

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 6 December 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 Request of Victims to Participate in the Appeal,
pursuant to 'Order of the Appeals Chamber' of 4 December 2006**

The Office of the Prosecutor

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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 to a/0003/06 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 the Prosecution, the Defence and the Victims’ Representative to each file a response to the Defence Request

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.

³ ICC-01/04-01/06-530 (“Victims’ Original Observations”).

⁴ ICC-01/04-01/06-586-tEN.

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’ First Response”).

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

by 29 November 2006, “which may 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

8. On 29 November, the Prosecution,¹¹ the Defence¹² and the Victims’ Representative¹³ all filed submissions in response to the order of the Appeals Chamber. The Victims’ Response and Request included requests that the Appeals Chamber allow the Victims’ Representative to attend any hearings in the instant appeal and to submit written observations or submissions on any issue which affects the interests of victims.¹⁴
9. On 4 December 2006, the Appeals Chamber issued a further order inviting the Prosecution and the Defence to respond to this additional application for participation by 6 December 2006.¹⁵
10. The Prosecution considers that the issues in relation to the Victims’ First Response of 16 November have already been fully explored before this Chamber.¹⁶ The Prosecution hereby files its response on the confined issue of the new request by the Victims’ Representative to participate in the instant appellate proceedings.

Discussion

The framework for victim participation in interlocutory appeals

11. In its prior Response to the Defence Request, the Prosecution submitted *inter alia* that in order for victims to participate in proceedings before the Appeals Chamber, they will generally be required to make an application for participation to the Appeals Chamber,

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

¹¹ “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”, ICC-01/04-01/06-736 (“Prosecution Response to Defence Request”).

¹² “Defence Response to the Appeals chamber Order of 24 November 2006”, ICC-01/04-01/06-734.

¹³ “Response of Victims a/0001/06, a/0002/06 and a/0003/06 to the Defence request of 16 November 2006”, ICC-01/04-01/06-739-tEN (“Victims’ Response and Request”).

¹⁴ Victims’ Response and Request, paras. 4-5 and prayer for relief.

¹⁵ “Order of the Appeals Chamber”, ICC-01/04-01/06-751.

¹⁶ See the Prosecution Response to Defence Request and the “Defence Response to the Appeals chamber Order of 24 November 2006”, ICC-01/04-01/06-734.

demonstrate that the substance of the instant proceedings affects their personal interests, and that their participation at this stage is appropriate.¹⁷

12. The Prosecution recognizes that Regulation 86(8) provides that “[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”. The Prosecution submits that the underlying purpose of this Regulation, which was not addressed directly in the Prosecution’s Response to the Defence Request, is to ensure that victims are not required to make separate applications to participate in the natural continuation of the same proceedings adjudicating the same substance merely because it has moved to the next stage of the determination.¹⁸ The Prosecution submits that in contrast, appellate proceedings on interlocutory matters are not a natural continuation of the proceedings,¹⁹ nor do they deal with the same issues.

13. The Prosecution reiterates its previous submission that “appellate proceedings are distinct proceedings with a specific and confined corrective purpose”²⁰ – an interlocutory appeal is therefore not the same “proceedings”, within the meaning of Regulation 86(8). As set out in its previous filing, the Prosecution submits that the narrowly defined nature of the issues under appeal, which will only be a small sub-set of those at issue in the case, militates in favour of the Appeals Chamber considering the appropriateness of the participation of victims in the instant proceedings, and whether their personal interests are affected, on a case-by-case basis.²¹ The Prosecution further submits that a subsidiary instrument such as the Regulations cannot alter the nature of the appellate regime, nor the

¹⁷ Prosecution Response to Defence Request, paras. 12, 14-18. The Prosecution acknowledged that victims may have a right to participate in appeals relating to challenges to jurisdiction and admissibility under Article 19 (para. 13). In this regard, Article 19(3), which mandates that victims may submit observations in relation to proceedings with respect to jurisdiction and admissibility, can be contrasted with Rule 118(1), which only provides that determinations on provisional release shall be made after seeking the views of the Prosecutor. While victims do not have an express right to participate in determinations of provisional release, if the Chamber decides to grant release and to impose conditions then at this later stage any victim “whom the Chamber considers could be at risk as a result of the release or the conditions” must have an opportunity to present their views on the nature of the conditions (Rule 119(3)).

