

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

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**

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**Registrar**

Ms Silvana Arbia



1. On 13 June 2008, Trial Chamber I ordered the stay of criminal proceedings against the accused, bringing to a halt his trial for the crimes under the Statute for which he was indicted. The Trial Chamber ordered stay because “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial”<sup>1</sup>. In coming to its decision, guidance was derived, *inter alia*, from the decision of the Appeals Chamber of 14 December 2006<sup>2</sup>, the following passage in particular:

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: “to see to the protection of individual fundamental rights which is the particular territory of the courts [...]” Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.<sup>3</sup>

The Trial Chamber did not resolve other issues posed before it, considering that stay rendered them redundant, adding, “However, if the stay on the proceedings is lifted hereafter, at that stage these matters will be resolved”.<sup>4</sup> Such issues might, as the Trial Chamber says, become live only if stay is lifted.

2. On 2 July, the Trial Chamber granted the Prosecutor leave to appeal the decision to stay the proceedings on the following issues:

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<sup>1</sup> *Prosecutor v Lubanga Dyilo* “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” 13 June 2008 (ICC-01/04-01/06-1401), para. 93.

<sup>2</sup> *Prosecutor v Lubanga Dyilo* “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006” 14 December 2006 (ICC-01/04-01/06-772), para. 39.

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid.*, para. 97.



a. Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in 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".

b. Whether 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.<sup>5</sup>

In the submission of the Prosecutor, the decision of the Trial Chamber on the issues raised is fraught with errors that vitiate the order made, meriting its reversal on appeal.

3. Following the lodgement of the appeal, wherein the errors allegedly faulting the sub judice decision are articulated, the legal representatives of victims requested the leave of the Appeals Chamber to participate in the appeal proceedings, claiming legitimisation to do so on account of the affection of their personal interests. Such interests derive from the implications that stay may have on a contingent claim to reparations against the accused, adding that their participation will in no way be prejudicial to his rights.

4. The claim of victims to participate is opposed by the defendant, respondent to the appeal, because of failure on their part to identify a personal interest affected by the proceedings in hand. Moreover, such a course would, as submitted, be prejudicial to and inconsistent with the rights of the accused. The appeal, as suggested, concerns solely the right of the accused to a fair trial and the consequences of failure to ensure such a trial.

5. The Prosecutor supports the application of the victims. Their personal interests, he contends, are affected by the proceedings, a position that finds support in the judgment of

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<sup>5</sup> *Prosecutor v Lubanga Dyilo* "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'" 2 July 2008 (ICC-01/04-01/06-1417), para. 32.

the Appeals Chamber of 13 February 2007<sup>6</sup>. The appeal in that case was directed against the decision of the Pre-Trial Chamber denying the application of the arrestee for interim release<sup>7</sup>. As can be gathered from the judgment in the above case, the risks to which victims would be exposed by the interim release of the person arrested provided the *raison d'être* for their participation, limited, as stressed, to voicing their views and concerns as to the consequences that release might have on the victims. The fairness of the proceedings was not at issue in the above case. The subject of the proceedings related to the implications of the release of a person against whom there were, according to a judicial decision, reasonable grounds to believe that he committed a crime within the jurisdiction of the Court. The proceedings in that case were in progress.

At issue in these proceedings is the soundness of the decision to stay the proceedings on the ground that a fair trial could not be held.

6. The requisites for victim participation in appeal proceedings and the course such participation may take were addressed, in addition to the aforesaid case, in two other decisions of the Appeals Chamber, those of 13 June 2007<sup>8</sup> and 16 May 2008<sup>9</sup>.

#### I. DETERMINATION OF THE APPLICATION

7. The crucial question is whether the personal interests of the victims are affected by the present proceedings; put another way, whether victims have a legitimate interest to participate. The proceedings were, to use the wording of the Trial Chamber, "halted" because a fair trial was impossible owing to breach of the rights of the accused safeguarded by the Statute. Article 67 (2) assures to the accused the right to be informed of exculpatory evidence in the hands of the Prosecutor, and binds the latter to disclose

<sup>6</sup> *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).

<sup>7</sup> *Prosecutor v Lubanga Dyilo* "Decision on the Application for the interim release of Thomas Lubanga Dyilo" 18 October 2006 (ICC-01/04-01/06-586-tEN).

<sup>8</sup> *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 Decisions of the Appeals Chamber' of 2 February 2007" 13 June 2007 (ICC-01/04-01/06-925).

<sup>9</sup> *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-01/04-01/06-1335).

such evidence to him. Failure on the part of the Prosecutor to make disclosure of such evidence, be it due to the conditions under which the evidence was received (article 54 (3) (f) of the Statute), made a fair trial impossible, as the Chamber held, so the proceedings were halted. The question on appeal is whether the holding of a fair trial had been made impossible in the circumstances of the case, especially by the failure or inability of the Prosecutor to disclose to the accused exculpatory evidence in his possession. Do victims have a personal interest in the matter of the fairness of the proceedings?

