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**THE APPEALS CHAMBER**

**Before:** Judge Georghios M. Pikis (Presiding Judge)  
Judge Philippe Kirsch  
Judge Navanethem Pillay  
Judge Sang-Hyun Song  
Judge Erkki Kourula

**Registrar:** Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR v. THOMAS LUBANGA DYILO**

**Public Document**

**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**

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The Appeals Chamber of the International Criminal Court (hereinafter the “Court”),

In the appeal of Mr. Thomas Lubanga Dyilo (hereinafter: the “Appellant”) of 30 January 2007 entitled “Defence Appeal Against the Pre-Trial Chamber’s ‘*Décision sur la confirmation des charges*’ of 29 January 2007” (ICC-01/04-01/06-797),

In the joint application of Victims a/0001/06 to a/0003/06 and a/0105/06 (hereinafter: the “Victims”) entitled “Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber”, filed on 1 February 2007” of 2 February 2007 (ICC-01/04-01/06-802-tEN),

*Renders* unanimously the following

## DECISION

The application is dismissed.

The reasons of the majority, namely Judge Kirsch, Judge Pillay and Judge Kourula, follow hereafter and are signed by Judge Kirsch. The reasons of the other two members of the Appeals Chamber are given in separate opinions.

### I. RELEVANT PROCEDURAL HISTORY

1. On 29 January 2007, the Pre-Trial Chamber rendered its “Decision on the confirmation of charges”.<sup>1</sup> In this decision the Pre-Trial Chamber determined that there was sufficient evidence to confirm the charges against the Appellant, and to commit him to trial, in relation to the crimes of conscripting and enlisting children under the age of fifteen years into armed forces and using them to participate actively in hostilities within the meaning of articles 8 (2) (b) (xxvi), 8 (2) (e) (vii) and 25 (3) (a) of the Statute.<sup>2</sup>

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<sup>1</sup> ICC-01/04-01/06-803-tEN.

<sup>2</sup> *Ibid*, at pages 156 and 157

2. On 30 January 2007, the Appellant filed the “Defence Appeal Against the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007”<sup>3</sup>, in which he stated that his appeal was brought pursuant to article 82 (1) (b) of the Statute, which provides for the appeal of a “decision granting or denying release of the person being investigated or prosecuted”<sup>4</sup>, arguing that the decision confirming the charges “effectively denies the release of Mr Thomas Lubanga Dyilo”.<sup>5</sup>

3. On 30 January 2007, the Appellant filed the “Urgent Defence Request for Extension of Time and Page Limits for Brief in Support of Appeal Against the ‘Décision sur la confirmation des charges’”.<sup>6</sup>

4. On 1 February 2007, the Appeals Chamber rendered the “Directions and Decision of the Appeals Chamber”, in which it decided that it was necessary and pertinent to examine whether the appeal was admissible under the provisions of article 82 (1) (b) of the Statute, as the Appellant claimed it to be, before addressing any other issue in the appeal.<sup>7</sup> In that connection, the Appeals Chamber directed the Appellant “to address the issue of whether the subject-matter of the appeal is an appealable decision within the meaning of article 82 (1) (b) of the Statute” in submissions to be filed by 7 February 2007. The Prosecutor was given an opportunity to respond to the submissions of the Appellant by 13 February 2007.<sup>8</sup> The Appeals Chamber further clarified that: “Subject to the decision of the Appeals Chamber on the appealability of the decision, the subject-matter of the appeal, directions will be given with regard to the submission of the document in support of the appeal, the time within which it may be filed and its length, as well as the time within which the Prosecutor may lodge his response.”<sup>9</sup> The “Directions and Decision of the Appeals Chamber” did not make any express provision for the Victims to file submissions on the admissibility of the appeal.

<sup>3</sup> ICC-01/04-01/06-797.

<sup>4</sup> *Ibid*, at paragraph 3.

<sup>5</sup> *Ibid*, at paragraph 5.

<sup>6</sup> ICC-01/04-01/06-798.

<sup>7</sup> ICC-01/04-01/06-800 at paragraph 1.

<sup>8</sup> *Ibid*, at paragraphs 2 and 3.

<sup>9</sup> *Ibid*, at paragraph 4.

5. On 2 February 2007, the Victims filed a joint application entitled “Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber”, filed on 1 February 2007” (hereinafter: “Application for Participation”), in which they requested the Appeals Chamber to authorise their filing of a response to the submission of the Defence on the appealability of the subject-matter of the appeal; and, “if need be”, to authorise their participation in the appeal proceedings more generally, “in particular, by submitting written observations on any issue raised by the Prosecution or the Defence that affects their interests”.<sup>10</sup>

6. On 5 February 2007, the Appeals Chamber rendered the “Directions of the Appeals Chamber” permitting the Appellant and the Prosecutor to respond to the Application for Participation by 9 February 2007.<sup>11</sup>

7. On 9 February 2007, the Prosecutor filed his response entitled “Prosecution’s Response to the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 pursuant to ‘Directions of the Appeals Chamber’ of 5 February 2007”<sup>12</sup> (hereinafter: “Prosecutor’s Response”), in which the Prosecutor opposed the Victims’ application to participate in relation to “the confined issue of whether or not the decision on confirmation of charges can be appealed as of right under Article 82 (1) (b)”.<sup>13</sup>

8. On 16 May 2007, within the extended time period permitted by the Appeals Chamber<sup>14</sup>, the Appellant filed his “Corrigendum to the Response to the application by Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorization to participate in the appeal proceedings relating to the *Decision on the confirmation of charges*”<sup>15</sup> (hereinafter: “Appellant’s Response”), to which he annexed the arguments made in the response that had been submitted on 9 February 2007 but that had been rejected by the Appeals Chamber because the response was unsigned (hereinafter: “Annex to the

<sup>10</sup> ICC-01/04-01/06-802-tEN at page 5.

<sup>11</sup> ICC-01/04-01/06-805.

<sup>12</sup> ICC-01/04-01/06-817.

<sup>13</sup> Prosecutor’s Response at paragraph 18.

<sup>14</sup> See, *inter alia*, ICC-01/04-01/06-903.

<sup>15</sup> ICC-01/04-01/06-901-Corr-tEN. The original document (ICC-01/04-01/06-901) was filed on 11 May 2007 by the Appellant.

Appellant's Response").<sup>16</sup> Paragraph 17 of the Appellant's Response stated that the Annex to the Appellant's Response is considered "an integral part of this written submission". The Annex to the Appellant's Response was signed by Duty Counsel.

9. The Appellant's Response opposed the Victims' Application for Participation stating, *inter alia*, that the "Directions and Decision of the Appeals Chamber" of 1 February 2007 did not permit the Victims "to file any submissions on whether or not 'the subject-matter of the appeal is an appealable decision within the meaning of article 82 (1) (b)'" and consequently the Application for Participation "should have been rejected on this issue".<sup>17</sup>

## II. REASONS

### A. The Submissions of the Parties

#### 1. *The Victims' Application for Participation*

10. In support of their Application for Participation in the appeal the Victims argue that, pursuant to a decision of Pre-Trial Chamber I, they were allowed to participate in relation to the confirmation hearing; regulation 86 (8) of the Regulations of the Court is therefore applicable and in the absence of any decision of the Appeals Chamber relating to participation, the decision of Pre-Trial Chamber I gives them the right to participate in appeals arising out of the confirmation hearing.<sup>18</sup>

11. In respect of their interests in participating in the present appeal proceedings the Victims state that they have an obvious interest in the outcome of the appeal. If the appeal were successful the decision confirming the charges would be quashed, which would bring the prosecution against the Appellant to an end and would "preclude any possibility for the Victims to later seek compensation for the harm they have suffered".<sup>19</sup>

<sup>16</sup> ICC-01/04-01/06-901-Anx.

