

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 18 June 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 DARFUR, SUDAN

Public Document

Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007



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

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

Legal Representatives of the Victims

Ms Wanda M. Akin
Mr Raymond M. Brown

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda, Principal Counsel

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of Public Counsel for the Defence (hereinafter: "OPCD") against the decision of Pre-Trial Chamber I entitled "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86 (2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" of 3 December 2007 (ICC-02/05-110), and

In the appeal of the Prosecutor and the OPCD against the decision of Pre-Trial Chamber I entitled "Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07" of 6 December 2007 (ICC-02/05-111).

Having before it an application for participation in all three appeals entitled "Request of the Legal Representative of Victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 to Participate in the Interlocutory Appeals of the Office of the Prosecutor and the Office of Public Counsel for the Defence" (ICC-02/05-134)

Renders, Judge Song partly dissenting, the following

DECISION

1. Victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 are granted the right to participate in these appeals 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 25 June 2008; the Prosecutor and the OPCD may thereafter file their responses by 03 July 2008 to the submissions presented by the aforesaid victims.



2. The applications for participation in the appeals by applicants a/0014/06, a/0021/07, a/0028/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07 a/0035/07, a/0025/07 and a/0027/07 are rejected.

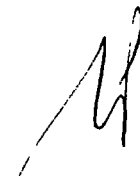
I. RELEVANT PROCEDURAL HISTORY

1. On 23 July 2007, the Single Judge of Pre-Trial Chamber I issued a decision¹ authorizing the Prosecutor and the OPCD to file their observations on the applications of a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings in the Situation in Darfur, Sudan.
2. On 21 August 2007, the OPCD filed its “Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86 (2) (e)”² in which the OPCD requested the Single Judge to order the legal representatives of the applicants to provide supporting documentation concerning various matters pursuant to Regulation 86 (2) (e) of the Regulations of the Court (hereinafter: “Regulations”).
3. On 24 August 2007, the OPCD filed its “Request for the Single Judge to order the Prosecutor to disclose exculpatory materials”³ in which the OPCD requests the Single Judge to order the Prosecutor to search for and disclose to the OPCD material falling within the ambit of article 67 (2) of the Statute.
4. On 3 December 2007, the Single Judge of Pre-Trial Chamber I rendered her “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86 (2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (hereinafter: “Decision of 3 December 2007”), in which both the requests of the OPCD were rejected.

¹ “Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings” (ICC-02/05-85).

² ICC-02/05-94-Conf.

³ ICC-02/05-97



5. On 10 December 2007 the OPCD sought leave to appeal the Decision of 3 December 2007⁴ which Pre-Trial Chamber I granted on 23 January 2008, with regard to a single overarching issue.⁵

6. On 4 February 2008, the OPCD filed its document in support of the appeal⁶ and the Prosecutor filed his response on 15 February 2008.⁷

7. On 13 February 2008, the Office of Public Counsel for Victims ("OPCV"), under the instruction of the legal representatives of applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, filed a "Request of the Legal Representatives for Clarifications on Victims' Participation in the Interlocutory Appeal filed by the OPCD under article 81(2) (d) of the Rome Statute"⁸ (hereinafter: "Request of the OPCV"). The Request of the OPCV concerned, inter alia, clarification from the Appeals Chamber on the procedure to be followed by victims already authorised to participate and those whose applications were still pending before Pre-Trial Chamber I, in the situation in Darfur, Sudan, to participate in the appeal lodged by the OPCD.

8. On 15 February 2008, the legal representatives of applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 filed the "Response of Legal Representatives of Victims to the OPCD appeal brief on the 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86 (2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor' and Alternative Request for Permission to Participate in the Appeal"⁹ (hereinafter: "Response of the Legal Representatives"), in which the legal representatives make full submissions on the merits

⁴ ICC-02/05-112.

⁵ ICC-02/05-118. The issue certified for appeal at page 8 of this decision reads: "[W]hether article 68 (3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or (ii) if not, how applications for participation at the investigative stage of a situation and the pre-trial stage of a case must be dealt with."

⁶ ICC-02/05-119.

⁷ ICC-02/05-123.

⁸ ICC-02/05-123.

⁹ ICC-02/05-124.



of the OPCD appeal and request, in the alternative, that the Appeals Chamber issue an order scheduling a time limit for applications for participation to be filed pursuant to the provisions of article 68 (3) of the Statute in the event that it declines to consider the merits of the legal representatives response.

