

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 OA 17

Date: 17 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

**Decision on the Participation of Victims in the Appeal against Trial Chamber I's
Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabile
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Paul Kabongo Tshibangu
Ms Carine Bapita Buyangandu
Mr Luc J. M. Walley

The Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo (ICC-01/04-01/06-T-314),

Having before it the “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)” of 22 July 2010 (ICC-01/04-01/06-2533-Conf-tENG), the “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” of 23 July 2010 (ICC-01/04-01/06-2535-tENG), and the “Application to Participate in the Appeal Proceedings against the Decision of 15 July 2010 to Release the Accused” of 26 July 2010 (ICC-01/04-01/06-2537-tENG),

After deliberation,

Unanimously,

Renders the following

DECISION

1. Victims a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06, a/0052/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09, and a/0398/09 are granted the right to participate in the present appeal for the purpose of presenting their views and concerns with respect to their personal interests in the issues raised in the appeal. They may file their submissions by 16h00 on 23 August 2010.
2. The Prosecutor and Mr Lubanga Dyilo may file their responses to the submissions of the victims by 16h00 on 27 August 2010.

3. Mr Paul Tshibangu and Ms Carine Bapita Buyangandu, legal representatives of a/0051/06, are ordered to file, by 16h00 on 27 August 2010, public redacted versions of the “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)” and of the “Clarifications urgentes sur la demande de participation en appel du 22 juillet 2010 (ICC-01/04-01/06-2533-Conf)”.

REASONS

I. RELEVANT PROCEDURAL HISTORY AND SUMMARY OF THE SUBMISSIONS

1. On 8 July 2010, Trial Chamber I rendered the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with VWU”¹ (hereinafter: “Decision to Stay the Proceedings”), staying the proceedings against Mr Lubanga Dyilo.
2. On 15 July 2010, the Trial Chamber rendered an oral decision, ordering the release of Mr Lubanga Dyilo in light of the Decision to Stay the Proceedings² (hereinafter: “Impugned Decision”).
3. On 16 July 2010, the Prosecutor filed the “Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect”.³ On 23 July 2010, the Appeals Chamber granted suspensive effect to the appeal.⁴
4. On 22 July 2010, Mr Paul Tshibangu and Ms Carine Bapita Buyangandu filed the “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

¹ ICC-01/04-01/06-2517.

² ICC-01/04-01/06-T-314-ENG.

³ ICC-01/04-01/06-2522.

⁴ “Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Lubanga Dyilo”, ICC-01/04-01/09-2536.

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Decision to Release the Accused of 15 July 2010 (ICC-01/04-01/06-T-314)”⁵ (hereinafter: “First Application”). They state that the protection of the victims who they represent is at stake and that Mr Lubanga Dyilo’s release might put them at risk.⁶ They express the fear that Mr Lubanga Dyilo might continue to commit the alleged crimes against the victims since their identities are known to him, especially because they do not enjoy any protective measures.⁷ Lastly, they assert that the possible release of Mr Lubanga Dyilo will make the victims less enthusiastic about presenting their views and concerns should the trial resume.⁸

5. On 3 August 2010, the Appeals Chamber ordered Mr Tshibangu and Ms Buyangandu *inter alia* to specify, by 16h00 on 4 August 2010, which victims they represent and the relevant decisions granting their participation in the proceedings⁹ (hereinafter: “Order”). On 5 August 2010, the legal representatives filed the “Clarifications urgentes sur la demande de participation en appel du 22 juillet 2010 (ICC-01/04-01/06-2533-Conf)”¹⁰ (hereinafter: “Clarification”), which was notified on 6 August 2010. In the Clarification, Mr Tshibangu and Ms Buyangandu request a retroactive extension of the time limit stipulated in the Order by a day for the submission of their response to the Order. They state that they were unable to take notice of the Order immediately after its notification because of their difficulties with the remote access to the Court’s electronic document management system from the Democratic Republic of the Congo and because their case manager returned from leave only on 5 August 2010.¹¹

6. On 23 July 2010, the Office of the Public Counsel for Victims (hereinafter: “OPCV”) filed the “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

⁵ ICC-01/04-01/06-2533-tENG.

⁶ First Application, para. 6.

⁷ First Application, para. 8.

⁸ First Application, para. 10.

