

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/07 OA 11

Date: 24 May 2010

THE APPEALS CHAMBER

Before:
Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA AND
MATHIEU NGUDJOLO CHUI**

Public Document

Decision

**on the Participation of Victims in the Appeal of Mr Katanga Against the
“Decision on the Modalities of Victim Participation at Trial”**



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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Fabricio Guariglia

Counsel for the Defence

Mr David Hooper

Mr Andreas O'Shea

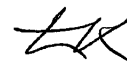
Legal Representatives of Victims

Mr Jean-Louis Gilissen

Mr Fidel Nsita Luvengika

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Katanga against the decision of Trial Chamber II entitled “Decision on the Modalities of Victim Participation at Trial” of 22 January 2010 (ICC-01/04-01/07-1788-tENG),

Having before it the “Joint Application by the Legal Representatives of the Victims to Participate in the Proceedings Pertaining to the Appeal of the Defence for Germain Katanga Against the Decision of 22 January 2010 on the Modalities of Victim Participation at Trial” of 4 May 2010 (ICC-01/04-01/07-2070-tENG),

After deliberation,

Unanimously,

Renders the following

DECISION

- (i) The victims represented by Mr Fidel Nsita Luvengika and by Mr Jean-Louis Gilissen are granted the right to participate in the present appeal 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 submissions by 16h00 on 28 May 2010.
- (ii) Mr Katanga and the Prosecutor may file their responses to the submissions presented by the aforesaid victims by 16h00 on 3 June 2010.

REASONS

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 20 November 2009, Trial Chamber II issued its “Directions for the conduct of the proceedings and testimony in accordance with rule 140”.¹ In its “Decision on the Modalities of Victim Participation at Trial” of 22 January 2010 (hereinafter:

¹ ICC-01/04-01/07-1665; a corrigendum to this decision was filed on 1 December 2009 (ICC-01/04-01/07-1665-Corr).

“Impugned Decision”), the Trial Chamber set out further principles of victim participation during the trial of Mr Katanga and Mr Ngudjolo Chui.²

2. On 1 February 2010, Mr Katanga sought leave to appeal the Impugned Decision,³ which was granted by Trial Chamber II on 19 April 2010.⁴

3. On 4 May 2010, the victims participating in the trial and represented by Mr Fidel Nsita Luvengika and by Mr Jean-Louis Gilissen (hereinafter: “Victims”) filed a joint application to participate in the present appeal (hereinafter: “Joint Application”).⁵ They submit that they have been recognised as victims in the present case.⁶ They further submit that their personal interests are directly affected by the present appeal insofar as it relates to the modalities and the extent of their participation in the ongoing trial.⁷ Moreover, in light of the issues at stake in this appeal, pursuant to article 68 (3) of the Statute and the Appeals Chamber’s ruling on a similar matter in the *Lubanga* case,⁸ they consider their participation to be appropriate.⁹ Lastly, emphasising that they only seek to clarify their position on very specific questions directly related to their rights and noting that the accused will in any event be able to respond to the Victims’ observations, they contend that their participation would not be prejudicial to or inconsistent with the rights of the accused and a fair trial.¹⁰

² ICC-01/04-01/07-1788-tENG.

³ “Defence Request for Leave to Appeal the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond* (ICC-01/04-01/07-1788)”, ICC-01/05-01/07-1815.

⁴ “Decision on the ‘Defence Application for Leave to Appeal the Trial Chamber’s *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*’”, ICC-01/04-01/07-2032.

⁵ “Joint Application by the Legal Representatives of the Victims to Participate in the Proceedings Pertaining to the Appeal of the Defence for Germain Katanga Against the Decision of 22 January 2010 on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-2070-tENG.

⁶ Joint Application, para. 9 (I).

⁷ Joint Application, paras 10-14.

⁸ Joint Application, para. 17. The Victims refer to the *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “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 (OA9 and OA10), (hereinafter: “Appeals Chamber’s Decision *in limine* on Victim Participation”), para. 47.

⁹ Joint Application, paras 15-17.

¹⁰ Joint Application, paras 18-21.

