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**International
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Court**

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No.: ICC-01/04-01/06 OA 9 and OA 10

Date: 16 May 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO**

Public Document

**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"**



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
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Legal Representatives of Victims

Mr Franck Mulenda
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**The Office of Public Counsel for
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Ms Paolina Massida

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeals of the Prosecutor and the Defence against the decision of Trial Chamber I entitled “Decision on Victims’ Participation” of 18 January 2008 (ICC-01/04-01/06-1119),

Having before it three applications for participation in the appeals comprising documents (ICC-01/04-01/06-1222-tENG), (ICC-01/04-01/06-1228) and (ICC-01/04-01/06-1241-tENG)

Renders , in limine, Judge Song, partly dissenting, the following

DECISION

1. Victims a/0001/06, a/0002/06, and a/0003/06 (ICC-01/04-01/06-1222-tENG) are granted the right to participate in these appeals 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 23 May 2008; the Prosecutor and the Defence may thereafter file their responses by 30 May 2008 to the submissions presented by the aforesaid victims.
2. The applications for participation in the appeals by applicants represented by the OPCV (ICC-01/04-01/06-1228) and victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 (ICC-01/04-01/06-1241-tENG) are rejected.

I. RELEVANT PROCEDURAL HISTORY

1. On 18 January 2008, Trial Chamber I rendered its “Decision on Victims’ Participation” (hereinafter: “Impugned Decision”).

No. : **ICC-01/04-01/06 OA9 and OA10** 3/22



2. On 28 January 2008, the Prosecutor and the Defence sought leave to appeal the Impugned Decision¹.
3. On 26 February 2008, Trial Chamber I granted the applications for leave to appeal in part, certifying for appeal three of the issues for which leave to appeal had been sought.²
4. On 10 March 2008, the Prosecutor and the Defence filed their documents in support of the appeal³. The Prosecution filed its response on 19 March 2008⁴.
5. On 11 March 2008 the Legal Representatives of victims a/0001/06, a/0002/06, and a/0003/06 filed the “Application of Victims a/0001/06, a/0002/06, a/0003/06 to Participate in the Proceedings Relating to the Appeals Taken by the Prosecutor and the Defence against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation” (ICC-01/04-01/06-1222-tENG) (hereinafter: “Application of Victims a/0001/06, a/0002/06, and a/0003/06”).
6. On 18 March 2008 the Office of Public Counsel for Victims (hereinafter: “OPCV”) filed the “Request of the OPCV Acting as Legal Representative of the Applicants in the *Lubanga* Case for Participation in the Interlocutory Appeals Against Trial Chamber I’s Decision dated 18 January 2008” (ICC-01/04-01/06-1228) (hereinafter: “Application by the OPCV”).
7. On 20 March 2008 the Appeals Chamber issued an order directing timelines for the filing of applications for participation in the appeals and responses thereto⁵.

¹ ICC-01/04-01/06-1135 and ICC-01/04-01/06-1136.

² ICC-01/04-01/06-1191. The Defence was granted leave to appeal (1) whether the notion of victim necessarily implies the existence of personal and direct harm. In addition both the Prosecutor and the Defence were granted leave to appeal the issues of (2) whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused; and (3) whether victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of evidence.

³ ICC-01/04-01/06-1219 OA9 and ICC-01/04-01/06-1220-tENG OA10.

⁴ ICC-01/04-01/06-1233 OA10.

⁵ “Order of the Appeals Chamber on the date of filing of applications for participation by victims and on the time of the filing of the responses thereto by the Prosecutor and the Defence” ICC-01/04-01/06-1239 OA9 and OA10.

8. On 21 March 2008, the Legal Representatives of Victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 filed an application to participate in the appeals, pursuant to the Appeals Chamber Order entitled “Application for Participation Filed by Victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 Seeking Leave to Participate in the Appeals Proceedings against the Decision issued on 18 January 2008 by Trial Chamber I” (hereinafter: “Application of Victims a/0009/06, and a/0106/06 to a/0109/06”).

9. On 7 April 2008 the Prosecutor⁶ and the Defence⁷ filed their respective consolidated responses to the applications to participate in the appeals pursuant to the Appeals Chamber Order (hereinafter: the “Prosecutor’s Response” and the “Defence Response” respectively).

II. REASONS FOR THE ORDER OF 20 MARCH 2008

10. On 20 March 2008, the Appeals Chamber issued an order (hereinafter: “Appeals Chamber Order”) directing that applications for participation in the appeals by victims were to be filed by 31 March 2008, and were to: “include a statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.” The Appeals Chamber Order in addition directed the Prosecutor and the Defence to file, by 7 April 2008, pursuant to Rule 89 (1) a consolidated response to the applications which may include submissions on the right of victims to participate in the appeals and the modalities for such participation.