⁹ “Order on the Filing of a Clarification to the ‘Demande de participation en appel contre la décision d’arrêt du procès pour abus de procédure, datée du 08 juillet 2010 (ICC-01/04-01/06-2517-Conf) et contre la décision de mise en liberté de l’accusé, datée du 15 juillet 2010 (ICC-01/04-01/06-T-314)”, ICC-01/04-01/06-2547.

¹⁰ ICC-01/04-01/06-2548.

¹¹ Clarification, para. 4.

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Trial Chamber I of 15 July”¹² (hereinafter: “Second Application”). The OPCV submits that victims who have been authorised by the Trial Chamber to participate in the proceedings should have an automatic right to participate in appellate proceedings pursuant to regulations 24 (2), 64 (4) and (5), and 86 (8) of the Regulation of the Court.¹³ Nevertheless, the OPCV argues that the victims who it represents meet the criteria for participation in the appeal. The OPCV points to jurisprudence of the Appeals Chamber indicating that the personal interests of victims are affected by matters of detention of suspects and accused persons.¹⁴ The OPCV further contends that the victims’ participation in the appeal is appropriate because their interests are affected by the order to release Mr Lubanga Dyilo¹⁵ and also because “victims granted leave to participate in proceedings having given rise to a decision, which has been appealed must be entitled *a fortiori* to participate in the interlocutory appeal in question”.¹⁶ The OPCV maintains that the victims’ participation is not prejudicial to the rights of the accused because their participation secures their rights under the Statute,¹⁷ noting that Mr Lubanga Dyilo has the right to respond to their submissions.¹⁸ Moreover, the OPCV submits that victim participation is an integral part of a fair trial.¹⁹

7. On 26 July 2010, Mr Luc Walleyne filed the “Application to Participate in the Appeal Proceedings against the Decision of 15 July 2010 to Release the Accused”²⁰ (hereinafter: “Third Application”). Mr Walleyne submits that the victims who he represents have a personal interest in the proceedings because the order for the unconditional release of Mr Lubanga Dyilo could have repercussions for the safety of the victims participating in the proceedings, particularly those who had agreed to give evidence for the Prosecutor, because Mr Lubanga Dyilo knows their identity.²¹ Mr Walleyne argues that the participation of the victims would not be prejudicial to the Mr Lubanga’s rights.²² Lastly, he observes that the Appeals Chamber has held that the

¹² ICC-01/04-01/06-2535-tENG.

¹³ Second Application, paras 8-10 and 12.

¹⁴ Second Application, paras 16-18.

¹⁵ Second Application, para. 19.

¹⁶ Second Application, para. 20.

¹⁷ Second Application, para. 27.

¹⁸ Second Application, para. 28.

¹⁹ Second Application, para. 29.

²⁰ ICC-01/04-01/06-2537-tENG.

²¹ Third Application, paras 4-5.

²² Third Application, para. 6.

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presentation of the views and concerns of victims regarding possible release of the accused is consistent with Mr Lubanga Dyilo's rights.²³

8. On 2 August 2010, Mr Lubanga Dyilo filed the "Observations de la Défense sur les demandes des victimes aux fins de participation à l'appel de la Décision du 15 juillet 2010 sur la libération de M. Thomas Lubanga"²⁴ (hereinafter: "Mr Lubanga's Response") stating that he does not intend to respond to the requests for victim participation but reserves his rights to respond to the victims' submissions should they be allowed to participate.²⁵

9. On 6 August 2010, the Prosecutor filed the "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"²⁶ (hereinafter: "Prosecutor's Response"). The Prosecutor does not oppose the participation of the victims who have been granted victim status by the Trial Chamber in both the appeal on release of Mr Lubanga Dyilo and the Decision to Stay the Proceedings.²⁷ The Prosecutor draws attention to the fact that five of the victims being represented by Mr Walleyne have not yet been granted victim status in the case.²⁸ On the issue of whether victims should have an automatic right to participate in appellate proceedings, the Prosecutor argues that such participation can only be with the leave of the Chamber.²⁹

II. PRELIMINARY ISSUES

A. The application for an extension of the time limit for the filing of the Clarification

10. The Appeals Chamber notes that Mr Tshibangu and Ms Buyangandu apply in the Clarification for a retroactive extension by one day of the time limit for the filing of that document. The Appeals Chamber further notes that pursuant to regulation 35 of the Regulations of the Court second sentence, "after the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can

²³ Third Application, para. 7.

