

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06 OA9 OA10

Date: 22 May 2008

THE APPEALS CHAMBER

Before:
Judge Navanethem Pillay, Presiding Judge
Judge Philippe Kirsch
Judge Georgios 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 on the requests of the Prosecutor and the Defence for suspensive effect of the
appeals against Trial Chamber I's Decision on Victim's Participation of 18 January
2008**

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 Mabile
Mr Jean-Marie Biju-Duval

Legal Representatives of the Victims

Mr Franck Mulenda
Mr Luc Walley

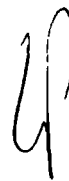
The Office of Public Counsel for Victims

Ms Paolina Massidda

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 the “Prosecutor’s Document in Support of Appeal against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation” (ICC-01/04-01/06-1219 OA9, hereinafter: “Prosecutor’s Document in Support of the Appeal”) of 10 March 2008, and the “Defence Appeal Against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation” (ICC-01/04-01/06-1220-tENG, hereinafter: “Defence Document in Support of the Appeal”) of 10 March 2008, in which requests for suspensive effect of the appeals are made, and

The “Request of the OPCV [“Office of Public Counsel for Victims”] 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: “Request of the OPCV”) in which the OPCV request leave to be heard on the applications for suspensive effect of the appeals (Request of the OPCV, page 11, last paragraph).

Renders the following

DECISION

1. The request of the Prosecutor and the Defence for suspensive effect of the appeals is granted in respect of the decisions made in the following paragraphs of Trial Chamber I’s “Decision on Victim Participation” of 18 January 2008:
 - (a) Paragraph 91 which gives rise to the first issue on appeal;
 - (b) Paragraphs 93, 95 and 96 which give rise to the second issue on appeal; and
 - (c) Paragraphs 108 and 109 which give rise to the third issue on appeal.



2. The Request of the OPCV to be heard on the applications of the Prosecutor and the Defence for suspensive effect of the appeals is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 18 January 2008, Trial Chamber I rendered its “Decision on Victims’ Participation” (hereinafter: “Impugned Decision”) in which it issued decisions on the role of victims in the proceedings leading up to and during the trial and issued eight specific orders¹ relating to the preparation of victims’ participation in the trial of Mr Lubanga Dyilo. The Trial Chamber stated at paragraph 84 that the Impugned Decision was intended to “provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings”.

2. On 28 January 2008, the Defence² and the Prosecutor³ sought leave to appeal the Impugned Decision. On 26 February 2008 the Trial Chamber granted leave to appeal (hereinafter: “Decision Granting Leave to Appeal”)⁴ on three issues, which the Chamber identified as follows: “(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; (c) whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.”⁵

¹ ICC-01/04-01/06-1119, paragraph 138.

² ICC-01/04-01/06-1135.

³ ICC-01/04-01/06-1136.

⁴ ICC-01/04-01/06-1191.

⁵ Ibid at paragraph. 54.

3. On 10 March 2008 the Prosecutor⁶ and the Defence⁷ filed their respective Documents in Support of the Appeal, in which they made requests for suspensive effect of the appeals.

II. REQUEST OF THE OPCV FOR LEAVE TO BE HEARD ON THE REQUESTS FOR SUSPENSIVE EFFECT

4. On 18 March 2008, the Request of the OPCV was filed which included a request for leave to be heard on the applications for suspensive effect. The Request of the OPCV on behalf of unspecified applicants for participation in the appellate proceedings at hand was rejected by the Appeals Chamber in its “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation” of 16 May 2008 (ICC-01/04-01/06-1335). Accordingly, and for the reason set out in that decision, namely, that they are not victims in the case of Mr Lubanga Dyilo, the request for participation by these applicants for participation in the applications of the Prosecutor and the Defence for suspensive effect of the appeals is rejected.

III. SUBMISSIONS OF THE PARTIES ON SUSPENSIVE EFFECT

A. The Prosecutor’s Request

5. At paragraph 8 of the Prosecutor’s Document in Support of the Appeal he requests the Appeals Chamber to grant suspensive effect to his appeal under article 82(3) and rule 156 (5) and states that: “[t]his request is strictly confined to those aspects of the Decision which are included in the Prosecution’s grounds of appeal.”⁸ In a footnote he adds “[i]n particular the orders of the Trial Chamber contained at points (b), (d) and (e) of para. 138 of the Decision.”

