

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

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

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the release of Thomas Lubanga Dyilo” of Trial Chamber I of 2 July 2008 (ICC-01/04-01/06-1418),

Having before it the “Demande de participation dans la procédure en appel contre la décision sur la mise en liberté de l’accusé” dated 8 July 2008 (ICC-01/04-01/06-1424) and the “Demande de participation du Représentant Légal de la Victime a/105/06 dans la procédure en appel contre la Décision sur la mise en liberté de l’accusé” of 9 July 2008 (ICC-01/04-01/06-1425),

Renders the following

DECISION

- (i) Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 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 2 July 2008, Trial Chamber I rendered the “Decision on the release of Thomas Lubanga Dyilo” (ICC-01/04-01/06-1418; hereinafter: “Impugned Decision”), in which it ordered that Mr. Thomas Lubanga Dyilo be released. The Prosecutor filed the “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’ and

Urgent Application for Suspensive Effect” dated the same day (ICC-01/04-01/06-1419) and on 10 July 2008, he filed the “Prosecution’s Document in Support of Appeal against ‘Decision on the release of Thomas Lubanga Dyilo” (ICC-01/04-01/06-1429; hereinafter “Document in Support of the Appeal”), requesting the Appeals Chamber to “overturn” the Impugned Decision. He raises two grounds of appeal, namely that “the Trial Chamber erred, procedurally, by entertaining the release of the Accused, based solely on the stay of the proceedings, pending a final determination on the stay of the proceedings (‘the First Ground’) and ... [that] [t]he Trial Chamber erred by ordering, at this stage of the proceedings, the immediate and unconditional release of the Accused (‘the Second Ground’)” (Document in Support of the Appeal, paragraph 10).

2. 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 sur la mise en liberté de l’accusé” dated 8 July 2008 (ICC-01/04-01/06-1424; hereinafter: “First 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 appeal because their situation is very insecure, as some of them are still living in the region which used to be under the control of the organisations over which Mr. Lubanga Dyilo continues to have influence, and some victims have agreed to cooperate with the Prosecutor as witnesses and their identities have been communicated to the defence (First Application for Participation, paragraph 3). The release of Mr. Lubanga Dyilo could change the power relations in the region, which could put the three victims’ security in peril (First Application for Participation, paragraph 4). The Legal Representatives recall that the victims had been allowed to express their views and concerns before the Trial Chamber in respect of the proceedings that led to the Impugned Decision and that their participation in the present appeal is particularly important because the Impugned Decision is not about interim release, but about permanent release (First Application for Participation, paragraphs 1 and 2). The Legal Representatives evoke a statement of the Trial Chamber in the Impugned Decision that victims “are entitled to have their views and concerns taken into account on issues of this kind” (quote in First Application for Participation, paragraph 5). It is submitted that

the participation of the three victims in the present appeal would be appropriate and would not be inconsistent with the rights of the accused (First Application for Participation, paragraph 6).

3. On 9 July 2008, the Legal Representative of victim a/0105/06 submitted the “Demande de participation du Représentant Légal de la Victime a/105/06 dans la procédure en appel contre la Décision sur la mise en liberté de l’accusé” (ICC-01/04-01/06-1425; hereinafter: “Second Application for Participation”), requesting to be allowed to present the views and concerns of the victim in the framework of the Prosecutor’s appeal. The Legal Representative submits that the personal interests of the victim are affected by the present appeal because the victim, a minor, is still living in the Ituri region; the release of Mr. Lubanga Dyilo could result in the outbreak of violence between the Hema and the Lendu communities, endangering the security of the victim, in respect of whom no protective measures have been put in place (Second Application for Participation, paragraphs 1 and 2). The Legal Representative submits that participation of the victim in the present appeal would be appropriate and not inconsistent with the rights of the accused (Second Application for Participation, paragraph 3).