<sup>17</sup> Annex to the Appellant's Response at paragraph 6.

<sup>18</sup> Application for Participation at pages 3 and 4.

<sup>19</sup> *Ibid*, at pages 4 and 5.

## 2. *The Prosecutor's Response*

12. In response to the Victims' Application for Participation, the Prosecutor submits that the right of the Victims to participate in the appeal is not automatic, but is subject to the Appeals Chamber determining, following an application, that the conditions set out in article 68 (3) of the Statute are satisfied.<sup>20</sup> He contends that the Victims have not demonstrated that the issue of the admissibility of the appeal affects their personal interests, stating that "ordinarily when the issue to be addressed is a narrow and procedural one, like the one relating to whether an appeal against a decision on confirmation may be appealed under Article 82 (1) (b), it will be difficult to sustain a position that the victims' "personal interests" are affected".<sup>21</sup> In addition, the Prosecutor submits that "participation at this limited procedural step may affect the expeditious conduct of the proceedings".<sup>22</sup>

13. The Prosecutor further submits that "any expression of views and concerns by victims cannot materialize until ... the Appeals Chamber has decided to hear the Appeal under Article 82 (1) (b)".<sup>23</sup>

## 3. *The Appellant's Response*

14. In response to the Victims' Application for Participation the Appellant submits that the Victims do not have an automatic right to participate in the appeal.<sup>24</sup> The Appellant further submits that the "Directions and Decision of the Appeals Chamber" of 1 February 2007 did not provide for any submissions by the Victims and that, for that reason alone, the request should be rejected.<sup>25</sup>

15. The Appellant recalls the decision of the Appeals Chamber of 12 December 2006, in relation to an earlier appeal, in which the Appeals Chamber granted the Victims the right "to participate in this appeal for the purpose of presenting their views and concerns

<sup>20</sup> Prosecutor's Response at paragraphs 2, 14 and 15.

<sup>21</sup> *Ibid*, at paragraph 16.

<sup>22</sup> *Ibid*

<sup>23</sup> Prosecutor's Response at paragraph 17.

<sup>24</sup> Appellant's Response at paragraph 37.

<sup>25</sup> Annex to the Appellant's Response at paragraphs 5 and 6.

respecting their personal interests in the issues raised on appeal”.<sup>26</sup> The Appellant submits that, as a result, in that decision the Appeals Chamber severely limited the scope of submissions by victims.<sup>27</sup>

16. The Appellant submits further that the phrase “either party” under article 82 (1) of the Statute refers only to the Prosecution and the Defence and, as such, victims do not have a right to appeal under this article, unless it is expressly stated that they do have such a right (as in article 82 (4) relating to the right to appeal against an order for reparations). In relation to article 82 (1) (b), the Appellant contends that victims do not have a right to appeal and therefore cannot respond to an appeal either.<sup>28</sup>

17. Furthermore, the Appellant contends that the Victims can only participate in the appeal if their personal interests are affected<sup>29</sup>; and that each Chamber “must maintain a strict interpretation of the concept of *personal interests of victims*”.<sup>30</sup>

18. The Appellant submits that the only personal interest that victims may pursue in proceedings before the Court is the interest to receive reparations.<sup>31</sup> He argues that issues concerning reparations are not dealt with in an appeal from a decision of the Pre-Trial Chamber.<sup>32</sup>

19. The Appellant contests the argument of the Victims that an appeal against a decision on the confirmation of charges affects their interests, emphasizing that “it is up to the Prosecution to prosecute the charges, not the victims”.<sup>33</sup> The Appellant submits further that the participation of the Victims would cause prejudice to the Defence, as the workload of the Defence would increase considerably<sup>34</sup>, thus aggravating the difficulty

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<sup>26</sup> ICC-01/04-01/06-769.

<sup>27</sup> Annex to the Appellant’s Response at paragraph 7

<sup>28</sup> *Ibid*, at paragraphs 8-10.

<sup>29</sup> Appellant’s Response at paragraph 19.

<sup>30</sup> *Ibid*, at paragraphs 23-25.

<sup>31</sup> *Ibid*, at paragraph 26.

<sup>32</sup> *Ibid*, at paragraph 28.

<sup>33</sup> *Ibid*, at paragraph 29.

<sup>34</sup> *Ibid*, at paragraph 31.

caused by their “wholly insufficient human resources ... to ensure that the interests of Mr Lubanga are defended in a fair trial”.<sup>35</sup>

20. In addition, the Appellant submits that the participation of the Victims would lead to a delay in the proceedings, which “calls into question Mr Lubanga’s right to an expeditious trial”.<sup>36</sup>

### **B. The Determination of the Appeals Chamber**

21. The Appeals Chamber, in its Directions of 1 February 2007, decided to examine whether this appeal was admissible under the provisions of article 82 (1) (b) of the Statute before addressing any other issue in the appeal. On the following day, the Victims applied to the Appeals Chamber for authorisation to respond to the submission of the Appellant on this preliminary issue, as well as to authorise, “if need be”, their participation in the appeal proceedings more generally.

22. The question of whether the Victims can participate in the preliminary issue being addressed by the Appeals Chamber at this stage of the proceedings falls to be decided under article 68 (3) of the Statute. Article 68 (3) 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.”

23. The Appeals Chamber recalls that it previously considered article 68 (3) in its judgment of 13 February 2007 (ICC-01/04-01/06-824)<sup>37</sup> in which it held that, in order for victims to participate in an appeal under article 82 (1) (b) of the Statute, an application

<sup>35</sup> *Ibid* , at paragraph 32.

<sup>36</sup> *Ibid* , at paragraph 33.

<sup>37</sup> “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’”.

seeking leave to participate in the appeal must be filed.<sup>38</sup> The ability of victims to participate was held not to be automatic, but to depend upon a determination by the Appeals Chamber that participation was appropriate.<sup>39</sup> An application to participate “should include a statement from the victims in relation to whether and how their personal interests are affected ... as well as why it is “appropriate” for the Appeals Chamber to permit their views and concerns to be presented”.<sup>40</sup>

24. In the present appeal, the Appeals Chamber notes that the Victims do not put forward any grounds capable of substantiating whether or how their personal interests are affected by the preliminary consideration of whether the appeal was correctly brought under article 82 (1) (b) of the Statute. The Victims also do not make any statement as to why it would be appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings.

25. The relevant part of the Application for Participation reads as follows:

“The interests of the Victims in participating in these appeal proceedings is obvious, as the appellant is requesting, *inter alia*, that the decision confirming the charges be quashed. Such a decision would mean the end of the prosecution and, as such, would preclude any possibility for the Victims to later seek compensation for the harm they have suffered.”<sup>41</sup>

26. At this stage of the proceedings, the Appeals Chamber is determining, by way of a preliminary issue, whether the appeal can be heard at all. As such, the decision of the Appeals Chamber on that preliminary issue will be limited to whether or not the Appellant is entitled to bring this appeal under article 82 (1) (b) of the Statute. The decision of the Appeals Chamber on the preliminary issue will neither result in the termination of the prosecution nor preclude the Victims from later seeking compensation; and the Victims have not put forward any other basis on which their personal interests are affected by the determination of that issue.

