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2 INTERNATIONAL CRIMINAL COURT

3 SITUATION DEMOCRATIC REPUBLIC OF CONGO

4 Case No: ICC-01/04-01/06

5

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7 Tuesday, 13 February 2007 at 11.07 a.m.

8 OPEN SESSION

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Before: Presiding Judge Erkki Kourula

10 His Honour Judge Sang-Hyun Song

His Honour Judge Philippe Kirsch

11 His Honour Judge Georgios Pikis

Her Honour Judge Navi Pillay

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13 APPEALS CHAMBER

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1 [11.07 a.m.] ICC-APP-01-04-01-06-T-4-EN

11:02:42 2 OPEN SESSION

11:04:14 3 [Mr Thomas Lubanga Dyilo present]

11:07:18 4 THE USHER: All rise. The Appeals Chamber of the
11:07:56 5 International Criminal Court is now in session. Please be
11:08:04 6 seated.

11:08:28 7 [Presiding Judge Kourula's microphone not activated]

11:08:28 8 THE REGISTRY: Thank you, Judge. The Appeals Chamber,
11:08:28 9 comprising the Presiding Judge Erkki Kourula,
11:08:28 10 Judge Philippe Kirsch, Judge Georgios Pikis,
11:09:02 11 Judge Navi Pillay and Judge Sang-Hyun Song, sitting today in
11:09:02 12 the situation of the Democratic Republic of the Congo, case of
11:09:04 13 the Prosecutor versus Thomas Lubanga Dyilo.

11:09:04 14 [Presiding Judge Kourula's microphone not activated]

11:09:27 15 PRESIDING JUDGE KOURULA: I will repeat what I tried to say.
11:09:35 16 Could I invite the Prosecution Counsel to place themselves on
11:09:39 17 the record, please.

11:09:39 18 MR GUARIGLIA: Good morning, your Honours.
11:09:42 19 Fabricio Guariglia, Senior Appeals Counsel in the Office of
11:09:44 20 the Prosecutor, appearing together with Mr Michael Adenuga,
11:09:54 21 Appeals Counsel, and Mr Ben Batros, Associate Appeals Counsel.

11:09:56 22 PRESIDING JUDGE KOURULA: Thank you very much. I note that
11:09:58 23 Defence Counsel is not present at the moment, due to his
11:10:02 24 illness, but I also note that Mr Thomas Lubanga Dyilo is
11:10:08 25 present, and I'm sure that his rights are duly protected and

11:10:16 1 also that the content of the judgment is duly noted, as

11:10:28 2 Madame Pandanzyla is present. Thank you.

11:10:28 3 [11:10 a.m.]

11:10:31 4 And then I'd like to turn to the victims' team. Could I

11:10:34 5 invite the victims' counsel to place themselves on record,

11:10:37 6 please.

11:10:41 7 MS PELLET: Thank you, your Honour. Sarah Pellet, Legal

11:10:44 8 Officer in the Office of Public Counsel for Victims, and I'm

11:10:47 9 speaking on behalf of Mr Luc Walley, representing victims 1,

11:10:52 10 2 and 3. Thank you.

11:10:54 11 PRESIDING JUDGE KOURULA: Then I'd like to move to deliver

11:10:59 12 the judgment. As was indicated by the court officer, the

11:11:05 13 Appeals Chamber today delivers its judgment on the appeal of

11:11:10 14 Mr Thomas Lubanga Dyilo against the decision of Pre-Trial

11:11:15 15 Chamber I, entitled "Decision on the Application for the

11:11:21 16 Interim Release of Thomas Lubanga Dyilo" of 18 October 2006.

11:11:26 17 [11:11 a.m.]

11:11:28 18 On behalf of my colleagues, I will give you a brief summary of

11:11:33 19 today's Appeals Chamber judgment. It should be emphasised

11:11:38 20 that the judgment, and not this summary, is the authoritative

11:11:43 21 text.

11:11:44 22 [11:11 a.m.]

11:11:46 23 I shall first refer only to those aspects of the procedural

11:11:50 24 background that are directly dealt with in this appeal. The

11:11:56 25 full procedural history is set out in the judgment.

11:12:02 1 [11:12 a.m.]

11:12:05 2 Finally, I obviously shall give a brief summary of the
11:12:09 3 judgment as well.

