

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/06**
Date: **25 February 2013**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

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

Public Document

Prosecution's Submissions on Victim Applications at Appeals Stage

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

Legal Representatives of the Applicants

Mr Joseph Keta Orwinyo

The Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Ms Silvana Arbia

Procedural History

1. On 14 March 2012, the Trial Chamber convicted Thomas Lubanga of three counts of war crimes (the “Judgment”).¹ On 10 July 2012, the Trial Chamber rendered its “Decision on Sentence pursuant to article 76 of the Statute” in which the Majority imposed a joint sentence of 14 years’ imprisonment (“Sentencing Decision”).²
2. On 3 October 2012, the Prosecution filed a Notice of Appeal against the Sentencing Decision.³ On the same day, Thomas Lubanga filed Notices of Appeal against the Judgment⁴ and the Sentencing Decision⁵.
3. On 3 December 2012, the Appellant filed documents in support of both his appeal against the Sentencing Decision⁶ and his appeal against the Judgment.⁷ On the same day, the Prosecution filed the document in support of its appeal against the Sentencing Decision.⁸
4. On 4 February 2013, the Prosecution filed its response to the Appellant’s appeals against conviction⁹ and sentence¹⁰, including to his request to present additional evidence. On the same day, the Appellant filed his response to the Prosecution’s appeal against sentence.¹¹
5. On 7 February 2013, the Registry filed a “Request for guidance regarding applicants for participation in the appeal phase”¹² in which it indicated that there are 32 new and/or newly supplemented applications for participation in the proceedings. The Registry requested the guidance of the Appeals Chamber on

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

³ ICC-01/04-01/06-2933 OA4.

⁴ ICC-01/04-01/06-2934 OA5.

⁵ ICC-01/04-01/06-2935 OA6.

⁶ Sentencing Appeal Brief.

⁷ ICC-01/04-01/06-2948-Conf.

⁸ ICC-01/04-01/06-2950.

⁹ ICC-01/04-01/06-2969-Conf.

¹⁰ ICC-01/04-01/06-2968-Conf.

¹¹ ICC-01/04-01/06-2967-Conf.

¹² ICC-01/04-01/06-2977.

whether to transmit the 32 applications to the Appeals Chamber, the parties and participants.

6. On 14 February 2013, the Appeals Chamber ordered submissions on “whether the Appeals Chamber should consider new victim applications given the current stage of the proceedings”.¹³

Prosecution’s Submissions

7. The Prosecution opposes consideration of new victim applications at this stage. The proceedings in this case are in their final phase. Trial proceedings have been completed, the appellate briefs have been filed (save for a reply brief by Thomas Lubanga), and other than the possibility of oral argument, there is no more litigation to be had before deliberations and decision. In the Prosecution’s submission, there is no further opportunity for victims to present their views and concerns in this case in writing. Assuming that the Chamber will entertain oral submissions and allow participating victims to also make oral submissions, the Prosecution submits that it would be unfair for any participant to appear for the first time at that hearing. Accordingly, in the Prosecution’s view, there is no feasible opportunity for new victims to participate in the case, and consequently no new victim applications should be considered at this stage.
8. Article 68(3) provides that “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered *at stages of the proceedings determined to be appropriate by the Court* and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.¹⁴ It is for the Court to determine whether victim participation is appropriate, considering whether the phase of the case will permit

¹³ ICC-01/04-01/06-2978 A5 A5 A6, p.3.

¹⁴ Emphasis added.

the meaningful presentation of views and concerns,¹⁵ and whether the participation will run counter to the rights of the accused / convicted person.

