



Original: English

**No. ICC-01/09-02/11 OA 5
Date: 24 April 2015**

THE APPEALS CHAMBER

Before:
Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public document

Decision on the victims' request to participate in the appeal proceedings

Order 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 James Stewart
Ms Helen Brady

Mr Uhuru Muigai Kenyatta

Legal Representative of Victims
Mr Fergal Gaynor

States Representatives
Mr Githu Muigai, SC, Attorney General
of the Republic of Kenya

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V(B) entitled “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, of 3 December 2014 (ICC-01/09-02/11-982),

Having before it the “Victims’ request to participate in the Prosecutor’s appeal against the ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, filed by the legal representative of victims on 27 March 2015 (ICC-01/09-02/11-1009),

Renders the following

DECISION

1. The “Response of the Government of the Republic of Kenya to ‘Victims’ request to participate in the Prosecutor’s appeal against the ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87 (7) of the Statute’” (ICC-01/09-02/11-1014) is rejected.
2. The 839 victims represented by the 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. They may file their observations by 16h00 on Friday, 1 May 2015.
3. The Prosecutor, Mr Uhuru Muigai Kenyatta and the Government of Kenya may file their responses to the observations presented by the aforesaid victims by 16h00 on Friday, 8 May 2015.

REASONS

I. PROCEDURAL HISTORY

1. On 20 March 2015, the Prosecutor filed the document in support of her appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute".¹
2. On 27 March 2015, the legal representative of victims filed an application² (hereinafter: "Victims' Request"), requesting that the victims he represents be granted leave to participate in the present appeal proceedings.³
3. On 1 April 2015, the Appeals Chamber issued an order, in which it set 16h00 on 10 April 2015 as the deadline for the filing of any responses to the Victims' Request⁴ (hereinafter: "Order on the Filing of a Response").
4. On 2 April 2015, the Prosecutor responded⁵ (hereinafter: "Prosecutor's Response"), stating that she does not oppose the Victims' Request.⁶ On 15 April 2015, the Government of Kenya (hereinafter: "Kenya") also filed a response⁷ (hereinafter: "Kenya's Response"). Mr Uhuru Muigai Kenyatta (hereinafter: "Mr Kenyatta") did not file a response.

II. PRELIMINARY MATTER

5. The Appeals Chamber notes that Kenya's Response was filed on 15 April 2015, thus five days later than the 10 April 2015 deadline set in the Order on the Filing of a

¹ ["Prosecution appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute'"](#), 20 March 2015, ICC-01/09-02/11-1006 (OA 5).

² ["Victims' request to participate in the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute'"](#), ICC-01/09-02/11-1009 (OA 5).

³ [Victims' Request](#), paras 1, 41.

⁴ ["Corrected version of 'Order concerning the filing of a response', 31 March 2015, ICC-01/09-02/11-1011"](#), dated 30 March 2015 and registered on 1 April 2015, ICC-01/09-02/11-1011-Corr (OA 5).

⁵ ["Prosecution Response to Victims' request to participate in the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute'"](#), ICC-01/09-02/11-1012 (OA 5).

⁶ [Prosecutor's Response](#), paras 1, 5.

⁷ ["Response of the Government of the Republic of Kenya to 'Victims' request to participate in the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87 \(7\) of the Statute'"](#), ICC-01/09-02/11-1014 (OA 5).

Response. Kenya did not present any explanation for the late filing, nor make a request for an extension of the deadline. Given these circumstances, the Appeals Chamber rejects Kenya's Response to the Victims' Request.

III. MERITS

6. The Appeals Chamber notes that, in line with its jurisprudence, the victims in the present case filed a request seeking leave to participate in the appellate proceedings. The Appeals Chamber notes that differing opinions have been expressed in the past as to whether it is necessary for victims to file an application in order to participate in interlocutory appeals.⁸

7. The Appeals Chamber does not consider it appropriate to address this matter in the appeal at hand, taking into account the recent re-composition of the Chamber by the Presidency on 27 March 2015, as well as the fact that the victims filed their request on that same day and that the Appeals Chamber has not been asked in this case to reconsider its jurisprudence. In light of these circumstances, the Appeals Chamber considers it appropriate for this case to follow the majority view reflected in

⁸ See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, "Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims" to "[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), pp. 55-57; *Prosecutor v. Thomas Lubanga Dyilo*, "Separate and partly dissenting opinion of Judge Sang-Hyun Song and reasons for dissent from the order of the Appeals Chamber of 20 March 2008" to "[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), pp. 18-22; *Prosecutor v. Thomas Lubanga Dyilo*, "Separate opinion of Judge Sang-Hyun Song and Judge Christine Van den Wyngaert with respect to the 'Decision on the participation of victims in the appeals' issued on 20 October 2009" to "[Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55\(2\) of the Regulations of the Court'](#)", 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16), p. 42; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Dissenting Opinion of Judge Sang-Hyun Song" to "[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), pp. 8-9; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Separate Opinion of Judge Sang-Hyun Song" to "[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), p. 8; *Prosecutor v. Thomas Lubanga Dyilo*, "Separate Opinion of Judge Sang-Hyun Song" to "[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), p. 8; *Prosecutor v. Laurent Koudou Gbagbo*, "Separate Opinion of Judge Sang-Hyun Song", 29 August 2013, ICC-02/11-01/11-492-Anx (OA 5) annexed to "[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'](#)", 29 August 2013, ICC-02/11-01/11-492 (OA 5).

the jurisprudence requiring victims to file an application seeking leave to participate in interlocutory appeal proceedings, without prejudice to the Appeals Chamber revisiting this jurisprudence in the future.

