

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-01/04-01/06 OA 13**

Date: **6 August 2008**

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Philippe Kirsch

Judge Georghios M. Pikis

Judge Navanethem Pillay

Judge Erkki Kourula

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Decision on the participation of victims in the appeal

Shs

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Luc Walley
Mr Franck Mulenda

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor pursuant to the decision of Trial Chamber I of 2 July 2008 entitled “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’” (ICC-01/04-01/06-1417),

Having before it the “Demande de participation dans la procédure en appel contre la décision du 13 juin 2008 de la Chambre de Première Instance I ordonnant la suspension de la procédure” of 16 July 2008 (ICC-01/04-01/06-1439),

Renders the following

DECISION

(i) Victims a/0001/06, a/0002/06 and a/0003/06 are granted the right to participate in the present appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal. They may present their submissions by 4 p.m. on Tuesday, 12 August 2008.

(ii) The Prosecutor and Mr. Thomas Lubanga Dyilo may file their responses to the submissions presented by the aforesaid victims by 4 p.m. on Monday, 18 August 2008.

REASONS

I. RELEVANT PROCEDURAL BACKGROUND AND SUBMISSIONS OF THE PARTICIPANTS

1. On 13 June 2008, Trial Chamber I rendered the “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues

raised at the Status Conference on 10 June 2008” (ICC-01/04-01/06-1401; hereinafter: “Impugned Decision”), which stayed the proceedings in respect of Mr. Thomas Lubanga Dyilo. By decision of 2 July 2008 entitled “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’” (ICC-01/04-01/06-1417; hereinafter: “Decision Granting Leave to Appeal”) the Prosecutor was granted leave to appeal the Impugned Decision in respect of two issues, namely “[w]hether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and its characterization of the Prosecution’s use of it as constituting ‘a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances’ and “[w]hether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute; whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the prosecution disclosing any potentially exculpatory evidence to the defence under Article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt); and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings” (Decision Granting Leave to Appeal, paragraph 32).

2. The Prosecutor filed his document in support of the appeal on 14 July 2008 (ICC-01/04-01/06-1434).¹

3. On 16 July 2008, the Legal Representatives of victims a/0001/06, a/0002/06 and a/0003/06 filed the “Demande de participation dans la procédure en appel contre la décision du 13 juin 2008 de la Chambre de Première Instance l’ordonnant la suspension de la procédure” (ICC-01/04-01/06-1439; hereinafter: “Application for Participation”), requesting the Appeals Chamber to be allowed to present the views and concerns of the victims in the framework of the Prosecutor’s appeal against the Impugned Decision. The Legal Representatives submit that the personal interests of the victims are affected by the

¹ The document in support of the appeal was re-filed on 24 July 2008 (ICC-01/04-01/06-1446-Anx1), following a decision of the Appeals Chamber to that effect (ICC-01/04-01/06-1445).

appeal because the Impugned Decision stayed the proceedings in respect of Mr. Lubanga Dyilo and could lead to their permanent termination. This would mean that the victims could not participate in a trial in respect of Mr. Lubanga Dyilo and that there would be no prospect that their claims for reparation against him be adjudicated by the Trial Chamber. The Legal Representatives recall the statements of the Trial Chamber at paragraph 95 of the Impugned Decision, which had found *inter alia* that “by staying these proceedings the victims have, in this sense, been excluded from justice.”

4. Mr. Lubanga Dyilo filed the “Réponse de la Défense à la ‘Demande de participation dans la procédure en appel contre la décision du 13 juin 2008 de la Chambre de Première Instance I ordonnant la suspension de la procédure’ datée du 16 juillet 2008” dated 29 July 2008 (ICC-01/04-01/06-1449; hereinafter: “Response by the Defence”). He opposes the applications for participation and requests that they be rejected. He submits that the victims have not established that their participation would be appropriate and that their participation would not be inconsistent with or prejudicial to the rights of the accused (Response by the Defence, paragraph 8). He notes that the appeal concerns solely the procedural obligations of the Prosecutor and the rights of the accused, but not the substance of the case against Mr. Lubanga Dyilo, and submits that the appeal does not relate to the exercise of the rights of victims (Response by the Defence, paragraph 9). Mr. Lubanga Dyilo underlines that article 68 (3) of the Statute does not grant victims an unlimited right to participate; he submits that the present appeal concerns only the right of the accused to a fair trial and therefore does not affect the personal interests of the victims; their participation in the present appeal could put the accused’s rights into peril (Response by the Defence, paragraph 9).