11. The Appeals Chamber Order indicated that the reasons of the majority and the dissent of Judge Song underlying the Order would be given in the decision on victim participation. Those reasons are set out below and the reasons for the dissent by Judge Song are appended to this decision.

⁶ ICC-01/04-01/06-1266. A corrigendum to this response was filed on 8 April 2008 (ICC-01/04-01/06-1266-Corr and ICC-01/04-01/06-1266-Corr-Anx).

⁷ ICC-01/04-01/06-1264-tENG.



12. The Appeals Chamber is mindful that it has not had occasion to rule on the modalities of participation by victims in interlocutory appeals pursuant to article 82 (1) (d) of the Statute until now. The Appeals Chamber recalls that in its judgment of 13 February 2007⁸ in relation to the modalities of participation by victims in an interlocutory appeal pursuant to article 82 (1) (b), it determined that victims shall file an application seeking leave to participate in this type of appeal and that this arises from the wording of article 68 (3) of the Statute. The stipulation in article 68 (3), that victim participation shall be permitted “at stages of the proceedings determined to be appropriate by the Court” mandated a specific determination by the Appeals Chamber that the participation of victims is appropriate in a particular interlocutory appeal under consideration. It follows that an application from victims seeking leave to participate is required in order to enable the Appeals Chamber appropriately to make that determination.⁹ With regard to the timeline for the filing of such applications, the Appeals Chamber has stated that applications by victims wishing to participate in an interlocutory appeal should in principle be made as soon as possible after the appeal is filed.¹⁰

13. The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82 (1) (b) of the Statute to be equally applicable to the instant interlocutory appeals arising under article 82 (1) (d) of the Statute.

14. Accordingly, following the procedure it has established, the Appeals Chamber issued an order in this case, stipulating definitive timelines for the filing of victim applications for participation and the respective responses to these applications by the parties. The issuance of the Appeals Chamber Order, in these circumstances, was a measure designed to facilitate the unimpeded and expeditious conduct of the appeal proceedings.¹¹

⁸ “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’”, ICC-01/04-01/06-824 OA7.

⁹ Ibid. at para. 40

¹⁰ Ibid. at para. 46.

¹¹ See Rule 156(4) of the Rules of Procedure and Evidence, which provides in relation to interlocutory appeals that: “The appeal shall be heard as expeditiously as possible.”



15. The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the constituent documents of the Court, applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

III. REASONS, FOR THE DECISION *IN LIMINE*, ON VICTIM PARTICIPATION IN THE APPEALS OF THE PROSECUTOR AND THE DEFENCE.

A. The Submissions of the Participants

1. *The Applications for Participation*

(a) Application of Victims a/0001/06, a/0002/06 and a/0003/06

16. In support of their application for participation in the appeal the Legal Representatives for the applicants state that they have been authorised to participate in the trial proceedings against Mr Thomas Lubanga Dyilo and as such have a direct and personal interest in participating.¹²

17. More specifically, the Legal Representatives state that: “[t]he appeals seek to limit the rights of the applicants in those proceedings [trial proceedings] in particular, the right acknowledged by the Trial Chamber, to lead evidence and challenge the admissibility or relevance of evidence [...]”.¹³ In addition they state that the arguments advanced by the parties in respect of the first and second issues certified for appeal could well have implications for the rights of the applicants.¹⁴ Hence they have a direct and personal interest in participating in the appeals.¹⁵

18. As for the appropriateness of their participation and any potential prejudice that the manner of their participation may have on the rights of the accused, they argue that “it would be difficult to reconcile a scenario in which victims were not allowed to participate in a proceeding concerning their rights with the principle of a fair trial; such a prohibition

¹² ICC-01/04-01/06-1222-tENG of 11 March 2008.

¹³ Ibid. at para. 1.

¹⁴ Ibid. at para. 2.

¹⁵ Ibid at para. 4.



would constitute a violation of the basic rights of the victims.”¹⁶ In addition they argue that as the Prosecutor and the Defence will have an opportunity to respond to any document they may file, “it is difficult to see how the participation of the applicants could be prejudicial to the rights of the accused.”¹⁷

(b) Application of the OPCV

19. The application of the OPCV is submitted on behalf of unspecified individuals whose applications for victim status are currently under consideration by Trial Chamber I in the case of Mr Thomas Lubanga Dyilo.

