

**Cour
Pénale
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**International
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No.: ICC-01/04-01/06 OA17 OA18

Date: 6 August 2010

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko
Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Prosecution's consolidated response to applications by Legal Representatives of victims to participate in the appeals against the decisions to stay the proceedings and to release the accused

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution is appealing the decision of Trial Chamber I to stay the proceedings against Thomas Lubanga Dyilo (“the Accused”) for abuse of process,¹ as well as the separate order to release the Accused.²
2. Legal Representatives of victims authorized to participate in the case seek to participate in the two appeal proceedings (OA17 and OA18) and submit that the victims whom they represent fulfil the criteria for participation in this instance.³
3. Given the nature of the issues in these appeals, and in line with the Appeals Chamber's prior jurisprudence, the Prosecution does not oppose the applications.

Procedural Background

4. On 8 July 2010, the Trial Chamber ordered a stay of the proceedings for abuse of process of the Court⁴ and authorized appeal.⁵ The Prosecution’s document in support of the appeal (OA18) was filed on 30 July 2010.⁶
5. On 15 July 2010, the Trial Chamber ordered the release of the Accused.⁷ On 16 July 2010, the Prosecution filed its appeal (OA17) against the release decision and requested that the Appeals Chamber suspend the release pending the resolution of this appeal.⁸ On 22 July 2010, the Prosecution filed its document in support of the appeal.⁹ On 23 July 2010, the Appeal Chamber suspended the release of the accused.¹⁰ On 30 July 2010, the Defence responded to the Prosecution’s document in support of the appeal.¹¹
6. Legal Representatives of victims filed the following requests to participate in the appeals proceedings OA17 and/or OA18 (“Victims’ Applications”):

¹ ICC-01/04-01/06-2517-Red. ICC-01/04-01/06-2544-Red OA 18 (Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July 2010 to stay the proceedings for abuse of process).

² ICC-01/04-01/06-T-314-ENG, pp.17-23. ICC-01/04-01/06-2534 OA17 (Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo).

³ ICC-01/04-01/06-2533-Conf OA17 OA8; ICC-01/04-01/06-2535 OA17; ICC-01/04-01/06-2537 OA17; 2541 OA18.

⁴ ICC-01/04-01/06-2517.

⁵ ICC-01/04-01/06-T-314-ENG, p.15.

⁶ ICC-01/04-01/06-2544-Red OA 18 (Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July 2010 to stay the proceedings for abuse of process).

⁷ ICC-01/04-01/06-T-314-ENG, pp.17-23 (Hereinafter, “Decision on Release”).

⁸ ICC-01/04-01/06-2522 OA17.

⁹ ICC-01/04-01/06-2534 OA17 (Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo).

¹⁰ ICC-01/04-01/06-2536.

¹¹ ICC-01/04-01/06-2542 OA17.

- Request for Participation in the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 (ICC-01/04-01/06-2517-Conf) and against the Decision to Release the Accused of 15 July 2010 (ICC-01/04-01/06-T-314);¹²
 - Application by the OPCV in its Capacity as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to Participate in the Interlocutory Appeal Lodged by the Prosecution Challenging the Oral Decision of Trial Chamber I of 15 July 2010;¹³
 - Application to Participate in the Appeal Proceedings against the Decision of 15 July 2010 to Release the Accused;¹⁴ and
 - *Demande de participation dans la procédure d'appel contre la décision du 8 juillet 2010 de suspendre la procédure.*¹⁵
7. The Defence submitted that it does not intend to respond to the above applications for victims to participate in the proceedings.¹⁶
8. On 3 August 2010, the Appeals Chamber ordered the Legal Representatives who filed the first application (ICC-01/04-01/06-2533-Conf-tENG OA17 OA18) to identify the basis for filing their application as confidential, to identify the victims they represent, and to indicate the decisions that granted them the right to participate as victims.¹⁷
9. Also on 3 August, the Chamber authorized the Prosecution to respond to the Victims' Applications.¹⁸

¹² ICC-01/04-01/06-2533-Conf-tENG OA17 OA18.

¹³ ICC-01/04-01/06-2535-tENG OA17. This application was submitted on behalf of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06.

¹⁴ ICC-01/04-01/06-2537-tENG OA17. This application was submitted on behalf of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0149/06, a/0149/08, a/0007/08, a/0155/07, a/0156/07, a/0303/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07, a/0162/07, a/0610/09, a/0611/09, a/0249/09, a/0523/08, a/0053/09, a/0292/09, a/0398/09, and a/0609/08.

