

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 9 February 2007

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public Document

**Prosecution's Response to the Joint Application of Victims a/0001/06 to a/0003/06
and a/0105/06 pursuant to 'Directions of the Appeals Chamber' of 5 February 2007**

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Introduction

1. The Prosecution acknowledges at the outset that victims may participate in appeals proceedings in appropriate circumstances including proceedings that may have an impact on denying or granting the Appellant release. The Appeals Chamber has previously ruled that victims may be granted the right to participate in appeals “for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal.”¹
2. The Prosecution submits that victims do not however have an automatic right to intervene in every interlocutory appeal arising from proceedings where they have been previously allowed to participate. The right of participation is subject to fulfilling the criteria in Article 68 (3) of the Statute and any determination of this right in specific proceedings is to be made on a case by case basis. The victims must demonstrate to the satisfaction of the Appeals Chamber how their personal interests are affected by the particular issues on appeal, especially in view of the fact that the appeals phase is separate and distinct from the pre-trial or trial phase.
3. The Appeals Chamber’s direction to participants “to address the issue of whether the subject-matter of the appeal is an appealable decision within the meaning of article 82 (1) (b) of the Statute”² is in the Prosecution’s submission, a confined procedural issue that in and of itself cannot affect the victims’ personal interests and accordingly does not require their participation, which should be reserved until such time as the Appeals Chamber decides to allow an appeal under article 82 (1) (b).

¹ See ICC-01/04-01/06-769, Decision of the Appeals Chamber, page 3. See also ICC-01/04-01/06-757 – Prosecution’s Response to Request of Victims to Participate in the Appeal, pursuant to ‘Order of the Appeals Chamber’ of 4 December 2006. In para. 15, the Prosecution submitted that the issue of provisional release is one which may arguably affect the personal interests of victims.

² ICC-01/04-01/06-800, para. 2.

Procedural History

4. Thomas Lubanga Dyilo ("the Appellant") was surrendered and transferred to the Court on 17 March 2006, pursuant to a warrant of arrest issued by Pre-Trial Chamber I on 10 February 2006.³ The Appellant had a copy of the warrant of arrest served on him on 16 March 2006.⁴
5. On 29 January 2007, the Pre-Trial Chamber gave its Decision on the confirmation of charges.⁵
6. On 30 January 2007, the Appellant filed the Defence Appeal Against the '*Décision sur la confirmation des charges*' of 29 January 2007.⁶
7. On 30 January 2007, the Appellant filed the Urgent Defence Request for Extension of Time and Page Limits.⁷
8. On 1 February 2007, the Appeals Chamber issued the 'Directions and Decision of the Appeals Chamber.'⁸
9. On 2 February 2007, the Victims filed the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 concerning the "Directions and Decision of the Appeals Chamber (hereinafter the application), filed on 1 February 2007.⁹

³ Decision on the Prosecutor's Application for a warrant of arrest, article 58, ICC-01/04-01/06-8-US-Corr Anx I ("Decision on Arrest Warrant").

⁴ See Prosecution's Response to Application for Release, ICC-01/04-01/06-149-Conf, 13 June 2006, paras. 19(iii), 20 and 22, and authorities cited therein.

⁵ ICC-01/04-01/06-796.

⁶ ICC-01/04-01/06-797.

⁷ ICC-01/04-01/06-805.

⁸ ICC-01/04-01/06-800. In para. 3, the Appeals Chamber requested submissions from the Appellant by 7 February and from the Prosecutor by 13 February 2007. There was no reference to the victims. The Prosecution will be making detailed submissions that the decision on confirmation is not appealable under Article 82 (1) (b).

⁹ ICC-01/04-01/06-802-tEN.

10. On 5 February 2007, the Appeals Chamber issued the Directions of the Appeals Chamber¹⁰.
11. The Prosecution is in receipt of the "*Demande de modification des délais en vertu de la norme 35 du règlement de la Cour.*"¹¹ The Prosecution assumes this relates to the Directions of the Appeals Chamber of 5 February 2007 as the Appellant has already responded to the Directions of 1 February 2007. The Prosecution does not object to the extension of the time limits.
12. The Prosecution hereby files its response.

Discussion

Victims are not entitled to participate in the Appeals proceeding regarding submissions on the issue of whether the decision on confirmation is appealable under Article 82 (1) (b)

13. The Prosecution submits that the key issue to be addressed at this juncture is whether victims have a right to participate in the confined proceedings stemming from the specific invitation by the Appeals Chamber to the parties to make submissions on the appealability of the confirmation decision under Article 82 (1) (b).
14. The right of victims to participate in a proceeding is subject to the conditions in Article 68 (3) of the Statute.¹² Those conditions must continue to subsist at the appellate stage.¹³ The Prosecution acknowledges that in appropriate cases, victims

¹⁰ ICC-01/04-01/06-800.