20. In relation to the personal interests of the applicants the OPCV contend that their “interest in participating is obvious to the extent that the appeals lodged by the Prosecution and the Defence clearly seek to restrict, in a substantial way, the possibility for Trial Chamber I to grant the status of victims to applicants [...]. Moreover if the Appeals Chamber were to allow the Prosecution’s and the Defence’s appeals, the applicants would, as a result, be deprived of very significant procedural rights flowing from the status which could be granted to them.”¹⁸

21. As for the appropriateness of their participation the OPCV assert that it is appropriate “insofar as the outcome of this proceeding is likely to directly affect the handling of their applications for participation in the proceedings before the Court, as well as the procedural rights attached to the status of victim.”¹⁹

(c) Application of Victims a/0009/06 and a/0106/06 to a/0109/06

22. This application²⁰ is filed on behalf of applicants who have been granted the status of victim and authorised to participate in the proceedings at the investigation stage of the Situation in the Democratic Republic of the Congo (DRC) by virtue of a decision of Pre-Trial Chamber I.²¹ However, the applicants’ application for participation in the trial

¹⁶ Ibid. at para 6.

¹⁷ Ibid at para. 7.

¹⁸ ICC-01/04-01/06-1228 at para. 19.

¹⁹ Ibid. at para. 21.

²⁰ ICC-01/04-01/06-1241-tENG.

²¹ Ibid. at para. 1



proceedings in the case of Mr Thomas Lubanga Dyilo is pending before Trial Chamber I.²²

23. The Legal Representatives argue that the personal interests of the applicants are directly affected by the first two issues on appeal²³ as a determination by the Appeals Chamber on these issues “may be decisive for the decision to be taken on their applications for participation in the Lubanga case.”²⁴ In addition, if allowed to participate in the appeal proceedings the applicants “intend to specifically present their views and concerns with respect to, *inter alia*, the direct or indirect nature of harm and the causal link between the crime and the harm.”²⁵

Furthermore, they argue that their participation is appropriate and without prejudice to the rights of the Defence since the issues on appeal directly impact their status as applicants for participation and since the Prosecutor and Defence will have an opportunity to respond to any document filed by them.²⁶

2. *The Prosecutor's Response*

24. At the outset the Prosecutor acknowledges that aspects of these appeals may affect the personal interests of victims. Therefore the participation of those victims who have been granted the right to participate in the case may be appropriate and not inconsistent with the rights of the Defence or a fair and impartial trial. As such the Prosecutor is not opposed to the participation of **Victims a/0001/06, a/0002/06 and a/0003/06** (referred to in paragraph 16, 17 and 18 above).

25. The Prosecutor opposes the participation in the appeal of applicants who have not been granted participant status in the case as yet. He argues that to permit victims who have not been granted the right to participate to nevertheless express views and concerns

²² *Ibid.* at para.5.

²³ The first two issues certified for appeal by the Trial Chamber being:(a) whether the notion of victim necessarily implies the existence of personal and direct harm, (b) whether the harm alleged by a victim and the concept of “personal interests” under article 68 of the Statute must be linked with the charges against the accused.

²⁴ ICC-01/04-01/06-1241-tENG at para. 5.

²⁵ *Ibid.*

²⁶ *Ibid.* at paras.6 and 7.

under Article 68 (3) is circular and undermines the entire system for managing and facilitating victim participation.²⁷

26. Furthermore, the Prosecutor argues that the system created by the Appeals Chamber for the efficient determination of victim participation in interlocutory appeals is predicated on an existing ruling from a Pre-Trial (or Trial) Chamber that an applicant fulfils the criteria of “victim” pursuant to Rule 85 (a).²⁸

27. In response to the **Application of the OPCV** (referred to in paragraphs 19, 20 and 21 above), the Prosecutor submits that “in addition to his opposition to the participation of applicants who have not been recognised as victims in the relevant case or situation, it would be inappropriate to allow participation of an undefined and unidentified class of individuals”.²⁹ The Prosecutor goes on to argue that the “nature of the participation under Article 68 (3) - the presentation of the victim’s “views and concerns” - reflects the personal nature of the submission, and underscores the need for the victims to be specified.”³⁰

28. Similarly, in response to the **Application of Victims a/0009/06 and a/0106/06 to a/0109/06** (referred to in paragraphs 22 and 23 above), the Prosecutor whilst acknowledging that these applicants have been authorised to participate in the Situation in the DRC, opposes their participation in the appeals. He argues that appeals under Article 82 are derived from and are part of an underlying situation or case, which is under the jurisdiction of a Pre-Trial or Trial Chamber.³¹ Therefore only those applicants who have already been determined by the relevant Chamber to be victims in relation to the situation or case out of which the appeal arose may participate in that appeal. If the Appeals Chamber were to do otherwise it would have to make its own findings as to whether the applicants in question qualify as victims in the context of this case, which

²⁷ ICC-01/04-01/06-1266 at para.18.