6. In support of his request the Prosecutor submits that “[i]mplementation of the disputed terms of the [Impugned] Decision will be onerous, and demand time and resources for the

⁶ ICC-01/04-01/06-1219 OA9

⁷ ICC-01/04-01/06-1220tENG OA10

⁸ ICC-01/04-01-06-1219 at paragraph 8.



parties as well as for the Trial Chamber, which will be unnecessary if this appeal succeeds. In particular, the Trial Chamber should refrain from making any new determinations of victim participation based on its impugned rulings and/or to allow any presentation of evidence, even in a preliminary fashion, by those victims which have been granted participant status.”⁹

B. The Defence Request

7. At page 15 of the Defence Document in Support of the Appeal, the Defence requests that the Appeals Chamber order “an immediate stay of the proceedings for the duration of the appeal”. In support of the request the Defence submits that “[t]he [Impugned] decision has a significant impact on the fair and efficient conduct of the proceedings. The Trial Chamber’s definition of the concept of victims, which allows for participation in the proceedings of a large number of persons with no link to the charges confirmed by the Pre-Trial Chamber, jeopardizes the fairness and expeditiousness of the trial.”¹⁰

8. In addition the Defence submit that given the importance of the issues raised on appeal and, more specifically, the impact they will have on the conduct of the trial, were the trial to commence on the basis of unfair rules, the Defence would find itself in a situation which might be impossible to remedy, even if its appeal were to be allowed by the Appeals Chamber.¹¹

III. DETERMINATION BY THE APPEALS CHAMBER

9. Article 82 (3) of the Statute provides that an appeal shall not have suspensive effect “unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence”. Rule 156 (5) of the Rules of Procedure and Evidence provides that “[w]hen filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.”

⁹ Ibid. at paragraph 8.

¹⁰ ICC-01/04-01/06-1220tENG OA10 at paragraph 12.

¹¹ Ibid. at paragraphs 52 and 53.



10. As neither article 82 (3) of the Statute nor rule 156 (5) of the Rules of Procedure and Evidence stipulate in which circumstances suspensive effect should be ordered, this decision is left to the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances.

11. As stated above, the Impugned Decision contains various determinations on victims' participation and an eight-part order set out in paragraph 138. In the determinations that are set out in the body of the Impugned Decision, the Trial Chamber established by way of guidelines which criteria it would apply to applications by victims to participate (Impugned Decision, paragraphs 86 to 100), the modalities of participation of victims (Impugned Decision, paragraphs 101 to 122), how common legal representatives for victims would be used (Impugned Decision, paragraphs 123 to 126), and which protective and special measures might be taken in respect of victims (Impugned Decision, paragraphs 127 to 131).

12. In the Decision Granting Leave to Appeal, the Trial Chamber, in order to grant leave pursuant to article 82 (1) (d) of the Statute, identified the appealable issues relating to the determinations made in the body of the Impugned Decision, and not to the orders contained in paragraph 138 of the Impugned Decision.

13. In these circumstances, the Appeals Chamber considers that the decisions that give rise to the issues identified for appeal are the subject-matter relevant for its consideration of the requests for suspensive effect and not the eight-part order.

14. In its consideration of the requests of the Prosecutor and the Defence for suspensive effect the Appeals Chamber will focus on the issues certified for appeal and whether the decisions giving rise to them require suspension pending the resolution of the proceedings on appeal. At this stage the Appeals Chamber will not make any determinations on the merits of the appeals.



(a) First issue: Whether the notion of victim necessarily implies the existence of personal and direct harm

15. In relation to the first issue, Trial Chamber I determined that:

“In relation to the link between the harm allegedly suffered and the crime, whereas Rule 85(b) of the Rules provides that legal persons must have ‘sustained direct harm’, Rule 85(a) of the Rules does not include that stipulation for natural persons, and applying a purposive interpretation, it follows that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.” (Impugned Decision, paragraph 91)

16. This ruling of Trial Chamber I involving the first issue on appeal, if implemented, would have the effect of permitting the participation of victims who themselves have not suffered direct harm as a result of crimes within the jurisdiction of the Court. As correctly acknowledged by Trial Chamber I in its Decision Granting Leave, “permitting victims who suffered indirect harm to participate may significantly affect the number of victims who are involved in the case and the issues that will fall to be canvassed during the proceedings.”¹²

(b) Second Issue: 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

17. In relation to the second issue, Trial Chamber I determined that:

“Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework.” (Impugned Decision, paragraph 93); and

“[A] victim of any crime falling within the jurisdiction of the court can potentially participate. However, self-evidently, it would not be meaningful or in the interests

¹² ICC-01/04-01/06-1191 at paragraph 27.