9. On 29 February 2008, the Appeals Chamber issued a decision and an order in the appeal of the OPCD against the Impugned Decision of 3 December 2007 entitled “Decision of the Appeals Chamber on the OPCV’s request for clarification and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor” (hereinafter: “Decision of 29 February 2008”).¹⁰ Herein the request of the OPCV for clarifications was dismissed and the Response of the Legal Representatives was rejected. The Appeals Chamber further ordered that applications for participation in the appeal be filed by 10 March 2008 and that the OPCD and the Prosecutor may thereafter, by 20 March 2008 file a consolidated response to all applications received.

10. On 6 December 2007 the Single Judge of Pre-Trial Chamber I issued the “Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07” (hereinafter: “Decision of 6 December 2007”).¹¹ In this decision the Single Judge granted, inter alia, the procedural status of victim to Applicants a/0011/06, a/0012/06, a/0013/06 and a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, and a/0038/07 in the Situation in Darfur.¹²

11. On 12 December 2007 both the Prosecutor and the OPCD applied for leave to appeal the Decision of 6 December 2007.¹³ On 6 February 2008, Pre-Trial Chamber I granted leave to appeal on two issues.¹⁴

¹⁰ ICC-02/05-129 OA.

¹¹ A corrigendum to this decision was filed on 14 December 2007 (ICC-02/05- 111-Corr).

¹² Ibid. Page 23.

¹³ ICC-02/05-113 and ICC-02/05-114.

¹⁴ ICC-02/05-121. The Prosecutor sought and was granted leave to appeal the issue of “whether a ‘procedural status of victim’ can be granted in the proceedings, independent of victims who are granted the right to participate within the terms of Article 68 (3) and Rule 89, and provides for a definition of the

12. On 18 February 2008, the Prosecutor¹⁵ and the OPCD¹⁶ filed their respective documents in support of their appeals. The responses were filed on 29 February 2008.¹⁷

13. On 29 February 2008, the Appeals Chamber issued identical orders in these two appeals entitled “Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor” (hereinafter: “Orders of 29 February 2008”).¹⁸

14. On 10 March 2008, pursuant to the Decision and the Order of 29 February 2008 and the Orders of 29 February 2008, the legal representatives of applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 filed a “Request of the Legal Representatives of Victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 to Participate in the Interlocutory Appeals of the Office of the Prosecutor and the Office of Public Counsel for the Defence” (hereinafter: “Application to Participate”).¹⁹

15. On 20 March 2008, the Prosecutor²⁰ and the OPCD²¹ filed their consolidated responses (hereinafter: the “Prosecutor’s Response” and the “OPCD’s Response” respectively) to the Application to Participate in the appeal.

personal interests diverting from the Appeals Chamber jurisprudence” (ICC-02/05-121 at pp.4, 11). The OPCD was granted leave to appeal the issue of “whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of a specific proceedings on the personal interest of the applicants, and an assessment as to the propriety of their participation” (ICC-02/05-121, at pp.4-5, 11).

¹⁵ ICC-02/05-125 OA2.

¹⁶ ICC-02/05-126 OA3.

¹⁷ ICC-02/05-131 OA2 and ICC-02/05-130 OA3.

¹⁸ ICC-02/05-132 OA2 and ICC-02/05-133 OA3.

¹⁹ ICC-02/05-134.

²⁰ Prosecution’s Response to Legal Representative of Victim’s Request to Participate in OPCD’s Appeal against the 3 December 2007 Decision on Production and Disclosure of Material and in the Appeals of the Prosecution and OPCD against the 6 December 2007 Decision on the Victims’ Applications for Participation in the Proceedings (ICC-02/05-135).

²¹ OPCD’s Consolidated Response to the Legal Representatives’ Application to Participate in the Appeals of 4 February 2008 and 18 February 2008 (ICC-02/05-136)

II. REASONS FOR THE DECISION AND THE ORDERS OF 29 FEBRUARY 2008

16. As noted above, the Appeals Chamber having before it: (i) the Request of the OPCV, and (ii) the Response of the Legal Representatives, rendered the Decision of 29 February 2008, in which both the Request of the OPCV and the Response of the Legal Representatives were dismissed.

17. The Decision of 29 February 2008 and the Orders of 29 February 2008 stated that the reasons for the decision and the respective orders (of the majority and the dissent of Judge Song) would be given in the decision of the Appeals Chamber on the participation of victims. Those reasons are set out below and the reasons for the dissent of Judge Song are appended to this decision.