²⁸ Ibid.

²⁹ Ibid. at para. 22.

³⁰ Ibid. at para. 23

³¹ Ibid. at para. 28.

would be contrary to the division of responsibilities between the Chambers, as well as to the expeditiousness³² and integrity of the appeal.³³

29. With regard to the modalities of participation should victims be permitted to participate in the appeals, the Prosecutor submits³⁴ that the appropriate modality for the presentation of the victims' views and concerns is for those views and concerns to be: submitted in writing; limited to the specific issues arising in the appeal to the extent that it affects their personal interests; submitted as a single set of views and concerns in respect of all these appeals by each Legal Representative and submitted within a modest timeframe prescribed by the Appeals Chamber given that several victims' applications will be affected by the resolution of the appeal and that the Legal Representatives have had an opportunity to consider the issues and should be in a position to present those views promptly.

3. *The Defence Response*

30. In relation to the **Application of Victims a/0001/06, a/0002/06 and a/0003/06** (referred to in paragraphs 16, 17 and 18 above), the Defence stated that it would not make any observations in response to their application for participation in the appeals.³⁵

31. In response to the **Application of the OPCV** (referred to in paragraphs 19, 20 and 21 above), the Defence argue that the OPCV application is inadmissible in the absence of a decision by the Trial Chamber authorising the applicants represented by the OPCV to participate in the proceedings.³⁶ The combined provisions of rules 89, 91 and 93 of the Rules of Procedure and Evidence indicate that victims cannot submit observations until they have been authorised to participate in the proceedings.³⁷ In addition the Defence

³² With regard to expeditiousness, the Prosecutor cites, at footnote 43, the delay in following the procedure under Rule 89(1) which has proven to be a time and resource intensive process.

³³ As to the "integrity" of the proceedings, the Prosecutor argues, at footnote 44, that in the present appeal, one of the issues for determination is whether in order to be considered a victim in the context of a case, the harm alleged and the personal interests must be linked with the charges against the accused. If the Appeals Chamber were to rule beforehand, on whether an individual was or was not a victim for the purpose of this case, it could be seen as having pre-judged the merits of the appeal.

³⁴ ICC-01/04-488 at paras.34-37.

³⁵ ICC-01/04-01/06-1264-tENG, at para.6.

³⁶ Ibid. at para.12.

³⁷ Ibid. at para. 8.

cites various decisions of the Trial and Pre-Trial Chambers wherein the right to participate by applicants who do not have the status of victim, was refused on grounds that they had no standing even where their interests were directly affected.³⁸

32. With regard to the **Application of Victims a/0009/06 and a/0106/06 to a/0109/06** (referred to in paragraphs 22 and 23 above), the Defence maintains that where applicants have not been admitted to participate in the proceedings against Mr. Thomas Lubanga Dyilo, their application is inadmissible. Further, the Defence points out that these applicants were specifically excluded by Trial Chamber I from participating in the proceedings that led to the Impugned Decision.³⁹

33. As to the modalities of participation where victims are allowed to participate in the appeals, the Defence has made no submissions.

B. The Determination of the Appeals Chamber

34. Article 68 (3) of the Statute provides, in relevant part:

“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

35. The Appeals Chamber recalls that it has previously considered the import of article 68 (3) of the Statute in its Judgement of 13 February 2007⁴⁰ and its Decision of 13 June 2007⁴¹ in which it held, *inter alia*, that “the Appeals Chamber, pursuant to article 68 (3)

³⁸ *Ibid.* at para.9 and 10. The Defence cites the following decisions of the Trial Chamber: ICC-01/04-01/06-1005-Conf, ICC-01/04-01/06-1004 and decision ICC-01/04-164-tENG of the Pre-Trial Chamber.

³⁹ *Ibid.* at para. 15.

⁴⁰ “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’”, (ICC-01/04-01/06-824 OA7).

⁴¹ “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” (ICC-01/04-01/06-925).



is required to determine whether the participation of victims in relation to that particular appeal is appropriate. It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance.”⁴² Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. It is for the Appeals Chamber to ensure that their participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

36. The Appeals Chamber will now proceed to examine each application for participation in these appeals in light of its earlier interpretation of the framework provided by article 68 (3) of the Statute, for granting participation, 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.

1. The first criteria: whether the individuals seeking participation are victims in the case

37. The Appeals Chamber recalls that in its Judgement of 13 February 2007⁴³ at paragraph 45, it decided 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. The Appeals Chamber will adopt the same approach with regard to individuals who have already been granted the status of victim in the case by the Trial Chamber.

⁴² 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*’’, (ICC-01/04-01/06-824 OA7) at paragraph 43.