¹⁵ ICC-01/04-01/06-2541 OA18. This application was submitted on behalf of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0149/06, a/0149/08, a/0007/08, a/0155/07, a/0156/07, a/0303/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07, a/0162/07, a/0610/09, a/0611/09, a/0249/09, a/0523/08, a/0053/09, a/0292/09, a/0398/09, and a/0609/08.

¹⁶ ICC-01/04-01/06-2545 OA17 OA18, para. 6.

¹⁷ ICC-01/04-01/06-2547 OA17 OA18. The Chamber requested that the Legal Representatives respond by 16:00h on 4 August. One group of Legal Representatives provided the information in a filing dated 5 August 2010, which was notified the following day (see ICC-01/04-01/06-2548-Conf OA17 OA18). Though the filing is technically out of time, the Prosecution has taken into account the information provided therein in formulating this response.

¹⁸ See ICC-01/04-01/06-2546 OA17.

Submissions

(a) Victims can only participate in an interlocutory appeal with leave from the Appeals Chamber

10. The Appeals Chamber has set out the requirements for victims' participation in interlocutory appeals, which have been consistently applied.¹⁹ According to these decisions, Article 68(3) "mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration."²⁰
11. The Appeals Chamber further requires that the victims demonstrate that: (i) the individual seeking participation is a victim in the case or situation out of which the appeal arises (an assessment to be made by a Pre-Trial or Trial Chamber);²¹ (ii) the individual has personal interests which are affected by the issues on appeal; (iii) the individual's participation is appropriate; and (iv) the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²²

(b) The applications appear to meet the requirements for victims to participate in these appeals

12. Once victims have been admitted to participate in the relevant situation or case, they do not need to demonstrate again to the Appeals Chamber that they meet the definition of "victim" under Rule 85.²³
13. The applications identify the victims on whose behalf they have been presented.²⁴ Three of the four applications do not refer to the relevant decisions granting such status,²⁵ in

¹⁹ "In order for victims to participate in an appeal under article 82(1)(b) of the Statute, an application seeking leave to participate in the appeal must be filed." See ICC-01/04-01/06-824 OA7, para. 38, see also paras. 40, 43. "The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82(1)(b) of the Statute to be equally applicable to the instant interlocutory appeals arising under article 82(1)(d) of the Statute", see ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 37. See also, e.g., ICC-01/04-01/06-1335 OA9 and OA10, paras. 12-13; ICC-01/04-01/06-925 OA8, para. 23; ICC-01/04-01/06-1452 OA12, para. 7; ICC-01/05-01/08-566 OA2, para. 13.

²⁰ ICC-01/04-01/06-824 OA7, para. 40; ICC-01/04-503 OA4 OA5 OA6, para. 36; ICC-01/05-01/08-566 OA2, para. 14.

²¹ ICC-02/05-01/09-48 OA, para. 10; ICC-01/04-01/06-1335 OA 9 and OA 10, para. 40.

²² ICC-01/04-01/06-1335 OA9 and OA10, paras. 35, 36; ICC-01/04-503 OA4 OA5 OA6, paras. 35, 90; ICC-01/04-01/06-1453 OA 13, para. 7; ICC-01/04-01/06-1452 OA12, para. 7; ICC-02/04-164 OA, para. 7; ICC-02/04-01/05-324 OA2, para 8; ICC-01/05-01/08-566 OA2, para. 8. See also ICC-01/04-01/06-824 OA7, paras. 2, 44 and 46; ICC-01/04-01/06-925 OA8, para. 23.

²³ ICC-01/04-01/06-824 OA7, paras. 44, 45; ICC-01/04-503 OA4 OA5 OA6, para. 92.