A. Reasons for the Decision

18. In relation to the Request of the OPCV, the OPCV on behalf of the Legal Representatives of the relevant victims, noted that the previous jurisprudence of the Appeals Chamber, namely, its Judgment of 13 February 2007²² and its Decision of 13 June 2007²³ dealt, *inter alia*, with victim participation in appeals lodged under article 82 (1) (b) only.²⁴ As the Appeals Chamber had not at that time, had occasion to rule on victim participation in appeals lodged under article 82 (1) (d), as in the instant case, the OPCV requested the Appeals Chamber to specify the procedure to be followed by victims already authorised to participate including those applicants whose applications are still pending before the Pre-Trial Chamber, to participate in the appeal lodged by the OPCD against the Decision of 3 December 2007.²⁵

²² “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).

²³ “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”, (ICC-01/04-01/06-925 OA8).

²⁴ ICC-02/05-122, paragraph 18.

²⁵ Ibid. Page 9.

19. The Appeals Chamber considers the Request of the OPCV to be without legal basis as no provision within the legal instruments of the Court can be said to found such a request. If the Appeals Chamber were to answer such a request it would have to assume the role of an advisory body which it considers to be beyond and outside the scope of its authority. The Request of the OPCV is therefore dismissed for lack of jurisdiction.

20. In relation to the Response of the Legal Representatives, the legal representatives submit that article 68 (3) of the Statute does not draw a distinction between the different stages of the proceedings before the Court, therefore the article fairly can be construed to allow victims to submit observations at all stages, i.e. in the investigation of a situation, in the case stage and appeals proceedings.²⁶ In addition, they contend “that the personal interests of the victims are affected in general during all stages since their participation, particularly at the appeals stage, shapes the Court’s jurisprudence on victims’ participatory rights.”²⁷ For the above reasons, the legal representatives proceeded to make full submissions in response to the OPCD’s appeal against the Decision of 3 December 2007.

21. The Appeals Chamber determined that the Response of the Legal Representatives was not properly before it as it was filed without the leave of the Appeals Chamber. Whether the participation of the relevant victims in the appeal was appropriate had not been determined, at that stage, by the Appeals Chamber. Accordingly, the Response of the Legal Representatives was rejected.²⁸

B. Reasons for the Orders of 29 February 2008

22. As noted above, on 29 February 2008, the Appeals Chamber issued three identical orders in each appeal²⁹ directing that applications for participation in the appeal were to be filed by 10 March 2008, and were to: “include a statement in relation to whether and

²⁶ ICC-02/05-124, paragraph 16.

²⁷ Ibid. Paragraph 21.

²⁸ See further paragraph 23 below.

²⁹ ICC-02/05-129 OA, ICC-02/05-132 OA2 and ICC-02/05-133 OA3. Since the order of 29 February 2008, which is subsumed in the Decision of 29 February 2008 (ICC-02/05-129 OA) in the OPCD’s appeal against the Decision of 3 December 2007, is identical to the separate orders (of the same day) issued in the appeals of the Prosecutor and the Defence against the Decision of 6 December 2007 the reasons for all three orders are dealt with collectively.



how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence.” In addition the Prosecutor and the OPCD were directed to file, by 20 March 2008, a consolidated response to the applications which may include submissions on the right of victims to participate in the appeals and the modalities for such participation.

23. The Appeals Chamber is mindful that it has not had occasion to rule on the modalities of participation by victims in interlocutory appeals arising from the situation in Darfur, Sudan, pursuant to article 82 (1) (d) of the Statute, until now. The Appeals Chamber recalls that in its judgment of 13 February 2007³⁰ in relation to the modalities of participation by victims in an interlocutory appeal arising in the case of Mr Lubanga Dyilo, pursuant to article 82 (1) (b), it determined that victims shall file an application seeking leave to participate in this type of appeal and that this arises from the wording of article 68 (3) of the Statute. The stipulation in article 68 (3), that victim participation shall be permitted “at stages of the proceedings determined to be appropriate by the Court” mandated a specific determination by the Appeals Chamber that the participation of victims is appropriate in a particular interlocutory appeal under consideration. It follows that an application from victims seeking leave to participate is required in order to enable the Appeals Chamber appropriately to make that determination.³¹ With regard to the timeline for the filing of such applications, the Appeals Chamber has stated that applications by victims wishing to participate in an interlocutory appeal should in principle be made as soon as possible after the appeal is filed.³²

24. The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82 (1) (b) of the Statute to be equally applicable to the instant interlocutory appeals arising under article 82 (1) (d) of the Statute.³³

³⁰ See note 22 *supra*.

³¹ Ibid. Paragraph 40.

³² Ibid. Paragraph 46.