⁴³ Ibid



38. With respect to the application of victims a/0001/06, a/0002/06 and a/0003/06, the Appeals Chamber notes that their status as victims was first determined by Pre-Trial Chamber I.⁴⁴ Their status as victims in the case was accepted by the Trial Chamber and they were authorised by it to participate in the specific proceedings giving rise to these appeals. Since the status of the victims in the case has been acknowledged to them by the Trial Chamber their status as victims need not be established before the Appeals Chamber. A presumption arises that they do have the status of victims. These victims therefore meet the first criteria under article 68 (3) of the Statute for participation in the appeals.

39. The remaining applicants (those represented by the OPCV and victim's a/0009/06 and a/0106/06 to a/0109/06) do not hold the status of victims in the case. They are currently applicants awaiting the Trial Chamber's determination of their status. Therefore they do not meet the prerequisite for participation in the appeals. In the circumstances, their applications for participation in these appeals are denied pursuant to Rule 89 (2) of the Rules of Procedure and Evidence and the Appeals Chamber will not examine whether they satisfy the remaining three criteria.

40. The Appeals Chamber will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims. With regard to the rejected applications, other factors inhibit the Appeals Chamber from taking the initiative to make such determinations. These include: (i) the fact that their applications for victim status and authorisation to participate in the trial proceedings are *sub judice* before the Trial Chamber, and (ii) no applications have been transmitted to the Appeals Chamber by the Registrar in terms of Rule 89 (1) of the Rules of Procedure and Evidence nor has the Appeals Chamber been provided with any of the information required under Regulation 86 of the Regulations of the Court.

⁴⁴ "Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo" of 31 July 2006, ICC-01/04-177-tENG.



41. The Appeals Chamber will now consider the remaining criteria in relation to victims a/0001/06, a/0002/06 and a/0003/06.

2. *The second criteria: whether they have personal interests which are affected by the issues on appeal*

42. The Appeals Chamber recalls that in its Judgement of 13 June 2007 it stated 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.”⁴⁵

43. The Appeals Chamber finds merit in the argument of victims a/0001/06, a/0002/06 and a/0003/06 that even though they were not directly affected by the first two issues on appeal their personal interests would be affected adversely if the arguments advanced by the Prosecutor and the Defence, in respect of these two issues on appeal succeeds. They have been granted significant substantive and procedural rights in the impugned decision that they risk losing in the event of certain outcomes on appeal. The Appeals Chamber therefore accepts that victims a/0001/06, a/0002/06 and a/0003/06 have personal interests that are affected by the three issues certified for appeal.

44. The first issue, namely, whether the notion of victim necessarily implies the existence of personal and direct harm affects them directly as this criteria was applied by Pre-Trial Chamber I when it determined their status.⁴⁶ This determination of their status by Pre-Trial Chamber I is still subject to review by Trial Chamber I on the basis of impugned rulings as indicated by Trial Chamber I in the Impugned Decision at paragraph 112, which reads:

“The victims who have the opportunity to participate prior to trial by way of written and oral submissions with the leave of the Chamber are those who currently have been allowed to participate by Pre-Trial Chamber I (i.e. victims a/0001/06, a/0002/06 and a/0003/06 and a/0105/06), subject to a review by the

⁴⁵ “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” (ICC-01/04-01/06-925 OA8) at paragraph 28.

⁴⁶ “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo” of 31 July 2006, ICC-01/04-177-tENG.



Chamber of their applications to participate in light of the criteria set out above, and any other victim granted that status hereafter.” (*Footnotes omitted*).

45. The second issue, namely, whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused similarly affects them directly as a consequence of a Trial Chamber review of their status and /or the appellate disposal of the issue.

46. The third issue, namely, whether victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of evidence, directly affects them. The Appeals Chamber is persuaded by the concern of the victims that the appeals seek to limit the rights acknowledged to them by the Trial Chamber, to lead evidence and challenge the admissibility or relevance of evidence.

3. *The third criteria: whether their participation is appropriate*

47. The Appeals Chamber is persuaded that participation by victims a/0001/06, a/0002/06 and a/0003/06 in the appeals at hand is appropriate given their subject-matter and the desirability for the views of victims in appeals of this nature to be heard.