9. The Appeals Chamber has already noted that the primary phases for full and effective victim participation are the pre-trial and trial phases, rather than the later appeals phase: “the majority of the proceedings – and therefore the main opportunities for victim participation – takes place before the Pre-Trial and Trial Chamber”.¹⁶ At the appeals phase, and certainly after the substantive appellate briefs have been filed, there is no further prospect for victims to contribute to the appellate process.¹⁷
10. The Appeals Chamber has already received the substantive appeal briefs, the responses thereto, and observations of participating victims. That fact bears heavily on the question of whether it is appropriate for fresh participation at this point in the process. When faced with requests for participation during the deliberations phase of the trial, Trial Chamber I found that it was *not* appropriate to accept applications at that stage.¹⁸ It reasoned that “given the evidence and submissions in the trial have concluded and the Chamber is currently in deliberation, there is no opportunity for the victims who have applied to participate to express their views and concerns under Article 68(3) of the Rome Statute”.¹⁹

¹⁵ “To give effect to the spirit and intention of article 68(3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful.” ICC-01/04-01/06-1432 OA9 OA10, para. 97.

¹⁶ ICC-02/05-01/09-48 OA, para.10.

¹⁷ “The stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute. *An opportune stage at which the views and concerns of participating victims may be presented is at the outset of the proceedings, alerting the Court and the parties to the implications of the case on the personal interests of victims and how best they may be safeguarded.*” (emphasis added) ICC-01/04-01/06-925 OA8, para.20 (Separate Opinion of Judge Pikis).

¹⁸ ICC-01/04-01/06-2838.

¹⁹ ICC-01/04-01/06-2838, para.5. The Trial Chamber concluded that applications for participation would only be relevant if there were an eventual sentencing and substantive reparations phase of the trial: ICC-01/04-01/06-2838, para.6.

11. The same rationale applies to the present case involving requests to participate, effectively during the deliberations phase of the appeal. All submissions on the appeals have been communicated to the Appeals Chamber, with the exception of any response by the parties to the submissions of victims, already filed, and Thomas Lubanga's reply to the Prosecution's submissions on his appeals. In this context, there is no further opportunity for the victims to present their views and concerns.
12. Equally importantly, the Appeals Chamber has noted that victim participation should primarily take place at the pre-trial and trial phases because those Chambers will often "have an in-depth familiarity with the facts underlying the case" and therefore be in "a better position to assess whether an applicant is a victim".²⁰ The Pre-Trial and Trial Chambers "would ordinarily make the determination of victim status, not the Appeals Chamber".²¹ It is plain that it would be exceptional for the Appeals Chamber to make initial evaluations on victim status, and only then if there were a real prospect of effective participation.
13. Additionally, the Appeals Chamber has already regulated the participation of victims under Article 68(3) in the instant appeals. It determined that only those victims who participated at trial (and whose right to participate as victims was not withdrawn) could participate in the appeals against conviction and sentence, "as their personal interests are affected by the appeal in the same way as during trial".²² Although there were at that time new applications for reparations by persons who did not participate as victims during the trial, the Appeals Chamber limited victim participation in the appeals against conviction and sentence to those who were trial participants, on the basis of existing personal interests.

²⁰ ICC-02/05-01/09-48 OA, para.10.

²¹ ICC-02/05-01/09-48 OA, para.10. Nor has the Appeals Chamber made first-instance determinations on the victim status. It has held that "the Appeals Chamber will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims." ICC-01/04-01/06 OA09 and OA10, para.40.

²² ICC-01/04-01/06-2951 A4 A5 A6, para.3.

14. Even for the broader category of participants to the ongoing appeals against Trial Chamber I's reparations decision, the Appeals Chamber confirmed that only those victims who were trial participants or had current applications for reparations have standing to appeal - any victims who were as yet unidentified do not.²³ As such, there is no scope for participation by persons who have not yet been accorded victim status.

Conclusion

15. In the Prosecution's submission, victim participation at this late stage in the proceedings must be limited to the current set of victim participants. New applications should be considered solely for participation in the substantive reparations proceedings.



Fatou Bensouda
Prosecutor

Dated this 25th day of February 2013
At The Hague, The Netherlands

²³ 14 December 2012, ICC-01/04-01/06-2953 A2 A3 OA21