



Original : English

No.: ICC-01/04-01/06
Date: 29 November 2006

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public Document

Defence Response to the Appeals Chamber Order of 24 November 2006

The Office of the Prosecutor

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a/003/06**

Mr. Luc Walley, Mr. Frank Mulenda

Introduction

1. On 26 October 2006, the Defence filed its appeal against the decision of the Pre-Trial Chamber denying the Defence request for interim release of Thomas Lubanga Dyilo.¹ The Prosecution filed its response to the Defence appeal on 1 November 2006.²
2. Subsequently, and without any previous application to participate in the proceedings before the Appeals Chamber, the representatives of the victims filed their response to the Defence Motion on 16 November 2006.³
3. In response to this filing, the Defence filed on the same day, the 'Defence Request for an Order Regarding Non-Compliance with the Time Limits',⁴ in which it requested the Appeals Chamber to order that the filing of the Victims Representatives does not comply with the Regulations of the Court, and further requested the Appeals Chamber to reject it.⁵
4. The Honourable Appeals Chamber subsequently unanimously ordered the Defence to file by 29 November 2006, 'submissions on the right of victims a/0001/06 to a/0003/06 to participate in the appeal, the need, if any, of an application to that end and an order of the Appeals Chamber validating it, and the modalities for such participation.'
5. Before addressing the substance of the Appeals Chamber's Order, the Defence respectfully submits that the issues of the need for an application and the modalities of participation of the legal representatives are academic in the present appeal. The legal representatives filed their response on 16 November 2006, twenty days after the appeal filed by the Defence. In citing regulations 24(2) and 34 of the Regulations of the Court,⁶ the legal representatives were aware that time limits applied to their appeal and furthermore, that the applicable time limit was that which applies to a response. In light of the fact that the legal representatives have been assisting a/0001/06 to a/0003/06 before the Court since at least 1 June 2006,⁷ they could be presumed to be familiar with the Regulatory framework of the Court. They were also

¹ Defence Appeal Against 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 26 October 2006, ICC-01/04-01/06-594

² Prosecution's Response to Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire Thomas Lubanga Dyilo', 1 November 2006, ICC-01/04-01/06-637

³ 'Réponse des victims a/0001/06, a/0002/06 et a/0003/06 à l'appel de la Défense concernant la Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo, 16 November 2006, ICC-01-04-01-06-704 (Victims' Interim Release Response) The Defence refers to 'legal representatives', 'victims' representatives', 'victims' and 'legal representatives of the victims' interchangeably in this filing.

⁴ Defence Request for an Order Regarding Non - Compliance with the Time Limits, 16 November 2006, ICC-01/04-01/06-708 (Defence Request)

⁵ Defence Request, at page 4

⁶ Victims' Interim Release Response, at page 2

⁷ See Solemn Declarations of Luc Walley and Franck Mulenda, Legal Representatives for Participants a/0001/06 to a/0003/06 ICC-01/04-01/06-492

able to avail themselves of the assistance of the Office of Public Counsel for Victims in relation to procedural question. However, they failed to comply with the strict time limits set out in Regulation 64(5) for appeals on interim release and as set out in the Defence Request, the Appeals Chamber should reject their filing.

6. Notwithstanding this fact, the Defence takes the opportunity offered by the Appeals Chamber to put forward its submissions on the regime that must apply to participation of the legal representatives in proceedings before the Appeals Chamber.
7. As a further introductory remark, the Defence highlights that under Article 68(3) of the Statute, if the Court permits the views of victims to be heard, this must be done 'in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. Moreover, in accordance with Rule 118(1), decisions pertaining to provisional release shall be decided without delay. The Defence submits that the issues of potential prejudice to the rights of the defence, and the need to adjudicate provisional release applications in an expeditious manner should comprise the guiding principles in the Appeals Chamber's consideration of the present questions.