4. On 21 May 2010, Mr Katanga and the Prosecutor filed their respective responses to the Joint Application in which they do not object to the requested participation.¹¹


II. DETERMINATION BY THE APPEALS CHAMBER

5. In its “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, the Appeals Chamber explained that with respect to victims’ participation in appeals brought under article 82 (1) (d) of the Statute, the following four cumulative criteria 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 lastly (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.¹²

6. In the present case, all four criteria for participation are fulfilled. As to the first criterion, the Appeals Chamber notes that the Victims have been granted victim status.¹³ However, the Appeals Chamber also notes that in their Joint Application, the

¹¹ “Defence Observations on the ‘Joint Application by the Legal Representatives of the Victims to Participate in the Proceedings Pertaining to the Appeal of the Defence for Germain Katanga Against the Decision of 22 January 2010 on the Modalities of Victim Participation at Trial’”, ICC-01/04-01/07-2120; “Prosecution Response to the ‘Joint Application by the Legal Representatives of the Victims to Participate in the Proceedings Pertaining to the Appeal of the Defence for Germain Katanga Against the Decision of 22 January 2010 on the Modalities of Victim Participation at Trial’”, ICC-01/04-01/07-2122.

¹² Appeals Chamber’s Decision *in limine* on Victim Participation, para. 36.

¹³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on the Applications for Participation in the Proceedings of Applicants a/0327 to a/0337/07 and a/0001/08”, 2 April 2008, ICC-01/04-01/07-357; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’”, 10 June 2008, ICC-01/04-01/07-579; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on the Application for Participation of Witness 166”, 23 June 2008, ICC-01/04-01/07-632; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure”, 31 July 2009, ICC-01/04-01/07-1347, and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “Corrigendum du dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure”, 5 August 2009, ICC-01/04-01/07-1347-Corr; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure”, 23 September 2009, ICC-01/04-01/07-1491-Red and ICC-01/04-01/07-1491-Conf-Exp-Anx; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure”, 23 November 2009, ICC-01/04-01/07-1669; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, 

Victims have not referred to the relevant decisions granting them such status. The Appeals Chamber considers that such information should be provided in an application for participation.

7. As to their personal interests, the Appeals Chamber recalls 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”.¹⁴ In the present appeal, the Appeals Chamber notes that Mr Katanga challenges the Trial Chamber’s finding that the Victims may present evidence and call victims to testify against the accused, in a manner that includes incriminating evidence and testimony, without disclosing the evidence prior to trial. In addition, Mr Katanga seeks to limit the scope of the Victims’ evidence and to have a general obligation imposed on Victims to disclose all incriminatory and exculpatory information in their possession. The appeal thus directly affects the Victims’ personal interests. Furthermore, the Appeals Chamber considers that the present appeal is a stage of the proceedings in which the participation of the Victims is appropriate.

8. As to the manner of participation, the Appeals Chamber decides that the Victims may participate in the present appeal by making written submissions limited to their views and concerns with respect to their personal interests relating to the issues raised in this appeal. The Appeals Chamber considers that the participation of the Victims in the present appeal, in the manner prescribed, is not inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, Mr Katanga and the Prosecutor will be permitted to reply to the Victims’ views and concerns, in accordance with rule 91 (2) of the Rules of Procedure and Evidence.


Judge Sang-Hyun Song appends a separate opinion in relation to this decision.



“Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure”, 22 December 2009, ICC-01/04-01/07-1737 and ICC-01/04-01/07-1737-Conf-Exp-Anx.

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “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 (OA 8), para. 28.

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



Judge Erkki Kourula
Presiding Judge

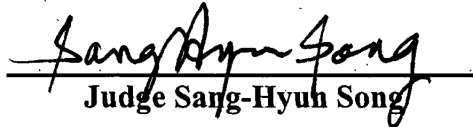
Dated this 24th day of May 2010

At The Hague, The Netherlands

Separate Opinion of Judge Sang-Hyun Song

I agree with the majority of the Appeals Chamber that the two groups of victims who seek to participate in the present appeal should be allowed to make submissions. However, as constantly expressed since my first dissenting opinion of 13 February 2007,¹⁵ I am still of the view that the victims have a right to make their submissions under regulation 65 (5) of the Regulations of the Court because they participated in the proceedings that gave rise to the present appeal. Therefore, in my opinion, there is neither a need for them to apply for participation, nor for the Appeals Chamber to rule on such applications.

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


Judge Sang-Hyun Song

Dated this 24th day of May 2010

At The Hague, The Netherlands

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “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), pp. 55-57. Even though that dissenting opinion related to an appeal brought under article 82 (1) (b) of the Statute, the same considerations apply to appeals brought under article 82 (1) (d) of the Statute; see my separate and partly dissenting opinion of 16 May 2008, Appeals Chamber’s Decision *in limine* on Victim Participation, pp. 18-22, at para. 3.