8. Turning to the Victims' Request, the Appeals Chamber recalls 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.⁹

9. The Appeals Chamber recalls that it has held that

In circumstances in which the particular victims have already been granted leave to participate in the proceedings before the [first instance] Chamber, the application [...] need not specifically address whether or not the person participating is "a victim" within the meaning of rule 85 of the Rules of Procedure and Evidence in the absence of any appeal relating to that matter. The issue for the Appeals Chamber is more limited. Given that the victims have been granted victim status by the [first instance] Chamber, the question to be addressed is whether their personal interests are affected by the interlocutory

⁹ See e.g. *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: "*Lubanga* OA 7 Judgment"), paras 44-45; *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) (hereinafter: "*Decision on Victim Participation Lubanga* OA 9/10"), 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 Victim 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; *Prosecutor v. Laurent Koudou Gbagbo*, "[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'](#)", 29 August 2013, ICC-02/11-01/11-492 (OA 5), para. 8.

appeal and whether it is appropriate for them to participate at that stage of the proceedings.¹⁰

10. The Appeals Chamber notes that all 839 victims have been found to be victims in the case in accordance with the procedures established by the Trial Chamber.¹¹ Furthermore, the Appeals Chamber notes that the victims participated in the specific proceedings before the Trial Chamber leading up to the impugned decision and the decision on the Prosecutor's request for leave to appeal the impugned decision.¹² Given that the status of the victims in the case has been acknowledged by the Trial Chamber, the Appeals Chamber will not further enquire into this matter.

11. Regarding whether the personal interests of the victims are affected by the issues on appeal, the victims recall that the charges against Mr Kenyatta have been withdrawn and submit that “[n]on co-operation by [Kenya] was a highly significant factor in the collapse of [this case]”,¹³ which has affected the victims' right “to know the truth about the crimes committed against them” and “to have those responsible for those crimes held accountable”.¹⁴ The victims argue that the impugned decision “unreasonably deprived the victims of a trigger which would have encouraged States Parties to cooperate [...] and reverse the consequences” of Kenya's non-cooperation.¹⁵ Thus, they argue that, “[i]n the overall circumstances of the present case, it is clear that the victims' personal interests have been negatively impacted by [Kenya's] obstructionism, and those interests are clearly affected by the Appeals Chamber's consideration of whether the Trial Chamber erred in not referring Kenya to the [Assembly of States Parties]”.¹⁶ The Appeals Chamber finds these arguments

¹⁰ [Lubanga OA 7 Judgment](#), para. 45. See also [Decision on Victim Participation Lubanga OA 9/10](#), para. 37 (“The Appeals Chamber recalls that [...] in circumstances in which victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, it would not enquire into their victim status but will proceed to the next stage of its enquiry, namely, the question of whether their personal interests are affected by the interlocutory appeal.”).

¹¹ See “[Decision on victims' representation and participation](#)”, 3 October 2012, ICC-01/09-02/11-498. See also Annex A, 22 January 2015, ICC-01/09-02/11-998-AnxA to “Thirteenth Periodic Report on the general situation of victims in the case and the activities of the Victims Participation and Reparations Section and the Common Legal Representative in the field”, dated 21 January 2015 and registered on 22 January 2015, ICC-01/09-02/11-998, para. 1; [Victims' Request, footnote 24](#).

¹² See e.g. Transcript of 13 February 2014, ICC-01/09-02/11-T-28-ENG (ET WT); “[Victims' response to the Prosecution's application for leave to appeal the decision on non-compliance](#)”, 15 December 2014, ICC-01/09-02/11-989.

¹³ [Victims' Request](#), para. 23.

¹⁴ [Victims' Request](#), para. 27.

¹⁵ [Victims' Request](#), para. 28.

¹⁶ [Victims' Request](#), para. 30.

persuasive within the context of the criteria under consideration and accordingly finds that the personal interests of the victims are affected by the issues on appeal.

12. The Appeals Chamber finds that the present appeal is a stage of the proceedings in which the victims' participation is appropriate in light of the potential consequences of the resolution of the appeal. As to the manner of participation, the victims may submit written observations limited to their views and concerns with respect to their personal interests in the issues raised in this appeal. The Appeals Chamber considers that this manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, the Prosecutor, Mr Kenyatta and Kenya will be permitted to respond to the victims' observations, in accordance with rule 91 (2) of the Rules of Procedure and Evidence.

13. Accordingly, the Appeals Chamber decides that the victims, through their legal representative, may file their observations by 16h00 on Friday, 1 May 2015. The Prosecutor, Mr Kenyatta and Kenya may file their responses to the observations presented by the aforesaid victims by 16h00 on Friday, 8 May 2015.

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



Judge Silvia Fernández de Gurmendi

Presiding Judge

Dated this 24th day of April 2015

At The Hague, The Netherlands