

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-01/04-01/06 OA 12**

Date: **29 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

Dissenting Opinion of Judge Georghios M. Pikis



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

REGISTRY

Registrar

Ms Silvana Arbia



1. Following its order to stay proceedings on the ground that a fair trial could not be held, the Trial Chamber ordered the release of the accused. Thereafter, leave was granted to the Prosecutor to appeal the decision with respect to the following two issues: a) whether the Trial Chamber erred in ordering the release of the accused “based solely on the stay of the proceedings, pending a final determination on the stay of those proceedings”¹, and b) whether the Trial Chamber erred “by ordering, at this stage of the proceedings, the immediate and unconditional release of the Accused”².

2. Stay is not at issue in these proceedings. The order staying the proceedings is challenged by the Prosecutor in another appeal, concurrently under consideration by the Appeals Chamber. The legal representative of three of the four victims seeking participation submitted that their personal interests are affected by the appeal. Their position, as may be summarised, is that the release of the accused is likely to expose their safety to risks, inasmuch as a) some victims have made witness statements to the Prosecutor and their identities have been disclosed to the defence, and b) the release of the accused could change the power relations in the region where they reside, a fact that could put their security in peril. They draw attention to the fact that the Trial Chamber allowed their views and concerns to be voiced on the sub judice issues.

The fourth victim seeking participation, a minor, contends that his personal interests are affected by the appeal, since the release of the accused may generate violence in the region where he resides which may expose his safety to risks, more so as he is not covered by protective measures.

3. The accused contests the right of victims to participate in the appeal proceedings, arguing that they have not disclosed personal interests that might allow them to ventilate their views and concerns. The Prosecutor, on the other hand, agrees, as stated in his response, with the participation of the victims in the proceedings. He brings to notice the

¹ *Prosecutor v Lubanga Dyilo* “Prosecution’s Document in Support of Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’” 10 July 2008 (ICC-01/04-01/06-1429), para 10.

² *Ibid.*



decision of the Appeals Chamber of 13 February 2007³, relevant, in his contention, to the sub judice issues. In that case, the Appeals Chamber sustained the application of victims to participate in an appeal taken by the arrestee against a decision of the Pre-Trial Chamber refusing his interim release.

I. DETERMINATION OF THE APPLICATION

4. Stay brought the proceedings to a “halt,” as the Trial Chamber determined. Release was the direct consequence of the order to stay proceedings owing to the impossibility of holding a fair trial. The justification of this order is the subject of another appeal in which victims also seek participation. In this appeal, the order to stay is not under review. The question arising is whether victims have a personal interest affected by the decision to release the accused, following the finding of the Trial Chamber that a fair trial cannot be held.

5. Article 68 (3) of the Statute confines participation of victims to extant proceedings, in relation to matters incidental thereto. An indication of the nature of the personal interests that victims may invoke to support their participation was given in the decision of the Appeals Chamber of 13 June 2007⁴. A relevant extract from that decision is the following (majority decision): “Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations”⁵. In my separate opinion, I raised the question, “In relation to what can victims express their views and concerns?”⁶, which I answered thus: “Not in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor (article 66 (2) of the Statute)”⁷.

³ *Prosecutor v 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).

⁴ *Prosecutor v Lubanga Dyilo* “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).

⁵ *Ibid.*, para. 28.

⁶ *Ibid.*, separate opinion of Judge Georghios M. Pikis, para. 16.

⁷ *Ibid.*



6. The aforementioned decision of the Appeals Chamber⁸ supports, to my mind, the proposition that victims are not legitimatised to participate in proceedings relating to the propriety of the course of the judicial process.

The framework of the criminal trial is defined in the first place by the presumption of innocence. This presumption can be refuted within the context of a fair trial. In the outcome of a fair trial, or in the outcome of a case in which a fair trial cannot be held, victims have no interest distinct from the public interest that the law should take its course.

7. The implications of stay of proceedings on the liberty of the accused raise a question of law affecting the propriety of the proceedings, the due course of the judicial process. Victims cannot identify an interest separate and distinct from that of the general public as to the course that judicial proceedings should follow. That the judicial process should follow the course ordained by law is a common cause; only the parties to the proceedings have a right to be heard regarding the process warranted by law and its sequel. Victims have no special interest that could justify their participation. In the proceedings before the Appeals Chamber, victims have no valid personal interest that could justify their participation.

8. In my opinion, the applicants have no right to participate in the proceedings, and for that reason, I would dismiss their application.

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



Judge Georghios M. Pikis

Dated this 29th day of August 2008

At The Hague, The Netherlands

⁸ *Prosecutor v Lubanga Dyilo* “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).