<sup>38</sup> *Ibid* , at paragraph 38.

<sup>39</sup> *Ibid* , at paragraphs 40-43.

<sup>40</sup> *Ibid* , at paragraph 44.

<sup>41</sup> Application for Participation at pages 4-5.

27. Whether the decision confirming the charges is ultimately liable to be quashed is predicated upon the Appellant having the right to appeal under article 82 (1) (b) of the Statute. If the Appellant fails to demonstrate that he has such a right, then there is no possibility of the decision confirming the charges being quashed, and the interests that the Victims assert in their Application for Participation will therefore never be implicated. On the other hand, should the Appeals Chamber decide, following its consideration of the preliminary issue, that the appeal can proceed to be heard, it would then consider, on the basis of the application made by the Victims, whether or not their personal interests are affected by the appeal itself and whether it is appropriate for them to participate at that stage.

28. More broadly, any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis. Clear examples of where the personal interests of victims are affected are when their protection is in issue<sup>42</sup> and in relation to proceedings for reparations.<sup>43</sup> More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor. 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. The Appeals Chamber is reluctant to explore these points further and/or to set out a definitive interpretation of article 68 (3) in the present appeal in the absence of any submissions from the Victims on the general scope and application of that article, and in the absence of any response from the Appellant and the Prosecutor thereto; and in circumstances in which such a determination is not necessary for its decision, as this is a case in which the Victims have not demonstrated that their personal interests are affected at the present time, for the reasons set out above.

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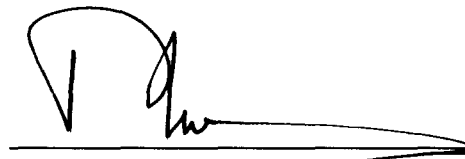
<sup>42</sup> See article 68 (1) and (2) of the Statute and rules 87 and 88 of the Rules of Procedure and Evidence.

<sup>43</sup> See article 75 of the Statute.

29. The Appeals Chamber concludes that, as the Victims have not demonstrated that their personal interests are affected by the consideration of the preliminary issue, the opening words of article 68 (3) preclude their participation and their application to participate in the preliminary issue is therefore dismissed.

30. The decision of the Appeals Chamber is rendered unanimously, with Judge Pikis attaching a separate concurring opinion and Judge Song appending a separate opinion concurring with the decision, but dissenting on the reasoning.

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



**Judge Philippe Kirsch**

Dated this 13th day of June 2007

At The Hague, The Netherlands

## Separate Opinion of Judge Georghios M. Pikis

1. The requisites for victims' participation in proceedings before the Court and the scope of their participation, if legitimized to take part, are the issues that have to be addressed and resolved in these proceedings. Aspects of the subject were elicited by the judgment<sup>1</sup> of the Appeals Chamber in the appeal of Mr. Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo". It was decided that participation of victims before the Pre-Trial Chamber does not *per se* confer upon them a right to take part in an appeal mounted by a party against a first-instance decision or any aspect of it. The aforesaid decision identifies the cause and sets forth the parameters of participation. Victims claiming a right to participate in appeal proceedings must move the Appeals Chamber by application to that end, specifying therein the reasons justifying their participation in the appeal.<sup>2</sup> Moreover, the grounds relied upon must indicate that the personal interests of the victims are affected by the proceedings before the Appeals Chamber "as well as why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented"<sup>3</sup>. The outcome of the applicants' petition in the aforesaid appeal was to permit them to present "their views and concerns respecting their personal interests in the issues raised on appeal"<sup>4</sup>. The decision underlines that the expression of victims' views and concerns is correlated to the personal interests of victims.

2. The present appeal<sup>5</sup> is directed against the decision<sup>6</sup> of Pre-Trial Chamber I to confirm the charges preferred against the accused. The appeal is taken pursuant to the

<sup>1</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>2</sup> See *Prosecutor v. Lubanga Dyilo* "Decision of the Appeals Chamber" 12 December 2006 (ICC-01/04-01/06-769) and reasons (majority decision – Judge Song dissenting) for the decision in "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>3</sup> 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 2.

<sup>4</sup> *Prosecutor v. Lubanga Dyilo* "Decision of the Appeals Chamber" 12 December 2006 (ICC-01/04-01/06-769)

<sup>5</sup> *Prosecutor v. Lubanga Dyilo* "Defence Appeal Against the Pre-Trial Chamber's 'Décision sur la confirmation des charges' of 29 January 2007" 30 January 2007 (ICC-01/04-01/06-797).



provisions of article 82 (1) (b) of the Statute, conferring a right on “either party” to appeal “a decision granting or denying release of the person being investigated or prosecuted”.

3. By its decision of 1 February 2007<sup>7</sup>, the Appeals Chamber set down for consideration the admissibility of the appeal and invited the Appellant and the Prosecutor to address the Chamber on the matter.

4. Four persons<sup>8</sup>, acknowledged<sup>9</sup> by Pre-Trial Chamber I to be victims (victims a/0001/06, a/0002/06, a/0003/06 and a/105/06) entitled to participate in pre-trial proceedings within the framework approved by the court, applied<sup>10</sup> to the Appeals Chamber requesting it “[t]o authorise Victims a/0001/06 to a/0003/06 and a/105/06 to file, within a time limit to be set by the Chamber, a response to the submission of the Defence as stated in paragraph 3 of the Directions and Decision of the Appeals Chamber”<sup>11</sup>. They advanced a second request seeking participation in the hearing of the appeal itself.

5. The Victims’ personal interests, as they assert in their application, are affected by the consequences they are likely to suffer if the decision confirming the charges is quashed. If this were to happen, they contend, “[s]uch a decision would mean the end of the prosecution and, as such, would preclude any possibility for the Victims to later seek compensation for the harm they have suffered.”<sup>12</sup> The interests identified concern solely and exclusively their second request. Nothing is said about any repercussions likely to be

<sup>6</sup> *Prosecutor v. Lubanga Dyilo* “Décision sur la confirmation des charges” 29 January 2007 (ICC-01/04-01/06-803).

<sup>7</sup> *Prosecutor v. Lubanga Dyilo* “Directions and Decision of the Appeals Chamber” 1 February 2007 (ICC-01/04-01/06-800).

<sup>8</sup> Hereinafter referred to interchangeably as “Victims” or “Applicants”.

<sup>9</sup> *Prosecutor v. Lubanga Dyilo* “Décision sur les demandes en participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l’affaire Le Procureur c. Thomas Lubanga Dyilo et de l’enquête en République démocratique du Congo” 28 July 2006 (ICC-01/04-01/06-228); “Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l’affaire Le Procureur c. Thomas Lubanga Dyilo” 20 October 2006 (ICC-01/04-01/06-601).

<sup>10</sup> *Prosecutor v. Lubanga Dyilo* “Demande conjointe des victims a/0001/06 à a/0003/06 et a/105/06 relative aux ‘Directions and Decision of the Appeals Chamber’ déposées le 1er février 2007” 2 February 2007 (ICC-01/04-01/06-802).

<sup>11</sup> *Ibid.* (ICC-01/04-01/06-802-tEN), page 5.