4. *The fourth criteria: that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*

48. In its judgment of 13 February 2007 at paragraph 55, the Appeals Chamber stated that it is for the Chamber to ensure that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

49. As noted above the Prosecutor does not object to the participation of these victims and acknowledges that aspects of these appeals may affect the personal interests of victims and that their participation may be appropriate and not inconsistent with the rights of the Defence or a fair and impartial trial. The Defence did not state an objection



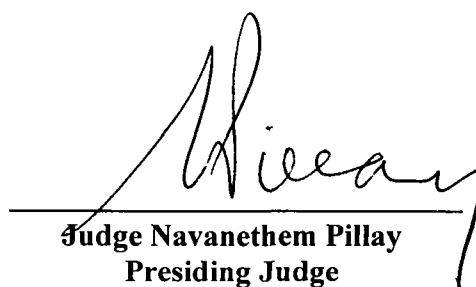
to the participation of these victims and made no arguments that their participation may be inappropriate and inconsistent with their rights or a fair and impartial trial.

50. Accordingly, in 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.

51. For these reasons the applications for participation by victims in these appeals is granted for victims a/0001/06, a/0002/06 and a/0003/06 and rejected in respect of the applicants represented by the OPCV and victims a/0009/06 and a/0106/06 to a/0109/06.

52. Judge Song appends his reasons for his dissenting opinion on the Order of the Appeals Chamber of 20 March 2008 and his separate and partly dissenting opinion to this decision.

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



Judge Navanethem Pillay
Presiding Judge

Dated this 16th day of May 2008

At The Hague, The Netherlands

No. : **ICC-01/04-01/06 OA9 and OA10** 17/22

**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**

1. On 20 March 2008, the Appeals Chamber issued the “Order of the Appeals Chamber on the date of filing of applications for participation by victims and on the time of the filing of the responses thereto by the Prosecutor and the Defence” (ICC-01/04-01/06-1239; hereinafter: “Order of 20 March 2008”), setting a time limit for the filing of applications by victims for participation in the appeals of Mr. Lubanga Dyilo and of the Prosecutor against the “Decision on Victims’ Participation” of Trial Chamber I of 18 January 2008 (ICC-01/04-01/06-1119). Today, the Appeals Chamber renders its decision on the applications for participation that it has received. For the reasons stated below, I have dissented from the Order of 20 March 2008 and I dissent from the decision of today to the extent that it rejects the applications of victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06. I am in agreement, albeit for different reasons, with the decision of today to the extent that it authorises victims a/0001/06, a/0002/06 and a/0003/06 to submit observations and rejects the applications of the persons represented by the Office of Public Counsel for Victims (hereinafter: “OPCV”).

2. The Order of 20 March 2008 and the decision of today are premised on the approach taken in the “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’” of 13 February 2007 (ICC-01/04-01/06-824; hereinafter: “Judgment of 13 February 2007”). In this judgment, the majority of the Appeals Chamber held that victims wishing to participate in an appeal brought under article 82 (1) (b) of the Statute must file an application seeking leave to do so, irrespective of whether these victims have already participated in the proceedings that gave rise to the appeal.

3. I dissented from this approach (ICC-01/04-01/04-824, pp. 55 to 57; hereinafter: “Dissenting Opinion of 13 February 2007”). In my opinion, victims who have participated in the proceedings that gave rise to an appeal under article 82 (1) (b) of the Statute must be considered participants in the meaning of regulation 64 (4) and (5) of the

Regulations of Court. The same considerations apply to appeals brought under article 82 (1) (d) of the Statute.

4. Accordingly, victims who have participated in the proceedings that gave rise to an appeal do not need to file an application in order to participate. Rather, they may file directly a response to the document in support of the appeal. This interpretation is further supported by regulation 86 (8) of the Regulations of the Court, which provides that “[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.” This provision is based on the assumption that decisions regarding the participation of victims shall apply throughout the proceedings, thereby avoiding unnecessary new determinations of the status and participatory rights of victims.

5. As I have explained already in paragraph 7 of my Dissenting Opinion of 13 February 2007:

I note that article 68 (3) of the Statute provides that the *Court* shall permit the participation of victims. The word “Court” does not necessarily refer solely to the Appeals Chamber, acting in a particular interlocutory appeal. In the present context, I read the word “Court” to include the plenary of the Judges of this Court. Pursuant to article 52 (1) of the Statute read with rule 4 of the Rules of Procedure and Evidence, the plenary of the Judges has a mandate to adopt Regulations of the Court “necessary for its routine functioning”. The regulation of the participation of victims when a case moves from one Chamber to another Chamber squarely falls within this mandate. Thus, the plenary of the Judges of this Court, by adopting regulation 64 (4) and (5), determined how victims who have participated in the proceedings that gave rise to the impugned decision may participate appropriately in interlocutory appeals: they may file a response, as may any other participant. The majority ignores this decision of the plenary of the Judges.

6. For the above reasons, the Order of 20 March 2008 was, in my view, superfluous and unnecessarily slowed down the proceedings in the present appeals.