¹¹ ICC-01/04-01/06-811.

¹² See also Regulation 86 (8) of the regulations of the Court and Rule 91 (1) giving a Chamber the right to modify victims' participation.

¹³ The Prosecution has previously made submissions on victims' participation at the Appeals Stage. See ICC-01/04-01/06-736 - 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. See also ICC-01/04-01/06-757 - Prosecution's Response to Request of Victims to Participate in the Appeal, pursuant to 'Order of the Appeals Chamber' of 4 December 2006. See *inter alia* paras. 11 – 14 on the appropriateness of victims' participation in interlocutory appeals.

may be able to participate in appellate proceedings if they can satisfy the Appeals Chamber that the specific issues involved affect their personal interests. Thus, any application for participation in this part of the proceedings by victims will have to be determined by the Appeals Chamber on a case by case basis subject to the fulfilment of the Article 68 (3) criteria.

15. The Prosecution submits that any right of the victims to participate cannot be to the unlimited extent suggested in the victims' Application, namely that victims may respond to any filing made by the other participants¹⁴. The fact that the victims participated in the confirmation or any other prior proceeding, does not give them a blanket right to participate in every stage of an appeal arising from the confirmation hearing. Article 68 (3) strictly limits any such participation to those instances where the personal interests of the victims are affected.

16. It is respectfully submitted that the victims have not demonstrated how the Directions of the Appeals Chamber of 1 February 2007 affect their personal interest. In this sense, the Prosecution notes that ordinarily when the issue to be addressed is a narrow and procedural one, like the one relating to whether an appeal against a decision on confirmation may be appealed under Article 82 (1) (b), it will be difficult to sustain a position that the victims' "personal interests" are affected. The Prosecution further submits that participation at this limited procedural step may affect the expeditious conduct of the proceedings.¹⁵

17. The Prosecution observes that there is currently no actual appeal pending on the decision on confirmation of charges. The Appeals Chamber is yet to decide on whether to entertain the appeal filed by the Appellant under Article 82 (1) (b).

¹⁴ See page 4 of the Application.

¹⁵ See Rule 156 (4) – All appeals under Article 82 are to be determined as expeditiously as possible. In relation to appeals filed under Article 82 (1) (b), short time limits for the filing of briefs is imposed in regulation 64 (5). Limitless participation by victims at every stage of the proceedings would unduly delay the resolution of appeals.

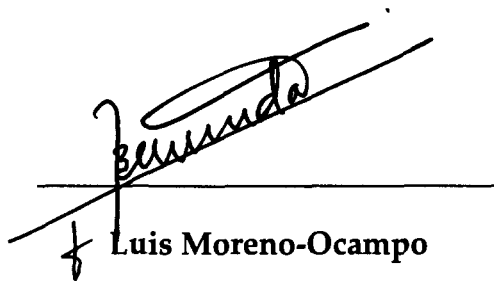
Furthermore, both the Prosecution and the Defence have filed applications before the Pre-Trial Chamber requesting leave to appeal the decision on confirmation¹⁶, and leave is yet to be determined by that Chamber. The Prosecution submits that any expression of views and concerns by victims cannot materialise until either the Appeals Chamber has decided to hear the Appeal under Article 82 (1) (b) or until after the Pre-Trial Chamber has granted leave to either the Prosecution or the Defence under Article 82 (1) (d).

Conclusion

18. The Prosecution respectfully requests that the Appeals Chamber denies the first request of the victims to participate at this stage of the Appellate proceedings regarding the confined issue of whether or not the decision on confirmation of charges can be appealed as of right under Article 82 (1) (b).

¹⁶ Prosecution's "Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "Décision sur la confirmation des charges." ICC-01/04-01/06-806. See also Defence Request for Leave to Appeal the Pre-Trial Chamber's 'Décision sur la confirmation des charges' of 29 January 2007, ICC-01/04-01/06-807.

19. In relation to the second request, the Prosecution submits that the issue of participation in the actual appeal proceedings will only become relevant if the Appeals Chamber decides to hear the appeal. This Request should be deferred until a decision is given by the Appeals Chamber to hear the appeal.

A handwritten signature in black ink, appearing to read 'Luis Moreno-Ocampo', is written over a horizontal line. The signature is stylized and slanted upwards to the right.

Prosecutor

Dated this 9th day of February 2007

At The Hague, The Netherlands