<sup>12</sup> *Ibid.*, pages 4 and 5.



suffered from the resolution of the specific issue set down by the Appeals Chamber for determination, i.e. whether the sub judice decision is appealable under article 82 (1) (b) of the Statute.

6. In his response<sup>13</sup> the Prosecutor disputes the Applicants' claimed right to take part in the proceedings in virtue of their participation before Pre-Trial Chamber I which issued the decision impugned. Such authorization does not *per se* afford them a right to participate in the hearing of the appeal or any aspect of it. Support for this proposition is derived from the decision<sup>14</sup> of the Appeals Chamber of 12 December 2006, earlier referred to.<sup>15</sup> He draws attention to the fact that the Victims neither identify nor specify any personal interests likely to be affected by the decision on the admissibility of the appeal.<sup>16</sup> The interests of victims, if any, are confined, in the submission of the Prosecutor, to the hearing of the appeal, if found to be justiciable.<sup>17</sup>

7. The Appellant opposes<sup>18</sup> the participation of the Victims in the admissibility proceedings as well as at the hearing of the appeal itself, if the decision is found to be appealable. The Victims have no conceivable interest, as he maintains, in the determination of the admissibility of the appeal and none as regards the appeal itself.<sup>19</sup> In his contention, they can have no interest in the confirmation of the charges either or any appeal arising therefrom. Their interest is confined to trial proceedings that lay the ground for the pursuit of reparations.<sup>20</sup> Another argument advanced is that by the terms of

<sup>13</sup> *Prosecutor v. Lubanga Dyilo* "Prosecution's Response to the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 pursuant to 'Directions of the Appeals Chamber' of 5 February 2007" 9 February 2007 (ICC-01/04-01/06-817).

<sup>14</sup> *Prosecutor v. Lubanga Dyilo* "Decision of the Appeals Chamber" 12 December 2006 (ICC-01/04-01/06-769).

<sup>15</sup> See *Prosecutor v. Lubanga Dyilo* "Prosecution's Response to the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 pursuant to 'Directions of the Appeals Chamber' of 5 February 2007" 9 February 2007 (ICC-01/04-01/06-817), para 1.

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

<sup>17</sup> See *ibid.*, para. 17.

<sup>18</sup> *Prosecutor v. Lubanga Dyilo* "Réponse à la demande des victimes a/0001/06, a/0002/06, a/0003/06 et a/0105/06 d'autorisation de participation à la procédure en appel de la décision de confirmation des charges" 11 May 2007 (ICC-01/04-01/06-901) and the annex thereto

<sup>19</sup> See *Prosecutor v. Lubanga Dyilo* "Réponse à la demande des victimes a/0001/06, a/0002/06, a/0003/06 et a/0105/06 d'autorisation de participation à la procédure en appel de la décision de confirmation des charges" 11 May 2007 (ICC-01/04-01/06-901), para. 28.

<sup>20</sup> See *ibid.*, paras 28 and 29

the decision of the Appeals Chamber of 1 February 2007 only the parties to the cause have a right to be heard.<sup>21</sup>

## **ARTICLE 68 (3) OF THE STATUTE – ANALYSIS – INTERPRETATION**

8. Specific provisions of the Statute confer a right upon victims to make representations in proceedings before the Court. They are to be found in article 15 (3) concerning the authorization of an investigation and article 19 (3) acknowledging them a right to make observations in proceedings determinative of the jurisdiction of the Court to take cognizance of a case or its admissibility. Moreover, victims suffering harm or injury from a crime for which an accused person is convicted by a Trial Chamber are entitled, in virtue of the provisions of articles 75 (3) and 76 (3), to make representations with regard to reparations.

9. The Rules of Procedure and Evidence confer upon victims, subject to the conditions specified therein, a right to be heard on the following issues: a) the reception of the testimony of victims of sexual violence in camera (rule 72 (2)) and b) the implications of release of a person upon victims, who have communicated with the Chamber, considered by the Chamber to be at risk from the possible release of the person under charge or the accused or the conditions attached thereto (rule 119 (3)).

10. Save for the above, article 68 (3) is the only provision of the Statute conferring upon a specified class of victims a right to participate, in the circumstances envisaged therein, in proceedings before the Court. A survey of the background<sup>22</sup> to the fashioning of article 68 (3) of the Statute reveals that paragraph 6 (b)<sup>23</sup> of the Declaration of Basic

<sup>21</sup> See *ibid.*, annex paras 6 and 7.

<sup>22</sup> See *inter alia* the version of paragraph 4 of draft article 68 of the 1998 Preparatory Committee Draft (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, A/Conf.183/13 (Vol. III), page 57): “[The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.]”.

<sup>23</sup> It reads: “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by [...] ( b) Allowing the views and concerns of victims to be presented and considered at

Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations on 29 November 1985 (resolution 40/34), formed the prototype for the configuration of this paragraph of the Statute.

11. Article 68 (3) of the Statute reads:

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. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.<sup>24</sup>

The right of victims to participate enunciated by article 68 (3) has no immediate parallel to or association with the participation of victims in criminal proceedings in either the common law system of justice as evolved in England and Wales, where no role is acknowledged to victims in criminal proceedings except for the right to initiate a private prosecution,<sup>25</sup> or the Romano-Germanic system of justice, where victims in the role of civil parties<sup>26</sup> or auxiliary<sup>27</sup> prosecutors have a wide-ranging right to participate in

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appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”

<sup>24</sup> The French version reads: “Lorsque les intérêts personnels des victimes sont concernés, la Cour permet que leurs vues et préoccupations soient exposées et examinées, à des stades de la procédure qu’elle estime appropriés et d’une manière qui n’est ni préjudiciable ni contraire aux droits de la défense et aux exigences d’un procès équitable et impartial.” The Spanish version reads: “La Corte permitirá, en las fases del juicio que considere conveniente, que se presenten y tengan en cuenta las opiniones y observaciones de las víctimas si se vieren afectados sus intereses personales y de una manera que no redunde en detrimento de los derechos del acusado o de un juicio justo e imparcial ni sea incompatible con éstos.”

<sup>25</sup> See the following decisions respecting the right to initiate a private prosecution: England and Wales: Queen’s Bench Division *R (on the application of Gladstone Plc) v Manchester City Magistrates* [2005] All.E.R. 56 (All England Law Reports); Divisional Court *Jones v. Whalley* [2006] 2 Criminal Law Review 67 on appeal to the House of Lords *Jones v. Whalley* [2006] 4 All.E.R. 113; Cyprus: Supreme Court *Ttofinis v. Theocharides* (1983) 2 Cyprus Law Reports 363; Note. The right to a private prosecution is acknowledged to victims in many countries outside the common law jurisdictions. A right to private prosecution is also acknowledged to victims in Australia and New Zealand.

<sup>26</sup> See *inter alia* France: “partie civile” (articles 85 and 87 of the French Criminal Procedure Code “*Code de Procédure Pénale*”), Belgium: “burgerlijke partij” (articles 63, 66 and 67 of the Belgian Criminal Procedure Code “*Wetboek van Strafvordering*”), Austria “Privatbetelligter” (para 47 of the Austrian Criminal Procedure Code “*Strafprozessordnung 1975*”).