of justice for all such victims to be permitted to participate as victims in the case against Mr Thomas Lubanga Dyilo, given that the evidence and the issues falling for examination in the case (which will be dependent on the charges he faces) will frequently be wholly unrelated to the crimes that caused harm to victims coming from this very wide category. Article 68 (3) of the Statute is clear in its terms: [...]. Applying that essential requirement, the interests of many victims even of the Situation in the Democratic Republic of the Congo will be unrelated to the substance of the present case (the issues and the evidence), and in consequence granting participation rights to them would not serve any useful purpose. The critical question is whether either of the following is established by the contents of the standard application form, supported by the report to the Chamber of the Registry's Victims Participation and Reparations Section:

(i) Is there a real evidential link between the victim and the evidence which the Court will be considering during Mr Thomas Lubanga Dyilo's trial [...], leading to the conclusion that the victim's personal interests are affected? or

(ii) Is the victim affected by an issue arising during Mr Thomas Lubanga Dyilo's trial because his or her personal interests are in a real sense engaged by it?" (Impugned Decision, paragraph 95); and

"Following an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings, thereafter in order to participate at any specific stage in the proceedings [...] a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek." (Impugned Decision, paragraph 96).

18. The identification of the requisites for participation in proceedings before the Trial Chamber as set out above do not correlate the personal interests of the victims to the charges raised against the accused. Whether personal interests should be correlated to the charges is a very important issue and one which is the subject of the second issue on



appeal. In the absence of a direct link between personal interests and the charges against the accused, the class of victims who may participate would be greatly expanded.

19. The Appeals Chamber notes that, in relation to both the first and second issues on appeal, the participation of victims based on the impugned determinations could lead to the Trial Chamber considering additional material in the trial with resulting effects on the fairness and expeditiousness of the trial and the outcome. In addition, implementation of these determinations could result in the rendering of decisions on the status of victims that may be premised on incorrect assumptions, forcing the parties to seek leave to appeal these decisions. The parties echo these concerns when they seek suspensive effect in relation to Trial Chamber I making any new determinations of victim participation based on its Impugned Decision.

20. The Appeals Chamber is of the view that resolution of these issues on appeal would be of crucial importance for the identification of victims with a right to participate in the trial proceedings. The Appeals Chamber concludes that suspension of the impugned rulings found in paragraphs 91, 93, 95 and 96 is justified.

(c) Third Issue: Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.

21. In relation to the third issue, Trial Chamber I at paragraphs 108 to 109 of the Impugned Decision determined that:

“The right to introduce evidence during trials before the court is not limited to the parties, [...]. Victims participating in proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has ‘requested’ the evidence.” (Impugned Decision, paragraph 108).

“In appropriate circumstances and following an application victims will be allowed to challenge the admissibility or relevance of evidence when their interests are engaged.” (Impugned Decision, paragraph 109).



22. The Appeals Chamber notes the concern raised by the Defence in relation to the presentation of evidence by those victims who have been granted participant status under the disputed criteria. The Defence argues that there will be irreversible outcomes because their rights will be affected in ways that cannot be remedied. The Appeals Chamber agrees that such a development may conceivably arise were Trial Chamber I to view additional material or hear evidence introduced by participants who, in the event of a successful appeal, no longer have the status of victim nor the right to lead and challenge the admissibility of evidence.

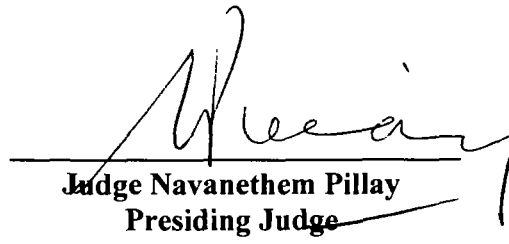
23. The ruling in paragraphs 108 to 109 of the Impugned Decision purports to interpret the right of victims to “present their views and concerns” pursuant to article 68 (3) to include the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence. This ruling is important in so far as it hinges on an interpretation of article 68 (3) which if reversed on appeal, would have far reaching consequences on the fairness of the proceedings and the rights of the accused. Implementation of these impugned determinations prior to the issuance of the judgment on appeal could mean that the trial might commence on the basis of an incorrect legal framework. The consequences would be very difficult to correct and may be irreversible. The Appeals Chamber finds that suspension of this ruling is therefore warranted.

24. In order to safeguard against such consequences the Appeals Chamber orders suspension of the impugned decision, to the extent that it is affected by the issues on appeal.

25. With regard to the Defence request for a stay of proceedings before the Trial Chamber pending the outcome of the appeal, the Appeals Chamber deems article 82(3) to permit suspension of a decision which is the subject of an appeal. In the present circumstances the suspension of certain impugned rulings within the Impugned Decision does not by implication necessitate the suspension of all the proceedings before the Trial Chamber.



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



Judge Navanethem Pillay
Presiding Judge

Dated this 22nd day of May 2008

At The Hague, The Netherlands