

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public

**Prosecution's Response to 'Defence Request for an Order Regarding
Non-Compliance with the Time Limits', pursuant to
'Order of the Appeals Chamber' of 24 November 2006**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Ekkehard Withopf, Senior Trial Lawyer

**Legal Representatives for Victims a/0001/06
to a/0003/06**

Mr Luc Walley
Mr Franck Mulenda

Counsel for the Defence

Mr Jean Flamme
Ms Véronique Pandanzyla

Office of Public Counsel for the Defence
Ms Melinda Taylor

Procedural History

1. On 20 September 2006, the Appellant filed before Pre-Trial Chamber I a “Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo”, which included a request for interim release.¹
2. On 9 October 2006, the Prosecution filed the “Prosecution’s Response to the Defence Request for Interim Release”.² On the same date, the legal representative of victims a/0001/06 to a/0003/06 (“the Victims’ Representative”) filed his “Observations des victimes a/0001/06, a/0002/06 and a/0003/06 sur la demande de mise en liberté introduite par la défense”.³ The Pre-Trial Chamber had determined that victims a/0001/06 qualify for participation in the case.
3. On 18 October 2006, the Single Judge rendered the “Decision on the Application for the interim release of Thomas Lubanga Dyilo”.⁴
4. The Appellant lodged an appeal against the Decision on 20 October 2006,⁵ and filed its substantive “Defence Appeal Against the ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” on 26 October 2006.⁶
5. On 1 November 2006, the Prosecution filed its “Prosecution’s Response to Defence Appeal Against the ‘Décision sur la demande de mise en liberté provisoire Thomas Lubanga Dyilo’”.⁷
6. On 16 November 2006, the Victims’ Representative filed the “Response of Victims a/0001/06, a/0002/06 and a/0003/06 to the appeal of the Defence from the Decision on the application for interim release of Thomas Lubanga Dyilo”.⁸ The same day, the Appellant filed its “Defence Request for an Order Regarding Non-Compliance with the Time Limits”.⁹
7. On 24 November 2006, the Appeals Chamber issued an order inviting, *inter alia*, the Prosecution to file a response to the Defence Request by 29 November 2006, “which may

¹ ICC-01/04-01/06-452, 20 September 2006, paras. 33-49 and relief sought, para. (vii).

² ICC-01/04-01/06-531 (“Prosecution Response”). Representatives of victims also filed a response on 9 October 2006 – see document ICC-01/04-01/06-530.

³ ICC-01/04-01/06-530.

⁴ ICC-01/04-01/06-586-tEN (“Decision” or “impugned Decision”).

⁵ ICC-01/04-01/06-594.

⁶ ICC-01/04-01/06-618.

⁷ ICC-01/04-01/06-637.

⁸ ICC-01/04-01/06-704-tEN (“Victims’ Response”).

⁹ ICC-01/04-01/06-708 (“Defence Request”).

include submissions with regard to 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.”¹⁰

Discussion

8. In response to the Defence Request and the Order of the Appeals Chamber, the Prosecution will address four issues:

- a. Whether the Victims’ Response was filed in compliance with the applicable Regulations regarding time limits;¹¹
- b. Whether the victims had the right to participate in the appeal without seeking the leave of the Appeals Chamber;¹²
- c. The appropriate modalities for any participation;¹³
- d. Whether the Victims’ Response impermissibly relies on items of evidence which are not part of the record of the appeal.¹⁴

Did the Victims’ Response comply with the applicable Regulations regarding time limits?

9. The Prosecution agrees that the Regulations of the Court regarding the time limits for the filing of documents serve important objectives, and that it is incumbent on all participants to comply with these Regulations.¹⁵ As noted by the Appellant, the Regulations also provide a mechanism if a party needs to seek an extension of the applicable time limit.¹⁶
10. Given that the Appeal was filed under Article 82 (1) (b), Regulation 64 (5) stipulates that the deadline for filing a response to the document in support of appeal was five days after the notification of the document in support of appeal. To the best of the Prosecution’s knowledge, the Victims’ Representative did not apply for, and has not been granted, an extension of the time limit for filing the response. The Prosecution must therefore conclude that the Victims’ Response was not filed in compliance with the Regulations relating to time limits.

¹⁰ “Order of the Appeals Chamber”, ICC-01/04-01/06-727, 24 November 2006, para. 1.

¹¹ Defence Request, paras. 3-10.

¹² Order of the Appeals Chamber, para. 1.

¹³ *Ibid.*

¹⁴ Defence Request, para. 12.

¹⁵ Defence Request, para. 5.

