

Separate Opinion of Judge Sang-Hyun Song

1. I disagree with the approach taken by the majority regarding victim participation in appeals brought under article 82 (1) (d) of the Statute. In my view, victims who were permitted to participate in proceedings giving rise to an appeal under that provision are participants within the meaning of regulations 64 (4) and 65 (5) of the Regulations of the Court.¹ As participants, they have the right to file a response to the document in support of the appeal. There is no need for them to apply for participation or for the Appeals Chamber to rule on such applications. Conversely, victims who did not participate in the underlying proceedings have no right to participate in the ensuing appeal.²

2. In the present instance, the victims did not participate in the proceedings arising out of the Request for Disclosure that led to the Impugned Decision. They only filed submissions responding to the request for leave to appeal the Impugned Decision.³ However, this in itself does not constitute participation in the “underlying proceedings”.⁴ Accordingly, the victims cannot be considered “participants” in terms of regulation 65 (5) of the Regulations of the Court, and they therefore have no right to participate in the present appeal.

¹ As consistently expressed since my first dissenting opinion in *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824 (OA 7), pp. 55-57.

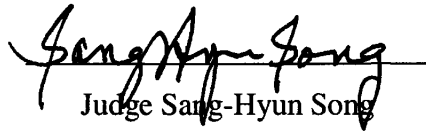
² See, e.g., dissenting opinion of Judge Sang-Hyun Song to “Decision on the Second Application by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-70, 28 January 2010, p. 8 para 2 (hereinafter: “Dissenting Opinion of 28 January 2010”).

³ “Réponse des Représentants Légaux Communs à la Requête de la Défense Demandant à être Autorisée à Interjeter Appel contre la Décision sur la Requête de la Défense pour Obtenir la Divulgence des Documents en Possession du Procureur”, 4 February 2013, ICC-02/05-03/09-450.

⁴ The Dissenting Opinion of 28 January 2010 did not specifically address the question of whether participation in the proceedings leading to the Impugned Decision was required for victims to be considered “participants”.

shs

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



Judge Sang-Hyun Song

Dated this 10th day of May 2013

At The Hague, The Netherlands