<sup>27</sup> See *inter alia* Germany “Nebenklager” (see paras 395 to 402 of the German Criminal Procedure Code “*Strafprozessordnung*”)



criminal proceedings. In the United States of America most states acknowledge a right to victims of crimes to participate in criminal proceedings, mainly in the sentencing process.<sup>28</sup> In Canada a right to participate, especially in the sentencing process,<sup>29</sup> is likewise vested in victims. The same applies to Australia and New Zealand.<sup>30</sup>

12. The grammatical interpretation is the principal rule governing the construction of the Statute. The Vienna Convention on the Law of Treaties<sup>31</sup> is the guide to the interpretation of treaties and conventions. The road to the interpretation of the Statute is mapped by the judgment<sup>32</sup> of the Appeals Chamber on the “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”. The following extract is revealing:

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.<sup>33</sup> [footnotes omitted]

In construing article 68 (3) of the Statute, it would be helpful if we were to break it down into its formative parts and seek to elicit thereby its meaning, its ambit and compass.

<sup>28</sup> See Beloof D.E. *Victims in Criminal Procedure* (Carolina Academic Press 1998), page 621, making reference at page 626 to *Payne v. Tennessee* (501 U.S. 808 (1991)).

<sup>29</sup> See section 722 of the Canadian Criminal Code; John Howard Society of Alberta, 1997, *Victim Impact Statements*, available at: <http://www.johnhoward.ab.ca/PUB/C53.htm> (last accessed on 12 June 2007).

<sup>30</sup> Australia (see Victoria: Division 1A of Part 6 of the Sentencing Act 1991 (L-49/1991); South Australia: Section 7A of the Criminal Law (Sentencing) Act 1988; New South Wales: sections 26 to 30A of the Crimes (Sentencing Procedure) Act 1999 (L-92/1999); a commonwealth Bill (Crimes Amendment (Victim Impact Statements 2006) is pending to amend the Crimes Act 1914, available at: [www.comlaw.gov.au/comlaw/legislation/bills1.nsf/previewlodgmentattachments/480697213FFC66D0CA25720D0006C770/\\$file/06158em.htm](http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/previewlodgmentattachments/480697213FFC66D0CA25720D0006C770/$file/06158em.htm) (last accessed on 12 June 2007)); New Zealand (see paras. 17 to 27 of Part 2 of the Victims’ Rights Act 2002, available at: [www.legislation.govt.nz/libraries/contents/om\\_isapi.dll?clientID=220423663&infobase=pal\\_statutes.nfo&jump=a2002-039&softpage=DOC](http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=220423663&infobase=pal_statutes.nfo&jump=a2002-039&softpage=DOC) (last accessed on 12 June 2007)); note also para 30 of the same law respecting bail proceedings.

<sup>31</sup> See articles 31 and 32 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232.

<sup>32</sup> *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168)

<sup>33</sup> *Ibid*, para 33.



13. The first constituent requires that “the personal interests of the victim must be affected”<sup>34</sup>. The status or identity of a person as a victim does not legitimize as such participation in any proceedings before the Court. The term “victim” or “victims” is not defined in the Statute. Reference to victims in articles 43 (6) and 68 (1), (2), (4) and (5) does leave the impression that they are not confined to those immediately affected by pending proceedings. Rule 85 of the Rules of Procedure and Evidence defines victims as follows:

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

The definition of “victims” given above embraces all persons who are victims of crimes within the jurisdiction of the Court. To qualify for participation in proceedings before the Court, the personal interests of a victim as such must be affected. The word “affect” denotes something having a bearing on, impact or repercussions upon the victims’ personal interests. To the question “affected” by what, the self-evident answer is by the proceedings before the Court, in which participation is sought. Of which victims (of those coming within the definition) the personal interests are at stake in any given proceedings? The inevitable answer is of victims who suffered harm from the crime or crimes, the subject-matter of investigation, confirmation, the trial, appeal, revision (article 84 of the Statute), and reduction of sentence (article 110 of the Statute and rule 224 of the Rules of Procedure and Evidence).<sup>35</sup>

14. Where it is demonstrated or made to appear that the victims’ personal interests are affected by the proceedings, the Court is duty bound (“shall”) to “permit their views and

<sup>34</sup> The French version reads: “Lorsque les intérêts personnels des victimes sont concernés”; the Spanish version reads: “si se vieron afectados sus intereses personales”.

<sup>35</sup> Rule 221 of the Rules of Procedure and Evidence assures victims a say in proceedings before the Presidency with regard to the dispositions and allocation of assets of the convicted person, the subject of an order of forfeiture and fines.



concerns to be presented and considered”<sup>36</sup>. “[C]onsidered” in this context means the taking into consideration of the views and concerns of victims in the course of the judicial process. An apt example is the elicitation of evidence revealing the injury inflicted upon victims by the crime, the subject-matter of the proceedings.

15. Participation is confined to the expression of the victims’ “views and concerns”. It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their “views and concerns”. The term “views” in the context of article 68 (3) of the Statute signifies “opinion”<sup>37</sup>, in fact an opinion, stance or position on a subject. In the Russian and Spanish version of article 68 (3) of the Statute the word “opinion” is used.<sup>38</sup> “[C]oncerns” signify matters of interest to a person; matters that preoccupy him/her. “[P]réoccupations”<sup>39</sup> is precisely the word used in the French text of the Statute. A combination of the two, “views”, “concerns” joined by the conjunctive “and” signifies that victims can express themselves about both, their preoccupations and their opinion. As to what they may express their views and concerns is addressed in the paragraph following.

16. In relation to what can victims express their views and concerns? 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

<sup>36</sup> The French version reads: “la Cour permet que leurs vues et préoccupations soient exposées et examinées”; the Spanish version reads. “que se presenten y tengan en cuenta las opiniones y observaciones de las víctimas”.

<sup>37</sup> The Shorter Oxford English Dictionary on Historical Principles (Oxford University Press, Fifth Edition, 2002), Volume 2, N-Z provides at page 3535: “8. A particular manner of considering or regarding something; a mental attitude; an opinion, idea, or belief concerning a particular subject or thing. b An aspect or light in which something is regarded or considered.”

<sup>38</sup> See the Russian version “МНЕНИЕ”, meaning: “opinion” according to Wheeler, M., Unbegaun B.(eds) *The Oxford Russian Dictionary* (Oxford University Press, Third Edition, 2000), page 223, see the Spanish version “opinión” meaning “opinion” according to Galimberti Jarman B , Russel R. (eds.), *The Oxford Spanish Dictionary* (Oxford University Press, Third Edition, 2003), page 587.

<sup>39</sup> The meaning of the French term “préoccupation” is “Souci, inquiétude qui occupe l’esprit” according to *Le Nouveau Petit Robert* (Paris, 2003), page 2054, the English term “preoccupation” means *inter alia* “[t]he state or condition of being preoccupied; mental absorption” according to *Shorter Oxford English Dictionary on Historical Principles* (Oxford University Press, Fifth Edition, 2002), Volume 2, N-Z, page 2327.



subject-matter of the proceedings. That the judicial process 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. Participating victims' views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings. The decision<sup>40</sup> of the Appeals Chamber of 12 December 2006 supports this proposition. Victims have an interest that the loss or injury they have suffered, a matter of individual concern, should surface in the proceedings and be brought to light. Such evidence would presage any claim<sup>41</sup> to reparations as well as illuminate the gravity of the crime. Rule 143 of the Rules of Procedure and Evidence imports by necessary implication a right to participating victims to express their position in any hearing held for sentencing purposes. Another area involving the personal interests of victims is their protection and support in the proceedings, for which provision is made in several parts of the Statute and the Rules of Procedure and Evidence.<sup>42</sup> The Court itself may elicit the views of participating victims in relation to the matters outlined in rule 93<sup>43</sup> of the Rules of Procedure and Evidence.