1) The right of victims a/0001/06 to a/0003/06 to participate in proceedings before the Appeals Chamber

8. a/0001/06 to a/0003/06 were accorded the status of victim as understood by Rule 85(a) by a decision of the Pre-Trial Chamber of 28 July 2006.⁸ In that decision, the Pre-Trial Chamber further invited the legal representatives of these victims to file any comments regarding arrangements for their participation in the confirmation hearing against Thomas Lubanga Dyilo.⁹
9. Having also heard the views of the Prosecution and Defence on this issue, the Pre-Trial Chamber then issued its decision on the arrangements of their participation at the confirmation hearing.¹⁰ In that decision, the Pre-Trial Chamber permitted the victims' representatives to attend the public sessions of the status conferences and actual confirmation hearing and make opening and closing statements at the confirmation

⁸Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 28 July 2006, ICC-01/04-01/06-228-tEN

⁹ At page 17.

¹⁰ Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462 (Arrangements Decision)

hearing but denied them the right to add any point of fact or law or to question the witnesses.¹¹

10. The Defence first submits that the right to participate in proceedings before the Pre-Trial Chamber granted to the victims' representatives in this decision is limited only to the actual proceedings before the Pre-Trial Chamber at the confirmation hearing. No right to participate in proceedings before any other Chamber can be inferred. If the victims wish to participate in proceedings before other Chambers, they must file separate applications to participate before these chambers. The Defence further submits that the application they must submit to participate in proceedings before other Chambers cannot have suspensive effect. This is especially the case when the issue on appeal is one that by its very nature should be resolved quickly.
11. According 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, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1'. Rule 91(1) states that a 'Chamber may modify a previous ruling under rule 89'. The Defence therefore submits that the instances in which the victims' representatives are entitled to interject, and the modalities of their submissions are governed by the express terms of the orders issued thus far by the Pre-Trial Chamber. Since the orders issued thus far have not expressly mandated the victims' representatives to participate in relation to appeal proceedings, such participation could only be predicated on a new order to that effect.
12. In this regard, the Defence submits that an application of the decision of the Pre-Trial Chamber granting the right to participate in proceedings on 28 July 2006, and the text of Regulation 86(8) only grants to the victims the right to participate in proceedings before the Pre-Trial Chamber. The Defence observes that this does not regulate the issue of whether this determination binds the Trial Chamber or Appeals Chamber.
13. The Defence submits therefore in the absence of any specific provision extending the participation to separate proceedings before the Appeals Chamber, the legal representatives have no automatic right to participate at that stage.

2) The need for an application to participate in the appeal

14. The Defence submits that even if the legal representatives of victims are granted the right to participate in proceedings before the Appeals Chamber, without making a

¹¹ Arrangements Decision at pages 7-8

further application under Rule 89, they are still obliged to make a specific application to file a response to the Defence appeal on interim release.

15. Since the 28 July decision of the Pre-Trial Chamber, the legal representatives have had the right to participate in proceedings before the Pre-Trial Chamber. Nonetheless, if they wished to file any document in the proceedings in relation to a specific issue, it was necessary for them to seek the leave of the Pre-Trial Chamber to do so. This was the case in relation to participation in the status conferences of 17 August, 4 and 19 September 2006. The legal representatives filed a request to participate in these proceedings contained within its observations regarding the arrangements for participation at the confirmation hearing.¹² Therefore, it is clear that they were aware that they were under an obligation to seek leave to participate in proceedings rather than having a right to do so. In adjudicating upon this request, the Pre-Trial Chamber made no reference to the fact that the representatives had an automatic right to participate in the proceedings and ultimately denied their request.¹³
16. This interpretation is further supported by the Decision of 22 September in which the Pre-Trial Chamber held that the legal representatives did not have the right to add any points of fact or law during the confirmation hearing.¹⁴ A response to the Defence appeal on interim release would clearly amount to submissions on fact and law.
17. The only situations in which the legal representatives have been permitted to file a document before the Pre-Trial or Appeals Chamber have been those in which the representatives have been expressly invited to do so by that Chamber, or possess an express statutory entitlement to do so. For example, in relation to the Defence request for interim release,¹⁵ the Pre-Trial Chamber expressly invited the legal representatives to file a response before the Pre-Trial Chamber and stated the deadline by which they must do so.¹⁶ The same situation applied before the Appeals Chamber in relation to the Defence Appeal on Jurisdiction, in which the legal representatives were expressly invited to respond to the Defence appeal.¹⁷