4. Mr. Lubanga Dyilo filed the “Réponse de la Défense à la ‘Demande de participation des victimes dans la procédure en appel contre la Décision sur la mise en liberté de l’accusé’ et à la ‘Demande de participation du Représentant Légal de la Victime a/105/06 dans la procédure en appel contre la Décision sur la mise en liberté de l’accusé’” dated 15 July 2008 (ICC-01/04-01/06-1438; hereinafter: “Response by the Defence”). He opposes the applications for participation and requests that they be rejected. He recalls that in previous decisions, the Appeals Chamber had required victims seeking participation in the proceedings to state whether and how their personal interests are affected by the appeal and why their participation would not be inconsistent with the rights of the defence (Response by the Defence, paragraph 9). He submits that the four victims have not specified how their interests are affected by the present appeal (Response by the Defence, paragraph 12), as their submissions only relate to the general security situation in the region in which they are residing (Response by the Defence,

paragraph 10). Mr. Lubanga Dyilo notes that his release could not pose a risk to the four victims, as he is unaware of their identities (Response by the Defence, paragraph 11).

5. On 18 July 2008, the Prosecutor filed the “Prosecution’s Response to Applications by Victims to Participate in the Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’” (ICC-01/04-01/06-1442; hereinafter: “Response by the Prosecutor”). The Prosecutor recalls previous decisions of the Appeals Chamber, in which the Chamber had found that issues arising in appeals relating to the release of the accused person may affect the personal interests of victims, and that their participation in such appeals may be appropriate (Response by the Prosecutor, paragraph 8). He recalls furthermore that the Trial Chamber had stated in the Impugned Decision that the views and concerns of the victims should be taken into account; the Prosecutor states that in the present circumstances, he does not oppose the participation of the four victims (Response by the Prosecutor, paragraphs 9 and 10). He submits that their submissions should be in writing and “limited to the issues arising out of the appeal, and to the extent that they impact on the personal interests of the victims”, a manner of participation that would be consistent with a fair trial and the rights of the accused (Response by the Prosecutor, paragraphs 11 and 12).

II. DETERMINATION BY THE APPEALS CHAMBER

6. For the following reasons, the Appeals Chamber decides that victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 may participate in the present appeal by making written submissions 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 four victims were victims in the case against Mr. Lubanga Dyilo in decisions of 28 July 2006 (ICC-01/04-01/06-228) and of 20 October 2006 (ICC-01/04-01/06-601). Their status was accepted by the Trial Chamber and the four 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, paragraphs 15 et seq.).

9. Secondly, the personal interests of the four victims are affected by the principal issue on appeal, namely whether Mr. Lubanga Dyilo should be released. In the appeal of Mr. Lubanga Dyilo against the “Decision on the Application for the interim release of Thomas Lubanga Dyilo” of Pre-Trial Chamber I of 18 October 2006, the Appeals Chamber allowed victims a/0001/06, a/0002/06 and a/0003/06 to participate in the appeal, considering at paragraph 54 of 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) that:

[T]he personal interests of the victims were affected by the circumstances of the current case, having regard to the nature of the appeal itself and paragraphs 11 to 15 of the Victims’ Response to the Request for Interim Release that had been filed before the Pre-Trial Chamber.

10. The concerns raised in paragraphs 11 to 15 of the “Victims’ Response to the Request for Interim Release” related *inter alia* to the consequences of a release of Mr. Lubanga Dyilo for the security of the three victims, matters that are similar to the concerns raised in the applications presently before the Appeals Chamber. The Appeals Chamber therefore is not persuaded by the arguments of Mr. Lubanga Dyilo that the submissions of the four victims only refer generally to the security situation in their region and fail to specify how their interests are affected.

11. 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.


12. 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.

13. The Appeals Chamber considers that participation of the four 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 Georghios M. Pikis on the issues raised, their resolution and the outcome of the applications for participation will be set out in an opinion to be filed shortly.

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

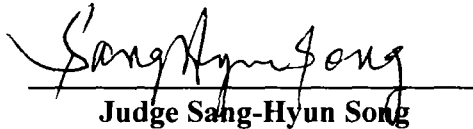

Judge Sang-Hyun Song
Presiding Judge

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 “Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims” of 13 February 2007 (ICC-01/04-01/06-824, pp. 55 to 57), I disagree with the approach of the majority to participation of victims in appeals brought under article 82 (1) (b) of the Statute. In my view, victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 have a right to file a response to the Document in Support of the Appeal pursuant to regulation 64 (4) 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 four 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