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**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**Registrar:** Mr Bruno Cathala

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

**Public**

**Decision on victims' participation**

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, following the Status Conference on 29 and 30 October 2007, delivers the following decision on the criteria for permitting participation by victims in the proceedings in accordance with Article 68 of the Rome Statute (“Statute”) and Rule 85 of the Rules of Procedure and Evidence (“Rules”), the role of victims in the proceedings leading up to, and during, the trial, victims’ common legal representation and certain other related matters.

## **I. Background**

### **A. Procedural background before the Trial Chamber**

1. On 5 September 2007, the Trial Chamber issued an “Order setting out schedule for submissions and hearings regarding the subjects that require early determination”,<sup>1</sup> in which the parties and participants were invited to make submissions on the “role of victims in the proceedings leading up to, and during, the trial”.
2. On 17 October 2007, the Trial Chamber issued “The Trial Chamber’s Agenda for the Hearing on 29-31 October 2007” (“Trial Chamber’s Agenda”),<sup>2</sup> which added the issues of common legal representation and the criteria for granting victims participating status to the matters to be dealt with at that hearing.
3. The legal representatives of victims filed a joint submission on 28 September 2007,<sup>3</sup> followed by the defence on 18 October 2007,<sup>4</sup> and the Office of the Prosecutor (“prosecution”) on 19 October 2007.<sup>5</sup>

<sup>1</sup> Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC-01/04-01/06-947. See also Order amending schedule for hearing, 9 October 2007, ICC-01/04-01/06-977.

<sup>2</sup> ICC-01/04-01/06-985.

<sup>3</sup> *Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0105/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procès et lors du procès*, ICC-01/04-01/06-964.

<sup>4</sup> *Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences*, ICC-01/04-01/06-991.

4. The legal representative of victims a/0001/06 to a/0003/06 filed a separate submission on 19 October 2007 addressing the issues added to the Trial Chamber's Agenda on 17 October 2007.<sup>6</sup>
5. A Status Conference was held on 29 and 30 October 2007 and time was allocated for comprehensive submissions to be made on the issues set out by the Chamber.<sup>7</sup>
6. At the hearing on 30 October, the Chamber granted leave to the Office of Public Counsel for Victims to file written submissions on the issues discussed.<sup>8</sup> The Office of Public Counsel for Victims filed its submissions on 9 November 2007.<sup>9</sup> The Chamber also asked the Registry to file a short written submission on the issue of the dual status of victims and witnesses,<sup>10</sup> which was submitted on 13 November 2007.<sup>11</sup> The Chamber refers to this Registry confidential submission in a general way so as not undermine the matters protected, but which is sufficient for the purposes of this Decision. In addition, at a Status Conference on 4 December 2007, the Trial Chamber heard submissions on the issues of protective measures for victim applicants and the dual status of victims and witnesses.<sup>12</sup> The legal representative of victims a/0001/06 to a/0003/06 and the Office of Public Counsel for Victims were each requested to file further submissions,<sup>13</sup> which were submitted on 7 December 2007.<sup>14</sup> On the issue of

<sup>5</sup> Prosecution's submissions of the role of victims in the proceedings leading up to, and during, the trial, ICC-01/04-01/06-993-Conf. This document was erroneously filed confidentially and was re-filed publicly on 23 October 2007, ICC-01/04-01/06-996 and ICC-01/04-01/06-996-Anxl.

<sup>6</sup> Conclusions des victimes a/0001/06 à a/0003/06 en vue de l'audience du 29.10.2007, ICC-01/04-01/06-992.

<sup>7</sup> Transcript of hearing on 29 October 2007, ICC-01/04-01/06-T-57-ENG; transcript of hearing on 30 October 2007, ICC-01/04-01/06-T-58-ENG and ICC-01/04-01/06-T-60-ENG.

<sup>8</sup> ICC-01/04-01/06-T-58-ENG, page 14.

<sup>9</sup> Observations du Bureau du conseil public suite à l'invitation de la Chambre de première instance, ICC-01/04-01/06-1020.

<sup>10</sup> ICC-01/04-01/06-T-60-ENG, page 3.

<sup>11</sup> Victims and Witnesses Unit Report on security issues relating to the dual status of witnesses and victims, ICC-01/04-01/06-1026-Conf.

<sup>12</sup> Transcript of hearing on 4 December 2007, ICC-01/04-01/06-T-62-ENG, pages 33-54 and 24-29, respectively. See also Order scheduling a hearing, 14 November 2007, ICC-01/04-01/06-1027; Order amending schedule for hearing, 16 November 2007, ICC-01/04-01/06-1031; Order amending schedule for hearing and adding an item to the agenda, 27 November 2007, ICC-01/04-01/06-1044.

<sup>13</sup> ICC-01/04-01/06-T-62-ENG, pages 53-54.

<sup>14</sup> Note pour les victimes a/0001/06 à a/0003/06, ICC-01/04-01/06-1060; OPCV's analysis of the notions of "victims" and of "victims who appear before the Court" with Annexes, ICC-01/04-01/06-1063, ICC-01/04-01/06-1063-AnxA, ICC-01/04-01/06-1063-AnxB.

protective measures for victim applicants, the Victims and Witnesses Unit also filed a submission on 12 December 2007.<sup>15</sup> Finally, the Registry was requested to present a written report to the Chamber following consultations with the parties and participants, the Office of Public Counsel for Victims and the Registry's Victims Participation and Reparations Section and Victims and Witnesses Unit on the issue of the dual status of victims and witnesses.<sup>16</sup> The initial deadline of 7 January 2008 was extended to 16 January 2008, when the report was filed.<sup>17</sup>

## **B. The jurisprudence of the other Divisions concerning participation by victims**

7. The first decision in relation to victims participating in proceedings before the Court was made on 17 January 2006 by Pre-Trial Chamber I in the Situation of the Democratic Republic of Congo. The Chamber differentiated between the victims of a situation and the victims of a case. In analysing the criteria that must be met in order for someone to be considered a victim of a situation before the Court, the Pre-Trial Chamber stated that "the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence".<sup>18</sup>
8. In decisions thereafter, when applying Rule 85 of the Rules to the present case against the accused, the Pre-Trial Chamber observed that the applicant must fulfil four criteria in order to be allowed to participate in the proceedings. By way of example, on 28 July 2006 the Pre-Trial Chamber stated that "the victim must be a natural person; that he/she has suffered harm; that the crime from which the harm resulted must fall within the jurisdiction of the Court and that there must be a causal link between the crime and the

<sup>15</sup> Protection of victims and mandate of the Victims and Witnesses Unit, ICC-01/04-01/06-1078 and ICC-01/04-01/06-1078-Conf-AnxI.

<sup>16</sup> ICC-01/04-01/06-T-62-ENG, page 29.

<sup>17</sup> Request from the Registrar for extension of time, 20 December 2007, ICC-01/04-01/06-1100-Conf; transcript of hearing on 10 January 2007, ICC-01/04-01/06-T-69-ENG, page 39. Confidential Joint Report – Proposed mechanisms for exchange of information on individuals enjoying dual status, ICC-01/04-01/06-1117-Conf.

<sup>18</sup> Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ICC-01/04-101-tEN-Corr, paragraph 66.

harm".<sup>19</sup> In order to participate in the proceedings, the Pre-Trial Chamber decided on an earlier occasion that "the Applicants must demonstrate that there is a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible and for whose commission the Chamber issued an arrest warrant".<sup>20</sup> This criteria was consistently applied by Pre-Trial Chamber I when determining applications by victims to participate in the proceedings against the accused.

9. On 29 June 2006 the Pre-Trial Chamber in addition to the above stated:

**CONSIDERING** that the Chamber considers that the causal link required by rule 85 of the Rules at the case stage, is substantiated when the victim, and where applicable, close family or dependants, provides sufficient evidence to allow it to be established that the victim has suffered harm directly linked to the crimes contained in the arrest warrant or that the victim has suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes;<sup>21</sup>

10. On 28 July 2006 the Pre-Trial Chamber similarly described its approach as follows:

**CONSIDERING** that in the "Decision on the Application for Participation in the Proceedings of VPRS1 to VPRS6 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*," which was rendered by the Chamber on 22 June 2006, the Chamber held that at this stage in the case, the Applicants must demonstrate that there is a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible and for whose commission the Chamber issued an arrest warrant; that the causal link required by rule 85 of the Rules with regard to the stage of the case is demonstrated once the victim, and, if applicable, the immediate family or dependents of that victim, provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed;<sup>22</sup>

<sup>19</sup> Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06-228-tEN, page 7.

<sup>20</sup> Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172-tFN, page 6.

<sup>21</sup> ICC-01/04-01/06-172-tEN, pages 7-8.

<sup>22</sup> ICC-01/04-01/06-228-tEN, pages 8-9.

11. On 22 September 2006, Pre-Trial Chamber I issued a decision on the modalities of victims' participation for the confirmation of charges hearing.<sup>23</sup> In relation to protective measures for victims, Pre-Trial Chamber I observed that anonymity was the only protective measure available at that stage and that it was necessary to ensure their participation was effective.<sup>24</sup> However, because the participation by victims in the proceedings was to be anonymous, Pre-Trial Chamber I ordered that the victims should only have access to the public documents and participate at public hearings, and that they would not be permitted to add any point of fact or any evidence and to question the witnesses.<sup>25</sup> In addition, the Pre-Trial Chamber held that the victims may make opening and closing statements.<sup>26</sup> The Pre-Trial Chamber also ordered the prosecution and the defence to identify and provide to the legal representatives of the victims a list of the public documents on their respective lists of evidence.<sup>27</sup> Pre-Trial Chamber I accepted that the victims may be granted access to confidential filings and hearings in exceptional circumstances.<sup>28</sup>
12. Accordingly, during the confirmation of charges hearing, victims were given the right to make opening and closing statements, and they were not allowed to present evidence or to question witnesses.<sup>29</sup> However, on 21 November 2006, the legal representative of victims a/0001/06 to a/0003/06 requested leave to put one question to the sole witness called by the prosecution. Following submissions from the parties, this request was granted.<sup>30</sup>
13. Within the context of the Situation in the Democratic Republic of Congo, Pre-Trial Chamber I issued a decision dated 17 August 2007 on the application

<sup>23</sup> Decision on the arrangements for participation of victims a/0001/06, a/0002/06 and a/0003/06 at the confirmation hearing, ICC-01/04-01/06-462-tEN.

<sup>24</sup> *Ibid.*, page 6.

<sup>25</sup> *Ibid.*, pages 6-7.

<sup>26</sup> *Ibid.*, page 8.