5. The Prosecutor filed the “Prosecution’s Response to Application by Victims to Participate in the Appeal against Decision to Stay Proceedings” dated 29 July 2008 (ICC-01/04-01/06-1450; hereinafter: “Response by the Prosecutor”). The Prosecutor requests the Appeals Chamber to grant the Application for Participation, submitting that the stay of the proceedings directly impacted “on the ability of those victims who have been permitted to participate to realise their recognised interests in the case” (Response by the Prosecutor, paragraph 11). He submits furthermore that the Impugned Decision formed

the basis for the Trial Chamber's "Decision on the release of Thomas Lubanga Dyilo" of 2 July 2008 (ICC-01/04-01/06-1418), and that the release of a suspect had previously been found by the Appeals Chamber to affect the personal interests of victims (Response by the Prosecutor, paragraph 12).

II. DETERMINATION BY THE APPEALS CHAMBER

6. For the following reasons, the Appeals Chamber decides that victims a/0001/06, a/0002/06, and a/0003/06 may participate in the present appeal by making written submission for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal.

7. In the "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'" of 16 May 2008 (ICC-01/04-01/06-1335; hereinafter: "Decision of 16 May 2008"), the Appeals Chamber explained that there are four criteria that need to be considered in respect of applications by victims for participation in appeals brought under article 82 (1) of the Statute, namely:

(i) whether the individuals seeking participation are victims in the case (ii) whether they have personal interests which are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

8. In the present case, all the criteria for participation are fulfilled. First of all, the Appeals Chamber notes that Pre-Trial Chamber I determined that the three victims were victims in the case against Mr. Lubanga Dyilo in the decision of 28 July 2006 (ICC-01/04-01/06-228). Their status was accepted by the Trial Chamber and the three victims have also participated in the proceedings before the Trial Chamber, including in those concrete proceedings that gave rise to the present appeal (see Impugned Decision, paragraph 55).

9. Secondly, the personal interests of the three victims are affected by the principal issue on appeal, namely whether the proceedings in respect of Mr. Lubanga Dyilo should

be stayed. If the trial in respect of Mr. Lubanga Dyilo does not take place, the victims will not have an opportunity to present their views and concerns in the course of that trial and will be unable to present a claim for reparations against him, should he be convicted. The Appeals Chamber therefore is not persuaded by the argument of Mr. Lubanga Dyilo that the issues on appeal do not relate to the personal interests of the victims; while the arguments on appeal are likely to relate to the obligations of the Prosecutor and the right of Mr. Lubanga Dyilo to a fair trial, the repercussions of the appeal on the personal interests of the three victims are considerable.

10. Thirdly, the Appeals Chamber considers that the participation of the Victims in the present appeal is appropriate, in particular in light of the consequences that the outcome of the present appeal may have.

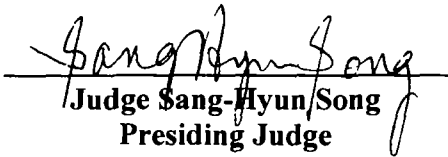
11. Finally, in respect of the manner of participation, the Appeals Chamber recalls paragraph 50 of the Decision of 16 May 2008, where the Appeals Chamber found that:

[I]n ordering the manner of participation of victims to comply with the rights of the Defence to a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.

12. The Appeals Chamber considers that participation of the three victims in the present case in the same manner, i.e. limited to the presentation of their views and concerns respecting their personal interests solely relating to the issues raised by the parties in the appeal, is consistent with the rights of the accused and a fair and impartial trial.

Judge Sang-Hyun Song appends a separate opinion to this decision. The position of Judge Georgios M. Pikis on the issues raised, their resolution and the outcome of the application for participation will be set out in an opinion to be filed shortly.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 6th day of August 2008

At The Hague, The Netherlands

Separate Opinion of Judge Sang-Hyun Song

1. For reasons first expressed in my “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” of 16 May 2008 (ICC-01/04-01/06-1335, pp. 18 to 22), I disagree with the approach of the majority to participation of victims in appeals brought under article 82 (1) (d) of the Statute. In my view, victims a/0001/06, a/0002/06 and a/0003/06 have a right to file a response to the Document in Support of the Appeal pursuant to regulations 64 (4) and 65 (5) of the Regulations of the Court, as they were participants in the proceedings that gave rise to the present appeal.
2. I nevertheless agree with the result of today’s decision of the Appeals Chamber. The three victims have, in my view, a right to file a response; therefore, they are allowed to participate in the appeal.


Judge Sang-Hyun Song

Dated this 6th day of August 2008

At The Hague, The Netherlands