17. The next component of article 68 (3) of the Statute relates to the presentation of the views and concerns of victims, the stage and manner in which they may be presented: "[...] 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 a fair and impartial trial."<sup>44</sup> The "stage" relates to the point or interval of the proceedings at

<sup>40</sup> *Prosecutor v. Lubanga Dyilo* "Decision of the Appeals Chamber" 12 December 2006 (ICC-01/04-01/06-769); reasons (majority decision – Judge Song dissenting) for the decision in "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>41</sup> See rule 94 of the Rules of Procedure and Evidence.

<sup>42</sup> See *inter alia* articles 68, 43 (6) of the Statute and rules 87 and 88, 16 and 17 of the Rules of Procedure and Evidence.

<sup>43</sup> Rule 93 reads: "A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, the Chamber may seek the views of other victims, as appropriate."; compare in this context articles 53 (1) (c), (2) (c), (3), 65 (4) of the Statute

<sup>44</sup> The French version reads: "à des stades de la procédure qu'elle estime appropriés et d'une manière qui n'est ni préjudiciable ni contraire aux droits de la défense et aux exigences d'un procès équitable et impartial"; the Spanish version reads: "La Corte permitirá, en las fases del juicio que considere conveniente



which views and concerns may be put forward and the “manner” to the framework of their presentation. The manner of presentation of victims’ views and concerns is subject to an important proviso. It must not be inconsistent with a) the rights of the accused and b) a fair and impartial trial. This is also a consideration relevant to the determination of the appropriateness of the stage at which such views and concerns may be presented.

18. The rights of the accused are defined by article 67 of the Statute. Their application extends to the confirmation proceedings by virtue of rule 121 (1) of the Rules of Procedure and Evidence and to appeal proceedings in accordance with rule 149 of the Rules of Procedure and Evidence.<sup>45</sup> They assure the person under charge and the accused of prior knowledge of evidence and information founding the case against him/her. Such knowledge must be gained prior to the confirmation hearing or the trial in order to enable the person under charge or the accused to prepare the defence to the case against him/her. Further, a person under charge or an accused has the right to confront witnesses against him/her (article 67 (1) (e) of the Statute), a right that introduces an “adversarial hearing”<sup>46</sup>. Casting the burden of proof, as the Statute does, upon the Prosecutor confines the discharge of this burden to the Prosecutor and limits the confrontation to the parties, i.e., the Prosecutor and the defendant.

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[...] y de una manera que no redunde en detrimento de los derechos del acusado o de un juicio justo e imparcial ni sea incompatible con éstos.”

<sup>45</sup> The rights of a person under investigation are separately secured by article 55 (2) of the Statute.

<sup>46</sup> See *inter alia* the judgments of the European Court of Human Rights with respect to Article 6 (3) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889, that reads: “Everyone charged with a criminal offence has the following minimum rights: [...] (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]” in *Case of Windisch v. Austria*, Application no. 12489/86, Judgment of 27 September 1990, para 26; *Case of Luca v. Italy*, Application no. 33354/96, Judgment of 27 February 2000, paras 39, 42; *Case of Eskelinen and others v. Finland*, Application no. 43803/98, 8 August 2006, para 31; See also *Case of Brandstetter v. Austria*, Application no. 11170/84, 12876/87, 13468/87, Judgment of 28 August 1991, para 67: “The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”



19. Equality of arms<sup>47</sup> is another element of a fair trial, which in the context of the Statute, putting the burden of proof on the Prosecutor, means that the defendant cannot be required to confront more than one accuser. Holding the scales even between the parties with the burden of proof cast upon the Prosecutor rules out a second accuser. The Prosecutor, the accuser, is required to forewarn and inform the person about the case he/she has to face at the confirmation hearing or at the trial.<sup>48</sup> The defendant too is required to forewarn and inform the other side respecting the advancement of specified defences.<sup>49</sup> A right to inspect material in the possession of either side is also envisaged.<sup>50</sup>

20. The stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute. An opportune stage at which the views and concerns of participating victims may be presented is at the outset of the proceedings, alerting the Court and the parties to the implications of the case on the personal interests of victims and how best they may be safeguarded. Power is acknowledged to the Court, it must be reminded, to seek the adduction of evidence (article 69 (3) of the Statute) and ask questions of witnesses, as provided for in rule 140 of the Rules of Procedure and Evidence. Rule 91 (3) of the Rules of Procedure and Evidence confers a limited right to victims to seek, subject to a ruling of the Chamber approving such a course, to question through their legal representatives or the Chamber witnesses, a right confined, as already explained, to matters affecting their personal interests, qualified again by the rights of the accused and a fair and impartial trial.

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<sup>47</sup> See the judgments of the European Court of Human Rights on “equality of arms” in *Case of Dombo Beheer B.V. v The Netherlands*, Application no. 14448/88, Judgment of 27 October 1993, at para 33: “[...] it is clear that the requirement of ‘equality of arms’, in the sense of a ‘fair balance’ between the parties, applies in principle to such cases as well as to criminal cases [...] ‘equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”; *Case of Bulut v. Austria*, Application no. 17358/90, Judgment of 22 February 1996, para 47

<sup>48</sup> See *inter alia* articles 61 (3), 64 (3) (c), 67 (2) of the Statute and rules 76, 84, 121 of the Rules of Procedure and Evidence.

<sup>49</sup> See rule 79 of the Rules of Procedure and Evidence.

<sup>50</sup> See rules 77 and 78 of the Rules of Procedure and Evidence.

21. Victims may refer to the effect of the evidence on their personal interests at the end of the trial, subject always to the right of the accused, assured by rule 141 (2) of the Rules of Procedure and Evidence, to have the last word. The possibility of affording victims the opportunity to present their views and concerns at the opening and closing stages of the trial is envisioned by rule 89 (1) of the Rules of Procedure and Evidence.<sup>51</sup>

22. In the present case, no grounds are put forward establishing personal interests of the Applicants being at stake or apt to be affected by the determination of the appealability of the sub judice decision. And none can be directly or inferentially identified. The issue raised is a purely legal one designed to elicit whether the appeal is justiciable. A prerequisite to victims' participation is the existence of viable proceedings and the effect they may have on their personal interests. If the proceedings (the appeal) are inadmissible, as they are in the present case, no right to participate could arise. Inevitably, the application must be dismissed.

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



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Judge Georghios M. Pikis

Dated this 13th day of June 2007

At The Hague, The Netherlands

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<sup>51</sup> The last sentence of sub-rule 1 of rule 89 of the Rules of Procedure and Evidence provides: "Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements."

## Separate opinion of Judge Sang-Hyun Song

1. On 2 February 2007, victims a/0001/06 to a/0003/06 and a/0105/06 (hereinafter: “Victims”) filed the “Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning ‘Directions and Decision of the Appeals Chamber’, filed on 1 February 2007” (ICC-01/04-01/06-802-tEN, hereinafter: “Application for Participation”), in which they requested the Appeals Chamber *inter alia*:

To authorise Victims a/0001/06 to a/0003/06 and a/0105/06 to file, within a time limit to be set by the Chamber, a response to the submission of the Defence as stated in paragraph 3 of the “Directions and Decision” of the Appeals Chamber.