¹² Observations concernant les modalités de la participation des victimes, 8 August 2006, ICC-01/04-01/06-316-Conf

¹³ Décision relative à la demande de participation des victimes a/0001/06 à a/0003/06 à la conférence de mise en état du 24 août 2006, 17 August 2006, ICC-01/04-01/06-335

¹⁴ Arrangements Decision at page 8

¹⁵ Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo, 20 September 2006, ICC-01/04-01/06-452

¹⁶ Decision establishing a Deadline in Relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo, 22 September 2006, ICC-01/04-01/06-465

¹⁷ See 'Appeals Chamber's Request and Directions', 13 October 2006, ICC-01/04-01/06-569, '3. The observations of the Democratic Republic of the Congo and the Victims a/0001/06 to a/0003/06 shall be submitted within 10 days after notification to them of the documents to be submitted by the Prosecutor and the Defence or the effluxion of the time stipulated for the purpose.'

18. The Defence submits that in the absence of an express invitation by the Chamber seized of a motion or an appeal or an express statutory entitlement, the legal representatives are required to file an application to be able to file a response on any particular issue. In the present appeal, the legal representatives failed to do so within the applicable time limit and in the absence of any express authorisation by the Appeals Chamber, their response must be rejected.

3) Criteria for Determining Whether Participation is Appropriate

19. The legal representatives are strictly limited by the Statute and Rules to issues which directly impact upon them. Under Article 68(6) the Court shall permit the views of victims to be presented and considered only ‘when the personal interests of the victims are affected’. As a consequence, the Defence is of the view that the legal representatives must satisfy the court that their personal interests are affected before they are permitted to file any document.

20. Guidance as to whether or not a request or an appeal on interim release affects the personal interests of the victims is given by Rules 118 and 119 of the Rules of Procedure and Evidence.¹⁸ Under Rule 118(1), in assessing whether to grant a Defence request for interim release, ‘the Pre-Trial Chamber shall decide upon on the request without delay, after seeking the views of the Prosecutor.’ The Defence notes that at this stage, when the relevant chamber is deciding upon whether to grant interim release, this rule does not require the Pre-Trial Chamber to solicit the views of the legal representatives. The same procedure is followed under Rule 118(3), when any request for interim release submitted by the Defence after the first appearance will be decided upon by the Pre-Trial Chamber ‘after having received observations in writing of the Prosecutor and the detained person’. Again the Defence notes that there is no obligation on the Pre-Trial Chamber to seek the views of the victims’ legal representatives. In this regard, the Defence submits that the underlying requirement that such decisions should be decided without delay militates against seeking the observations of the victims’ representatives at this stage.

21. The Defence observes that the only stage when the views of the victims are sought is when the Pre-Trial Chamber has decided on interim release and wishes to set conditions restricting liberty under Rule 119. Under Rule 119(3), ‘before imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, and relevant State and the victims who

¹⁸ Hereafter, the Rules

have communicated with the Court in that case'. Therefore the only point at which it is envisaged that it would be appropriate for the legal representatives to participate is during the discussion of the conditions imposed on the person who has been granted interim release, rather than during the prior litigation on the underlying merits of the right to release.

22. The Defence further submits that this is also the only stage during the proceedings before the Appeals Chamber that the legal representatives should be permitted to participate.
23. In addition, Rule 119(3) further envisages that the Chamber will only seek the views of these victims if it considers that the threshold criteria – that the victims 'could be at risk as a result of a release or conditions imposed' – has been met. Therefore, Rule 119(3) does not set out an automatic right of the victims to submit their views at this later point as they must also prove to the Pre-Trial Chamber that the decision could place them at risk.
24. The Defence further notes that Rule 119(3) applies expressly to decisions of the Pre-Trial Chamber and cannot be automatically transposed to proceedings before the Appeals Chamber. Consequently, it is arguable that even at this stage, after the Appeals Chamber has rendered a decision granting interim release, the legal representatives could not rely on this rules to invoke an automatic right to file submissions regarding the conditions of release before the Appeals Chamber.
25. In the present issue, if the legal representatives were to file an application to participate in appeals proceedings in relation to the issue of whether to grant interim release (as opposed to the conditions of release), the Defence submits that the Appeals Chamber should reject their application. The fact of granting or refusing interim release is not in itself an issue which goes to the heart of the case: it has not impact on the proceedings to determine the individual responsibility of Thomas Lubanga Dyilo in relation to the charging document, nor does it have any impact on putative requests for reparation. The request concerns a fundamental and personal right of the detained person to be free from arbitrary detention and to seek interim release in accordance with the law. The Defence therefore submits that the threshold requirement that the participation of victims should be linked to issues which impact on their personal interests would not be satisfied in relation to the underlying merits of the issue as to whether Thomas Lubanga Dyilo has a right to be granted interim release.
26. The Defence has previously expressed its concerns about the victims being a second Prosecutor. Even if the victims' adopt a different tact from the Prosecutor, the

