the Legal Representatives of V02 Victims did not file their response within the required time

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<sup>18</sup> OPCV’s Response, para. 28.

<sup>19</sup> OPCV’s Response, para. 31

<sup>20</sup> OPCV’s Response, paras. 32-46.

<sup>21</sup> “Réponse de l’équipe V02 à la demande de l’équipe V01 sollicitant l’autorisation d’interjeter appel des ordonnances du 21 octobre 2016”, 16 November 2016, ICC-01/04-01/06-3259.

limit. Accordingly, the Chamber has not taken into consideration the arguments presented by the Legal Representatives of V02 Victims in the present decision.

12. The Chamber also points out that, pursuant to rule 155(1) of the Rules, a party wishing to appeal a decision under article 82(1)(d) of the Statute must make its application to the Chamber within five days of being notified of the decision that it seeks to challenge. Consequently, and irrespective of whether such an application may be presented to the Chamber in a response to a request, the application for leave to appeal made by the Legal Representatives of the V02 victims is rejected *in limine*.

#### **b. Application for Leave to Appeal**

13. The Chamber reiterates that, pursuant to article 82(1)(d) of the Statute, it may grant either party leave to appeal provided the following three cumulative criteria are met:

1. The matter is an appealable issue;
2. The issue at hand could significantly affect:
  - i) the fair and expeditious conduct of the proceedings; or
  - ii) the outcome of the trial; and
3. In the opinion of the Pre-Trial or Trial Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.

14. As previously stated, the Pre-Trial or Trial Chamber is vested with the power to certify the existence of an appealable issue and to decide whether that issue must

receive the immediate attention of the Appeals Chamber.<sup>22</sup> Moreover, the Chamber recalls that an “issue” is an identifiable subject or topic requiring a decision for its resolution and that a mere disagreement or conflicting opinion cannot form an appealable issue.<sup>23</sup> Further, it is insufficient to argue that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.<sup>24</sup> Lastly, the Chamber notes that it is for the applicant to demonstrate that the

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<sup>22</sup> “Decision rejecting the application of the Defence for Thomas Lubanga Dyilo for leave to appeal the Decision of 6 October 2016”, 1 November 2016, ICC-01/04-01/06-3256-tENG, para. 11. See also, Situation in the Central African Republic, *The Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Appeals Chamber, “Judgment on Mr Mangenda’s appeal against the ‘Decision on request for compensation for unlawful detention’”, 8 August 2016, ICC-01/05-01/13-1964 (OA13) (“Judgment of 8 August 2016”), para. 12; See also, Situation in the Central African Republic, *The Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Appeals Chamber, “Decision on the ‘Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015’”, 23 December 2015, ICC-01/05-01/13-1533, para. 16; Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’”, 18 December 2015, ICC-02/11-01/15-369 (OA7), para. 18; Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, ICC-02/11-01/11-572 (OA 5), para. 63; Trial Chamber I, “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’”, 4 August 2011. (This decision was reclassified as “Public” pursuant to Trial Chamber I’s instruction of 25 October 2015), ICC-01/04-01/06-2779 (“Decision of 4 August 2011”), para. 10.

<sup>23</sup> “Judgment of 13 July 2006”, para. 9; Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, Trial Chamber 9, “Decision on Defence Request for Leave to Appeal Decision”, 2 September 2016, ICC-02/04-01/15-521 ICC-02/04-01/15-529 (“Decision of 2 September 2016”), paras. 5-6.

<sup>24</sup> Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, Trial Chamber IX, “Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521”, 2 September 2016, ICC-02/04-01/15-529, para. 8, referring, in particular, to the Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, “Decision on the prosecution and defence applications for leave to appeal the ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’”, ICC-01/05-01/08-1169, para. 25.



cumulative criteria in article 82(1)(d) of the Statute are fulfilled.<sup>25</sup> Consequently, the failure to fulfil one or more of those criteria is fatal to an application for leave to appeal.<sup>26</sup>

15. The Chamber notes that the Legal Representatives of V01 Victims claim that the Order on Symbolic Collective Reparations and the Order on the Identification Process contain errors of law, but do not explain the basis for that argument or state an issue, as required by article 82(1)(d) of the Statute.

16. The Chamber considers, as does the OPCV, that the Legal Representatives of V01 victims merely state the points on which they are in disagreement with the Chamber and that the arguments that they present largely suggest a misunderstanding of the Order on Symbolic Collective Reparations and the Order on the Identification Process. In this regard, the Chamber considers that the arguments developed primarily on the basis of conflicting opinions, or which inaccurately reflect the decisions of the Chamber, cannot be considered issues likely to give rise to an interlocutory appeal.<sup>27</sup>

17. Given that the first criterion of article 82(1)(d) has not been fulfilled, the Chamber considers that there is no reason to further examine the Application for Leave to Appeal.

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<sup>25</sup> “Decision of 29 May 2012”, para. 9, referring to the “Decision of 19 August 2005”, para. 15; Situation in Uganda, Pre-Trial Chamber II, “Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, ICC-02/04-112, para. 16.

<sup>26</sup> “Decision of 2 September 2016”, para. 9; “Decision of 26 January 2011”, para. 24.

<sup>27</sup> See, for example, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, ICC-02/11-01/15-117, para. 19.

**FOR THESE REASONS, the Chamber**

**REJECTS** the Application for Leave to Appeal.

Done in both English and French, the French version being authoritative.

[signed]

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**Judge Marc Perrin de Brichambaut**  
**Presiding Judge**

[signed]

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**Judge Olga Herrera Carbuccion**

[signed]

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**Judge Péter Kovács**

Dated this 8 December 2016

At The Hague, the Netherlands