³³ See also the recent Appeals Chamber Decision of 16 May 2008: “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled



25. Accordingly, following the procedure it has established, the Appeals Chamber issued orders in the appeals, stipulating definitive timelines for the filing of applications for participation and the respective responses to these applications by the parties. The issuance of the Orders of 29 February 2008, in these circumstances, was a measure designed to facilitate the unimpeded and expeditious conduct of the appeal proceedings.³⁴

26. The Appeals Chamber directs that in future cases and until such time as the matter is regulated in the constituent documents of the Court, applications by victims for participation in appeals must be filed as soon as possible and in any event before the date of filing of the response to the document in support of the appeal.

III. REASONS FOR THE DECISION ON VICTIM PARTICIPATION IN THE APPEALS

A. Preliminary procedural issues

1. General considerations in relation to the handling of the appeals

27. This decision is being determined in the context of three appeals. The first appeal lodged by the OPCD arises against a preliminary decision (Decision of 3 December 2007) of the Single Judge, concerning matters arising during rule 89 proceedings. The second and third appeals result from both the Prosecutor and the OPCD lodging appeals against the same decision (Decision of 6 December 2007) in respect of similar issues which are intrinsically linked to the issue certified for leave in the first appeal. Viewed collectively, the issues concern the manner in which applications by victims to participate at the investigation stage of a situation and the pre-trial stage of a case should be addressed. In the interests of efficiency the Appeals Chamber will consider the appeals jointly for the purpose of determining victim participation in these appeals.

'Decision on Victim's Participation'" (ICC-01/04-01/06-1335 OA9 OA10), where the same procedures were adopted in respect of interlocutory appeals pursuant to article 82 (1) (d) of the Statute arising in the case of Mr Lubanga Dyilo.

³⁴ See Rule 156(4) of the Rules of Procedure and Evidence, which provides in relation to interlocutory appeals that: "The appeal shall be heard as expeditiously as possible."



2. *The Admissibility of the Application to Participate*

28. The Prosecutor³⁵ and the OPCD³⁶ in their respective responses to the Application to Participate, challenge the admissibility of the Application to Participate given that it was filed 48 minutes past the stipulated filing time³⁷, namely at, 16h48 on the 10 March 2008 and the document was not signed by the legal representatives. The OPCD contends that “the existence of a signature is necessary to verify that the Legal Representatives accept legal responsibility for the contents of the filing, in particular, as regards their obligation to represent the interests of their clients.”³⁸ The Prosecutor notes in this regard that the Appeals Chamber has previously rejected an unsigned document as inadmissible.³⁹ To date, no explanation for the lateness of the filing or the lack of a signature from the legal representatives has been provided.

29. In relation to the lack of signature attesting to the author/s of the Application to Participate, Regulation 23 (1) of the Regulations of the Court provides that a document filed with the Court shall, as far as practicable, state: “(a) [t]he identity of the person filing the document.” A plain reading of this provision does not expressly require that the document be signed.

30. In the present case, there can be no doubt as to the identity of the person filing the document; the names of the legal representatives are clearly reflected on the last page of the document. This further distinguishes the present case from a previous case, namely, *Prosecutor v Lubanga* (ICC-01/04-01/06-834 OA8) where the Appeals Chamber rejected a document which apart from not being signed, did not emanate from defence counsel and had not been authorised by him. This, and not the lack of signature, was the main reason for the rejection. A signature is the appropriate means of certifying the provenance of a document and as such it is desirable for participants to append their signatures to their documents. In the circumstances, the Appeals Chamber concludes that the absence

³⁵ ICC-02/05-135, paragraphs 11 to 13.

³⁶ ICC-02/05-136, paragraphs 10 to 12.

³⁷ Regulation 33 (2) of the Regulations of the Court provides: “Documents shall be filed with the Registry between 9am and 4pm The Hague time [...]”.

³⁸ ICC-02/05-136, paragraph 11.

³⁹ ICC-02/05-135, paragraph 12.



of a signature to the Application to Participate by the legal representatives does not of itself render the filing inadmissible.

31. As a rule participants are required to comply with time limits prescribed by the Appeals Chamber and/or the relevant legal texts. Failure to comply with a time limit or failure to make timeous application for an extension of the time limit will normally result in rejection of the filing by the Appeals Chamber.

32. In relation to the late filing of the Application to Participate, Regulation 29 (1) of the Regulations of the Court provides that: “in the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.”

33. In the present case, the Appeals Chamber, on an exceptional basis condoned the late filing by 48 minutes of the Application to Participate as the infringement of Regulation 33 (2)⁴⁰ was negligible, in no way delayed the process and did not cause any prejudice to the parties or to the proceedings as a whole. Hence the document was accepted.