<sup>27</sup> Transcript of hearing on 13 November 2006, ICC-01/04-01/06-T-33-EN, page 79.

<sup>28</sup> ICC-01/04-01/06-462-tEN, page 6.

<sup>29</sup> Transcript of hearing on 9 November 2006, ICC-01/04-01/06-T-30-EN, pages 75-102; transcript of hearing on 28 November 2006, ICC-01/04-01/06-T-47-EN, pages 45-86.

<sup>30</sup> ICC-01/04-01/06-T-39-ENG, pages 95 and 141.

process for victims' participation and their legal representation.<sup>31</sup> Amongst the matters considered in this decision, Pre-Trial Chamber I ruled on the proof of identity for victims. The Pre-Trial Chamber accepted a wide range of documents as proof of identity, taking into account the current situation in the Democratic Republic of Congo, including the recent conflict and difficulties in communication and travel.<sup>32</sup>

14. In the Situation in Uganda, Pre-Trial Chamber II has taken a slightly different approach as regards victims' participation. In its decision of 10 August 2007, Pre-Trial Chamber II interpreted the criteria to be met under Rule 85 as: "(i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) most crucially, whether such harm appears to have arisen "as a result" of the event constituting a crime within the jurisdiction of the Court." In relation to the standard of proof, Pre-Trial Chamber II stated that due to the lack of provisions in this regard, it has "broad discretion in assessing the soundness of a given statement or other piece of evidence". The Pre-Trial Chamber indicated that harm would be held to have occurred "as a result of" the alleged incident when "the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent."<sup>33</sup>
15. As regards the Appeals Chamber, the judgment of 13 June 2007<sup>34</sup> is the sole appellate decision to date on the participation of victims in the proceedings. The Appeals Chamber dismissed the joint application of victims a/0001/06 to a/0003/06 and a/0105/06 to participate in the determination of the preliminary

<sup>31</sup> Decision on the requests of the legal representatives of applicants on application process for victims' participation and legal representation, ICC-01/04-374.

<sup>32</sup> *Ibid*, paragraphs 14-15.

<sup>33</sup> Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, paragraphs 12-14.

<sup>34</sup> Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925.

issue of the admissibility of the appeal against the Decision on the confirmation of charges.<sup>35</sup> The majority found that the victim applicants' personal interests were not affected by the issue, since the Appeals Chamber's determination would neither result in the termination of the prosecution nor preclude the victims from later seeking compensation, and the victims had not put forward any other basis on which their personal interests were affected.<sup>36</sup>

16. The Appeals Chamber emphasized that any future decision by it as to whether the personal interests of victims are engaged by the substance of any particular appeal would require careful individual consideration. It further indicated that:

even when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>37</sup>

17. Judge Pikis, in his separate opinion, considered, *inter alia*, whether the victim applicants had demonstrated that their personal interests were affected by the issue before the Appeals Chamber. The reasons expressed by Judge Pikis were that the issue was a purely legal one, and "[a] prerequisite to victims participation is the existence of viable proceedings and the effect they may have on their personal interests."<sup>38</sup> In answering the question of which victims' personal interests are at stake, Judge Pikis concluded that "the inevitable answer is of victims who suffered harm from the crime or crimes, the subject-matter of investigation, confirmation, the trial, appeal, revision [...] and reduction of sentence".<sup>39</sup>
18. Judge Song also considered the issue of the interests of victims in his separate opinion, identifying two general interests: a) to receive reparations and b) to

<sup>35</sup> *Ibid*, paragraph 29.

<sup>36</sup> *Ibid*, paragraph 26.

<sup>37</sup> *Ibid*, paragraph 28.

<sup>38</sup> ICC-01/04-01/06-925. Separate Opinion of Judge Pikis, paragraph 22.

<sup>39</sup> *Ibid*, paragraph 13.



receive justice.<sup>40</sup> Judge Song considered that victims may have interests in procedural questions, as they are important for the outcome of substantive questions.<sup>41</sup> Judge Song concluded that participation of victims *per se* is not contrary to the right to an expeditious trial, as “[u]nless special circumstances exist, this delay is not inconsistent with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in the proceedings before the Court”.<sup>42</sup>

19. Although Judge Pikis and Judge Song agreed with the majority in dismissing the application, their separate reasoning described in the preceding paragraphs was not reflected in the majority decision and in consequence is not binding on this Chamber; however, it goes without saying that the Chamber has paid their opinions very close attention.

## **II. Relevant Provisions**

20. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions under the Rome Statute framework.
21. Regarding the victims’ rights to participate in the proceedings and to be granted protection, Article 68 of the Statute provides:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. 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

<sup>40</sup> ICC-01/04-01/06-925, Separate Opinion of Judge Song, paragraph 10.

<sup>41</sup> *Ibid.*, paragraph 19.

<sup>42</sup> *Ibid.*, paragraph 27.

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.

22. Article 69(3) of the Statute sets out that:

3. [...] The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

23. In order to assist the Court in determining who is a victim under the statutory framework, Rule 85 of the Rules states:

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.

24. Rule 86 of the Rules provides certain general principles on matters related to victims, setting out that:

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

25. With regards to procedural protective measures for victims, Rule 87 of the Rules in paragraph 3 sets out that:

A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

[...]

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

26. Rule 88(1) of the Rules provides for special measures, defined as:

[...] measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 [...]

27. Rule 89(1) of the Rules stipulates that once victims have applied to participate, the Chamber

[...] shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

28. As regards common legal representation, Rule 90 of the Rules provides that the Chamber:

2. [...] may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives [...]

[...]

4. [...] shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

29. In relation to the participation of the legal representative of victims in the proceedings, Rule 91 of the Rules provides:

1. A Chamber may modify a previous ruling under rule 89.

2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions...

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The

ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

30. On this same matter, Regulation 79(2) of the Regulations of the Court ("Regulations") states:

When choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.

31. In establishing rules of notification for victims and their legal representatives, Rule 92 of the Rules sets out as follows:

[...]

5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:

- (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;
- (b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings

32. Rule 131(2) of the Rules, on the subject of the record of the proceedings provides the following:

2. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

33. Regulation 56 of the Regulations affords the possibility for the Trial Chamber to:

[...] hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.

34. In addition, Article 21(3) of the Statute states that:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status

35. In light of Article 21(3) of the Statute, and taking into consideration the decision of the Appeals Chamber that it "makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights",<sup>43</sup> the Trial Chamber has considered the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles"), which in its principles 8 and 9 provides as follows:<sup>44</sup>

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

36. As regards victims who are children, article 3(1) of the Convention on the Rights of the Child indicates the following:<sup>45</sup>

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

37. Article 12(2) of the same convention provides:

<sup>43</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paragraph 36.

<sup>44</sup> Adopted by the United Nations General Assembly, resolution 60/147, 16 December 2005.

<sup>45</sup> Adopted by the United Nations General Assembly, resolution 44/25, 20 November 1989.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### **III. Submissions**

#### **A. Legal representatives of victims**

38. In their joint submission, the legal representatives referred to the current situation of the victims: in many instances they are children under the age of 18; they come from the accused's ethnic group; and, allegedly, they were under his authority. As regards their safety, the legal representatives of the victims suggested that since they all live in the Democratic Republic of Congo they are at risk of intimidation and threats from their own community.<sup>46</sup>
39. The victims' legal representatives submitted that the interests of victims in participating in the proceedings are diverse, and include, *inter alia*, obtaining reparations, expressing their views and concerns, verifying facts, protecting their dignity during the hearings and securing recognition as victims.<sup>47</sup>
40. The victims' legal representatives contended that the extent and the form of their participation during the trial will largely depend on whether the Chamber decides to hold reparations hearings as part of trial or as a separate post-trial procedure. The victims' legal representatives argued that if reparations are part of the trial, then victims should have appropriately broad rights to examine witnesses (under Regulation 56) and should be allowed to intervene whenever the evidence or the issues during a hearing relate to reparations.<sup>48</sup> Relying on this regulation, the victims' legal representatives seek to present evidence relating to the victims and the harm they suffered during the trial process, since

<sup>46</sup> ICC-01/04-01/06-964, paragraphs 3 and 5; ICC-01-04-01-06-T-57-ENG, page 29.

<sup>47</sup> ICC-01/04-01/06-964, paragraphs 6-9 and 21.

<sup>48</sup> *Ibid*, paragraphs 10-18.

they submit this provision affords victims the same rights as the parties to investigate relevant evidence.<sup>49</sup>

41. The victims' legal representatives contended that victims should be allowed to participate in all hearings as a general rule, with non-participation being the exception, to be decided on a case-by-case basis. They observed that no provision in the ICC legal framework justifies a general exclusion of victims from all closed hearings. Furthermore, victims wish to be able to initiate *ex parte* hearings (i.e. for protective measures) as and when necessary.<sup>50</sup>
42. The legal representatives informed the Trial Chamber that victims a/0002/06 and a/0105/06 will in due course request to appear before the Chamber in person.<sup>51</sup>
43. In relation to the victims' right to make oral and written submissions, the victims' legal representatives submitted that victims should not only be allowed to react to events during the proceedings, but they should also be able to initiate issues, call evidence and ask questions. They seek to establish the right to respond to all submissions advanced and to address any matters raised *proprio motu* by the Chamber. In addition, the victims' legal representatives request leave to make one-hour opening and closing statements at the commencement and end of the trial.<sup>52</sup>
44. In elaboration of their submissions on possible involvement in matters of evidence, relying on Rule 91(3) of the Rules, the victims seek the opportunity to present the documents that are relevant to the testimony of a witness, and to examine witnesses (including expert witnesses) and the accused, with the authorisation of the Chamber.<sup>53</sup> They also request access to the list of witnesses

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<sup>49</sup> *Ibid.*, paragraphs 33-36.

<sup>50</sup> *Ibid.*, paragraphs 22-26.

<sup>51</sup> *Ibid.*, paragraph 32.

<sup>52</sup> *Ibid.*, paragraphs 27-29, 31, and page 17.

<sup>53</sup> *Ibid.*, paragraph 39.