11:12:10 4 [11:12 a.m.]

11:12:12 5 Starting with the procedural history, on 10 February 2006,
11:12:19 6 Pre-Trial Chamber I issued a warrant of arrest in respect of
11:12:22 7 the Appellant for his alleged involvement in conscripting and
11:12:28 8 enlisting children under the age of 15 years and for using
11:12:33 9 them to participate actively in hostilities.

11:12:36 10 [11:12 a.m.]

11:12:38 11 The Appellant was arrested in Kinshasa, Democratic Republic of
11:12:44 12 the Congo, on the basis of the warrant of arrest, and on
11:12:50 13 17 March last year he was surrendered to the court and
11:12:54 14 transferred to the court's Detention Centre in The Hague.

11:12:57 15 [11:12 a.m.]

11:12:58 16 On 20 March, the Appellant made his first appearance before
11:13:02 17 Pre-Trial Chamber I. In the course of his initial appearance
11:13:09 18 hearing, the Pre-Trial Chamber informed the Appellant of his
11:13:13 19 right to apply for interim release pending trial and asked him
11:13:20 20 if he wanted to assert this right.

11:13:23 21 [11:13 a.m.]

11:13:25 22 On September 20, 2006, the Appellant filed the "Request for
11:13:32 23 Further Information Regarding the Confirmation Hearing and for
11:13:35 24 Appropriate Relief to Safeguard the Rights of the Defence
11:13:44 25 and", himself, "Thomas Lubanga Dyilo", in which he sought that

11:13:47 1 he be immediately granted provisional release.

11:13:51 2 [11:13 a.m.]

11:13:53 3 On 18 October, the Pre-Trial Chamber I issued the decision on

11:14:04 4 the application for the interim release of Thomas Lubanga

11:14:07 5 Dyilo, in which it decided, inter alia, to reject the

11:14:11 6 application for interim release.

11:14:14 7 [11:14 a.m.]

11:14:15 8 On October 20 and October 26, the Appellant filed the Defence

11:14:21 9 appeal against "Decision sur la demande de mise en liberte de

11:14:26 10 Thomas Lubanga Dyilo", and the document in support of this

11:14:32 11 appeal, respectively.

11:14:34 12 [11:14 a.m.]

11:14:36 13 On 12 December, the Appeals Chamber rendered a decision

11:14:45 14 deciding, inter alia, to grant victims a/0001/06, a/0002/06

11:14:56 15 and a/0003/06 the right to participate in this appeal for the

11:15:03 16 purpose of presenting the views and concerns respecting the

11:15:09 17 personal interests and the issues raised on appeal.

11:15:09 18 [11:15 a.m.]

11:15:16 19 On 15 December last year, the victims concerned filed

11:15:22 20 confidentially the submissions further to the

11:15:26 21 Appeals Chamber's decision of 12 December 2006. A public

11:15:33 22 redacted version of this document was registered with the

11:15:37 23 Court.

11:15:37 24 [11:15 a.m.]

11:15:39 25 On 20 December, the Appellant filed confidentially the Defence

11:15:44 1 reply to the conclusions of the victims, and two days later
11:15:49 2 the Prosecutor filed confidentially the Prosecution request
11:15:52 3 for leave to reply to the Appellant's 20 December response to
11:15:58 4 the observations of victims, and on 2 January this year he
11:16:05 5 filed, confidentially, submissions supplementing the
11:16:09 6 Prosecution's request for leave to reply.
11:16:11 7 [11:16 a.m.]
11:16:12 8 I will not go into the substance of these submissions, in
11:16:17 9 light of the conclusions drawn by the Appeals Chamber. While
11:16:26 10 the Appeals Chamber has noted concerns -- the concerns
11:16:30 11 expressed by the victims in relation to what they allege might
11:16:34 12 happen if the Appellant were to be granted interim release, it
11:16:40 13 has not relied on them in determining the specific grounds
11:16:42 14 before it in the present appeal. It is in such circumstances,
11:16:48 15 the Appeals Chamber has necessarily also disregarded response
11:16:53 16 of the Appellant to those concerns.
11:16:55 17 [11:16 a.m.]
11:16:57 18 Furthermore, in view of the determination of the
11:17:02 19 Appeals Chamber in relation to the victims' submissions and
11:17:05 20 the Appellant's response to the victims' submissions pursuant
11:17:11 21 to the decision of 12 December last year, the Appeals Chamber
11:17:14 22 has concluded that the Prosecutor's application for leave to
11:17:18 23 reply is unnecessary and is not relevant to the deliberations
11:17:25 24 of the Appeals Chamber. Accordingly, the Appeals Chamber has
11:17:30 25 rejected the Prosecutor's application for leave to reply.