¹⁶ Regulation 35 – see Defence Request, para. 9.

11. On this basis alone, the relief requested by the Defence appears to be warranted. This Chamber therefore could find the failure to comply with Regulation 64 (5) determinative in this instance and reserve other questions on which it has invited briefing for appeals in which those questions are squarely presented. However, because the Chamber has invited the Prosecution to expand on the issues of the right of victims a/0001/06 to a/0003/06 to participate in the appeal; the need, if any, for a specific application; and the modalities for participation, the Prosecution addresses those issues below.

Were the victims required to seek the leave of the Appeals Chamber to participate in this appeal?

12. The Prosecution firstly submits that the Statute expressly limits the right to appeal to the parties: Article 81 limits appeals against acquittals, convictions or against sentence to the Prosecutor and the convicted person,¹⁷ and Article 82 states that “[e]ither party” may appeal one of the decisions contained therein, including a decision “granting or denying release of the person being investigated or prosecuted”.¹⁸ Legal representatives of victims enjoy full rights to lodge appeals only in relation to orders for reparations entered under Article 75 of the Statute.¹⁹ The provisions governing the appellate regime of the Court do not appear to provide for victim representatives’ intervention in appellate proceedings as a matter of right,²⁰ including intervention as a respondent.²¹
13. This general position appears to vary in relation to appeals pertaining to challenges to jurisdiction or admissibility lodged under Article 19, since (a) under Article 19 (3) victims may submit observations in proceedings with respect to jurisdiction or admissibility without the need for prior authorization, and (b) the Appeals Chamber has ruled that appellate proceedings in connection with challenges to admissibility or jurisdiction are a continuation of the same proceedings initiated before the first instance Chamber.²² Thus, it

¹⁷ See Article 81 (1) and (2).

¹⁸ See Article 82 (1) (emphasis added).

¹⁹ See Article 82 (4).

²⁰ See also Jorda and de Hemptinne, “The Status and the Role of the Victim” in Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol. II*, p. 1406: the victim “has no right of appeal and cannot, on that basis, present his arguments against the accused to the Appeals Chamber”. See also Roth and Henzlin, “The Appeal Procedure of the ICC”, in Cassese et al (*op. cit.*), p. 1551: “Victims, civil parties and third parties affected by a decision cannot normally be considered as parties, in the strictest sense of the word, to an appeal against an interim decision under Article 82, unless such decisions affect their civil rights as envisaged by Article 82(4)/Article 75.”

²¹ The term “respondent” has been defined as “[t]he defending party in an appeal or petition to the courts”. See *Oxford Dictionary of Law*, (2003), p. 431.

²² See Reasons for the Appeals Chamber’s Decision of 16 November 2006 on the “Prosecution’s Request for an Extension of the Page Limit”, ICC-01/04-01/06-717, 17 November 2006, para. 8: “Proceedings before either tier

can be argued that victim participants may properly “submit observations”, within the terms of Article 19 (3), before the Appeals Chamber, without any need for an application to that end and an order of the Appeals Chamber.

14. In relation to all other appeals, victim participation may still be possible through the general provision governing participation in Article 68 (3), which appears to apply equally at the appellate stage. Thus, victims may have their views and concerns considered by the Appeals Chamber, subject to the general requirements set forth in that provision: that their personal interests must be affected; that the Chamber must be satisfied that participation would be appropriate at this stage of the proceedings; and that participation must take place in a manner that is not prejudicial to or inconsistent with the rights of the accused and the requirements of fairness and impartiality of the proceedings.
15. Such participation necessarily requires a specific application for participation in the instant appeal, and a finding from the Appeals Chamber as to whether the issues on appeal affect the victims’ personal interests and whether participation at the appellate stage would be appropriate. The Prosecution stresses that appellate proceedings are distinct proceedings with a specific and confined corrective purpose, held before a separate Chamber of the Court. Thus, a general finding that participation of a given victim is appropriate before the first instance Chamber cannot automatically mean that the victim may subsequently participate in all appellate proceedings flowing from every decision by that Chamber, regardless of whether his or her interests are affected by the issues being discussed on appeal. Further, the Appeals Chamber is the master of its own procedure,²³ and cannot be bound by procedural decisions entered by first instance Chambers:²⁴ it is the prerogative

of Justice, first instance or on appeal, involve determining whether the Court has jurisdiction in light of the challenges made under article 19 (2) of the Statute to take cognisance of a cause or matter.”