(including the expert witnesses of the parties) and the statements of the witnesses, in order to establish if their interests are engaged.<sup>54</sup>

45. The victims' legal representatives submitted that victims should be allowed to make submissions on the admissibility and relevance of evidence, particularly when these relate to reparations.<sup>55</sup>
46. Regarding protective measures, the victims emphasised that protective measures are not provided as a mere favour but instead are provisions of necessity or "force majeure" for victims, and accordingly should not be a reason for diminishing the rights of victims.<sup>56</sup> The victims' legal representatives emphasised that anonymity of victims is often essential as far as the public is concerned, but they accepted this is not necessarily the case as regards the defence. Indeed, the victims' legal representatives indicated that victims a/0002/06 and a/0105/06 have agreed to have their identities disclosed to the defence.<sup>57</sup> The legal representative of victim a/0105/06 additionally suggested that it may be possible to reveal the identity of a "key person" only for each group of victims, for instance whenever they allegedly lived in the same place at the same time and were the victims of the same crimes (e.g. when at the same recruitment camp).<sup>58</sup>
47. The victims' legal representatives anticipated that they may, in due course, request the Chamber to adopt special measures under Rule 88 of the Rules<sup>59</sup> and the legal representative of victims a/0001/06 to a/0003/06 noted that protective measures generally are in keeping with the provisions of international human rights standards.<sup>60</sup>

<sup>54</sup> *Ibid*, page 17.

<sup>55</sup> *Ibid*, paragraphs 37-38.

<sup>56</sup> *Ibid*, paragraph 41; ICC-01/04-01/06-T-57-ENG, page 15.

<sup>57</sup> ICC-01/04-01/06-964, paragraphs 42 to 46.

<sup>58</sup> ICC-01/04-01/06-T-57-ENG, page 31.

<sup>59</sup> ICC-01/04-01/06-964, paragraph 47.

<sup>60</sup> ICC-01/04-01/06-1060.



48. The legal representative of victims a/0001/06 to a/0003/06 submitted that the approach to common legal representation should be flexible and should depend on whether the victims under consideration have common interests.<sup>61</sup>
49. The victims' legal representatives did not advance any particular submissions as regards the criteria for the participation of victims under Rule 85 of the Rules, save to suggest that this matter should be resolved at the earliest possible time.<sup>62</sup>
50. On the question of the protection to be afforded to those who have applied to participate in the proceedings, the legal representative of victims a/0001/06 to a/0003/06 submitted that protection should be given to victim applicants from the time of their application.<sup>63</sup> The legal representative of victim a/0105/06 suggested that the involvement of applicants with the Court commences at the moment at which their application forms are completed.<sup>64</sup>

## B. Defence

51. The defence submitted that reparations proceedings should be dealt with separately from the trial, since the issue of reparations only arises if there is a guilty verdict. The defence argued that only at that stage should victims be permitted to tender evidence and examine experts and other witnesses without the restrictions provided for in Rule 91(3) of the Rules.<sup>65</sup> The defence suggested that Regulation 56 of the Regulations is an exception to the general principle that there should be separate trial and reparations proceedings, and that if this approach became general practice it would infringe the rights of the accused, most particularly by undermining the presumption of innocence.<sup>66</sup>
52. The defence submitted that a decision permitting victims to participate in the proceedings should not automatically encompass the entire trial, but instead

<sup>61</sup> ICC-01/04-01/06-992, paragraphs 22-25.

<sup>62</sup> ICC-01-04-01-06-T-58-ENG, page 26, lines 12 to 17.

<sup>63</sup> ICC-01/04-01/06-T-62-ENG, page 46, line 10 to page 49, line 15.

<sup>64</sup> *Ibid.*, page 49, line 19 to page 52, line 3.

<sup>65</sup> ICC-01/04-01/06-991, paragraphs 9-11.

<sup>66</sup> *Ibid.*, paragraphs 14-16.

victims should request individually to participate when appropriate, by reference principally to whether their interests are affected at any particular stage.<sup>67</sup> Furthermore, the defence submitted that involvement by way of Rule 91(3) of the Rules is a particular exception to the usual trial process, and any other modality of participation by victims during trial would be without legal foundation.<sup>68</sup> The defence suggested that if the Chamber grants the victims the opportunity to participate in the various ways requested by their legal representatives this would essentially afford victims the same rights as the prosecution and the defence and could in consequence create an imbalance in the trial, thereby prejudicing the rights of the accused.<sup>69</sup>

53. The defence argued that the opportunity to make submissions should be limited to when the Chamber deems it appropriate and when a particular victim's interests are affected, but only if this does not affect the rights of the defence.<sup>70</sup>
54. In relation to the victims' request to make one-hour opening and closing statements, the defence argued that although Rule 89(1) of the Rules refers to the possibility of victims making opening and closing statements during the proceedings, Rule 141 of the Rules which provides for closing statements after the evidence only refers to the prosecution and the defence.<sup>71</sup> The suggestion, therefore, is that this opportunity does not extend to victims.
55. In response to the victims' suggestion that some of them may be present in person during the trial or at hearings, the defence submitted that victims appearing in person should be subjected to the same requirements applicable to appearances by prosecution witnesses, particularly those in Rule 140 of the Rules.<sup>72</sup>

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<sup>67</sup> *Ibid.*, paragraphs 44-47.

<sup>68</sup> *Ibid.*, paragraph 51.

<sup>69</sup> *Ibid.*, paragraph 53.

<sup>70</sup> *Ibid.*, paragraphs 56 and 58.

<sup>71</sup> *Ibid.*, paragraphs 60 and 61.

<sup>72</sup> *Ibid.*, paragraph 63.

56. The defence argued that only the parties may present and examine evidence during the trial, prior to verdict. Therefore, the defence contended that evidence relating to the guilt or innocence of the accused may only be investigated by the prosecution and the defence, and any evidence relating to reparations should be examined after the trial, notwithstanding the provisions of Regulation 56 of the Regulations.<sup>73</sup>
57. With regard to disclosure of evidence to victims, the defence submitted that notification in accordance with Rule 92 of the Rules is to enable the victims to apply to participate in proceedings when their interests are affected, and that otherwise the parties have no disclosure obligations towards victims. The defence accepted that in accordance with Rule 131(2) of the Rules, victims have the right to access the record of the case, subject to confidentiality measures ordered by the Chamber.<sup>74</sup>
58. Addressing the protective measures sought by the victims, the defence argued that significant redactions to the evidence ordered to protect victims and witnesses should not be maintained during the trial, and moreover the defence submitted the accused has the right to know the identity of all victims and applicants to participate. The defence argued that at this stage in the proceedings, anonymity is no longer the sole protective measure available and requested, in consequence, that disclosure of the identities of victims is made a precondition of their participation.<sup>75</sup>
59. As regards common legal representation, the defence suggested that the Chamber could invoke Rule 90 of the Rules (which gives it the power to request or order common legal representation) in order to promote promptness, efficiency and equality in the proceedings.<sup>76</sup>

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<sup>73</sup> *Ibid*, paragraphs 64-69.

<sup>74</sup> *Ibid.*, paragraphs 41-43, 70.

<sup>75</sup> *Ibid.*, paragraphs 24-38.

<sup>76</sup> *Ibid*, paragraph 39.

60. Finally, on the criteria for allowing a victim to participate under Rule 85 of the Rules, the defence submitted that the concept of "crimes within the jurisdiction of the Court" refers to the particular charges confirmed by the Pre-Trial Chamber. Therefore, the defence contended that a narrow causality link should be applied and that only the children who were allegedly the victims of the events founding the charges the accused faces (and who suffered harm as a result), along with their mothers and fathers, should be permitted to participate.<sup>77</sup>

### C. Prosecution

61. The prosecution proposed a "blended approach", in that it suggested that victims should be permitted, under Rule 91(3)(a) of the Rules and Regulation 56 of the Regulations, to question witnesses called by the parties during the trial for the purposes of reparations if trial issues and reparations issues can reasonably be dealt with at the same time. It submitted that the victims should also have the opportunity to introduce evidence that related solely to the issue of reparations prior to the delivery of a verdict. In the prosecution's submission, an examination of all the evidence in one fact-finding procedure would maximise judicial efficiency, since the Chamber could act in one "unified factual collection mode."<sup>78</sup> However, the prosecution also emphasised that for the purposes of its judgment on the guilt or innocence of the accused, the Trial Chamber must carefully separate any submissions or material relating exclusively to reparations from the evidence relating to guilt or innocence, as submitted by the parties.<sup>79</sup>
62. In order for a victim to be allowed to participate under Rule 85 of the Rules, the prosecution contended that the applicant must provide sufficient information to establish grounds to believe he or she is:

<sup>77</sup> ICC-01/04-01/06-T-58-ENG, pages 14 to 16.

<sup>78</sup> ICC-01/04-01/06-T57-ENG, page 52, line 24.

<sup>79</sup> ICC-01/04-01/06-996-AnxI, paragraphs 7-8.

- (i) a natural person,
- (ii) who has suffered harm,
- (iii) as a result of the crime falling within the jurisdiction of the court,  
and
- (iv) that there is a sufficiently direct and genuine casual link between the harm suffered by the applicant and any of the crimes set out in the document containing the charges.<sup>80</sup>

63. The prosecution further argued that the applicant must be a direct victim of one of the six charges confirmed against the accused in order to be granted leave to participate.<sup>81</sup>

64. The prosecution did not oppose the presence of the victims' legal representatives in hearings before and during the trial unless a justifiable reason existed for their exclusion, which would necessarily be assessed on an issue by issue basis.<sup>82</sup>

65. Regarding the victims' request to make oral and written submissions, the prosecution argued that victims do not have a general right to participate on all questions, and their involvement should be limited to issues that directly impact on their interests, to be decided on the particular facts. The prosecution highlighted that some issues are clearly restricted to the parties alone (e.g. the determination of guilt).<sup>83</sup>

66. In relation to the disclosure of evidence to victims, the prosecution submitted that the victims' legal representatives are not entitled to receive pre-trial disclosure from either of the parties, and that the inspection regime does not apply to the victims. The prosecution contended that their right to information

<sup>80</sup> ICC-01/04-01/06-T-57-ENG, page 68.

<sup>81</sup> *Ibid*, pages 68 to 69.

<sup>82</sup> ICC-01/04-01/06-996-AnxI, paragraphs 12-13.

<sup>83</sup> *Ibid*, paragraph 3

is limited to that provided by Rule 131(2) of the Rules, and victims should only be given access to public materials in the prosecution's list of evidence.<sup>84</sup>

67. The prosecution submitted that the opportunity to introduce evidence during the trial is a right limited to the parties, and that victims should only have the right to call evidence during the reparations element of the hearing or when the Chamber is determining protective measures. Accordingly it was suggested this form of participation does not extend to issues such as the innocence or guilt of the accused.<sup>85</sup>
68. Similarly, the prosecution argued that victims should only be permitted to challenge the admissibility of evidence if they are able to establish that the evidence in question relates to issues where their interests are affected.<sup>86</sup>
69. The prosecution contended that in order to question witnesses, experts and the accused, an application under Rule 91(3) of the Rules is necessary, which should be determined by the Chamber witness-by-witness during the course of the trial. The prosecution further submitted that any questioning by a victim's legal representative should be solely related to reparations and should not impact on the guilt or innocence of the accused.<sup>87</sup>
70. Addressing protective measures, the prosecution submitted that the parties should know the identity of victims participating in the trial and in the proceedings leading up to the trial, but acknowledged that it may be necessary for victims to maintain their anonymity as regards the public.<sup>88</sup>
71. On the issue of the protection of individuals who apply to be recognized as victims before the Court, the prosecution submitted that they are entitled only to the protection afforded by anonymity prior to their being recognized by the

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<sup>84</sup> *Ibid.*, paragraphs 9-11.