11:17:34 1 [11:17 a.m.]

11:17:38 2 So, a lot of attention was devoted to the participation of
11:17:41 3 victims in appeals proceedings.

11:17:46 4 [11:17 a.m.]

11:17:47 5 Turning now to the grounds of appeal, in relation to the
11:17:53 6 impugned decision, the Appellant advanced three grounds of
11:17:57 7 appeal: first, that the Pre-Trial Chamber failed to fulfil
11:18:03 8 its obligation to review periodically the detention of a
11:18:07 9 suspect pursuant to Article 60(3) of the Statute; secondly,
11:18:24 10 that the Appellant has been held in detention prior to the
11:18:30 11 confirmation of charges for an unreasonably long period; that
11:18:39 12 the Pre-Trial Chamber, thirdly, should have granted interim
11:18:43 13 release pursuant to Article 60(2) of the Statute.

11:18:43 14 [11:18 a.m.]

11:18:52 15 As to relief sought, the Appellant submitted that the Appeals
11:18:56 16 Chamber should reverse the impugned decision and that he be
11:19:02 17 granted interim release with immediate effect.

11:19:06 18 [11:19 a.m.]

11:19:11 19 Now, in relation to the first ground of appeal, and for the
11:19:14 20 reasons set out in the judgment, the Appeals Chamber confirms
11:19:19 21 the ruling of the Pre-Trial Chamber that there has not been
11:19:24 22 any failure to comply with the requirements of Article 60(3)
11:19:30 23 of the Statute in the present case.

11:19:32 24 [11:19 a.m.]

11:19:37 25 In relation to the second ground of appeal, and for the

11:19:42 1 reasons set out in the judgment again, the Appeals Chamber
11:19:47 2 determines that the Pre-Trial Chamber did not err in finding
11:19:54 3 that the Appellant had not been detained for an unreasonable
11:19:59 4 period prior to the trial due to inexcusable delay by the
11:20:04 5 Prosecutor.
11:20:04 6 [11:20 a.m.]
11:20:11 7 In relation to the third ground of appeal, and for the reasons
11:20:15 8 again set out in the judgment, the Appeals Chamber determines
11:20:19 9 that the Pre-Trial Chamber did not err in finding that the
11:20:28 10 Appellant should continue to be detained pursuant to
11:20:31 11 Article 60(2), read with Article 58(1) of the Statute.
11:20:45 12 [11:20 a.m.]
11:20:46 13 Let me highlight a few key findings made by the Chamber.
11:20:49 14 First, as far as the victims are concerned, for victims to
11:20:53 15 participate in an appeal under Article 82(1)(b) of the
11:21:01 16 Statute, an application seeking leave to participate in the
11:21:05 17 appeal must be filed. Judge Song is going to deliver a
11:21:12 18 dissenting opinion on this particular point.
11:21:14 19 [11:21 a.m.]
11:21:20 20 Secondly, an application by victims seeking leave to
11:21:22 21 participate in an appeal pursuant to, again, Article 82(1)(b)
11:21:28 22 of the Statute should include a statement in relation to
11:21:32 23 whether and how their personal interests are affected by the
11:21:41 24 particular appeal, as well as why it is appropriate for the
11:21:46 25 Appeals Chamber to permit their views and concerns to be

11:21:52 1 presented.

11:21:52 2 [11:21 a.m.]

11:21:57 3 Touching upon, briefly also, the substance, a periodic review
11:22:05 4 by the Pre-Trial Chamber of its ruling on the detention of a
11:22:11 5 person, subject to a warrant of arrest under Article 60(3) of
11:22:19 6 the Statute follows from, and is dependent upon, a ruling on a
11:22:27 7 previous application by the detained person for interim
11:22:31 8 release.

11:22:31 9 [11:22 a.m.]