2. With today’s decision, the Appeals Chamber dismisses this application.

3. Although I agree with this conclusion, my reasons for the dismissal are different from the reasons that are expressed in the Decision of the majority of the Judges of the Appeals Chamber as well as from the reasons that are expressed in the separate opinion of Judge Pikis.

4. In my opinion and for the reasons given below, the request of the Victims has to be dismissed because even though the question of the admissibility of the present appeal affects their personal interests, their participation at this stage of the proceedings would be inappropriate.

5. The Victims submit that pursuant to regulation 24 (2) of the Regulations of the Court they have a right to submit a response to the Appellant’s submission further to the Directions of the Appeals Chamber.<sup>1</sup> This submission is premised on the opinion that pursuant to regulation 86 (8) of the Regulations of the Court, the Victims should be considered participants in interlocutory appeals proceedings unless the Appeals Chamber decides otherwise.

6. In my Dissenting Opinion in relation to aspects of the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled

<sup>1</sup> Application for Participation, pp. 3-4.

‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” of 13 February 2007 (ICC-01/04-01/06-824; hereinafter: Judgment in 01/04-01/06 OA 7”), I expressed my view that victims who have participated in proceedings that gave rise to an appeal under article 82 (1) (b) of the Statute indeed should be considered participants in the ensuing appeals proceedings, at least in the meaning of regulation 65 (5) of the Regulations of the Court. I respect, however, the view expressed in paragraph 43 of the Judgment in 01/04-01/06 OA 7 that rejected this interpretation. This view makes untenable the submission of the Victims in the present case that they should be considered participants in the meaning of regulation 24 (2) of the Regulations of the Court.

7. Thus, the question of whether the request of the Victims to file a response to the submissions of the Appellant on the admissibility of his appeal should be granted is governed solely by article 68 (3), first sentence, of the Statute, which reads as follows:

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.

8. The provision is best constructed as consisting of a condition (“[w]here the personal interests are affected”) and a consequence, namely the right of victims to present their views and concerns. This consequence is further qualified: first, it is for the relevant Chamber to determine the appropriate stage of the proceedings where victims may present their views and concerns; and second, the *manner* in which the views and concerns are presented and considered must not be prejudicial to or consistent with the rights of the accused and a fair and impartial trial.

#### **I. Personal interests of the Victims**

9. The Victims submit that:

The interests of the Victims in participating in these appeal proceedings is [sic] obvious, as the appellant is requesting, inter alia, that the decision confirming the charges be quashed. Such a decision would mean the end of

the prosecution and, as such, would preclude any possibility for the Victims to later seek compensation for the harm they have suffered.<sup>2</sup>

10. Thus, the Victims assert that their interests lie, first of all, in the possibility of seeking reparations. Secondly, the Victims assert their interest in seeing the Appellant being prosecuted; in other words, the Victims want that justice is done.

11. In my opinion, both interests qualify as personal interests in the meaning of article 68 (1) of the Statute because both interests are acknowledged by the Statute and by the Rules of Procedure and Evidence as legitimate interests of victims in proceedings before the Court.

12. As far as reparations to victims are concerned, article 75 of the Statute provides that the Court may make an order for reparations if the accused person is convicted. Such reparations may take the form of individual reparations to victims, including to those victims who have participated in the proceedings. Thus, the Statute acknowledges the interest of victims to receive reparations. For that reason, this interest qualifies as personal interest in the meaning of article 68 (3) of the Statute.

13. While the interest in receiving reparations is of a material and tangible nature, the interest that justice is done is intangible. Nevertheless, such an intangible interest also qualifies as a personal interest in the meaning of article 68 (3) of the Statute. The victim of a crime has a particular interest that the person allegedly responsible for his or her suffering is brought to justice; this interest goes beyond the general interest that any member of society may have in seeing offenders held accountable. This interest of victims is acknowledged in the Statute and the Rules of Procedure and Evidence. For instance, in relation to proceedings on an admission of guilt, the Trial Chamber may find that a more complete presentation of facts is “required in the interests of justice, *in particular in the interests of the victims*” (emphasis added). Pursuant to rule 93 read with rule 191 of the Rules of Procedure and Evidence, a Chamber may seek the views of victims *inter alia* in respect of the granting of an assurance to a witness or an expert pursuant to article 93 (2) of the Statute “that he or she will not be prosecuted, detained or

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<sup>2</sup> Application for Participation, pp. 4-5.

subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of the person from the requested State.” That the Rules of Procedure and Evidence underline that victims may be heard with regard to such an assurance acknowledges the interest of victims that justice is done.

14. The interest of victims that justice is done also is recognized in the jurisprudence of the Inter-American Court of Human Rights (IACHR) and of the European Court of Human Rights (ECHR). For instance, in its judgment in the case of *Blake v. Guatemala*, the IACHR held that

Article 8(1) of the American Convention [on judicial guarantees] recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death to [sic] effectively investigated by the Guatemalan authorities to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained.<sup>3</sup>

15. Similarly, the ECHR held in its judgment in the case of *Kılıç v. Turkey*:

Given the fundamental importance of the right to protection of life, Article 13 [of the European Convention on Human Rights] requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life ...<sup>4</sup>

16. While this jurisprudence does not stipulate that victims have a human right to participate in criminal proceedings, the findings of the IACHR and of the ECHR emphasize that victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and that this interest is protected by human rights norms.<sup>5</sup> This jurisprudence should be taken into account when interpreting

<sup>3</sup> IACHR, *Case of Blake v Guatemala*, “Judgment”, 24 January 1998, para. 97.

<sup>4</sup> ECHR, *Case of Kılıç v Turkey*, “Judgment”, 28 March 2000, Application no. 22492/93, para. 91.

<sup>5</sup> See also United Nations Economic and Social Council, Commission on Human Rights, “Promotion and Protection of Human Rights – Impunity – Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity”, E/CN.4/2005/102/Add.1, 8 February 2005, principle 19 (2); United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, “The Administration of Justice and the Human Rights of Detainees/Question of the impunity of perpetrators of human rights violations/Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119”, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, paras. 26 et seq., Annex II, principle 18 (2).

the term “personal interests of the victims” in article 68 (3) of the Statute, as article 21 (3) of the Statute obliges the Court to interpret and apply the Statute in consistence with internationally recognized human rights.

## II. Interests are affected

17. For the reasons given below, I am of the opinion that the personal interests of the Victims identified in the preceding section are affected by the appeal and, more specifically, by the question of the admissibility of the appeal.

18. In the present case, the Appellant requests the Appeals Chamber to reverse the decision confirming the charges and to release the Appellant unconditionally.<sup>6</sup> If the appeal were successful, the Appeals Chamber could reverse the decision confirming the charges (rule 158 (1) of the Rules of Procedure and Evidence). As a consequence, a successful appeal would substantially diminish the prospects of the Victims to receive reparations (as reparations are dependent on conviction after trial) and to see that justice is done; any trial against the Appellant would at least be delayed or might not even take place at all.

19. The interests of the Victims also are affected by the question of the admissibility of the appeal. The question of admissibility is an integral aspect of the appeal that cannot be separated from the other questions that are arising in the appeal. For the Victims, it would make little difference whether the appeal is dismissed as inadmissible or as substantially unfounded. For that reason, I am not persuaded by the argument of the Prosecutor that because of the procedural nature of the question of admissibility the Victims’ interests cannot be affected.<sup>7</sup> Depending on the circumstances of the case, procedural questions may be as important for the outcome of an appeal as substantive questions.

