

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-02/11-01/11 OA 5
Date: 29 August 2013**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT KOUDOU GBAGBO

Public document

Decision

**on the participation of victims in the Prosecutor's appeal against the "Decision
adjourning the hearing on the confirmation of charges pursuant to article
61(7)(c)(i) of the Rome Statute"**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr Laurent Koudou Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of Victims
Ms Paolina Massidda
Ms Sarah Pellet

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” of 3 June 2013 (ICC-02/11-01/11-432),

Having before it the “Application to Participate in the Interlocutory Appeal Filed by the Prosecution against the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’ of 3 June 2013”, filed by the common legal representative of victims on 13 August 2013 (ICC-02/11-01/11-475),

Renders the following

DECISION

1. The 199 victims represented by the common legal representative of victims, who have applied to participate in the present appeal, are granted the right to participate for the purpose of presenting their views and concerns with respect to their personal interests in the issues raised on appeal pursuant to article 68 (3) of the Statute. They may file their observations on 27 September 2013.
2. Mr Gbagbo and the Prosecutor may file their responses to the observations presented by the aforesaid victims by 16h00 on Wednesday, 2 October 2013.

REASONS

I. PROCEDURAL HISTORY

1. On 3 June 2013, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”), by majority, Judge Fernández de Gurmendi dissenting, decided to adjourn the confirmation of charges hearing and request the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges (hereinafter: “Impugned Decision”).¹
2. On 31 July 2013, the Pre-Trial Chamber, by majority, Judge Fernández de Gurmendi dissenting, granted in part the “Prosecution’s application for leave to appeal the ‘Decision

¹ “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, ICC-02/11-01/11-432; “Corrigendum to Dissenting opinion of Judge Silvia Fernández de Gurmendi”, 6 June 2013, ICC-02/11-01/11-432-Anx-Corr.

adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” in relation to the following issue:

Whether the Pre-Trial Chamber erred in holding that, when the Prosecutor alleges that an “attack against any civilian population” consists of multiple smaller incidents, none of which alone rises to the level of the minimum requirements of article 7 of the Statute and which allegedly took place at different times and places, a sufficient number of these incidents must be proved to the requisite standard, meaning that each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an ‘attack’ took place.²

3. On 12 August 2013, the Prosecutor, having been granted an extension of the page limit,³ filed the document in support of the appeal (hereinafter: “Document in Support of the Appeal”).⁴

4. On 13 August 2013, the common legal representative of victims filed the “Application to Participate in the Interlocutory Appeal Filed by the Prosecution against the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’ of 3 June 2013”⁵ (hereinafter: “Victims’ Application”).

5. The Victims’ Application indicates that the 199 victims applying for participation in this interlocutory appeal (hereinafter: “Victims”) have been granted the status of victim and have been authorised to participate in the proceedings against Mr Gbagbo before the Pre-Trial Chamber.⁶ The Victims submit that the underlying issue on appeal is whether the suspect will stand trial, an issue which clearly affects their personal interests.⁷ The Victims contend that they have been “granted significant substantive and procedural rights in the proceedings leading to the Impugned Decision that they risk losing in the event of certain outcomes on appeal”.⁸ The Victims further submit that their participation is appropriate, “given the subject-matter of the appeal and the consequences that the outcome of the appeal

² “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, ICC-02/11-01/11-464; “Dissenting opinion of Judge Silvia Fernández de Gurmendi”, ICC-02/11-01/11-464-Anx.

³ “Decision on the ‘Prosecution’s Request for an Extension of the Page Limit for the Prosecution’s Appeal against the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 7 August 2013, ICC-02/11-01/11-471 (OA5).

⁴ “Prosecution’s appeal against the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 12 August 2013, ICC-02/11-01/11-474 (OA5).

⁵ ICC-02/11-01/11-475 (OA5).

⁶ Victims’ Application, para. 13.

⁷ Victims’ Application, para. 15.

⁸ Victims’ Application, para. 16.

may have on [their] personal interests”.⁹ Finally, the Victims state that their participation is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial because they seek to present their views and concerns regarding their personal interests solely in relation to the issues on appeal, and Mr Gbagbo will be permitted to respond to the same.¹⁰

6. On 21 August 2013, the Prosecutor filed her observations on the Victims’ Application, in which she indicates that she does not oppose the Victims’ Application.¹¹ The Prosecutor notes, *inter alia*, that “the Appeals Chamber has already acknowledged that the personal interests of victims are affected where a Chamber stays the proceedings or decides not to confirm the charges”.¹² The Prosecutor agrees with the Victims that “although the impugned decision does not result in the immediate termination of the prosecution nor directly precludes the victims from seeking compensation, the issue on appeal seriously impact[s] the victims’ personal interests”.¹³ She submits that the Victims should therefore be permitted to make submissions “specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings” and that the parties must be given an opportunity to respond.¹⁴ The Prosecutor submits that it is appropriate for the Victims to be allowed to present their views in this appeal and that their participation would not be prejudicial to or inconsistent with the rights of the accused person and a fair and impartial trial.¹⁵

7. On 21 August 2013, Mr Gbagbo filed his observations on the Victims’ Application, in which he objects to the Victims’ Application.¹⁶ Mr Gbagbo argues, *inter alia*, that the Victims’ Application fails to demonstrate the specific manner in which the Victims possess a personal interest in the issue before the Appeals Chamber and that there is no logical link between the issue under appeal and the personal interests of the Victims.¹⁷ Mr Gbagbo argues

⁹ Victims’ Application, paras 17-21.