²⁴ ICC-01/04-01/06-2535-tENG; ICC-01/04-01/06-2537-tENG; ICC-01/04-01/06-2541.

spite of the fact that the Appeals Chamber has indicated that they have the obligation to do so,²⁶ but the Prosecution has been able to identify the decisions and satisfy itself regarding victim recognition. It has determined that while all victims referred to in application ICC-01/04-01/06-2535 OA17 have been recognized as victims,²⁷ five out of the 24 victims referred to in applications ICC-01/04-01/06-2537 OA17 and ICC-01/04-01/06-2541 OA18 have not yet been granted victim status in this case. Nevertheless, the Prosecution does not object that the two applications be granted with respect to the other victims included therein, who have been granted victim status.²⁸

14. The Prosecution considers that the issues in this appeal plainly affect the personal interests of the victims. The decision to stay the proceedings has brought this case to a halt, directly impacting on the victims' ability to present their interests. Moreover, the Appeals Chamber has previously ruled that the personal interests of victims are affected by issues arising out of an appeal regarding the release of the Accused.²⁹
15. The Prosecution further considers it appropriate for victims to be allowed to present their views and concerns on the issues in these appeals. It is also consistent with previous Appeals Chamber's determinations that victims may participate in appeals against a decision to stay the proceedings³⁰ and against orders to release the accused.³¹

(c) The modalities of participation

16. The Prosecution submits that the victims should be permitted to present their views and concerns regarding those issues in writing, through their Legal Representatives. Such views and concerns "must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings."³²

²⁵ ICC-01/04-01/06-2535-tENG, para. 9; ICC-01/04-01/06-2537-tENG, paras 2-3; ICC-01/04-01/06-2541, para. 1. In relation to the fourth application, this information was provided in a supplementary filing upon request of the Appeals Chamber (ICC-01/04-01/06-2548-Conf OA17 OA18).

²⁶ ICC-01/04-01/07-2124 OA11, para. 6.

²⁷ ICC-01/04-01/06-1556.

²⁸ The applications of a/0149/06, a/0303/08, a/0610/09, a/0609/08, and a/0611/09 are still pending. Status has been granted to other victims in the following decisions: ICC-01/04-01/06-205 (for a/0001/06, a/0002/06 and a/0003/06); ICC01/04-01/06-1556 (for victims a/0049/06, a/0149/08, a/0007/08, a/0115/07, a/0156/07, a/0405/08, a/0406/08, a/0409/08, a/0149/07, and a/0162/07); ICC-01/04-01/06-2035 (for victims a/0249/09, a/0523/08, and a/0053/09); ICC-01/04-01/06-1562 (for victim a/0407/08); and ICC-01/04-01/08-2115 (for victims a/0292/09 and a/0398/09).

²⁹ ICC-01/04-01/06-824 OA7, para. 54.

³⁰ ICC-01/04-01/06-1453 OA13.

³¹ ICC-01/04-01/06-1452 OA12; ICC-01/05-01/08-500 OA2.

³² ICC-01/04-503 OA4 OA5 OA6, para. 101; ICC-01/04-01/06-1335 OA9 and OA10, para. 50. See also ICC-01/04-01/06-824 OA7, para. 55: "Observations to be received by the victims are [...] limited to, and must be specifically relevant to, the issues arising in the appeal, rather than more generally".

17. Furthermore, as mandated by Rule 91(2), the Prosecution and the Defence must have an opportunity to respond to the views and concerns presented by victims in this appeal. Under these circumstances, the participation of the victims in this appeal would not be prejudicial to or inconsistent with the rights of the Accused and a fair and impartial trial.³³
18. The Prosecution also requested that the Chamber permit oral argument on the appeal from the decision suspending the trial (OA18). It submits that, should oral argument be provided, the Legal Representatives who request leave to participate in that appeal³⁴ could be allowed to orally proffer their views and concerns with respect to the matters specifically argued.

Conclusion

19. For the reasons set out above, the Prosecution submits that the Appeals Chamber should
- a) grant all four applications to the extent that the Legal Representative present the views and concerns of those victims who have been admitted to participate in this case;
 - b) order that the Legal Representatives of the victims participating in this appeal file their views and concerns in writing within a defined period; and permit the Prosecution and Defence to respond to those views and concerns within a deadline prescribed by the Chamber; the Prosecution also requests that Appeals Chamber order the Legal Representatives to file one consolidated document containing their joint submissions for each of the appeal proceedings;
 - c) allow the Legal Representatives of victims who are granted to participate in the appeal OA18 to participate in any oral hearing that may be held in that appeal.

³³ The Appeals Chamber has previously recognised that if victims are permitted to participate, “the Prosecutor and the Defence shall be allowed to reply to any filing of the victims in accordance with the provisions of rule 91(2) of the Rules of Procedure and of Evidence”, ICC-01/04-01/06-824 OA7, para. 49.

³⁴ ICC-01/04-01/06-2533-Conf and ICC-01/04-01/06-2541.



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Dated this 6th day of August 2010
At The Hague, The Netherlands