²³ See e.g. SCSL Appeals Chamber, *Prosecutor v. Gbao et al.*, SCSL-2003-08 PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para. 27: “In any event, the Special Court has an inherent power to organise itself, through its procedural rules, in a way that its judges agree will best assist its work so long as such rules do not contravene any express provision of the Agreement and Statute. Such power in common law courts has been upheld by the House of Lords (*Jones* 1964) and by the ICTY Appeals Chamber in *Tadic* which explains that inherent jurisdiction “is a necessary component of the judicial function” and does not need to be expressly provided for in the constitutive documents of the tribunal.” (footnotes omitted). The ICTY Appeals Chamber decision relied upon by the SCSL elaborates that such powers extend to those which, “even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, [...] are essential for the carrying out of judicial functions and ensuring the fair administration of justice.” (*Prosecutor v. Tadic*, IT-94-1, Judgement, 15 July 1999, para. 322). See also *Prosecutor v. Blaskic*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, footnote 27.

²⁴ See e.g. *Prosecutor v. Taylor*, SCSL-2003-01-R72, Decision on Urgent Defence Motion against Change of Venue, 29 May 2006, paras. 4-8, finding that the referral of the motion by the Trial Chamber to the Appeals Chamber was inappropriate and declaring the motion inadmissible.

of the Appeals Chamber to determine who can participate in proceedings before it, subject to any applicable provisions of the Statute or Rules.

16. Finally, deciding whether the defined and concrete issues on appeal – as opposed to more general issues pertaining to the case – affect the applicants’ personal interests entails a new determination that can be properly and efficiently performed by the Appeals Chamber, on the basis of the applications filed before it and any responses thereto, as well as the rest of the record on appeal. The same holds true in relation to whether participation at the appellate stage would be “appropriate” in the instant case.
17. The Prosecution nonetheless submits that here a full fresh determination under Rule 89 (1), including a determination of whether the relevant person qualifies as a “victim”, within the terms of Rule 85, is likely to be unnecessary: firstly, the determination regarding the propriety of participation in the instant case has already been made by the first instance Chamber after a thorough process involving the Registry and the parties; secondly, what must be determined by this Chamber is not the status of the applicants as victim-participants in the case (unless there is a dispute concerning their status),²⁵ but rather whether the scope of the proper participation of those victims under Article 68 (3) extends to participation in the instant appellate proceedings.
18. The Prosecution finally submits that the burden is on the Victims’ Representative to demonstrate that participation is warranted in the instant appeal. The Prosecution recognizes that, depending on the circumstances, the issue of provisional release is one that may arguably affect the victims’ personal interests. However, since no argument pertaining to this question has been put forward by the Victims’ Representative, the Prosecution does not consider it appropriate to make further submissions on the issue.

Modalities of participation

19. Within the general framework described above, it is submitted that victims may file a response under Regulation 24 (2) to documents filed during the appellate stage, when they are permitted to participate *in those specific appellate proceedings*. That response should nonetheless be confined to the presentation of views and concerns, as authorized pursuant to Article 68 (3), regarding the issues on appeal as brought by the parties (rather than raising new or different issues), and should not result in an infringement of the rights of the accused.

²⁵ The applicants have already been recognized as victims and granted the right to participate before the Pre-Trial Chamber in this case.

Did the Victims' Response impermissibly rely on evidence not in the record of the appeal?

20. The final issue raised in the Defence Request is that the Victims' Response allegedly "refers to several items of evidence which were not part of the appeal record" and the Victims' Representative's failure to seek leave to adduce additional evidence.²⁶ The Prosecution notes that the Defence Request does not identify the items of evidence in question. However the Prosecution also notes that on at least one occasion the Victims' Response does refer to evidence which was not before the Pre-Trial Chamber at the time of the Decision²⁷ and does not constitute part of the record of the appeal.²⁸ To the extent that the Victims' Representative has purported to rely on evidence which was not part of the record of the appeal, the Prosecution agrees with the submissions of the Appellant. A participant cannot introduce new evidence in an appeal without the leave of the Appeals Chamber.²⁹

Conclusion

21. The Prosecution is filing these submissions pursuant to the Order of the Appeals Chamber of 24 November 2006, and in an effort to assist the Appeals Chamber in the proper determination of the issues enumerated in the same Order. It need not, and does not, seek at this stage any relief in relation to the issues discussed in this document.



Luis Moreno-Ocampo

Prosecutor

Dated this 29th day of November 2006

At The Hague, The Netherlands

²⁶ Defence Request, para. 12.

²⁷ Victims' Response, footnote 24 – referring to evidence adduced during the confirmation hearing on 14 November 2006.

²⁸ See Rule 156(1).

²⁹ See the procedure set out in Regulation 62.