<sup>85</sup> *Ibid.*, paragraphs 21-22.

<sup>86</sup> *Ibid.*, paragraph 24.

<sup>87</sup> *Ibid.*, paragraphs 19-21.

<sup>88</sup> *Ibid.*, paragraphs 25-29.

Court as victims,<sup>89</sup> and that the Court has no other obligation to them at that stage.

#### D. Observations by the Office of Public Counsel for Victims

72. As regards the criteria for the participation of victims under Rule 85 of the Rules, the Office of Public Counsel for Victims submitted in writing that, in contrast with the approach adopted by the Pre-Trial Chamber in its decision of 29 June 2006 (see above paragraph 9), the Trial Chamber should not distinguish between direct and indirect victims of a crime. The Office of Public Counsel for Victims also contended that when determining the applications of victims for participation in the proceedings under Rule 85 of the Rules the Trial Chamber should not limit itself to the decisions made by the Pre-Trial Chamber, since evidence presented at the trial stage may reveal additional relevant information.<sup>90</sup>
73. The Office of Public Counsel for Victims suggested that no requirements other than those included in Article 68(3) of the Statute should be considered when deciding whether victims should participate in the proceedings. The Chamber was invited, therefore, to reject any factors not contained in this provision.<sup>91</sup>
74. The Office of Public Counsel for Victims contested the prosecution's argument that there are a range of issues that will only be of concern to the parties and which can never be relevant to victims, and submitted that a general and inflexible approach of this kind has no basis in the Rome Statute framework. In the submission of the Office of Public Counsel for Victims, the test established in Article 68(3) of the Statute should be applied issue-by-issue and not by reference to a predetermined formula, irrespective of the facts.<sup>92</sup>

<sup>89</sup> ICC-01/04-01/06-T-62-ENG, page 45, lines 1-7.

<sup>90</sup> ICC-01/04-01/06-1020, paragraphs 6 and 10.

<sup>91</sup> *Ibid*, paragraph 11.

<sup>92</sup> *Ibid*, paragraphs 31 and 32.

75. The Office of Public Counsel for Victims argued that access by the victims' legal representatives to confidential filings in the record, on occasion, may be necessary. It submitted that the current situation in which victims only have access to public filings has already led to absurd results, such as some victims not having access to confidential filings which expressly deal with their submissions.<sup>93</sup>
76. Turning to the application of Regulation 56 of the Regulations, the Office of Public Counsel for Victims argued that a non-restrictive approach to participation would not undermine the rights of the defence or the presumption of innocence since a reparations order can only follow a guilty verdict. It contended that the Chamber will be able to distinguish easily between those matters that are relevant to the charges and those that solely concern reparations (should the latter become a live issue), and that dealing with trial and reparations issues in a joint hearing will further the objective of expediting the proceedings and limiting unnecessary further trauma to the victims.<sup>94</sup>
77. As regards the protective and special measures to be granted to victims, the Office of Public Counsel for Victims submitted that these should be regarded as the means provided by the Rome Statute framework for ensuring the participation of victims in the proceedings in the best achievable circumstances, taking into consideration their safety, physical and psychological well-being, dignity and private life, in accordance with Article 68(1) of the Statute.<sup>95</sup>
78. The Office of Public Counsel for Victims contended that participation by victims should not be dependent on the disclosure of their identities, since anonymity provisions are contained in the Rome Statute framework (see Rules 81 and 87 of the Rules). Furthermore, the European Court of Human Rights has decided that the use of anonymous witnesses is permissible in criminal proceedings, subject

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<sup>93</sup> *Ibid*, paragraph 44.

<sup>94</sup> *Ibid*, paragraphs 47 and 50.

<sup>95</sup> *Ibid*, paragraphs 26 and 29.



to certain conditions and most notably that an appropriate balance is struck between the rights of the accused and those of the witnesses or victims who are called to give evidence. However, it was argued that under the jurisprudence of the European Court of Human Rights a guilty verdict may not be founded solely on the evidence of anonymous witnesses.<sup>96</sup> On the basis of this case-law concerning witnesses, the Office of Public Counsel for Victims argued that preserving the anonymity of victims is compatible with the requirements of a fair trial, so long as sufficient counterbalancing measures are adopted by the Chamber.<sup>97</sup>

79. Turning to the issue of common legal representation, the Office of Public Counsel for Victims argued that victims should not be expected to accept joint representation if it would conflict with their interests. However, that said, it accepted that their interests may include being grouped on the basis of common interests. The Office of Public Counsel for Victims recognised the important role that is played by the Registry's Victims Participation and Reparations Section in assisting the Chamber with the task of making these decisions, not least because it has responsibility for completing reports on the victims' applications to participate and, as a result, they have a global perspective which enables them to recommend to the Chamber the possibility of grouping particular victims together. The Office of Public Counsel for Victims suggested that these decisions should be made on the particular facts, taking into consideration the criteria provided for in Article 68 of the Statute, as well as other general factors such as the interests of the victims, any relevant locations, the crimes the victims allegedly suffered and the identity of the intermediaries assisting the victims.<sup>98</sup> The Office of Public Counsel for Victims submitted that the views of victims

<sup>96</sup> The Chamber notes that the position of the European Court of Human Rights is that "a conviction should not be based either solely or to a decisive extent on anonymous statements" (emphasis added): *Case of Doorson v the Netherlands*, Judgment (Merits), 20 February 1996, 20524/92 at paragraph 76.

<sup>97</sup> ICC-01/04-01/06-1020, paragraphs 55-58.

<sup>98</sup> *Ibid.*, paragraphs 60 to 62

should be taken into consideration, as well as the rights of the accused and the overall fairness of the proceedings.<sup>99</sup>

80. On the question of the protection afforded to individuals applying to participate in the proceedings, the Office of Public Counsel for Victims aligned itself with the submissions of the legal representatives of victims and submitted that, in its view, the travaux préparatoires of the Statute supported their position. The Office submitted that due to the inclusion of the concept of “victims who appear before the Court” in Article 43(6) of the Statute and the use of the sole word “victims” in all other articles, a distinction was deliberately drawn in the Statute between the protection to be provided to victims and all other issues concerning victims. The Office of Public Counsel for Victims argued that the Victims and Witnesses Unit’s mandate is therefore limited, when acting *proprio motu*, to “victims who appear before the Court.” However, it argued that this does not have any impact on the obligation of the Registry’s Victims and Witnesses Unit’s to act when requested to do so by the Court and it does not provide a derogation to the general obligation of the Court under Article 68(1) to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,” which covers all victims. As such, it was submitted that the Registrar is still bound by any order issued by a relevant Chamber to protect victims, including victims who do not appear before the Court.<sup>100</sup>

#### **E. Observations by the Registry**

81. The Victims and Witnesses Unit anticipated that witnesses who have been referred to its protection programme may have the dual status of witness and victim. However, the Victims and Witnesses Unit contended that the participation of a witness in the ICC protection programme should not prevent

<sup>99</sup> *Ibid*, paragraph 65.

<sup>100</sup> ICC-01/04-01/06-1063, paragraph 17.

an individual from participating as a victim, so long as this does not compromise his or her security.<sup>101</sup>

82. The Victims and Witnesses Unit requested, in order to avoid security problems, to be made aware of anyone who has dual status as soon as possible.<sup>102</sup> The Victims and Witnesses Unit thus requested access to any information available to the parties and to the Victims Participation and Reparations Section that relates to the dual status of any victim. It submitted that it may advise a witness to seek legal advice when it is aware that the witness may also be a victim.<sup>103</sup> In the joint report filed on 16 January 2008, the Registry informed the Trial Chamber that discussions will continue between the Victims and Witnesses Unit, the Victims Participation and Reparations Section, the parties and the participants on possible practical arrangements for the sharing of information on persons with the dual status of victim and witness.<sup>104</sup>

83. On the issue of the protection of victims who apply to participate, the representative of the Registry accepted at the hearing on 4 December 2007 that overall responsibility lies with the Victims and Witnesses Unit of the Court.<sup>105</sup> However, in a subsequent filing the Registry appears to have adopted a more restrictive interpretation of the mandate of the Victims and Witnesses Unit, submitting that “[v]ictims who appear before the Court’ only refers to those victims participating in the proceedings and whose status has therefore been recognized by a Chamber”.<sup>106</sup>

#### **IV. Analysis and Conclusions**

84. This Decision is intended to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings. These guidelines do not in any way pre-determine the merits of

<sup>101</sup> ICC-01/04-01/06-1026-Conf, paragraph 2.

<sup>102</sup> *Ibid*, paragraph 6.

<sup>103</sup> *Ibid*, paragraphs 18 and 19.

<sup>104</sup> ICC-01/04-01/06-1117-Conf.

<sup>105</sup> ICC-01/04-01/06-Γ-62-ENG, pages 41-42.

<sup>106</sup> ICC-01/04-01/06-1078, paragraph 18.

the individual applications to participate that will be dealt with in due course, particularly given the Chamber has only sought to describe the general approach it proposes to adopt. It follows the Trial Chamber will apply the principles or guidelines identified below, on an applicant-by-applicant basis.

85. In analysing how victims shall participate under Article 68(3) of the Statute, the Trial Chamber has borne in mind that proceedings before the Court are *sui generis* and the Court must develop trial procedures that meet the particular exigencies of the international cases that it will have to decide, applying the Rome Statute framework. The opportunities for participation by victims must be given meaningful effect by applying the plain language of the relevant provisions, but always ensuring that the implementation of this objective does not result in an unfair trial.

#### **A. The criteria to be applied to applications by victims to participate**

86. In order to determine which applicant victims will have the right to participate in this trial, the Trial Chamber must consider the following issues: first whether the applicant is a victim of a crime under the jurisdiction of the Court, as provided for in Rule 85 of the Rules, and second whether the interests of the victim are affected in the proceedings in accordance with Article 68(3) of the Statute.