11:22:36 10 And as far as Article 60(4) is concerned, it is independent of
11:22:44 11 Article 60(2) in the sense that even if a detainee is
11:22:50 12 appropriately detained pursuant to Article 60(2), the
11:22:56 13 Pre-Trial Chamber shall consider releasing the detainee under
11:22:59 14 Article 60(4) if he or she is detained for an unreasonable
11:23:06 15 period prior to trial due to inexcusable delay by the
11:23:13 16 Prosecutor. Judge Pikis will deliver a separate opinion on
11:23:19 17 this and other points.

11:23:21 18 [11:23 a.m.]

11:23:22 19 Finally, the judgment -- the Appeals Chamber unanimously
11:23:29 20 delivers the following judgment. The decision of Pre-Trial
11:23:33 21 Chamber I entitled "Decision on the Application for the
11:23:37 22 Interim Release of Thomas Lubanga Dyilo" of 18 October 2006 is
11:23:44 23 confirmed. The appeal is dismissed.

11:23:48 24 [11:23 a.m.]

11:23:50 25 The Appeals Chamber decides, furthermore, the application of

11:23:55 1 the Prosecutor for leave to reply that was made in the

11:24:00 2 Prosecution request for leave to reply to the Appellant's
11:24:06 3 20 December 2006 response to the observations of victims a/1,
11:24:18 4 2, and 3/06, of 22 December 2006 is rejected.
11:24:27 5 [11:24 a.m.]
11:24:29 6 Moreover -- it is a technical point, more or less -- the
11:24:35 7 Registrar is directed to notify the same victims on
11:24:40 8 19 February 2007, this year: first, of the Defence reply to
11:24:40 9 "Conclusions des victims a/0001/06, a/0002/06 et a/0003/06
11:24:40 10 suite a l'ordonance de la chambre d'appel du 12 decembre
11:24:58 11 2006"; and, secondly, of the Prosecution request for leave to
11:25:02 12 reply to the Appellant's 20 December 2006 response to the
11:25:08 13 observations of the same victims; and, thirdly, of the
11:25:15 14 submissions supplementing the Prosecution's 22 December 2006
11:25:20 15 request for leave to reply to the Appellant's 20 December 2006
11:25:25 16 response to the observations of the victims.
11:25:30 17 [11:25 a.m.]
11:25:31 18 However, such notification shall not take place if, by 4 p.m.
11:25:37 19 on 16 February, the Appellant and/or the Prosecutor have filed
11:25:46 20 an application to the Appeals Chamber requesting that such
11:25:51 21 notification should not take place. I shall now like to
11:26:00 22 invite Judge Pikis to deliver his separate opinion. Judge
11:26:09 23 Pikis, you have got the floor.
11:26:13 24 JUDGE PIKIS: While in agreement with the judgment delivered
11:26:16 25 and the Resolution of every issue considered therein, I deem

11:26:20 1 it necessary to write a separate opinion in order to express
11:26:23 2 my reasons in relation to the legal framework governing

11:26:29 3 detention and release of the arrestee pending trial seen in
11:26:34 4 the light of the provisions of Article 21(3) of the Statute.
11:26:38 5 [11:26 a.m.]
11:26:42 6 In my separate opinion, I concentrate on the human rights
11:26:47 7 aspect of the case. There is complaint that Article 60(3) of
11:26:54 8 the Statute was misinterpreted, while Article 60(4) was
11:26:59 9 subordinated to the provisions of Article 60(2).
11:26:59 10 [11:27 a.m.]
11:27:04 11 The Statute has a very clear scheme with -- I'm summarising
11:27:12 12 here orally what is in the judgment, and as concisely as I
11:27:19 13 can. The Statute has a clear scheme. It requires, a priori,
11:27:28 14 both justification and validation for the necessity for the
11:27:32 15 issuance of a warrant of arrest.
11:27:32 16 [11:27 a.m.]
11:27:33 17 The standard -- it is noticed, or must be noticed -- is not
11:27:38 18 that of reasonable suspicion, but that of reasonable belief
11:27:43 19 that elevates the requirement, elevated further by the need to
11:27:49 20 establish such reasonable belief upon grounds founded, as the
11:27:55 21 scheme requires, on evidential material adduced by the
11:28:01 22 Prosecutor.
11:28:01 23 [11:28 a.m.]
11:28:02 24 The arrest entails, per se, the detention of the person
11:28:10 25 affected thereby. From the outset, the person is afforded an