7. Regarding the participation of victims in the present appeal, I note that the decision of today concerns three categories of persons wishing to participate in the proceedings before the Appeals Chamber: victims a/0001/06, a/0002/06 and a/0003/06 have been granted the status of victims in relation to the case of Mr. Lubanga Dyilo by Pre-Trial

Chamber I in its decision of 28 July 2006 (ICC-01/04-01/06-228). In line with rule 89 of the Rules of Procedure and Evidence read with regulation 86 (8) of the Regulations of the Court, these victims have participated in the proceedings before the Trial Chamber, including in the concrete proceedings that gave rise to the present appeals. In my view, these victims are participants in the meaning of regulations 64 (4) and 65 (5) of the Regulations of the Court and should have filed a response to the documents in support of the appeal within the time limit stipulated in regulation 65 (5). However, given that this view is not shared by the majority of the Appeals Chamber, I agree that they should at least be given the opportunity to submit observations, as per the first operative paragraph of the decision of today.

8. In relation to victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06, the situation is different. These victims have been recognised by Pre-Trial Chamber I as victims in the context of the situation in the Democratic Republic of the Congo (see the decision of 24 December 2007, as corrected by the decision of 31 January 2008, ICC-01/04-423-Corr). However, they have not been recognised yet by either the Pre-Trial or the Trial Chamber as victims in the context of the case of Mr. Lubanga Dyilo; an application to that effect has been made to the Trial Chamber (see “Demande de Participation déposées par les victimes a/0009/06, a/0106/06, a/0107/06 et a/0108/06 et tendant à être autorisées de participer à la procédure d’appel de la décision rendu le 18 janvier 2008 par la Chambre de Première Instance I” of 19 March 2008, ICC-01/04-01/06-1241, paragraph 5). These victims have not participated in the proceedings that gave rise to the present appeal and therefore cannot be considered participants in the meaning of regulations 64 (4) and 65 (5) of the Regulations of the Court. Accordingly, they did not have a right to file a response to the documents in support of the appeal.

9. Nevertheless, victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 should be allowed to participate pursuant to the second sentence of rule 93 of the Rules of Procedure and Evidence, which provides that “[i]n addition, a Chamber may seek the views of other victims, as appropriate.”

10. Pursuant to this provision, the Chambers of the Court are vested with the discretionary power to seek the views of victims other than those who are already participating in the proceedings pursuant to rules 89 to 91 of the Rules of Procedure and Evidence.

11. In the present case, it is appropriate to seek the views of victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 because the present appeal affects their personal interests: their applications for participation in the case of Mr. Lubanga Dyilo are still pending before Trial Chamber I. It may be that the Trial Chamber will grant the applications and that the victims will be allowed to participate in that case. Both, the determination of their applications for participation in the case and the eventual scope and modalities of their participation are likely to be directly influenced by the outcome of the present appeals.

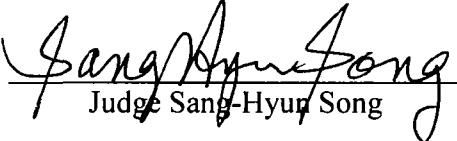
12. The third category concerns persons who are represented by the OPCV. It appears from paragraph 13 of the “Request of the OPCV Acting as Legal Representative of the Applicants in the *Lubanga* Case for Participation in the Interlocutory Appeals Against Trial Chamber I’s Decision dated 18 January 2008” of 18 March 2008 (ICC-01/04-01/06-1228, hereinafter: “OPCV Request”) that these persons have applied to the Trial Chamber to be recognised as victims in the case of Mr. Lubanga Dyilo.

13. As the persons represented by the OPCV have not participated in proceedings before the Trial Chamber that gave rise to the appeal, they do not have a right to participate pursuant to regulations 64 (4) and 65 (5) of the Regulations of the Court by filing a response to the documents in support of the appeal.

14. There also is no room for their participation under the second sentence of rule 93 of the Rules of Procedure and Evidence. Only “victims” may be asked to submit their views under that provision. The OPCV Request does not specify whether a Chamber of the Court has already determined that any of the persons it is representing are victims in the meaning of rule 85 of the Rules of Procedure and Evidence. Failing such information, it must be assumed that no such determination has been made. Given that it must furthermore be assumed that the applications of the persons represented by the OPCV are

currently pending before the Trial Chamber and that the Trial Chamber will have to decide whether or not the persons are victims when it considers the pending applications, it would be inappropriate for the Appeals Chamber to make a determination as to their status. In light of this, it is unnecessary for the purpose of the present decision to explore whether the Appeals Chamber itself could, in appropriate circumstances, determine the victim status of persons, in order to allow their participation under the second sentence of rule 93 of the Rules of Procedure and Evidence in appeals proceedings pursuant to article 82 (1) (d) of the Statute.