¹⁸ The Prosecution submits that this is entirely consistent with the position set out in the Prosecution Response to Defence Request: that the Appeals Chamber is not required to determine afresh the status of an applicant as a victim-participant; rather the Appeals Chamber is required to determine whether the personal interests of the victim are affected by the present proceedings; whether the participation of the victim is appropriate in the present proceedings; and the scope of any such participation (para. 17).

¹⁹ The Prosecution notes that the situation may vary in relation to appellate proceedings in connection with proceedings with respect to admissibility or jurisdiction, as the Appeals Chamber has appeared to consider that in certain respects they could be seen as a continuation of the proceedings before the first instance Chamber - see Prosecution Response to Defence Request, para. 13.

²⁰ Prosecution Response to Defence Request, para. 15.

²¹ Prosecution Response to Defence Request, para. 16.

principles governing the scope of victim participation, established in the Statute and the Rules of Procedure and Evidence.²²

14. The only legal authority cited by the Victims' Representative in support of the request to participate in the instant appellate proceedings is Rule 91(2).²³ The Prosecution notes as a preliminary point that Rule 91(2) governs the modalities of participation, and does not provide for an independent right of victims to participate. The Prosecution submits that the initial grant of authorization to participate in the pre-trial proceedings by the Pre-Trial Chamber did not extend to authorizing participation in separate interlocutory appeals before the Appeals Chamber. This application to participate is neither a question of the modalities of participation nor the modification thereof. The Prosecution reiterates its submission that any request by victims to the Appeals Chamber to participate in an interlocutory appeal should be based first and foremost on Article 68 (3) and the criteria set out in the Article must be fulfilled.

Whether the personal interests of the Victims are affected in this instance

15. The Prosecution has previously recognized that the issue of provisional release is one which may arguably affect the personal interests of victims.²⁴ The Prosecution submits that victims should clearly articulate before the Appeals Chamber the specific manner in which the issues involved in the appeal affect their personal interests and why it is appropriate for them to participate at this stage of the proceedings. In the Victims' Response and Request, the Victims' Representative makes reference to the victims' prior filing before the Pre-Trial Chamber, in which the Victims' Representative raises a series of concerns.²⁵ These concerns included submissions linking the possibility of the interim release of Thomas Lubanga with an increased risk of re-recruitment of child soldiers, possibly including the victims.²⁶ While these points have not been developed before the

²² See Prosecution Response to Defence Request, para. 12. Rule 89(1) states that if a Chamber grants participation it "shall then specify the proceeding and manner in which participation is considered appropriate". The Prosecution submits that this demonstrates that participation must be linked to specific proceedings. The Pre-Trial Chamber did not, and could not, specify that the grant of participation included interlocutory appeals. While the participation might be able to continue when the same proceedings move to the next stage, it cannot be imposed upon different proceedings convened especially to consider a specific issue.

²³ Victims' Response and Request, para. 4.

²⁴ Prosecution Response to Defence Request, para. 18. See also Rule 119(3).

²⁵ Victims' Response and Request, para. 5; referring to Victims' Original Observations, paras. 11-15.

²⁶ See in particular Victims' Original Observations, paras. 12-14. The Victims' Representative also made observations regarding the risk that Thomas Lubanga would obstruct the investigation if released (para. 11); the

Appeals Chamber in these proceedings, the Prosecution acknowledges that, if accepted by the Appeals Chamber, such concerns may demonstrate that the personal interests of the victims are affected by the issues in this appeal.

Whether the participation of the Victims is appropriate at this stage in the proceedings