*Whether the applicant is a victim of a crime under the jurisdiction of the Court, as provided for in Rule 85 of the Rules.*

#### **The First Issue**

87. Once the Trial Chamber has received a victim's application to participate in the proceedings before or during the trial (or both), the Chamber will determine whether the victim is a "natural or legal person" pursuant to Rule 85 of the Rules. In reaching this decision, the Trial Chamber will seek to achieve a balance between the need to establish an applicant's identity with certainty, on the one

hand, and the applicant's personal circumstances, on the other. Bearing in mind the current situation in the Democratic Republic of Congo and the difficulties that applicants may often have in obtaining or producing copies of official identity documents, and the need in consequence of ensuring that victims are not unfairly deprived of an opportunity to participate for reasons beyond their control, the Trial Chamber will consider, *inter alia*, the following range of documents by which a "natural person" may establish proof of his or her identity:<sup>107</sup>

- i) Official identification documents, such as a national identity card, a passport, a birth certificate, a death certificate, a marriage certificate, a family registration booklet, a will, a driving licence or a card from a humanitarian agency;
- ii) Non-official identification documents, such as a voting card, a student identity card, a pupil identity card, a letter from local authority, a camp registration card, documents relating to medical treatment, an employee identity card or a baptism card;
- iii) Other documents, such as a certificate or attestation of loss of specified official documents, school documents, a church membership card, an association or political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality or a pension booklet.

88. In those instances where it is not possible for an applicant to acquire or produce documents of the kind set out above, the Chamber will consider a statement signed by two credible witnesses attesting to the identity of the applicant and including, where relevant, the relationship between the victim and the person acting on his or her behalf, providing there is consistency between the statement and the application. The statement should be accompanied by proof of identity

<sup>107</sup> ICC-01/04-374, paragraphs 13-15.

of the two witnesses. In assessing the credibility of the witnesses, the Trial Chamber will consider, *inter alia*, the nature and length of the relationship with the applicant, the proof of identity of the witnesses and their standing in the community. In these instances the Trial Chamber will welcome any information the Victims Participation and Reparations Section considers relevant. This information should be included in the reports provided to the Chamber.

89. In cases where the applicant is an organisation or institution, the Chamber will consider any document constituting it in accordance with the law of the relevant country, and any credible document that establishes it has sustained “direct harm to any of [its] 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”, as provided for in Rule 85(b).

### **The Second Issue**

90. Once the Trial Chamber has determined that an applicant is a natural or legal person, it will consider if there is evidence (including by reference to the victim’s statements or application form) that the applicant suffered any harm as a result of the commission of a crime within the jurisdiction of the Court.
91. In relation to the link between the harm allegedly suffered and the crime, whereas Rule 85(b) of the Rules provides that legal persons must have “sustained direct harm”, Rule 85(a) of the Rules does not include that stipulation for natural persons, and applying a purposive interpretation, it follows that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.
92. The Rome Statute framework does not provide a definition of the concept of harm under Rule 85 of the Rules. However, in accordance with Principle 8 of the Basic Principles, a victim may suffer, either individually or collectively, from

harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights. This principle provides appropriate guidance.

### The Third Issue

93. For the reasons explained in detail at paragraphs 95 to 100 hereunder, during the trial stage of a case the right of victims to participate is principally dependent on whether their personal interests are affected in accordance with Article 68(3) of the Statute, and Rule 85 of the Rules which provides a definition of “victims” should be read in light of that Article. Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a “crime within the jurisdiction of the Court” and to add the proposed additional element – that they must be the crimes alleged against the accused – therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court. Instead, the relevant restrictions are set out in Articles 5, 11 and 12 of the Statute.
94. In accordance with Article 5 of the Statute, the jurisdiction *rationae materiae* of the Court includes the crimes of genocide, crimes against humanity, war crimes and the crime of aggression (once it is defined). By Article 11 of the Statute, the jurisdiction *rationae temporis* of the Court includes any crime committed after the entry into force of the Statute, 1 July 2002. Under Article 12 of the Statute, any crime committed in the territory of a State Party or by a national of a State Party is a crime within the jurisdiction of the Court. Hence, it is necessary that the harm was suffered as a result of a crime committed in the territory of a State Party or by a national of a State Party.

*Whether the interests of the victim are affected in the case of Mr Thomas Lubanga Dyilo*

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

- i. Is there is a real evidential link between the victim and the evidence which the Court will be considering during Mr Thomas Lubanga Dyilo’s trial (in the investigation of the charges he faces), leading to the conclusion that the victim’s personal interests are affected?

or



- ii. Is the victim affected by an issue arising during Mr Thomas Lubanga Dyilo's trial because his or her personal interests are in a real sense engaged by it?

*Whether the interests of the victim are affected at a particular stage in the proceedings*

96. Following an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings, thereafter in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek. A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient. These applications will necessarily be examined on a case-by-case basis, since the question of whether "personal interests" are affected is necessarily fact-dependent. However, involvement in or presence at a particular incident which the Chamber is considering, or if the victim has suffered identifiable harm from that incident, are examples of the factors that the Chamber will be looking for prior to granting the right to participate at any particular stage in the case.
97. In a general sense, victims have multiple and varied interests, but it is critical to emphasise and repeat that for victims to participate in this trial these interests must relate to the evidence and the issues the Chamber will be considering in its investigation of the charges brought against Mr Thomas Lubanga Dyilo: the extent of the evidence and the issues to be considered by the Chamber during this trial are defined by the alleged crimes the accused faces. In contrast, the general interests of the victims are very wide-ranging and include an interest in receiving reparations, an interest in being allowed to express their views and

concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being recognised as victims in the case, among others. The crimes under the Chamber's jurisdiction, as international crimes, may have many and various consequences for victims, of a direct and an indirect nature. Against that background the Chamber will ensure that victims are provided appropriate access to justice within the context of the focus of the trial process, and it will bear in mind the wide-ranging particular needs and interests of individual victims and groups of victims.

98. In the view of the Trial Chamber it is necessary to stress that the participation of victims in the proceedings is not limited to an interest in receiving reparations: Article 68(3) of the Statute provides for participation by victims whenever their personal interests are affected, and these are self-evidently not limited to reparations issues. Therefore, as indicated during the hearing of 29 October 2007, the Trial Chamber considers that the participation by victims should encompass their personal interests in an appropriately broad sense, and, for the reasons analysed hereafter, whenever necessary they should be entitled to express their views and concerns through statements, examination of witnesses or by filing written submissions.<sup>108</sup>
99. Addressing the standard of proof to be applied in order for victims to participate, there is no statutory or regulatory provision in this regard. It would be untenable for the Chamber to engage in a substantive assessment of the credibility or the reliability of a victim's application before the commencement of the trial. Accordingly the Chamber will merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court. The Trial Chamber will assess the information included in a victim's application form and

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<sup>108</sup> ICC-01/04-01/06-T-57-ENG, page 64, lines 1-5.

his or her statements (if available) to ensure that the necessary link is established.

100. The Chamber is conscious that different considerations may apply at the trial, as opposed to the pre-trial stage. By the time applications to participate in the proceedings are made to the Trial Chamber a considerable amount will be known about the facts and issues that will arise. Accordingly, not only is the approach outlined above a correct interpretation of the relevant provisions but it is the procedure that will best enable the victims at this stage in the proceedings before the Court to present their views and concerns fairly.

### **B. Modalities of participation**

101. It is clear from the analysis set out above that participation is not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time.
102. When considering victims' applications for participation, the Trial Chamber will assess whether the interests of the victims relate to the prosecution's "summary of presentation of evidence".<sup>109</sup> The Chamber will be assisted by the report on the applications submitted to it by the Registry's Victims Participation and Reparation Section in accordance with Regulation of the Court 86.
103. Subsequently, a victim who wishes to participate in relation to any identified stage of the proceedings should set out in a discrete written application the nature and the detail of the proposed intervention (e.g. by providing the

<sup>109</sup> See Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, 9 November 2007, paragraphs 25 and 26. Public Submission of the Prosecution's Summary of Presentation of Evidence With Confidential – Prosecution and Defence Only Attachment and Annexes, 14 December 2007, ICC-01/04-01/06-1089, ICC-01/04-01/06-1089-Conf-Exp-AnxA, ICC-01/04-01/06-1089-Conf-Exp-Anx1-Corr2, ICC-01/04-01/06-1089-Conf-Exp-Anx2-Corr; Public Submission of the Prosecution's Summary of Presentation of Evidence With Confidential – *Ex parte* - Prosecution Only Attachment and Annexes, 14 December 2007, ICC-01/04-01/06-1094, ICC-01/04-01/06-1094-Conf-Exp-Anx, ICC-01/04-01/06-1094-Conf-Exp-Anx1-Corr, ICC-01/04-01/06-1094-Conf-Exp-Anx2-Corr. Annexes 1 and 2 detail how the prosecution's evidence is related to the charges; Annex 1 deals with witnesses, while Annex 2 deals with the other evidence. The public redacted version of the prosecution's "summary of presentation of evidence" was filed on 19 December 2007: Submission of the Prosecution's Summary of Presentation of Evidence. ICC-01/04-01/06-1099 and ICC-01/04-01/06-1099-Anx. No public versions of Annexes 1 and 2 were filed.

questions that he or she seeks to put). At this stage, the victim must describe the way in which his or her personal interest is affected, for example by identifying how the harm he or she suffered relates to the evidence or the issues the Chamber is considering in its determination of the charges.

104. Once the Trial Chamber has determined that the interests of a victim or group of victims are affected at a certain stage of the proceedings, the Trial Chamber will determine if participation in the manner requested is appropriate and consistent with the rights of the defence to a fair and expeditious trial.

*Victims' access to the record, documents and filings*

105. As a general rule, the Trial Chamber considers that Rule 131(2) of the Rules provides participating victims the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information.
106. Due to the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution's investigations, the presumption will be that the legal representatives of victims shall have access only to public filings. However, if confidential filings are of material relevance to the personal interests of participating victims, consideration shall be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place.
107. In accordance with Rule 92(5) of the Rules, victims or their legal representatives shall be notified in a timely manner of all public proceedings and filings before the Court, and, if the Chamber determines that a victim's personal interests are materially affected, of any that are confidential to the extent that this does not breach other protective measures that need to remain in place. This will enable victims to identify the parts of the proceedings which may affect their interests.

The Trial Chamber reiterates its general approach set out in the Order on notification of filings of 19 November 2007 that “the party or participant filing a document bears responsibility for determining the appropriate recipients”.<sup>110</sup> Accordingly, confidential filings which include the names of the legal representatives of the victims on their cover shall also be notified to the victims by the Registry.