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


Judge Sang-Hyun Song

Dated this 16th day of May 2008

At The Hague, The Netherlands

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06 OA 9 and OA 10

Date: 20 May 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

**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"**

Separate 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

Legal Representatives of Victims

Mr Franck Mulenda
Mr Luc Walley
Mr Michael Verhaeghe
Mr Sylvestre BismiwantaKabajira

The Office of Public Counsel for Victims

Ms Paolina Massida

REGISTRY

Registrar

Ms Silvana Arbia



**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"**

Separate Opinion of Judge Pikis

1. I agree with the majority decision¹, subject to the following reservation. Persons whose status as victims has not been acknowledged by the first instance court are not prevented from participating in proceedings on appeal, provided they establish before the Appeals Chamber their status as victims, in addition to demonstrating that their personal interests are affected by the proceedings in which they seek participation. In paragraph 39² and in the opening statement of paragraph 40³ of the majority decision, the position is adopted that persons whose status as victims has not been recognised by the first instance court cannot seek participation in appeals directed against interlocutory decisions.

2. Article 68 (3) does not limit victim participation in the way suggested above. The word "Court," in the context of this provision of the Statute, denotes the Chamber seized of the cause in which participation is sought. The previous decision of the Appeals Chamber of 13 February 2007 supports, to my understanding, the proposition that persons seeking participation in appeal proceedings, in the capacity of victims, are not precluded from moving the Appeals Chamber to participate.⁴ Enlightening about the

¹ *Prosecutor v. 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), [hereinafter referred to as "Majority Decision"].

² See Majority Decision, para. 39: "[The remaining applicants (those represented by the OPCV and victim's a/0009/06 and a/0106/06 to a/0109/06) do not hold the status of victims in the case. They are currently applicants awaiting the Trial Chamber's determination of their status. Therefore they do not meet the prerequisite for participation in the appeals.]".

³ See Majority Decision, para. 40: "[The Appeals Chamber will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims.]".

⁴ See *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), para. 43: "[The Appeals Chamber, pursuant to article 68 (3), is required to



requisites pertaining to victim participation in appeal proceedings is also the subsequent decision of the Appeals Chamber of 13 June 2007.⁵ In a separate opinion in that decision, I adverted to the analysis and interpretation of article 68 (3) in an endeavour to demarcate its ambit, compass and parameters with regard to victim participation in judicial proceedings.⁶

3. It is judicially settled that persons whose status as victims has been acknowledged by the first instance court need not establish that status anew in proceedings before the Appeals Chamber.⁷ This is confirmed by the majority decision, noting that in their case “a presumption arises that they do have the status of victims”⁸. The Appeals Chamber will not inquire, as stated in the majority decision, into their victim status.⁹ Unlike persons whose status as victims has been acknowledged by the first instance court, persons who do not have that status must establish their identity as victims before the Appeals Chamber. The modalities of seeking such participation are prescribed in rule 89 of the Rules of Procedure and Evidence and particularised in regulation 86 of the Regulations of the Court. In this case, the applicants failed to ground their case as victims, a fact that seals the fate of their application. In the majority decision it is underlined that this is an additional or independent reason warranting the dismissal of the

determine whether the participation of victims in relation to that particular appeal is appropriate. It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance. The Pre-Trial Chamber could not, at that stage, have had any mandate which could grant the victim participants the right automatically to participate in any interlocutory appeal that may arise.]”.

⁵ *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 OA8).

⁶ See *Ibid.*, dissenting opinion of Judge Pikis.

⁷ *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).

⁸ See Majority decision, para. 38.

⁹ See Majority Decision, para. 37: “[...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.]”.



application.¹⁰ The application of the OPCV is premised on the assumption that the persons represented are victims, confining their request to propounding that their interests are prejudicially affected by the sub judice decision.¹¹ Sequentially, I associate myself with the dismissal of the application.

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



Judge Georghios M. Pikis

Dated this 20th day of May 2008

At The Hague, The Netherlands

¹⁰ See Majority decision, para. 40: “[...no applications have been transmitted to the Appeals Chamber by the Registrar in terms of Rule 89 (1) of the Rules of Procedure and Evidence nor has the Appeals Chamber been provided with any of the information required under Regulation 86 of the Regulations of the Court.]”.

¹¹ *Prosecutor v. Lubanga Dyilo* “Request of the OPCV Acting as Legal Representative of the Applicants in the *Lubanga* Case for Participation in the Interlocutory Appeals Against Trial Chamber I’s Decision dated 18 January 2008” 18 March 2008 (ICC-01/04-01/06-1228).