16. The Prosecution recalls that all appeals under Article 82 are to be determined as expeditiously as possible.²⁷ The particularly short time limits for the filing of documents in relation to appeals against a “decision granting or denying the release of a person being investigated or prosecuted”²⁸ demonstrate that the parties (and in the case of a decision denying release, “the person being investigated or prosecuted”) have a particular interest in the prompt determination of such appeals.
17. Even if the victims are held to have a right to file a response in these appellate proceedings without first seeking the permission of the Chamber, the Victims’ First Response was filed some 15 days after the expiry of the time limit under Regulation 64(5).²⁹ The filing of this document then gave rise to the present sequence of parallel litigation, further delaying the resolution of the substance of the appeal. The Prosecution submits that any likely delay to the proceedings and the resulting impact on the parties’ rights is one factor which should be considered by a Chamber in determining whether the participation of victims at that stage of the proceedings is “appropriate”. Given the delay in the filing of the Victims’ First Response, and the ongoing procedural complications that this has caused, the Prosecution queries whether the participation of the victims at this stage in these proceedings could be seen as “appropriate”.³⁰

risk of further victimization in general (paras. 11 and 14); and the risk that the provisional release of Thomas Lubanga could be seen as supporting the UPC and encouraging the commission of war crimes (para. 15).

²⁷ Rule 156(4).

²⁸ Article 82(1)(b); Regulation 64(5).

²⁹ Prosecution Response to Defence Request, para. 10.

³⁰ In relation to the modalities of participation requested by the Victims’ Representative, the Prosecution notes that at this stage no oral hearing has been scheduled or proposed in these proceedings. According to Rule 156(3), “appeal proceedings [under Article 82] shall be in writing unless the Appeals Chamber decides to convene a hearing.” At this stage, the Prosecution submits that it is not possible to make submissions on the participation of victims in a hypothetical hearing. The Prosecution submits that in the event that a hearing is convened, then if the Chamber has granted the victims permission to participate in these proceedings it should also rule on whether the victims may participate in that hearing and what the modalities of such participation might be.

Whether the current Request for Participation was filed in a timely manner

18. The Prosecution acknowledges that there is no express time-limit in the Statute, Rules or Regulations for a request by victims to be allowed to participate in interlocutory appeals. In principle, victims should make an application to participate in an interlocutory appeal as soon as the appeal itself is filed³¹ or leave to appeal is granted, if the issues raised at that stage affect their personal interests.³² In general, the Prosecution submits that the expeditious determination of interlocutory appeals is best promoted by victims who have already been granted leave to participate in the appeal filing their observations as responses, as provided for in Regulation 24(2) and in accordance with the schedule for filings provided in the Regulations.³³ Therefore, even if the effect of the issues raised in the appeal on the personal interests of victims does not become clear until the filing of the document in support of the appeal, the Prosecution submits that any application to the Appeals Chamber to participate in the appeal should be made prior to the deadline for the filing of the relevant response.³⁴
19. The Prosecution recalls that in this instance, the Victims' Representative has not done so; nor has the Victims' Representative demonstrated "good cause", as required under Regulation 35(2), in order for the Appeals Chamber to extend the time limit for the filing of any application or response by the Victims' Representative.³⁵ The Prosecution recalls its earlier submissions regarding the important objectives served by the Regulations regarding the time limits for the filing of documents.³⁶

³¹ Under Rule 154(1) or (2), and Regulation 64(1).

³² This is consistent with the objectives underlying Regulation 86(3). Although it would not be possible for the victims to apply to the Appeals Chamber for participation prior to the initiation of the interlocutory appeal, as it is unknown whether there will be an appeal to participate in, they should do so as soon as possible thereafter.

³³ Prosecution Response to Defence Request, para. 19.

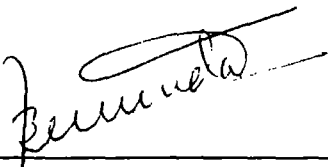
³⁴ If necessary, and especially in cases where there are particularly short time-frames for the filing of responses such as the instant case, the Prosecution submits that the application to participate – setting out how the issues in the appeal affect the personal interests of the victims, and why their participation at this stage is appropriate – could be made in the same document as the response.

³⁵ In this instance, pursuant to the said Regulation, the Prosecution notes that the Victims' Representative would also have to demonstrate that the application was made after the time limit for the filing of a response "for reasons outside his or her control."

³⁶ Prosecution Response to Defence Request, para. 9.

Conclusion

20. For the above mentioned reasons, the Prosecution respectfully submits that the Victims' Representative has not adequately substantiated his request to participate in the instant appellate proceedings, and that such participation may not be "appropriate" at this stage, especially in light of the late filing of the initial response and the later request to participate.



Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of December 2006
At The Hague, The Netherlands