positions adopted far have always been directly opposed to the requests of the Defence. The Defence has therefore been forced to divert its time and resources from focusing on the submissions of the Prosecution and its general defence pre-trial preparation, to address the additional substantive submissions of the victims' representatives.

27. Therefore, unless the scope of the submissions of the legal representatives is strictly limited to issues directly linked to their personal concerns regarding the conditions of release, the Defence would in reality be facing two Prosecutors, one of which is anonymous, and not bound by any obligation to formulate its submissions in a manner which is consistent with the role of a prosecutor as an impartial minister of justice.
28. Their participation in relation to the substantive arguments concerning a personal right of Thomas Lubanga Dyilo thus clearly contradicts the requirement in article 68(3) that the participation of victims should not be prejudicial to or inconsistent with the rights of the defence and a fair and impartial trial.
29. Consequently, if the Defence request for interim release is granted, the Defence submits that the response of the victims' representatives should be limited to factual submissions on the effect that the conditions imposed by the Chamber may have on them. This is the proper role of the victims' representatives in the litigation surrounding such an issue.

4) The modalities for participation in proceedings

30. The Defence submits that if the legal representatives wish to participate in proceedings before the Appeals Chamber, they must comply with the applicable time limits. This subject has been addressed at length by the Defence in a separate filing.¹⁹
31. The Defence simply wishes to highlight the strict deadlines that apply to appeals of decisions regarding interim release. The Defence was obliged to file its appeal within seven days under Regulation 64(5) of the Regulations of the Registry²⁰ and the Prosecution was obliged to file its response within five days of the Defence appeal by virtue of the same Regulation. This time limit is in stark contrast with the 21 days that is accorded to the appellant to file a document in support of an appeal under Article 81(1)(a).²¹ It is also far shorter than the time limit for filing appeals where leave of the

¹⁹ See Defence Request for an Order Regarding Non - Compliance with the Time Limits, 16 November 2006, ICC-01/04-01/06-708

²⁰ Hereafter 'The Regulations'

²¹ Under Rule 154(1) the appeal under this article in relation to either jurisdiction or admissibility must be filed within five days of the decision which is the same deadline for filing appeals against decisions on interim release. However, under Regulation 64(2) the appellant shall file the document in support of appeal for appeals

Pre-Trial Chamber is required. In that circumstance, a document in support of the appeal must be filed within ten days of notification of the decision granting leave to appeal.²²

32. As explained at in the Defence Request, the right to liberty is fundamental and therefore any challenge to a decision restricting this right must be considered expeditiously. This is the rationale for the shortening of the time limits. To permit out of time filings, would further violate Thomas Lubanga Dyilo's rights.
33. The Defence further submits that if the legal representatives are permitted by the Appeals Chamber to participate in the current proceedings, their response must be limited to the impact that a successful appeal would have on them. They should not be permitted to respond to the Defence submissions on legal errors made by the Pre-Trial Chamber in relation to the underlying right to provisional release. This is the proper role of the Prosecution.
34. If the victims are granted this right to make the factual submissions on the conditions of release, the Defence submits that in line with Article 68(3) of the Statute, this must be done in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Therefore, this must not prejudice the right of the person to have an issue determined expeditiously nor the right to have adequate time and resources for his defence.
35. As a consequence, if the victims representatives wish to file a response on the conditions of release, they must be ordered to so at the same time as the Prosecution files its response. This would ensure that a resolution by the Appeals Chamber of the issue on appeal is not delayed. Furthermore, their response must be limited to issues that directly impact upon them. In the present case, as the Defence has not been disclosed the identities of the victims, and is not requesting that Mr Lubanga be provisionally released to the Democratic Republic of Congo, the Defence submits that the impact of release on the personal interests of the victims can only be minimal.
36. Furthermore, the Defence submits that it should have the automatic right to file a reply to any response filed by the legal representatives. The Defence sought to file a reply to the observations of the victims' representatives during litigation before the Pre-Trial Chamber²³ but was not granted leave to do so.²⁴ The Defence notes that this decision