<sup>6</sup> See “Defence Appal Against the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007”, 30 January 2007, ICC-01/04-01/06-797, para. 6.

<sup>7</sup> See “Prosecution’s Response to the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 pursuant to ‘Directions of the Appeals Chamber’ of 5 February 2007”, 9 February 2007, ICC-01/04-01/06-817, para. 16.

20. Nor am I persuaded by the argument of the Prosecutor that since the Appeals Chamber has yet to decide on the admissibility of the present case, there is no appeal pending in which the Victims could participate.<sup>8</sup> Appeals under article 82 (1) (b) of the Statute fall in the category of appeals that do not require the leave of the Chamber that rendered the impugned decision. Pursuant to rule 154 (1) of the Rules of Procedure and Evidence, the appeal may be filed within a time limit stipulated in that rule. Regulation 64 (1) and (2) of the Regulations of the Court further regulates the procedure to be followed; notably, it stipulates what information the notice of appeal pursuant to rule 154 of the Rules of Procedure and Evidence must contain and it requires the appellant to file a document in support of the appeal in addition to the notice appeal. Neither the Rules of Procedure and Evidence nor the Regulations of the Court require that for an appeal to become pending, the Appeals Chamber would have to declare the appeal admissible. Nor has the Appeals Chamber the authority to rescind the effect of the filing of a notice of appeal; even if an appeal is inadmissible, it remains a pending appeal until the Appeals Chamber has made its final determination. For that reason, the Directions of the Appeals Chamber that invited submissions from the Appellant and the Prosecutor on the admissibility of the appeal did not have any effect on the question of whether the appeal was pending.

### **III. Inappropriateness of participation of the Victims at this stage**

21. Once it has been established that the personal interests of the victims are affected it is the Chamber that has to determine the appropriate stage at which the victims may present their views and concerns. In appeals proceedings under article 82 (1) (b) of the Statute, the appropriate stage for participating victims to present their views generally will be after the submission of the document in support of the appeal, once the arguments of the appellant have been fully expressed. Only then will the victims be able to react properly and to submit their views and concerns in relation to the appeal.

22. In the present case, the document in support of the appeal has not been submitted yet because the Appeals Chamber directed the Appellant and the Prosecutor to address

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<sup>8</sup> *Ibid*, para. 17.

the question of the admissibility of the appeal first.<sup>9</sup> Thus, for reasons of procedural economy, the Appeals Chamber departed from the usual procedure in appeals brought under article 82 (1) (b) of the Statute and singled out the question of admissibility for determination prior to the submission of the document in support of the appeal pursuant to regulation 64 (2) of the Regulations of the Court.

23. In light of this decision of the Appeals Chamber and in the circumstances of the present case, it would not be appropriate for the Victims to participate at this stage and to submit their views and concerns in relation to the admissibility of the appeal. The proceedings in this appeal have been delayed for several weeks due to the withdrawal of counsel for the Appellant shortly after the appeal had been filed. The process of the selection and appointment of new counsel for the Appellant has taken longer than expected and still has not been concluded. To ensure that the proceedings in this appeal could continue, the Appeals Chamber directed the Registrar to appoint duty counsel for the Appellant to make submissions *inter alia* on the admissibility of the appeal.<sup>10</sup> If the Victims now were allowed to make submissions on the admissibility, it is likely that the proceedings would be further delayed, in particular in view of the fact that the Appellant still is not represented by counsel. As both the Appellant and the Prosecutor have made extensive submissions on the admissibility of the appeal, which seem to cover all angles of the question, further submissions by the Victims are not likely to add substantially to it. On balance, the participation of the Victims at this stage of the proceedings therefore would be inappropriate.

#### **IV. Manner prejudicial to or inconsistent with the rights of the accused**

24. As the participation of the Victims is inappropriate at this stage of the proceedings, the question of whether the manner of the participation sought – that is, by way of making written submissions – would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial does not have to be addressed in much detail.

<sup>9</sup> See “Direction and Decision of the Appeals Chamber”, 1 February 2007, ICC-01/04-01/06-800.

<sup>10</sup> See “Appeals Chamber’s Decision to Extend Time Limits for Defence Documents”, 3 April 2007, ICC-01/04-01/06-857.

25. At the outset, it is noteworthy that many jurisdictions that provide for relatively strong participation of victims in criminal proceedings are bound by the International Covenant on Civil and Political Rights<sup>11</sup> and by regional human rights treaties, which stipulate rights of the accused similar to the rights enshrined in article 67 of the State. For example, in France a victim can become a *partie civile*, which makes the victim a party of the criminal process. Similarly, the *Nebenkläger* in German criminal procedure has many procedural rights and can, *inter alia*, request the court to hear further evidence, and make submissions as to the facts and the law. The jurisprudence of the ECHR indicates that criminal proceedings may well be considered fair and consistent with the rights of the accused even if the participation of victims is relatively far-reaching.<sup>12</sup> The jurisprudence of the ECHR does not require that the criminal process should be a bipolar procedure between the defence and the prosecution with no or only very restricted involvement of victims.

26. The argument of the Appellant that the participation of the Victims would prejudice his rights because he does not have sufficient resources to cope with the extra work that the participation of the Victims may necessitate<sup>13</sup> has not been substantiated. The additional work that the participation of the Victims in relation to the admissibility of the appeal is likely to cause would consist of the filing of a response by the Appellant. The Appellant has not demonstrated why he could not cope with this work.

27. Similarly, I am not convinced by the argument of the Appellant that the participation of the Victims would lead to a delay in the proceedings and therefore would be inconsistent with the right to an expeditious trial. Obviously, if the Victims were to participate in the appeal, they would have to be given some time to make their submissions; the Appellant and the Prosecutor would be given time to respond (rule 91 (2) of the Rules of Procedure and Evidence). Such delay will arise whenever victims are allowed to participate. Unless special circumstances exist, this delay is not inconsistent

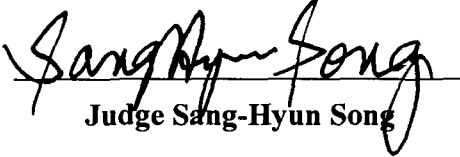
<sup>11</sup> International Covenant on Civil and Political Rights, 999 United Nations Treaty Series No. 14668, 16 December 1966.

<sup>12</sup> See, for example, ECHR, *Case of Verdú Verdú v Spain*, “Judgment”, 15 February 2007, Application no. 43432/02, paras. 20 et seq.

<sup>13</sup> See “Corrigendum to the Response to the application by Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorization to participate in the appeals proceedings relating to the *Decision on the confirmation of charges*”, 16 May 2007, ICC-01/04-01/06-901-Corr-tEN, para. 32.

with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in proceedings before the Court. As has been explained in the preceding section, in the specific circumstances of this case, it is *inter alia* the further delay that the participation of the Victims in respect of the admissibility of the appeal would cause that renders their participation at this stage of the proceedings inappropriate. The Appellant has not demonstrated, however, that this delay would reach an extent so as to violate the right of the accused person under article 67 (1) (c) of the Statute to be tried without undue delay.

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

  
Judge Sang-Hyun Song

Dated this 13<sup>th</sup> day of June 2007

At The Hague, The Netherlands

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