### *Evidence*

108. The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has “requested” the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.
109. As regards the request of the victims’ legal representatives to have the opportunity to challenge the admissibility or relevance of evidence when their interests are engaged, the right to make submissions on matters of evidence is not reserved to the parties, and there is no provision within the Rome Statute framework which prohibits the Trial Chamber from ruling on the admissibility

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<sup>110</sup> ICC-01/04-01/06-1035, paragraph 4.

or relevance of evidence having taken into account the views and concerns of the victims, in accordance with Articles 68(3) and 69(4) of the Statute. In appropriate circumstances, this will be allowed following an application.

110. The Trial Chamber considers that victims applying to participate should be provided with access to the public redacted version of the prosecution's "summary of presentation of evidence". The victims currently participating have been provided with a copy of this document.
111. Turning to inspection, the Trial Chamber agrees with the prosecution that inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence. However, as a matter of general principle, and in order to give effect to the rights accorded to victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing. The participating victims should also be provided with the public evidence listed in the prosecution's annexes 1 and 2 to its "summary of presentation of evidence"<sup>111</sup> subject to a demonstration of relevance to their personal interests as stated above. If part of a document in this context is confidential, the document should be made available in a suitably redacted form.

*Victims' right to participate in hearings/status conferences and during the trial, and to file written submissions*

112. The victims who have the opportunity to participate prior to trial by way of written and oral submissions with the leave of the Chamber are those who currently have been allowed to participate by Pre-Trial Chamber I (i.e. victims

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<sup>111</sup> See footnote 109.

a/0001/06 to a/0003/06 and a/0105/06),<sup>112</sup> subject to a review by the Chamber of their applications to participate in light of the criteria set out above, and any other victim granted that status hereafter.

113. The Trial Chamber may, *proprio motu* or upon request by any of the parties or participants, permit victims to participate in closed and *ex parte* hearings, depending on the circumstances. Whether or not participation by victims could exceptionally encompass hearings that are *ex parte*, victims only (e.g. when considering protective measures) is an issue that can only be resolved by reference to the facts of the particular application. To the extent that it is possible and necessary, the Chamber will consult with the parties whenever the victims apply to participate in such hearings.
114. The above applies *mutatis mutandis* with regard to the right of victims to make confidential or *ex parte* written submissions.
115. By Article 68(3) of the Statute it is clear that victims have the right to participate directly in the proceedings, since this provision provides that when the Court considers it appropriate the views and concerns of victim may otherwise be presented by a legal representative.
116. The Chamber is aware, however, that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims' common views and concerns may sometimes be better presented by a common legal representative (i.e. for reasons of language, security or expediency), the Trial Chamber will decide either *proprio motu*, or at the request of a party or participant, whether or not there should be joint representation and joint presentation of views and concerns by legal representatives at any particular stage in the proceedings. These issues are considered hereafter (see paragraphs 123-126).

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<sup>112</sup> ICC-01/04-01/06-228-tEN; Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v Thomas Lubanga Dyilo*, 20 October 2006, ICC-01/04-01/06-601-tEN.

117. The Trial Chamber considers that Rule 89(1) of the Rules is clear in its effect when it provides that victims' participation may include opening and closing statements, particularly given this is not inconsistent with any other part of the Rome Statute framework. The Trial Chamber will consider in due course the request of some victims to make one-hour opening and closing statements during the trial.<sup>113</sup>
118. Finally, in relation to the request of the victims legal representatives to be granted the right to initiate procedures (for instance by filing applications and requests), the Trial Chamber considers that there is nothing in the Court's statutory and regulatory provisions which prevents victims from filing requests or applications to the Chamber whenever an issue arises that affects their interests (individually or collectively), in accordance with Article 68(3) of the Statute. The Trial Chamber will decide on any application or request of this kind, having consulted with the parties and other participants to the extent that is appropriate, and bearing in mind the right of the accused to a fair and expeditious trial.

*Proceedings under Regulation 56 of the Regulations of the Court*

119. The Trial Chamber accepts the submission of the legal representatives of victims that the extent of participation by victims during trial will to a significant degree depend on the Chamber's decision as to whether or not evidence concerning reparations will, at least in part, be considered during the trial or as a separate procedure after the trial.
120. In the judgment of the Chamber, Regulation 56 of the Regulations does not, as suggested by the defence, undermine the rights of the defence and the presumption of innocence. The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable

<sup>113</sup> ICC-01/04-01/06-T-57-ENG, page 59, line 20.



the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.

121. In discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted). Should it emerge that evidence relating to reparations introduced during the trial may be admissible and relevant to the determination of the charges, consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt. The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.
122. The Chamber does not agree with the prosecution's concept of a wholly "blended approach" because there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.

### C. Common legal representation for victims

123. Rule 90(2) of the Rules gives the Chamber the power to request the victims or a particular group of victims to choose a common legal representative or representatives “for the purposes of ensuring the effectiveness of the proceedings.” In so doing, the victims will receive the assistance of the Registry if necessary. Accordingly the determination of when common legal representation is necessary in order to ensure the effectiveness of the proceedings is to be made by the Chamber.
124. Rule 90(4) of the Rules provides that in the process of the selection of common legal representatives, the Chamber and the Registry shall take “all reasonable steps to ensure that [...] the distinct interests of the victims [...] are represented and that any conflict of interest is avoided.” In order to protect these individual interests effectively, it is necessary to apply a flexible approach to the question of the appropriateness of common legal representation, and the appointment of any particular common legal representative. As a result, detailed criteria cannot be laid down in advance. However, the Chamber envisages that considerations such as the language spoken by the victims (and any proposed representative), links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance. In order to assist it in the consideration of this issue, the Trial Chamber directs the Victims Participation and Representation Section to make recommendations on common legal representation in its reports to the Chamber.
125. The Chamber agrees with the legal representatives of victims that the approach to decisions under Rule 90 of the Rules should not be rigid, and instead will depend on whether at a certain phase in the proceedings or throughout the case a group or groups of victims have common interests which necessitate joint

representation. The Chamber accepts the defence submission that this approach should promote clarity, efficiency and equality in the proceedings.

126. The Chamber will take into consideration the views of victims under Article 68(3) of the Statute, along with the need to ensure that the accused's right to a fair and expeditious trial under Article 67 of the Statute is not undermined.

#### **D. Protective and Special Measures for Victims**

127. As regards protective and special measures, applying the general principle contained in Rule 86 of the Rules, the Trial Chamber recognises there are particular special needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings. Generally, the Chamber will take into account to the fullest extent possible the needs and interests of victims or groups of victims, and it recognises that these may sometimes be different or in opposition. Under Rule 88 of the Rules the Chamber may order special measures to assist victims and witnesses, including measures to facilitate the testimony of a traumatized victim or witness, children, the elderly and victims of sexual and gender violence.
128. Similarly, the Trial Chamber accepts the submission of the Office of Public Counsel for Victims that protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with Article 68(1) of the Statute.
129. The Chamber also accepts the suggestion of the legal representatives of victims that protective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute. The participation of victims and their

protection are included in the same statutory provision, namely Article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.

130. Both the prosecution and the defence resisted any suggestion that victims should remain anonymous as regards the defence during the proceedings leading up to and during the trial. However, the Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.
131. However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.<sup>114</sup>

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<sup>114</sup> See footnote 96.

**E. The dual status of victims-witnesses, disclosure to the Victims and Witnesses Unit and protection for victims who have applied to participate**

132. The Trial Chamber rejects the submission of the defence that victims appearing before the Court in person should be treated automatically as witnesses. Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as witnesses during the proceedings.
133. Furthermore, the Chamber is satisfied that the victims of crimes are often able to give direct evidence about the alleged offences, and as a result a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber's obligation to establish the truth.
134. However, when the Trial Chamber considers an application by victims who have this dual status, it will establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case. The Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.
135. The Registry's Victims and Witnesses Unit alerted the Chamber to the fact that it is not always aware of the dual status of a witness as victim who applied to participate in the proceedings or was allowed to participate, and that the lack of information may impact adversely on the protection of such victim-witness. It is self-evident that the Victims and Witnesses Unit should be assisted in providing protection to victims and witnesses by the other organs of the Court, so long as this does not conflict with their other functions and obligations. It is necessary, therefore, for careful consideration to be given to sharing information with the Victims and Witnesses Unit on matters concerning protection, including providing information on any victims who have dual status. Although the cooperation of the defence is expected in this regard, the Chamber is not

persuaded that this should be described as an obligation. The Trial Chamber notes that consultations have taken place between the Victims and Witnesses Unit, the Victims Participation and Reparations Section, the parties and the participants on possible practical arrangements for the exchange of information on persons with the dual status of victim and witness and that discussions are continuing.

136. On the issue of whether or not the Victims and Witnesses Unit has responsibility for victims who have applied to participate prior to the determination by the Court of their application, the starting point is Article 43 (6) of the Statute which provides:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. (emphasis added)

137. In the view of the Chamber, the process of “appearing before the Court” is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of “appearing before the Court”, regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, “an appearance” for the purposes of this provision has occurred. Whilst the Chamber readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided, nonetheless to the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit, pursuant to Article 43(6). It follows the Chamber rejects the submissions of the

Prosecution and accepts the concession made at one stage by the Registrar that this responsibility lies with the Unit.

#### **V. Orders of the Trial Chamber**

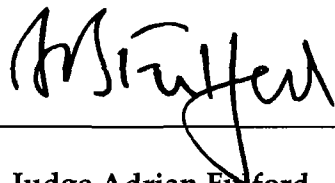
138. For these reasons, the Trial Chamber hereby orders the following:

- a. The Registrar shall provide access to the entire public record and index of the case of The Prosecutor v. Thomas Lubanga Dyilo to all victims who have been granted participating status in the proceedings.
- b. The Registrar shall provide victims who have applied to participate in the proceedings with a public version of the prosecution's "summary of presentation of evidence" forthwith.
- c. The Registrar shall notify victims participating in the proceedings and their legal representatives of all public proceedings and filings before this Chamber, and of any other filing which include on its cover page the names of the victims or their legal representatives.
- d. All victims wishing to participate in the proceedings shall apply to do so in writing, setting out in detail the nature of the harm they suffered, and how their personal interests are affected. This does not apply to victims who have been granted leave to participate and those who have already applied.
- e. Subsequently, at a time to be determined by the Trial Chamber, victims who have been allowed to participate shall apply in writing to the Trial Chamber to participate at any specific stage of the proceedings by setting out the reasons why their interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation sought.

