

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

**No.: ICC-01/04-01/06  
Date: 11 December 2006**

**THE APPEALS CHAMBER**

**Before:**  
**Judge Erkki Kourula, Presiding**  
**Judge Philippe Kirsch**  
**Judge Georgios M. Pikis**  
**Judge Navanethem Pillay**  
**Judge Sang-Hyun Song**

**Registrar:** **Mr Bruno Cathala**

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

**Public Document**

**Dissenting Opinion of Judge Pikis to the Order of the Appeals Chamber issued on  
4 December 2006**

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
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**Counsel for the Victims a/0001/06 to  
a/0003/06**

Mr Luc Walley  
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1. Following the objection<sup>1</sup> of Mr. Thomas Lubanga Dyilo (hereinafter “the appellant”) to the admissibility of the response<sup>2</sup> of the victims a/0001/06, a/0002/06 and a/0003/06 (hereinafter “the victims”) to the appeal on grounds of its non-timely filing, the Appeals Chamber made the following order on 24 November 2006<sup>3</sup>:

1. “The Prosecutor may file by 29 November 2006 a response to the Defence Request which may include submissions with regard to the right of victims a/0001/06 to a/0003/06 to participate in the appeal, the need, if any, of an application to that end and an order of the Appeals Chamber validating it, and the modalities for such participation.
2. The Defence may file by 29 November 2006 submissions on the right of victims a/0001/06 to a/0003/06 to participate in the appeal, the need, if any, of an application to that end and an order of the Appeals Chamber validating it, and the modalities for such participation.
3. Victims a/0001/06 to a/0003/06 may file by 29 November 2006 a response to the Defence Request which may include submissions with regard to their right to participate in the appeal, the need, if any, of an application to that end and an order of the Appeals Chamber validating it, and the modalities for such participation.”

2. The object of the order, as its tenor suggests, was to elicit whether the victims could participate in the appeal as of right, in addition to abbreviating the time within which the Prosecutor and victims may respond to the application of the appellant. If the victims had no such right, examination of any matter relevant to the filing of the response of victims would be superfluous. Article 68 (3) of the Statute defines the circumstances

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<sup>1</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Defence Request for an Order Regarding Non-Compliance with the Time Limits” 16 November 2006 (ICC-01/04-01/06-708).

<sup>2</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Réponse des victimes a/0001/06, a/0002/06 et a/0003/06 à l’appel de la Défense concernant la Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo » 16 November 2006 (ICC-01/04-01/06-704).

<sup>3</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Order of the Appeals Chamber” 24 November 2006 (ICC-01/04-01/06-727).

under which victims may participate in proceedings before the Court and foreshadows the nature and manner of their participation.

3. The appellant<sup>4</sup> and the Prosecutor<sup>5</sup> asserted that the victims had no right to participate in the proceedings on appeal without the prior authorization by the Appeals Chamber. The victims in their response<sup>6</sup> made no clear answer to this question. They argued that their response, although filed out of time, should be duly considered as its untimeliness did not prejudice the rights of the appellant. “In any case”, as they put it, they “request that they be ‘entitled to attend and participate in the proceedings [...]’”<sup>7</sup> invoking rule 91 (2) of the Rules of Procedure and Evidence in aid of their submission.

4. The duty of the Appeals Chamber was to my comprehension to decide in the first place whether the victims were entitled to participate as of right in the appeal proceedings. If so entitled, the next question would be whether their response should be rejected as filed out of time. If not so entitled, there would be room for the examination of the victims’ request provided it was deemed to be a proper procedural step for moving the court to authorize their participation in the proceedings. Instead, the Appeals Chamber made the order<sup>8</sup> of 4 December 2006 to the following effect:

“The Prosecutor and the Defence may file a response to the application to participate in the present proceedings, which was made in the Victims’ Response, by 6 December 2006.”

Determination of the issue defined by the order of 24 November 2006 was a necessary prerequisite to addressing any other matter concerning the participation of the victims in

<sup>4</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Defence Response to the Appeals Chamber Order of 24 November 2006” 29 November 2006 (ICC-01/04-01/06-734).

<sup>5</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Prosecution’s Response to ‘Defence Request for an Order Regarding Non-Compliance with the Time Limits’, pursuant to ‘Order of the Appeals Chamber’ of 24 November 2006” 29 November 2006 (ICC-01/04-01/06-736).

<sup>6</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* « Réponse des victimes a/0001/06, a/0002/06 et a/0003/06 concernant la requête de la Défense du 16 novembre 2006 » 29 November 2006 (ICC-01/04-01/06-739).

<sup>7</sup> *Ibid* page 3.

<sup>8</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Order of the Appeals Chamber” 4 December 2006 (ICC-01/04-01/06-751).

the proceedings. If they had no such right, the order of 4 December 2006 would be superfluous. To the extent, on the other hand, that the order may leave the impression that the victims have no right to participate in the absence of prior authorization by the Appeals Chamber, the order clouds the proceedings with uncertainty, a course unpropitious to the ends of justice.

5. For the aforesaid reasons I dissented, dissociating myself from the order made.

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



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**Judge Georghios M. Pikis**

Dated this 11<sup>th</sup> day of December 2006

At The Hague, The Netherlands