²⁴ ICC-01/04-01/06-2545.

²⁵ Mr Lubanga's Response, paras. 6-7.

²⁶ ICC-01/04-01/06-2549.

²⁷ Prosecutor's Response, para. 3.

²⁸ Prosecutor's Response, para. 13.

²⁹ Prosecutor's Response, paras 10-11.

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demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

11. Mr Tshibangu and Ms Buyangandu submit that they were unable to meet the time limit for filing the Clarification stipulated in the Order because of the short time limit, their inability to access the Order electronically from the Democratic Republic of the Congo immediately after its notification and the absence of their case manager. The Appeals Chamber is, however, not convinced that these factors were outside their control and thus rejects the filing of the Clarification. In the view of the Appeals Chamber, Mr Tshibangu and Ms Buyangandu have not adequately substantiated the nature of the difficulties they encountered in accessing the Order and how this factor affected their ability to file the Clarification within the time limit. In particular, the Appeals Chamber underlines that the absence of the case manager when the Order was notified cannot form the basis for a request for an extension of time for the filing of a document. When managing their offices, the legal representatives must factor in the possibility of orders of the Court that set short time limits.

12. The Appeals Chamber observes that the purpose of the Order was to clarify, *inter alia*, whether Mr Tshibangu and Ms Buyangandu were acting on behalf of more than one victim since they referred in the First Application on several occasions to the “victims” who they represented and in respect of whom they sought authorisation for participation,³⁰ but only provided details regarding a single victim, namely a/0051/06.³¹ Having rejected the Clarification for being late, the Appeals Chamber will consider the First Application as applying only in respect of a/0051/06. As to the confidential filing of the First Application and the Clarification, the Appeals Chamber considers it appropriate to order Mr Tshibangu and Ms Buyangandu to file public redacted versions of these documents.

13. The Appeals Chamber further reminds all the legal representatives of victims of the need to specify, in their applications to participate in appeals brought under article

³⁰ See First Application, paras 3, 6-8 and 9, as well as the last paragraph.

³¹ First Application, para. 9.

82 (1) (b), (c) and (d) of the Statute, the victims that they represent, as well as the decisions that granted the victims such status.³²

B. No automatic right for victims to participate in an appeal

14. The Appeals Chamber notes that in the Second Application, the OPCV reiterates its view that victims who have been authorised by the Trial Chamber to participate in the proceedings must have an automatic right to participate in appellate proceedings.³³ This view is echoed by Mr Luc Walley in the Third Application.³⁴

15. The Appeals Chamber has emphasised in its prior decisions that victims seeking to participate in appeals under article 82 (1) (b) of the Statute must first seek leave of the Appeals Chamber to participate,³⁵ and that leave will only be granted if the following criteria are satisfied: (1) the applicants must be victims in the proceedings; (2) their personal interests must be affected by the issues on appeal; (3) their participation must be at an appropriate stage of the proceedings; and (4) the manner of participation must neither be prejudicial nor inconsistent with the rights of the accused and a fair and impartial trial.³⁶

16. The Appeals Chamber recalls that it has had occasion to determine the question whether victims should be given an automatic right to participate in appellate proceedings. In response to an application submitted by legal representatives of victims on a previous occasion, the Appeals Chamber explained that regulation 64 (4) and (5) of the Regulations of the Court “were not understood as granting victims an automatic right to participate in an interlocutory appeal, as this would preclude a

³² See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the Participation of Victims in the Appeal of Mr Katanga Against the ‘Decision on the Modalities of Victim Participation at Trial’”, 24 May 2010, ICC-01/04-01/07-2124 (OA 11), para 6.

³³ Second Application, paras 8-10 and 12.

³⁴ Third Application, para. 1.

³⁵ *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) (hereinafter: “Decision in *Lubanga* OA 7”), para. 38; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’”, 16 May 2008, ICC-01/04-01/06-1335 (OA 11) (hereinafter: “Decision in *Lubanga* OA 11”), para. 35; *Prosecutor v. Jean-Pierre Bemba Gombo*, “Reasons for the ‘Decision on the Participation of Victims in the Appeal Against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 20 October 2009, ICC-01/05-01/08-566 (OA 2) (hereinafter: “Reasons for Decision in *Bemba* OA 2”), paras 13-14.