B. The Submissions of the Participants

1. The Application of victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07

34. As noted in paragraph 14 above, the legal representatives of victims a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 filed their Application to Participate in the appeals on 10 March 2008.

⁴⁰ See note 37 *supra*.



35. The Application to Participate in the appeals is made on behalf of victims who have been granted the status of victim and authorised to participate in the Situation in Darfur, Sudan⁴¹ and applicants whose applications are *sub judice* before Pre-Trial Chamber I.⁴²

36. In support of their application the legal representatives relying on the jurisprudence of the Pre-Trial Chambers submit that “the personal interests of the victims are affected in general in any proceedings relating to a situation. Thus, the personal interests of the victims are also concerned in any interlocutory appeal.”⁴³ In relation to the particular interlocutory appeals at hand they state: “[t]he interests of the victims are affected by the interlocutory appeals of the OPCD and the OTP, which clearly aim to deny victims their right to participate in the investigation stage. Thus if the Appeals Chamber grants the interlocutory appeals, the victims would be deprived of all procedural rights arising from their status as victims pursuant to Article 68 (3) of the Rome Statute and provided by the ‘Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07’ dated the 6 December 2007 Decision.”⁴⁴

37. With regard to the personal interests of applicants whose applications are *sub judice* before Pre-Trial Chamber I, the legal representatives assert that “[a]ny decision respecting the OPCD’s interpretation of the application process may greatly diminish the rights of victims who are in the process of providing additional information and who have yet to have this additional information-their entire application-reviewed by the Single Judge.”⁴⁵

⁴¹ See “Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 of 6 December 2007” (ICC-02/05-111-Corr). Applicants’ a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/06, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 were granted the status of victim and authorised to participate in the proceedings.

⁴² Ibid. Page 23. Eight applications, namely, a/0014/06, a/0021/07, a/0028/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07 and a/0035/07 were deemed incomplete. In addition 2 applicants’ a/0025/07 and a/0027/07 were rejected because the applications concerned deceased persons (ICC-02/05-111-Corr, paragraph 36).

⁴³ ICC-02/05-134, paragraph 16.

⁴⁴ ICC-02/05-134, paragraph 17.

⁴⁵ Ibid. Paragraph 19.



38. In sum, the legal representatives submit that given the subject matter of the appeals any decision in this regard “will determine the rights of victims at the investigation stage, the rights of victims whose applications have been partially reviewed by the Single Judge and may even impact or change the application procedure.”⁴⁶

39. As to the appropriateness of their participation, the legal representatives recall that “according to the previous jurisprudence of the court [Pre-Trial Chamber I], the stage of the investigation in a situation is appropriate for the participation of victims as provided for in article 68 (3) of the Rome Statute. It follows therefore that the participation of victims in an interlocutory appeal that aims to contradict a decision taken at the investigation stage must also be considered as appropriate.”⁴⁷ In addition they assert that the participation of victims “is appropriate in so far that it meets the requirements of the victims’ right to be heard as enshrined in article 68-3 of the Rome Statute.”⁴⁸

40. The legal representatives note that in relation to the rights of the Defence the participation of victims in the interlocutory appeals “has to do with the effective implementation of victims’ rights at all stages of the proceedings, as recognized in the Rome Statute, and has no negative impact on the right of the Defence.”⁴⁹

2. *The Prosecutor’s Response*

41. The Prosecutor acknowledges that “the issue in these appeals may have significant repercussions on the victims who have been granted ‘procedural status of victim’ in the situation to date, their standing and the manner in which they are able to exercise their rights under the Statute and the Rules.”⁵⁰ However, the Prosecutor disagrees with the arguments raised in support of the Application to Participate. In particular, he disputes the argument that because the Pre-Trial Chamber has held that the interests of victims are affected in general by any proceedings relating to a situation, the personal interests of all victims are therefore necessarily affected by any interlocutory appeal arising out of a

⁴⁶ Ibid. Paragraph 29.

⁴⁷ Ibid. Paragraph 22.

⁴⁸ Ibid. Paragraph 23.