11:28:17 1 opportunity to contest both the lawfulness and the necessity
11:28:24 2 for his arrest. Article 60 is designed to provide such

11:28:30 3 safeguards regarding it essential for the protection of the
11:28:35 4 rights of the person detained.
11:28:37 5 [11:28 a.m.]
11:28:39 6 Article 60(1) requires that upon appearance before the court,
11:28:43 7 the person must be immediately apprised by the court of
11:28:49 8 his/her rights, and at the same time, importantly, be informed
11:28:54 9 that the person is at liberty to seek his or her interim
11:28:59 10 release.
11:28:59 11 [11:28 a.m.]
11:29:01 12 In the present case, as explained in my separate judgment,
11:29:08 13 the -- no use was made of that right on the date of the first
11:29:11 14 appearance, and not for the ensuing five months; that is,
11:29:17 15 before 20 September, that application to that end was made
11:29:23 16 resulting in the judgment of the Pre-Trial court upon giving
11:29:31 17 rise thereafter to the present appeal.
11:29:33 18 [11:29 a.m.]
11:29:35 19 Article 60(2) provides the requisites for interim release. It
11:29:47 20 envisages the same requisites as Article 58(2), save that they
11:29:57 21 are judged and considered from a different time perspective;
11:30:00 22 that is, it must be made to appear by reference to the facts
11:30:07 23 relevant to the time that the application is considered, that
11:30:11 24 there is both justification and need for the detention.
11:30:15 25 [11:30 a.m.]

11:30:17 1 Article 60(3) is the one upon which much emphasis has been
11:30:24 2 laid. It was suggested that the review envisaged therein
11:30:29 3 suggested by the Appellant is designed to afford opportunity

11:30:34 4 to the Court to review on its own motion any prior ruling
11:30:40 5 relevant to the detention of the subject, whereas the
11:30:45 6 Pre-Trial court determined that the power contained therein is
11:30:50 7 confined to a review of a prior ruling bearing on release and
11:30:54 8 detention.

11:30:55 9 [11:30 a.m.]

11:30:56 10 Well, the very notion of release entails release from
11:31:02 11 captivity. Article 60(3) relates to a previous ruling on
11:31:10 12 release, or the continuation of detention. Such a ruling in
11:31:16 13 the present case was inexistent, therefore powers of
11:31:22 14 Article 60(3) did not come into play. We explain also in -- I
11:31:28 15 explain also in the judgment that ruling is -- in the context
11:31:32 16 of Article 60(3) is synonymous to a judicial decision.

11:31:39 17 [11:31 a.m.]

11:31:40 18 Of course, Article 60(3) does provide an additional safeguard
11:31:46 19 or a further safeguard for the protection of the rights of the
11:31:54 20 detainee. It may act proprio motu in reviewing a previous
11:32:03 21 ruling or a previous judicial decision bearing on the possible
11:32:06 22 release of the arrestee.

11:32:06 23 [11:32 a.m.]

11:32:10 24 Now, Article 40, as earlier stated, is said to have been
11:32:19 25 misapplied in that it was subordinated -- allegedly, in the

11:32:24 1 contention of the Appellant -- by the Pre-Trial Chamber to the
11:32:27 2 provisions of Article 60(2), referring or envisaging the
11:32:36 3 interim release of the person in detention. That is an

11:32:43 4 unsubstantiated proposition and is for the reasons stated in
11:32:49 5 the judgment delivered.
11:32:51 6 [11:32 a.m.]
11:32:52 7 The essence of Article 60(2) is that it requires the Court to
11:32:59 8 keep under surveillance the detention of the subject with a
11:33:06 9 view to warding off unreasonable delays in the process, owing
11:33:20 10 to delays on the part of the Prosecutor to move the case
11:33:24 11 forward. It is a significant position, solely designed to
11:33:31 12 provide an additional measure for the survey of the legitimacy
11:33:39 13 of the continuation of the detention.
11:33:42 14 [11:33 a.m.]
11:33:45 15 In face of such detention, power is acknowledged to the Court
11:33:50 16 to direct the release of the person in detention,
11:33:54 17 conditionally or unconditionally.
11:33:56 18 [11:33 a.m.]
11:33:59 19 We did not, in the present proceedings, probe further the
11:34:05 20 interpretation and implications of Article 60(4), first and
11:34:11 21 foremost because of the finding of the Pre-Trial Chamber
11:34:21 22 upheld on appeal that there was no delay on the part of the
11:34:24 23 Prosecutor in moving the process.
11:34:26 24 [11:34 a.m.]
11:34:29 25 The provisions of the Statute must be applied and interpreted

