

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

A handwritten signature in black ink, consisting of a stylized, cursive letter 'S' followed by a horizontal line extending to the right.

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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 “D cision sur la demande de mise en libert  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).