⁴⁹ Ibid. Paragraph 34

⁵⁰ ICC-02/05-135, paragraph 19.

situation.⁵¹ The Prosecutor contends that this argument is contrary to the Appeals Chamber jurisprudence on point and “is based on a ruling which is at the heart of the dispute in the appeals.”⁵²

42. In relation to applicants who have not been granted the “procedural status of victim” the Prosecutor is opposed to their participation. In support of his argument, the Prosecutor argues that “[o]nly victims may present their views and concerns to the Court. The majority of applicants in question were denied the procedural status of victim in the situation [...] and there has been no ruling that the applicants in question fulfil the criteria of ‘victim’ pursuant to Rule 85 (a).”⁵³

43. With regard to the modalities of participation should victims be permitted to participate in the appeals, the Prosecutor submits that the appropriate modality for the presentation of the victims’ views and concerns is for those views and concerns to be: submitted in writing; limited to the specific issues arising in the appeal to the extent that it affects their personal interests; submitted as a single set of views and concerns in respect of all three appeals by the Legal Representatives and submitted within a modest time frame.⁵⁴

3. *The OPCD’s Response*

44. The OPCD in its response to the Application to Participate agrees that the personal interests of applicants who have been granted the status of victim during the situation phase could be affected by the issues on appeal.⁵⁵ Accordingly, it is unopposed to the Appeals Chamber granting those victims who have the status of victim in the situation the right to participate in the appeals in so far as their personal interests are directly (as opposed to indirectly or hypothetically) affected by the issues on appeal.⁵⁶

⁵¹ Ibid. Paragraph 20.

⁵² Ibid.

⁵³ Ibid. Paragraph 24.

⁵⁴ Ibid. Paragraphs 26 to 30.

⁵⁵ ICC-02/05-136, paragraph 19. The OPCD provides a non-exhaustive list of issues that “could conceivably impact on the personal interests of the alleged victims.”

⁵⁶ Ibid. Paragraph 50.



45. In relation to applicants who were denied the procedural status of victim, the OPCD is opposed to their participation in the appeals. The OPCD argues that “these applicants do not presently possess personal interests capable of being affected by this aspect of the appeal; the applicants’ status will remain unchanged by the appeals irrespective as to whether the appeals are granted or denied and, consequently, their personal interests will remain wholly unaffected.”⁵⁷

46. As to the appropriateness of the participation of victims the OPCD state: “it would be in the interests of justice to ensure that the views and concerns of alleged victims are taken into consideration as it would ensure that the Appeals Chamber has the benefit of considering the appellate issues through the lens of those directly affected by these issues.”⁵⁸ However, with regard to applicants who have not been granted the status of victim the OPCD contend that their participation could impact on the fairness and impartiality of the process, in that it may leave the appellate process open to persons with a tenuous link, if any at all, to the proceedings.⁵⁹

47. With regard to the modalities of participation should victims be permitted to participate in the appeals the OPCD submit that the “primary focus of their participation should be on facilitating the presentation of the personal views and concerns of each alleged victim. In this way, the decision of the Appeals Chamber will be founded on a consideration of the real, as opposed to abstract or hypothetical, views and concerns of the persons most affected by these issues.”⁶⁰

C. The Determination of the Appeals Chamber

48. Article 68 (3) of the Statute provides, in relevant part:

“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

⁵⁷ Ibid. at para. 26.

⁵⁸ Ibid. Paragraph 33.

⁵⁹ Ibid. Paragraph 43.

⁶⁰ Ibid. Paragraph 46.



49. The Appeals Chamber recalls that it has previously considered the import of article 68 (3) of the Statute in its Judgement of 13 February 2007⁶¹ and in its Decision of 13 June 2007⁶² in which it held, *inter alia*, that “the Appeals Chamber, pursuant to article 68 (3) is required to 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.”⁶³ Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate. It is for the Appeals Chamber to ensure that their participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁶⁴

50. The Appeals Chamber is aware that the abovementioned determinations were made in relation to interlocutory appeals arising in the case of Mr Thomas Lubanga Dyilo. In determining victim participation in interlocutory appeals arising in the situation phase of the proceedings before the Pre-Trial Chamber, article 68 (3) as interpreted by the Appeals Chamber in the case of Mr Lubanga should also be made applicable to interlocutory appeals in the situation phase of proceedings.

51. The Appeals Chamber will now proceed to examine the Application to Participate in these appeals in light of its interpretation of article 68 (3) of the Statute for granting participation, namely, (i) whether the individuals seeking participation are victims in the situation phase of the proceedings, (ii) whether they have personal interests that are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly,

⁶¹ “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).

⁶² “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” (ICC-01/04-01/06-925).

⁶³ 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) at paragraph 43.

⁶⁴ Ibid. Paragraph 44.

(iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

52. The Appeals Chamber is mindful that in the situation phase of the proceedings a suspect or group of suspects has yet to be identified by the Prosecutor. The application therefore of criteria (iv) above, namely, “that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” will be with a view to safeguarding the rights of future suspects.