11:34:34 1 in accordance with the provisions of Article 21(3) of the
11:34:39 2 Statute in the manner giving effect to recognised human
11:34:47 3 rights. Recognised human rights in this area -- that is, the
11:34:52 4 right of a person coming into detention and remaining in

11:34:57 5 detention -- are identified in the universal declaration of
11:35:02 6 human rights, the international covenant on civil and
11:35:06 7 political rights, and regional treaties and conventions, such
11:35:11 8 as the European Convention on Human Rights, the corresponding
11:35:17 9 American convention and the Convention of the Rights of
11:35:20 10 African People.

11:35:20 11 [11:35 a.m.]

11:35:24 12 The universally recognised human rights, as may be distilled
11:35:31 13 as relevant to this area of human rights, require that there
11:35:35 14 must be judicial authorisation for the arrest of any person;
11:35:41 15 secondly, access to a court of law to test the lawfulness and
11:35:45 16 necessity of the detention and, furthermore, the detention
11:35:56 17 should not be unreasonably prolonged because of delay or for
11:36:01 18 any other cause to the detriment of the rights of the
11:36:04 19 detainee.

11:36:05 20 [11:36 a.m.]

11:36:07 21 I am of the view that the Statute gives effect -- Statute
11:36:12 22 interpreted in the light of the provisions of Article 21(3),
11:36:17 23 gives effect to human rights in this area of human rights.
11:36:22 24 And, lastly, one other thing to be identified is that the
11:36:30 25 Statute, in addition to everything else, assures a right to

11:36:35 1 damages for anyone who has been unlawfully -- who has come
11:36:41 2 under arrest unlawfully or remains under arrest unjustifiably,
11:36:47 3 in accordance with the provisions and in the manner envisaged
11:36:50 4 by the same provisions -- that is, those of Article 85. The

11:36:55 5 judgment will be available, along with the judgment of the
11:36:59 6 Court, and will be, no doubt, distributed soon after our
11:37:08 7 session.

11:37:11 8 PRESIDING JUDGE KOURULA: Thank you, Judge Pikis. Could I
11:37:15 9 then immediately invite Judge Song to deliver his dissenting
11:37:19 10 opinion regarding the participation of victims. Judge Song,
11:37:25 11 you have got the floor.

11:37:26 12 JUDGE SONG: Thank you, Mr Presiding Judge.
11:37:26 13 [11:37 a.m.]

11:37:30 14 For the following reasons, I respectfully disagree with the
11:37:35 15 view of the majority of the Appeals Chamber that is expressed
11:37:39 16 in today's judgment on the appeal of Mr Thomas Lubanga Dyilo
11:37:46 17 against the decision of Pre-Trial Chamber I, entitled
11:37:53 18 "Decision sur la demande de mise en liberte provisoire de
11:37:54 19 Thomas Lubanga Dyilo", regarding the scheme of participation
11:38:01 20 of victims in appeals brought under Article 82(1)(b) of the
11:38:08 21 Statute.
11:38:09 22 [11:38 a.m.]

11:38:11 23 I also disagree with the reasons for which the majority of the
11:38:15 24 Appeals Chamber rejected the "Reponse des victims a/0001/06,
11:38:15 25 a/0002/06 et a/0003/06 a l'appel de la Defense concernant la

11:38:15 1 Decision sur la demande de mise en liberte provisoire de
11:38:50 2 Thomas Lubanga Dyilo" of 16 November 2006, in the decision of
11:38:57 3 the Appeals Chamber of 12 December 2006.
11:39:05 4 [11:39 a.m.]

11:39:07 5 Nevertheless, I agree with the rejection of the victims'

11:39:11 6 response. I am in full agreement with the remainder of the
11:39:15 7 judgment.

11:39:15 8 [11:39 a.m.]