¹⁰ Victims’ Application, paras 22-27.

¹¹ “Prosecution’s Observations on the ‘Application to Participate in the Interlocutory Appeal Filed by the Prosecution against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61 (7) (c) (i) of the Rome Statute” of 3 June 2013’”, ICC-02/11-01/11-486 (OA5) (hereinafter: “Prosecutor’s Response”).

¹² Prosecutor’s Response, para. 4.

¹³ Prosecutor’s Response, para. 4.

¹⁴ Prosecutor’s Response, para. 5.

¹⁵ Prosecutor’s Response, para. 5.

¹⁶ “Réponse de la défense à la demande de participation à la procédure d’appel relative à la ‘décision d’ajournement de l’audience de confirmation des charges conformément à l’article 67-7-c-i du Statut’ (ICC-02/11-01/11-432-tFRA) déposée par la Représentante légale des Victimes le 13 août 2013 (ICC-02/11-01/11-475)”, ICC-02/11-01/11-487 (OA5) (hereinafter: “Mr Gbagbo’s Response”).

¹⁷ Mr Gbagbo’s Response, paras 27-39.

further that the emphasis placed by the Victims on the role of victims in criminal proceedings, as an “integral part of fair and impartial proceedings”,¹⁸ distorts the notion of adversarial proceedings and thereby limits the rights of the accused.¹⁹ He avers that on past occasions, when authorised to intervene, the Victims have gone beyond merely expressing their personal interests and have always acted in support of the Prosecutor.²⁰ Mr Gbagbo requests that the Victims’ Application be rejected; or, in the alternative, that the views and concerns of the Victims be strictly limited to their personal interests.²¹

8. On 22 August 2013, the time limit for the filing of Mr Gbagbo’s response to the Document in Support of the Appeal was extended by one month to 20 September 2013.²²

II. MERITS

8. The Appeals Chamber reiterates that, with respect to victims’ participation in appeals brought under article 82 (1) (d) of the Statute, the following four cumulative criteria enumerated in article 68 (3) of the Statute must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.²³

9. In respect of the Victims’ Application, all four criteria for victim participation are fulfilled. As to the first criterion, the Victims indicate by reference to the relevant decisions of the Pre-Trial Chamber that each of them has been authorised to participate in the pre-trial proceedings.²⁴

¹⁸ Mr Gbagbo’s Response, para. 42, referring to Victims’ Application, para. 27.

¹⁹ Mr Gbagbo’s Response, paras 40-53.

²⁰ Mr Gbagbo’s Response, paras 54-63.

²¹ Mr Gbagbo’s Response, paras 69-74.

²² “Decision on Mr Gbagbo’s request for translation and an extension of time for the filing of a response to the document in support of the appeal”, 22 August 2013, ICC-02/11-01/11-489.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’”, 16 May 2008, ICC-01/04-01/06-1335 (OA 9 OA 10), para. 36; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “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’”, 28 January 2010, ICC-02/05-01/09-70 (OA), para. 9; *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 Victims Participation at Trial’”, 24 May 2010, ICC-01/04-01/07-2124 (OA 11), para. 5; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Decision to Stay the Proceedings”, 18 August 2010, ICC-01/04-01/06-2556 (OA 18), para. 7.

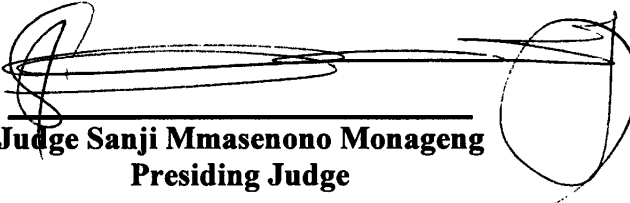
²⁴ Victims’ Application, para. 13.

10. As to the personal interests of the Victims, the Appeals Chamber recalls that “any determination [...] of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis”.²⁵ The Victims submit that the “extension of the standard of proof to the ‘incidents’ underlying the contextual elements will affect the likelihood of having the charges confirmed and thereby have a direct impact on the possibility for victims to continue participating in the proceedings and to eventually get reparations for the damage, loss and injury they suffered as a consequence of the crimes alleged by the Prosecutor against Mr Gbagbo”.²⁶ The Appeals Chamber is persuaded by these arguments of the Victims and holds that the personal interests of the Victims are affected by this appeal.

11. The Appeals Chamber finds that the present appeal is a stage of the proceedings in which the participation of the Victims is appropriate in light of the potential consequences of the appeal. As to the manner of participation, the Appeals Chamber decides that the Victims may participate in the present appeal by making written submissions limited to their views and concerns with respect to their personal interests in the issues raised in this appeal. The Appeals Chamber considers that the participation of the Victims in the present appeal, in that manner, is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, Mr Gbagbo and the Prosecutor will be permitted to respond to the Victims’ views and concerns, in accordance with rule 91 (2) of the Rules of Procedure and Evidence.

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

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


Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 29th day of August 2013

At The Hague, The Netherlands

²⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007”, 13 June 2007, ICC-01/04-01/06-925 (OA 8), para. 28.

²⁶ Victims’ Application, para. 16.