1. The first criteria: whether the individuals seeking participation are victims in the situation phase of the proceedings

53. The Appeals Chamber recalls that in its Judgement of 13 February 2007⁶⁵ at paragraph 45, it decided that in circumstances in which victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, 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.

54. The Application to Participate is filed on behalf of:

- a. Eleven applicants, namely, a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07, whose status as victims has been established by the Single Judge of Pre-Trial Chamber I by virtue of its Decision of 6 December 2007. The Appeals Chamber accepts that they are victims and meet the first criteria under article 68 (3) of the Statute for participation in the appeals.
- b. Eight applicants, namely, a/0014/06, a/0021/07, a/0028/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07 and a/0035/07 whose status as victims has not been determined by the Single Judge of Pre-Trial Chamber I nor established before the Appeals Chamber. Sequentially they do not meet the first criteria under article 68 (3) of the Statute. In the circumstances, their applications for participation in these appeals are denied pursuant to Rule 89 (2) of the Rules of

⁶⁵ Ibid.



Procedure and Evidence and the Appeals Chamber will not examine whether they satisfy the remaining three criteria.

- c. The applications of two applicants, namely, a/0025/07 and a/0027/07 were rejected by the Single Judge of Pre-Trial Chamber I on the basis that the applicants were deceased and therefore “did not fall within the meaning of natural persons under Rule 85 (a) of the Rules”⁶⁶. In light of this determination which remains undisputed by the legal representatives, the Appeals Chamber likewise rejects the said applications.

2. The second criteria: whether they have personal interests which are affected by the issues on appeal

55. The legal representatives submit that the eleven victims would, if the Appeals Chamber grants the interlocutory appeals, be deprived of all procedural rights arising from their status as victims which they presently hold.⁶⁷ Any changes to the application process will have repercussions for them.

56. Both the Prosecutor and the OPCD are unopposed to the participation of these victims but point out that the requirement is a demonstration of personal and not general interests.

57. The issues on appeal encompass interpretations of rule 89 of the Rules of Procedure and Evidence and regulation 86 of the Regulations of the Court which regulate the application process for participation of victims; and whether a procedural status of victim can be granted independent of procedural rights.

58. The Appeals Chamber accepts that the eleven victims have demonstrated that they would be personally affected since they stand to lose rights that they have gained in the Decision of 6 December 2007. Any change to the application process will affect them personally in the event that a re-application for victim participation on their part becomes necessary. Sequentially, they fulfil the second criteria for participation.

⁶⁶ ICC-02/05-111-Corr, paragraph 36.

⁶⁷ ICC-02/05-134, paragraph 17.



3. *The third criteria: whether their participation is appropriate*

59. The Appeals Chamber is persuaded that participation by these eleven victims in the appeals at hand is appropriate given the subject-matter of the current appeals and the desirability for the views of victims in appeals of this nature to be heard.

4. *The fourth criteria: that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*

60. In its judgment of 13 February 2007 at paragraph 55, the Appeals Chamber stated that it is for the Chamber to ensure that the manner in which victims present their views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

61. As noted above the Prosecutor and the OPCD do not object to the participation of these victims and acknowledge that aspects of these appeals may affect the personal interests of victims and that their participation may be appropriate and not inconsistent with the rights of the Defence or a fair and impartial trial.

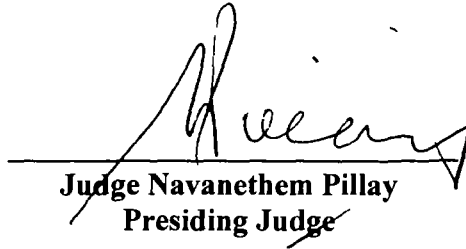
62. Accordingly, in ordering the manner of participation of victims to comply with the rights of future suspects or a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. 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.

63. For these reasons the applications for participation by victims in these appeals is granted for victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/06, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 and rejected in respect of applicants a/0014/06, a/0021/07, a/0028/07, a/0030/07, a/0031/07, a/0032/07, a/0033/07 and a/0035/07.



64. Judge Song appends his reasons for his dissenting opinion on the Order of the Appeals Chamber of 20 March 2008 and his partially dissenting opinion to this Decision.