11:39:18 9 The majority of the Appeals Chamber is of the view that in
11:39:23 10 appeals proceedings pursuant to Article 82(1)(b) of the
11:39:29 11 Statute, participation of victims who have participated in the
11:39:35 12 proceedings that gave rise to the appeal is dependent upon an
11:39:42 13 application by these victims and on subsequent authorisation
11:39:46 14 by the Appeals Chamber.

11:39:46 15 [11:39 a.m.]

11:39:49 16 On that basis, the majority authorised victims to participate
11:39:54 17 in the present appeal. In my view, the approach of the
11:39:59 18 majority is not warranted by the relevant provisions of the
11:40:04 19 Statute, the Rules of Procedure and Evidence and the
11:40:09 20 Regulations of the Court and leads to unnecessary procedural
11:40:14 21 steps that are bound to slow down the appellate process.

11:40:20 22 [11:40 a.m.]

11:40:21 23 In my view, no application by the victims is necessary to file
11:40:26 24 a response to the document in support of the appeal in appeals
11:40:32 25 proceedings pursuant to Article 82(1)(b) of the Statute,

11:40:38 1 provided that the victims in question have participated in the
11:40:43 2 proceedings that gave rise to the appeal.

11:40:45 3 [11:40 a.m.]

11:40:47 4 This results from Regulation 64(4) and (5) of the Regulations
11:40:58 5 of the Court, pursuant to which participants may file a

11:41:01 6 response to the document in support of the appeal within five
11:41:04 7 days of the notification of that document. There is no reason
11:41:10 8 why the word "participant" in these provisions should not
11:41:15 9 include all participants to the proceedings that gave rise to
11:41:20 10 the appeal, including victims.

11:41:23 11 [11:41 a.m.]

11:41:25 12 That victims may file a response to the document in support of
11:41:29 13 the appeal without prior authorisation is further supported by
11:41:35 14 Regulation 86(8) of the Regulations of the Court, which
11:41:43 15 provides that decisions on the participation of victims shall
11:41:46 16 apply throughout the proceedings in the same case.

11:41:50 17 [11:41 a.m.]

11:41:51 18 An appeal under Article 82(1)(b) of the Statute is an
11:41:57 19 extension of the proceedings before the Pre-Trial Chamber
11:42:02 20 regarding interim release, and therefore it is appropriate to
11:42:07 21 qualify the appeal as being the same case in the sense of
11:42:13 22 Regulation 86(8) of the Regulations of the Court.

11:42:17 23 [11:42 a.m.]

11:42:18 24 For that reason, the Appeals Chamber should not overturn
11:42:21 25 lightly a decision of the Pre-Trial Chamber regarding the

11:42:25 1 appropriateness of the victims' participation in relation to
11:42:35 2 proceedings on interim release, or even rule on the issue
11:42:38 3 again without good reason to do so.

11:42:38 4 [11:42 a.m.]

11:42:41 5 I am not persuaded by the majority's interpretation of
11:42:45 6 Regulation 86(8) of the Regulations of the Court, which reads

11:42:53 7 Regulation 86(8) to be confined to the stage of the
11:42:58 8 proceedings before the Chamber taking the decision referred to
11:43:01 9 in the text of the Regulation.

11:43:04 10 [11:43 a.m.]

11:43:05 11 This reading renders Regulation 86(8) of the Regulations of
11:43:13 12 the Court superfluous because it states the obvious: the
11:43:20 13 decision of a Chamber is applicable throughout the proceedings
11:43:23 14 before the same Chamber unless and until it is modified.

11:43:25 15 [11:43 a.m.]

11:43:28 16 Nor am I convinced by the majority's reasoning that the
11:43:30 17 Appeals Chamber cannot be bound by the Pre-Trial Chamber's
11:43:34 18 determination that the participation of victims is
11:43:40 19 appropriate. An appeal pursuant to Article 82(1)(b) of the
11:43:46 20 Statute addresses issues arising from proceedings before the
11:43:51 21 Pre-Trial Chamber. Therefore, the assumption of Regulation
11:43:59 22 86(8) of the Regulations of the Court that decisions on
11:44:03 23 victims' participation taken by the Pre-Trial Chamber also
11:44:06 24 apply to appellate proceedings, is justified and logical.

11:44:06 25 [11:44 a.m.]