³⁶ Decision in *Lubanga* OA 11, para. 36.

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specific determination by the Appeals Chamber that participation in the particular interlocutory appeal is appropriate”.³⁷ On that occasion, the Appeals Chamber affirmed the practice established in its previous decisions, noting that the legal representatives had advanced no convincing reasons warranting a departure from those decisions.³⁸ The Appeals Chamber remains unmoved by the arguments of the legal representatives in the present case, which are repetitive and unconvincing.

III. MERITS

17. As noted above, the first condition for victim participation in the present appeal is that they must be recognised as victims in the proceedings. The Appeals Chamber notes that five of the victims mentioned in the Third Application, that is, a/0149/06, a/0303/08, a/0610/09, a/0611/09 and a/609/08 have not yet been granted the right to participate in the trial. Their application to participate in the appeal is thus rejected. The Appeals Chamber however observes that all the other victims have been granted victim status by the Trial Chamber in this case.³⁹

18. The Appeals Chamber finds that the victims meet all the other criteria for participation in the appeal. The Appeals Chamber takes the view that the present appeal affects the victims’ personal interests, given that the Impugned Decision ordered the unconditional release of Mr Lubanga Dyilo.⁴⁰ Furthermore, the Appeals Chamber considers the participation of victims in the present appeal to be appropriate and notes that their participation is consistent with Mr Lubanga Dyilo’s rights, especially since he will have the right to respond to the views and concerns of the victims pursuant to rule 91 (2) of the Rules of Procedure and Evidence. Finally, turning to the manner of participation, in line with its previous jurisprudence, the Appeals Chamber considers that victims should be allowed to present their views and concerns in writing with respect to the issues raised on appeal.

³⁷ Reasons for Decision in *Bemba* OA 2, para. 14.

³⁸ Reasons for Decision in *Bemba* OA 2, para. 16.

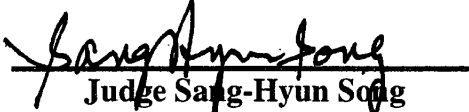
³⁹ “Decision on the applications by victims to participate in the proceedings”, 15 December 2008, ICC-01/04-01/06-1556-Anx1, para. 137, Corrigendum of which was filed on 13 January 2009 as ICC-01/04-01/06-1556-Corr.Anx1; “Decision on the applications by 3 victims to participate in the proceedings”, 18 December 2008, ICC-01/04-01/06-1562, para. 13; “Decision on the applications by 7 victims to participate in the proceedings”, 10 July 2009, ICC-01/04-01/06-2035, para. 34; “Decision on the application by 2 victims to participate in the proceedings”, 10 September 2009, ICC-01/04-01/06-2115, para. 12.

⁴⁰ See also Decision in *Lubanga* OA 7, para. 54; Reasons for Decision in *Bemba* OA 2, para. 17.

19. Therefore, the Appeals Chamber grants victims, a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06, a/0052/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09, and a/0398/09 the right to participate in the present appeal for the purpose of presenting their views and concerns with respect to their personal interests in the issues raised in the appeal.

Judge Sang-Hyun Song appends a separate opinion to this decision.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 17th day of August 2010

At The Hague, The Netherlands

Separate Opinion of Judge Sang-Hyun Song

I agree with the majority that the victims specified in the operative part of the present decision should be allowed to make submissions on the appeal. However, as constantly expressed since my first dissenting opinion on this issue of 13 February 2007,⁴¹ I disagree with the approach of the majority to participation of victims in appeals brought under article 82 (1) (b) of the Statute. In my view, victims who have been permitted to participate in proceedings giving rise to an appeal under that provision are participants in terms of regulation 64 (4) and (5) of the Regulations of the Court. They therefore have the right to file a response to the document in support of the appeal. There is neither a need for them to apply for participation, nor for the Appeals Chamber to rule on such applications.


Judge Sang-Hyun Song

Dated this 17th day of August 2010

At The Hague, The Netherlands

⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “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’”, ICC-01/04-01/06-824 (OA 7), pp. 55-57.