8. The right of a victim to participate presupposes the existence of pending proceedings, conducted according to the norms of a fair trial, the only premise upon which the verdict of the court can be founded. The right to reparations against the accused is contingent upon conviction resulting from a fair trial.

The Court is the guardian of the fairness of the judicial process, dependent in large measure upon the discharge of the investigatory and prosecutorial duties of the Prosecutor, upon whom the burden of proof lies (article 66 (2) of the Statute). The rights of the person under investigation and those of the accused, along with their sustenance, are vital components of a fair trial. The accused is entitled to assert his rights at the trial and confront his adversary, the Prosecutor, with breaches of them. In my partly dissenting opinion of 11 July 2008 in “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”<sup>10</sup>, the following was said: “The Prosecutor is the only authority the accused has to confront in relation to the charges. The two sides are locked into a conflict upon the denial of the charges by the accused”<sup>11</sup>. Further down, it was stated: “A fair trial entails an adversarial hearing, warranted, *inter alia*, by the rights of the accused, the sustenance of which is an inseparable element of a fair trial”<sup>12</sup>. In his partly dissenting opinion in the same case, Judge Kirsch states, “First, this conclusion results in the accused being faced by one Prosecutor, in accordance with the scheme of the Statute, rather than, potentially,

<sup>10</sup> *Prosecutor v Lubanga Dyilo* “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” 11 July 2008 (ICC-01/04-01/06-1432).

<sup>11</sup> *Ibid.*, para. 12.

<sup>12</sup> *Ibid.*, para. 13.

multiple accusers. Significant in this context are the provisions of article 66 (2) of the Statute, making it clear that it is the Prosecutor who bears the onus of proving guilt at the trial, entailing the related responsibility to lead evidence as to guilt or innocence at trial”<sup>13</sup>.

Victims, as well as the public at large, have a common interest in the holding of a fair trial. A fair trial entails an adversarial hearing, confining participation in the determination of the presence or absence of the requisites of a fair trial to the adversaries in the cause, the parties to the proceedings. Victim participation in the proceedings is incidental to the efficacy of the proceedings and not supplementary thereto.

9. In its decision of 13 June 2007<sup>14</sup>, the Appeals Chamber held that victims had no legitimate ground to participate in the determination of the admissibility of an appeal directed against a decision of the Pre-Trial Chamber to confirm the charges. As the Appeals Chamber pointed out in the majority decision, “Even when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”<sup>15</sup>. In my separate opinion, I debated at length the implications of victim participation in proceedings before the court. In answer to the question, “In relation to what can victims express their views and concerns,”<sup>16</sup> I gave the following answer: “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). Provision is made in the Statute (article 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject-matter of the proceedings. That the judicial process

<sup>13</sup> *Prosecutor v Lubanga Dyilo* “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Partly Dissenting Opinion of Judge Philippe Kirsch” 23 July 2008 (ICC-01/04-01/06-1432-Anx) para. 24.

<sup>14</sup> *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 Decisions of the Appeals Chamber’ of 2 February 2007” 13 June 2007 (ICC-01/04-01/06-925).

<sup>15</sup> *Ibid.*, para. 28.

<sup>16</sup> *Ibid.*, para. 16.



should follow its ordained course is a cause common to all; its sustenance is the responsibility of the Court, the guardian of the judicial process. It is not the victims' domain either to reinforce the prosecution or dispute the defence"<sup>17</sup>.

To my mind, victims can have no say in a matter relating to the proper conduct of the proceedings. In the above case, the issue was whether the appeal was legally acceptable. The Appeals Chamber held that victims could not validly claim a personal interest to be heard in the matter.

10. In conclusion, the very participation of victims is dependent on the existence of viable proceedings. It is within that context that they may voice their views and concerns incidental to the subject-matter of the proceedings. Viable proceedings are proceedings conforming to the norms of a fair trial. The duty to disclose evidence to the accused falls on the shoulders of the Prosecutor, the only party other than the accused with a right to be heard in relation to its discharge and the consequences that failure to disclose may entail. There is equality of arms between the two parties to the proceedings. Acknowledging an interest individuating to victims in relation to the holding of a fair trial would equate them with a party to the cause, which they are not. The holding of a fair trial is a prerequisite for the participation of victims, the only context within which victims may voice their views and concerns respecting personal interests affected by the proceedings.

11. For the aforesaid reasons, I would dismiss the application of the victims to participate in the pending appeal proceedings.

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



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**Judge Georghios M. Pikis**

Dated this 29<sup>th</sup> day of August 2008

At The Hague, The Netherlands

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<sup>17</sup> *Ibid.*, para. 16.