11:44:13 1 Clearly, if the Appeals Chamber considers that in specific
11:44:18 2 appeals the participation of victims would be inappropriate,
11:44:22 3 it could issue an order to that effect. This is expressly
11:44:27 4 acknowledged by Regulation 86(8) of the Regulations of the
11:44:33 5 Court, which is subject to the powers of the relevant Chamber
11:44:40 6 in accordance with Rule 91, sub-rule 1.

11:44:45 7 [11:44 a.m.]

11:44:46 8 Furthermore, any participation of victims that would go beyond
11:44:51 9 the filing of a response pursuant to Regulations 64(4) and (5)
11:44:59 10 of the Regulations of the Court would require prior
11:45:02 11 authorisation by the Appeals Chamber.

11:45:03 12 [11:45 a.m.]

11:45:06 13 I am not convinced by the opinion of the majority of the
11:45:09 14 Appeals Chamber that a separate application by victims to
11:45:14 15 participate in the appeal and a decision by the Appeals
11:45:19 16 Chamber thereupon is necessary, because Article 68(3) of the
11:45:25 17 Statute mandates a specific determination by the Appeals
11:45:30 18 Chamber that the participation of victims is appropriate in
11:45:34 19 the particular interlocutory appeal under consideration. I
11:45:40 20 note that Article 68(3) of the Statute provides that the Court
11:45:50 21 shall permit the participation of victims. The word "Court"
11:45:55 22 does not necessarily refer solely to the Appeals Chamber
11:45:59 23 acting in a particular interlocutory appeal. In the present
11:46:03 24 context, I read the word "Court" to include the plenary of the
11:46:12 25 judges of this Court.

11:46:13 1 [11:46 a.m.]

11:46:14 2 Pursuant to Article 52(1) of the Statute, read with Rule 4 of
11:46:19 3 the Rules of Procedure and Evidence, the plenary of the judges
11:46:24 4 has a mandate to adopt the Regulations of the Court necessary
11:46:28 5 for its routine functioning. The Regulation of the
11:46:31 6 participation of victims, when a case moves from one Chamber
11:46:35 7 to another, squarely falls within this mandate. Thus, the

11:46:42 8 plenary of the judges of this court, by adopting Regulations
11:46:47 9 64(4) and (5), determined how victims who have participated in
11:46:55 10 the proceedings that gave rise to the impugned decision may
11:46:58 11 participate appropriately in interlocutory appeals: they may
11:47:03 12 file a response, as may any other participant. The majority
11:47:09 13 ignores this decision of the plenary of the judges.

11:47:13 14 [11:47 a.m.]

11:47:15 15 Regulations 64(4) and (5) of the Regulations of the Court not
11:47:23 16 only saves time and resources of the Court, it also is fully
11:47:28 17 consistent with the wording and the spirit of Article 68(3) of
11:47:33 18 the Statute. The personal interests of the victims are
11:47:37 19 necessarily affected if they have participated in the
11:47:42 20 proceedings before the Pre-Trial Chamber in relation to
11:47:47 21 interim release, arguing that the detainee should not be
11:47:51 22 released, and the resulting decision denying release
11:47:57 23 subsequently is appealed.

11:47:57 24 [11:47 a.m.]

11:47:59 25 On appeal, the decision of the Pre-Trial Chamber could be

11:48:02 1 reversed, leading to the release of the detainee. Therefore,
11:48:08 2 it is appropriate that the victims submit their views and
11:48:12 3 concerns to the Appeals Chamber by way of filing of a response
11:48:18 4 to the document in support of the appeal.

11:48:18 5 [11:48 a.m.]

11:48:23 6 As to the present case, the Appeals Chamber should have
11:48:27 7 rejected the victims' response because it was filed outside of

11:48:31 8 the time limit stipulated by Regulation 64(5) of the
11:48:37 9 Regulations of the Court. The victims did not advance any
11:48:41 10 reasons as to why they were in breach of this time limit.
11:48:47 11 Thank you.
11:48:57 12 PRESIDING JUDGE KOURULA: Thank you, Judge Song. I shall
11:49:09 13 declare the session closed. I thank you all very much.
11:49:14 14 [11:49 a.m.]
11:49:19 15 THE USHER: All rise.
11:49:22 16 [At 11.49 a.m. the Appeals Chamber was adjourned]

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