- f. The prosecution shall provide to participating victims upon a specific request, subject to a demonstration of relevance to their personal interests, material in its possession and public evidence listed in Annexes 1 and 2 to the prosecution's "summary of presentation of evidence".
- g. The Victims Participation and Reparations Section shall make recommendations on common legal representation as part of the reports it provides to the Chamber.
- h. The relevant sections of the Registry, the parties and the participants shall continue their discussions on the proposed mechanisms for the exchange of information on persons with the dual status of victim and witness and shall report back to the Chamber on the outcome of the discussions by 16 February 2008.

Judge René Blattmann is appending a partly separate and partly dissenting opinion to this Decision.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito

Dated this 18 January 2008

At The Hague, The Netherlands



### Separate and Dissenting Opinion of Judge René Blattmann

1. On 29 October 2007 a Status Conference was held which allowed for comprehensive oral submissions on the modalities of victims' participation in the proceedings leading up to, and during the trial. Written submissions on the topic were filed by the legal representatives of victims on 28 September 2007, the defence on 18 October 2007 and the prosecution and legal representative of victims a/0001/06 to a/0003/06 separately on 19 October 2007.
2. The decision of the Majority of the Trial Chamber of today sets forth the criteria for granting victims status, victims' common legal representation and the role of victims in proceedings before the Trial Chamber.
3. While agreeing with sections of the Majority opinion, I dissent with portions of the reasoning with regard to victims' status and rights of participation as well as with some of the conclusions drawn by the Majority. In particular I would like to address the Majority's opinion concerning the available parameters under which the Trial Chamber may act when assessing victims' applications, as well as the test used to determine victims' participation in the proceedings.
4. Finally, I am concerned by the Majority application of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. While the Majority opinion lists the Basic Principles in the relevant provisions which are taken into account by the Chamber, I caution that this is not a strongly persuasive or decisive authority which the Chamber should be using in its legal determination of victims and in particular the definition of victims and participation. I support and follow Article 21(3), which requires that decisions of the Chamber must be consistent with internationally recognized human rights. However, the particular

provisions relied on in the Majority decision were specifically considered and rejected during the preparatory stages of the drafting of the Rome Statute.<sup>1</sup>

5. Thus, with particular emphasis on principle 8 of the Basic Principles, because the definition was considered and inserted in footnote form in the draft statute submitted to the Rome Conference and due to a lack of support, it was ultimately left out of the Rome Statute. Further, an accepted definition of victim has been incorporated into the ICC legislation in Rule 85 of the Rules of Procedure and Evidence. It therefore seems inappropriate to go beyond the scope of what was approved by the drafters of the Rome Statute and following legislation.<sup>2</sup>
6. As a general note, I believe that an imprecise definition of victims (such as the one set forth by the Majority) will not allow for an effective exercise of the participation rights of victims afforded to them by the Statute. I think it important to remember that victims are not abstract entities but rather concrete persons or group of individuals who have suffered harm as a result of conduct attributed or specified in a particular case or situation and their rights must be upheld. The best possible way to uphold these rights is to ensure that, as a logical starting point, we have clearly defined who is to be afforded victim's status. Only from this basis will it be possible to then regulate victim's participation rights.

**I. Parameters Under Which the Trial Chamber is Bound in its Consideration of Victims' Participation**

7. Article 19(1) of the Statute specifically requires that the Court satisfy itself that it has jurisdiction with respect to *cases brought before it*. The Court's jurisdiction is limited by the crimes under which it is concerned, as well as the

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<sup>1</sup> See Lee, Roy S., ICC: Elements of Crimes and Rules of Procedure and Evidence, pgs. 428, 429; See also, Triffterer, Otto, Commentary on the Rome Statute of the International Criminal Court, pg. 969.

<sup>2</sup> The definition was included in the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (Victims Declaration) and was related in that document to acts or omissions in violation of criminal laws rather than to human rights violations. However, the quoted definition of victim remains the same in both the Victims Declaration and the Basic Principles.

temporal and territorial jurisdiction framed under Articles 5, 11 and 12 of the Statute. While the Majority opinion has accepted the parameters framed in Articles 5, 11, and 12 as those under which the Chamber is able to act in respect of its determination of victims' status, it does not satisfy the requirement of Article 19(1) that jurisdiction be satisfied with respect to *cases*. I diverge from the Majority opinion in that I believe that the Statute has carefully crafted a framework through the inclusion of all the above mentioned articles to act as a limiting agent for the Court's jurisdiction rather than being used to expand a particular Chamber's jurisdiction thereby endangering the rights of the Accused. Rather, I believe that while the Court's jurisdiction is determined under the framework of Articles 5, 11 and 12, Trial Chamber I must determine this jurisdiction through the competence of the Chamber in the parameters set out by the charges brought against Mr Lubanga by the prosecution. I completely disagree with the assertion of the Majority that the Statute does not limit the Chamber's jurisdiction to the crimes attributed to the accused.<sup>3</sup> In truth, the drafters of the Rome Statute have been careful to address issues of jurisdiction through the guise of the case brought before the Court.<sup>4</sup> Furthermore, it is symptomatic that the Statute restricts the parties' presentation of evidence to that which is relevant to the case before the Chamber.<sup>5</sup>

8. It is important to note that while not bound by either the Single Judge's decision of Pre-Trial Chamber I of 24 December 2007 or the separate opinion of Judge Pikis of 13 June 2007, both decisions suggest that victims participation must be determined through the lens of the competency afforded the decision maker. The Single Judge states in her decision of 24 December 2007 that applicant's should show reasons to believe that the harm which they have suffered is a result of a crime within the jurisdiction (*compétence*) of the

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<sup>3</sup> Majority decision paragraph 93.

<sup>4</sup> See for example, Rome Statute Article 15(4) and Article 19(1).

<sup>5</sup> Rome Statute Article 69(3).

Court, and that such crime has been committed within the temporal, geographic and, as the case may be, personal parameters that have defined the concerned situation.<sup>6</sup> This clearly acknowledges the concept that a victim applicant must demonstrate that they are attached to the competency surrounding the given situation or case. Judge Pikis further elaborates on the participation rights of victims in his separate opinion by linking the crime from which the victim suffered harm to the subject matter of the respective stage of the proceedings.<sup>7</sup>

9. Pre-Trial Chamber I has introduced a methodology to classify victims with this competency in mind, thereby distinguishing between victims of the case and victims of the situation. The Appeals decision on victims leaves this methodological distinction unchanged and the Statute provides for the easy application of this methodology.<sup>8</sup> However, in the Majority opinion there seems to be a re-categorisation of victims who are related neither to the situation nor to the case. This new category seems to be arbitrary and abstract without purpose or a legal foundation. I disagree with the Majority approach here and see no reason to depart from the methodology which has been established through ICC jurisprudence thus far.

<sup>6</sup>"La juge unique considère en outre qu'à ce stade de la procédure, il lui suffit de demander si les demandeurs qui souhaitent se voir reconnaître la qualité de victimes autorisés à participer à la procédure au stade de l'enquête sur la situation en question ont démontré qu'il y a des motifs de croire que le préjudice qu'ils ont subi résulte d'un crime relevant de la compétence de la Cour, et que ce crime a été commis dans les paramètres temporels, géographiques et le cas échéant, personnels définissant la situation concernée." PTC I J Steiner's "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête de la République démocratique du Congo par 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 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06 ..." ICC-01/04-423, para 4.

<sup>7</sup> "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)." Separate Opinion of Judge Pikis, ICC-01/04-01/06-925, 13 June 2007, paragraph 13.

<sup>8</sup> See Articles 15 (3), 55(2), 58(1)(a) and 61(7) and 68 of the Rome Statute. Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS4, VPRS5 and VPRS6, 17 January 2006, ICC-01/04-101-Corr and Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172.

10. Article 67 of the Rome Statute requires that an accused person have a fair and efficient trial. I believe that the rights of the Accused are endangered by an over inclusive and imprecise definition of victims, such as the one suggested by the Majority. With such a definition, it becomes very difficult to know who is actually a victim of the alleged crimes attributed to the Accused. This goes against the Accused's due process rights<sup>9</sup> without providing tangible benefits for victims and does not take into consideration those victims who have already been granted status after fulfilling the requirements established by the Pre Trial Chamber. Rather, a precise definition of victim's status will give real, concrete and timely opportunity for the victims to participate in the proceedings in a fair manner which does not infringe upon the ever present rights of the Accused.
11. It is my strong belief that the Trial Chamber is not competent to make any assessments, including those regarding victim status, which step outside the strict mandate of the charges brought against Mr Lubanga which have already been through the process of judicial scrutiny. Assessments of this type that overstep the mandate of the charges are an attempt against the principle of legality embodied in those charges, which sets limits on the accusations that may be brought and to the actors that may intervene in the proceedings. Any other determination would bring about, in my opinion, the inappropriate scenario in which the Trial Chamber could be forced to make determinations based on evidence which is outside of the scope the charges against the Accused. As well, the possibility would be present that another chamber of the Court which is competent to review the application would, having seen the evidence relevant to the situation or case before it, make a different determination with regard to the victims applicant. This situation would

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<sup>9</sup> The right to a fair trial is affirmed by Articles 10 and 11 of the Universal Declaration of Human Rights (UDHR), by Article 14 of the International Covenant on Civil and Political Rights (ICCPR), article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights, and article 6 of the European Convention on Human Rights and Fundamental Freedoms.

cause great confusion, lead to legal uncertainty, and would be extremely unfair to potential victim applicants.

12. It is within this scope under which I lay out below the framework which I believe the Trial Chamber should follow in its assessment of victims and their ability to participate in proceedings before the Chamber in the case of Mr Thomas Lubanga Dyilo.
13. It is necessary to state, first and foremost, the important notion that victims' participation is not a concession of the Bench, but rather a right accorded to victims by the Statute.
14. The Chamber should remain mindful that the right to participate when victims' interests are affected is the consequence of a legal protected interest of the victim.
15. Therefore, I would suggest that in order to determine which victim applicants will have the right to participate in the proceedings before the Trial Chamber, the Chamber must first assess whether the applicant is a person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court related to the confirmation of the charges against the accused. If found to meet the definition, the Chamber must then determine whether the victim applicant's interests are affected in the particular case. If this element is met, the Trial Chamber should then assess whether participation by the victim is appropriate at the particular time and stage within the proceedings, and finally whether their manner of participation would prejudice the rights of the accused to a fair, impartial and efficient proceeding.