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



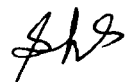
Judge Navanethem Pillay
Presiding Judge

Dated this 18th day of June 2008

At The Hague, The Netherlands

Partly dissenting opinion of Judge Sang-Hyun Song and reasons for dissent from the decision and orders of the Appeals Chamber of 29 February 2008

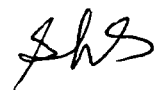
1. On 29 February 2008, the Appeals Chamber issued the “Decision of the Appeals Chamber on the OPCV’s [Office of Public Counsel for Victims] request for clarification and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD [Office of Public Counsel for the Defence] and the Prosecutor” (ICC-02/05-129; hereinafter: “Decision and Order of 29 February 2008”). In the Order and Decision of 29 February 2008, the Appeals Chamber decided, in respect of the appeal of the OPCD against the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” of 3 December 2007 (ICC-02/05-110), first of all, to dismiss the request for clarification that the OPCV had made in relation to the procedure for participation of victims in the appeal. Furthermore, the Appeals Chamber decided to reject the “Response of Legal Representatives of Victims to the ‘OPCD appeal brief on ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’ and Alternative Request for Permission to Participate in the Appeal” of 15 February 2008 (ICC-02/05-124; hereinafter: “Response of the Legal Representatives of Victims”). In the Decision and Order of 29 February 2008, the Appeals Chamber also set, by way of an order, time limits for the filing of applications by victims for participation in the appeal and for responses by the OPCD and the Prosecutor to such applications. Two identical orders (ICC-02/05-132 and ICC-02/05-133; hereinafter: “Orders of 29 February 2008”), setting time limits for applications for participation and the responses thereto, were issued by the Appeals Chamber on the same day in relation to the appeals of the Prosecutor and of the OPCD against the “Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07” of Pre-Trial Chamber I of 6 December 2007 (ICC-02/05-111). Today, the Appeals Chamber renders its decision on the applications for participation in the three appeals that it has received.



2. I was in agreement with the Decision and Order of 29 February 2008 to the extent that it rejected the request of the OPCV for clarification for the reasons expressed at paragraph 19 of today's decision of the Appeals Chamber.

3. I dissented from the remainder of the Decision and Order of 29 February 2008 and from the Orders of 29 February 2008. The rulings by the Appeals Chamber were predicated on the view that in order for victims to participate in appeals proceedings under article 82 (1) (d) of the Statute, they have to make an application to the Appeals Chamber, setting out why they wish to participate. I do not share this view. In the separate and partly dissenting opinion to 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, pp. 18 to 22), I explained that in my analysis, victims who have participated in the proceedings giving rise to appeals under article 82 (1) (d) of the Statute have the right, pursuant to regulations 65 (5) and 64 (4) of the Regulations of the Court, to file a response to the document in support of the appeal because they are participants in the meaning of these provisions.

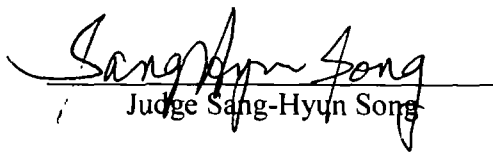
4. In the present case, the situation is different in that not all of those seeking participation in the appeal proceedings have been recognised as victims by the Pre-Trial Chamber yet. This is, however, irrelevant for their right to file a response to the document in support of the appeal in the present proceedings. The right to file such a response follows from the fact that their applications to participate under article 68 (3) of the Statute have resulted in the decisions of the Pre-Trial Chamber that are now the subject of the present appeals. Without these applications, the proceedings before the Pre-Trial Chamber would not have taken place. In such circumstances, and given that the decision of the Appeals Chamber on the present appeals is likely to have a direct impact on the eventual disposal of their applications for participation by the Pre-Trial Chamber, they must be considered participants in the meaning of regulations 65 (5) and 64 (4) of the Regulations of the Court.



5. The present case clearly indicates the impracticability of the approach taken by the majority of the Appeals Chamber in respect of participation of victims in appeals under article 82 (1) (d) of the Statute. Had the Appeals Chamber accepted the Response of the Legal Representatives of Victims as properly filed under regulations 65 (5) and 64 (4) of the Regulations of the Court, the filing would have been before the Appeals Chamber already on 15 February 2008. The view taken by the majority leads to delays in the appellate process that are difficult to reconcile with the principle of expeditious proceedings (see rule 156 (4) of the Rules of Procedure and Evidence).

6. As to the decision of today, I am in agreement to the extent that victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 are given the right to participate in the appeals proceedings and that the applications of a/0025/07 and a/0027/07 are rejected. I dissent from the decision of the majority to the extent that that the applications of applicants a/0014/06, a/0021/07, a/0028/07, a/0031/07, a/0033/07 and a/0035/07 are rejected. For the reasons expressed above, these applicants have, in my view, a right to file a response to the document in support of the appeal and therefore should be allowed to participate.

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


Judge Sang-Hyun Song

Dated this 18th day of June 2008

At The Hague, The Netherlands