under Rule 154, 'within 21 days of notification of the relevant decision'. This provision applies to appeals against decisions on jurisdiction or admissibility.

²² Regulation 65(4)

²³ Motion Requesting Authorisation to Respond to the Office of the Prosecutor and the Representatives of Victims a/0001/06 to a/0003/06, 13 October 2006, ICC-01/04-01/06-571

to refuse leave to file a reply to the victims' representatives appears to violate Rule 91(2) which mandates that 'the defence shall be allowed to reply to any oral or written observation by the legal representative for victims'.

37. The Defence submits in light of the nature of the submissions that the victims' representatives are permitted to make, a reply from the Defence is necessary to ensure that the issues have been fully litigated.
38. Firstly, in filing its appeal, the Defence is able to anticipate the legal arguments that are put forward by the Prosecution in opposition to the appeal. Therefore, it can make submissions on the arguments that it foresees will be made by the Prosecution. In contrast, the Defence submits that it would be an extremely complex task to anticipate and make submissions on the possible response of the victims when they may not, at the stage of filing of the appeal, have applied to the Appeals Chamber for leave to file their observations. This was the case in the present litigation, in which there had been no application by the victims' representatives to participate in proceedings before the Appeals Chamber prior to the filing of the Defence appeal on 26 October 2006.
39. Secondly, although the Defence may be able to anticipate the legal argument that will be advanced by the Prosecution, it would not be able to anticipate the submissions of the victims' representatives on the impact of a decision granting interim release. Since their views in relation to the conditions of release may be based on questions of fact, this would undoubtedly entail the submission of new facts before the Appeals Chamber to which the Defence must be given the proper opportunity to respond. This impression is confirmed by two sets of observations recently presented by the victims' representatives before the Appeals Chamber. Both the observations on provisional release and the observations on the appeal on jurisdiction referred to evidence presented to the confirmation hearing,²⁵ which was shown over two weeks after the Defence filed its respective appeals briefs on 26 October 2006.
40. The Defence therefore respectfully requests that if the victims are allowed to file their observations on this issue, the Defence be granted the automatic right to reply to their submissions.

²⁴ Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 October 2006, ICC-01/04-01/06-586, at page 3

²⁵ See Observations des victimes a/0001/06, a/0002/06 et a/0003/06 à l'appel de la Défense concernant la Décision relative à l'exception d'incompétence de la Cour en vertu de l'article 19-2-a du Statut, 22 November 2006, ICC-01/04-01/06-725 at footnote 50 where the victims' representatives make allegations or re-recruitment of child soldiers based on evidence presented by the Prosecution during the hearing of 14 November. The same allegation appears in the Victims' Interim Release Response at footnote 24

Relief sought

41. The Defence therefore respectfully requests the Appeals Chamber to;

- 1) reject the response of the legal representatives of the victims as it was filed out of time;
- 2) hold that if the legal representatives wish to participate in proceedings before the Appeals Chamber they are required to file an application before the Appeals Chamber establishing that they meet the requisite criteria (as described in section 3 of this filing);
- 3) hold that if the legal representatives are permitted to participate in proceedings before the Appeals Chamber, they are only permitted to do so in relation to the conditions imposed by the Chamber on the person granted interim release and not on the issue of whether interim release itself should be granted;
- 4) hold that if the legal representatives are permitted to participate in proceedings before the Appeals Chamber, they must not be permitted to respond to the legal submissions of the Defence and must file their observations concurrently with the Prosecution; and
- 5) hold that the Defence has an automatic right of reply to any observations filed by the victims.



Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo

Dated this 29th day of November, 2006

At The Hague