## II. The Trial Chambers Determination of Victims' Participation

### A. Determination of victim

16. With regard to the Trial Chamber's determination of victim, I am generally in agreement with the Majority test. *A victim of the Court as defined under Rule 85 may be a natural or legal person who has suffered harm resulting from the commission of a crime within the jurisdiction of the Court.* However, I strongly believe that the Trial Chamber has the competency to determine whether a person is a victim only when linked to the facts and circumstances found within the charges presented by the prosecution and confirmed by the Pre Trial Chamber, and must stay within this framework in its consideration of victims. It is useful to note that Rule 85 falls in Chapter 4 of the Rule of Procedure and Evidence, *Provisions relating to various stages of the proceedings.* Thus, Rule 85 must be applied to the specific stage of the proceedings, and in the present moment, the trial proceedings before us.
17. It is important to note that both Pre-Trial Chambers I and II have required, in order to determine the status of victims, that a causal link be found between the harm a victim applicant has suffered and the crimes that the accused has been charged with.<sup>10</sup> The Appeal Chamber has never overruled this important causal link requirement and no party has questioned the validity of maintaining this. To not require that this element be met threatens the rights of the Accused by leaving the possibility open of granting victim status that goes beyond the framework of the case brought against Mr Lubanga by the

<sup>10</sup> Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172, page 6 and 7; Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, pages 9-10. Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, page 5; and Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-252, paragraph 12 which states, "Accordingly, the Single Judge will undertake such assessment by analysing (i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) most crucially, *whether such harm appears to have arisen 'as a result' of the event constituting a crime within the jurisdiction of the Court*" (emphasis added).

Prosecutor and allows the Chamber to enter into an area which I consider that the Chamber does not have competency<sup>11</sup> to decide upon.

18. I am in agreement with the Majority approach in its establishment of an applicants' identity and strongly believe that a flexible methodology must be taken when asking victim applicants to prove their identity while still maintaining an important degree of judicial scrutiny.
19. Once the Trial Chamber has determined that an applicant is a natural or legal person, it will verify whether the applicant suffered harm. It is again, in my opinion, the Chamber's duty to assess this harm under the auspices of that harm which was suffered as a result of facts or circumstances which are described in the charges against Mr Lubanga Dyilo.
20. As regards the concept of harm, the statutory provisions do not define what may encompass harm under Rule 85. However, Rule 85(b) provides that legal persons must have "sustained direct harm" while Rule 85(a) does not make that specification with regards to natural persons.

*B. Whether the interests of the victim are affected in the proceedings*

21. Once an applicant has fulfilled the aforesaid requirements under Rule 85, the Trial Chamber is in agreement that a determination must be made as to whether the personal interests of the victim are affected by the present case under Article 68(3) of the Statute. While making this assessment, the Majority envisages that victims must have interests which are affected by the issue or evidence arising in the case, but does not believe that victims' participation should be encased by the charges confirmed by the Pre-Trial Chamber against Mr Lubanga Dyilo. In this, I, once again, diverge in my opinion. For the reasons I have already set out above, I believe it to be against fundamental

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<sup>11</sup> It should be noted that while the English version of the Rome Statute uses the terminology "jurisdiction", the French version is more precise and uses the term "compétence" which I personally prefer for it refers to the competency of the Court as defined by the parameters of territory, temporality, personality and subject matter of each case.



principles of criminal law, such as the principle of legality, to not link the status of victim and consequent rights of participation to the charges confirmed against the accused.

22. As well, the Majority appears to be requiring two applications of victims. First, an application to be recognized by the Trial Chamber as a victim who may generally participate in the proceedings, and a second application to indicate at what specific stage in the proceedings they may participate as victims. This, I believe, places too large a burden on victims. It should be possible for victims to apply to participate fully in their original application. Any information needed by the Trial Chamber to determine their right to participate and the appropriate moment at which to do so should be extracted by the Chamber from the information provided in the original victim application.
23. The Majority briefly mentions in their opinion that a determination will be made by the Trial Chamber as to whether participation of victims in the manner requested is appropriate and whether it is consistent with the rights of the accused. However, neither of these prongs of the test to determine victims' participation is further examined in the Majority opinion. I briefly develop these elements in my below analysis.

C. *Whether a victims' participation in the proceedings is appropriate*

24. Judge Song, in his separate opinion of 13 June 2007 states that, "[o]nce 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."<sup>12</sup>
25. In the present case, it is the Trial Chamber who must determine at what stage during the trial proceedings it is appropriate for victims to present any views

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<sup>12</sup> Separate Opinion of Judge Sang-Hyun Song, ICC-01/04-01/06-925, 13 June 2007, paragraph 21.

or concerns. In its determination of appropriateness, the Trial Chamber should consider, *inter alia*, such factors as the significance of any victims' participation to the proceedings, the constructiveness of the participation, the legal protected interest affected, judicial economy and whether not allowing an intervention at a particular time during the proceedings would affect the interests of the victims.

D. *Whether a victims' participation in the proceedings would prejudice the rights of the accused*

26. The mere existence of victims' participation within the proceedings is not inconsistent with the rights accorded to the accused by Article 67 and both the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims' participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding.<sup>13</sup>

27. It is therefore, up to the Trial Chamber to always remain heedful that the timing and modalities of a victims' request to participate in the proceedings do not interfere with the rights enshrined in Article 67, and that the accused have a fair and expeditious proceeding which does not step outside the scope of relevance to the charges against the accused.

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<sup>13</sup> In Spain the victim may appear as a civil claimant or as a private prosecutor in criminal proceedings (article 108, 101 and 270 Code of Criminal Procedure-*Ley de Enjuiciamiento Criminal*); the German legal system allows the victim to participate as an auxiliary prosecutor or *Nebenklager* and also as a civil claimant in some cases (s. 395, 396 and 403-406b StPO) and the French criminal system allows the victim to participate as a civil claimant or *partie civile* (article 4 Code of Criminal Procedure – *Code de Procédure Penale*). Within the Latin-American jurisdictions several criminal justice systems allow the victim to participate, usually as a private prosecutor and/or as a civil claimant: Argentina (articles 82-96 Code of Criminal Procedure - *Código Procesal Penal*); Bolivia (articles 11, 36 and 37 Code of Criminal Procedure - *Código de Procedimiento Penal*); Peru (articles 54 and 302 Code of Criminal Procedure); Chile (article 12 Code of Criminal Procedure – *Código Procesal Penal*) and also in articles 78-99 of the Model Code of Criminal Procedure for Iberoamerica - *Código Procesal Penal Modelo para Iberoamérica*. In Ireland victims may act as private prosecutors of summary offences, commonly known as 'common informers' (State (Cronin) v Circuit Judge of the Western Circuit [1937] IR 34,49); and in Canada a victim may participate in some stages of the proceedings, for example providing victim impact statements (section 722 Canadian Criminal Code).

### III. Conclusion

28. In essence, the Majority opinion does not find support in the decision from the Pre-Trial Chambers and the subsequent Appeals decision. Nor have any submissions from the parties and participants either requested or argued for the position that victims' status in a particular case would not be tied to whether the harm suffered is a result of the charges confirmed against the Accused.<sup>14</sup> No party or participant has requested the Trial Chamber to grant victim status to persons outside the scope of the confirmation of charges, nor have they expressed any dissatisfaction whatsoever with the granting of the status of victim being tied to a specific situation or case. For the Chamber to do so could be perceived as to act *ultra petita* and weakens the position of the prosecution, defence and the victims.
29. Further, although victims' participation is a completely new concept for an international criminal court, the concept exists in many countries around the world. The Majority has not provided any national legislation or jurisprudence which would allow victims' status to be found in a criminal court without linking it to the charges of a particular case.
30. While the Trial Chamber is provided with the powers under Article 64 to act *proprio motu*, I am unconvinced that the precedence set by the Pre-Trial Chamber and left untouched by the Appeals Chamber should be altered in the way in which the Majority decision seeks to do. The rights of the victims to participate do not overshadow the absolute right of the Accused to a fair and

<sup>14</sup> ICC-01/04-01/06-172, ICC-01/04-01/-228, ICC-01/04-01/-462, ICC-02/04-01/05-252; ICC-01/01-423; Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925; Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0105/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procès et lors du procès, 24 September 2007, ICC-01/04-01/06-964; Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure : le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences, 18 October 2007, ICC-01/04-01/06-991; Conclusions des victimes a/0001/06 à a/0003/06 en vue de l'audience du 29.10.2007, 19 October 2007, ICC-01/04-01/06-992, and Prosecution's public filing of the "Prosecution's submissions of the role of victims in the proceedings leading up to, and during, the trial", 23 October 2007 ICC-01/04-01/06-996-Anxl.

impartial trial and this must always be at the forefront of our judicial activity.<sup>15</sup> I believe the Majority opinion with regard to the imprecise scope it allows in assessing victims applications upsets this important balance.

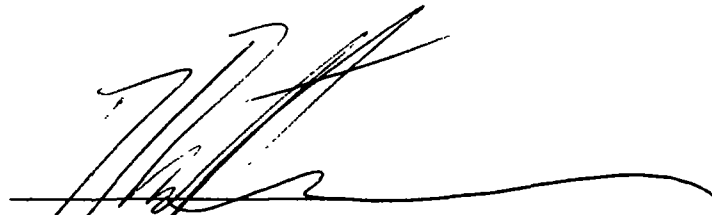
31. The Majority's decision may create a tendency to cause delays and legal insecurities because it adopts a system in which every application is to be evaluated on a case-by-case basis for every procedural action. This decision does not, in fact, provide a solution for modalities of participation for persons who have victims' status in a particular case, and instead postpones decisions for future determination.
32. Ultimately, while agreeing with many aspects of the Majority opinion I have grave concerns with some fundamental premises within the decision.
  - First and foremost, I believe that the Chamber is bound by its competence which is determined through the parameters imposed upon it by the charges which have been confirmed by the Pre-Trial Chamber against Mr Lubanga, and must also remain within this framework in its consideration of victims.
  - In order to determine which victim applicants will have the right to participate in the proceedings before the Trial Chamber, the Chamber must assess 1) whether the applicant is a person who has suffered harm as a result of the crimes charged and confirmed against the accused; 2) whether the victim applicant's interests are affected in the particular case; 3) whether participation by the victim is appropriate at the particular time and stage within the proceedings; and 4) whether their manner of participation would prejudice the rights of the accused to a fair, impartial and efficient proceeding.

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<sup>15</sup> Article 68(3).

- By providing the possibility of victims' status to applicants who have suffered harm not linked to the charges in the present case, the rights of those victims who do fulfill the criteria of victim are compromised.
- The application process for victim applicants must not be over burdensome.

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



**Judge René Blattmann**

Dated this 18 January 2008

At The Hague, The Netherlands