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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 the Defence and Prosecution Requests for Leave to Appeal the
Decision on Victims' Participation of 18 January 2008**

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the defence and the Office of the Prosecutor (“prosecution”) Requests for Leave to Appeal the Decision on Victims Participation of 18 January 2008:

I. BACKGROUND

1. On 18 January 2008 the Trial Chamber issued its Decision on victims’ participation, with a Separate and Dissenting Opinion of Judge René Blattmann (“impugned decision”).¹
2. On 28 January 2008 the defence filed a request seeking leave to appeal (“defence request”) the following issues:²
 - a) What should be the modalities of identification for an individual applying to participate as a victim?
 - b) Should there be *prima facie* admissibility for applications?
 - c) Does the notion of victim necessarily imply the existence of personal and direct harm?
 - d) Must the harm alleged be linked to the charges against the accused?
 - e) Should anonymous victims be allowed to participate in the proceedings?
 - f) Is it possible for victims to tender evidence during the trial and challenge the admissibility or relevance of evidence?
 - g) Should the evidence of the prosecutor be provided to the victims before trial?
 - h) What is the scope of Regulation 56 of the Regulations of the Court?

¹ Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119.

² Requête de la Défense sollicitant l’autorisation d’interjeter appel de la “Decision on Victims’ Participation” rendu le 18 janvier 2008”, ICC-01/04-01/06-1135.

3. The defence submitted that each of these questions has an impact on the fair and efficient conduct of the proceedings.³
4. On 28 January 2008 the prosecution filed its "Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' Participation" ("prosecution request").⁴ The prosecution requested leave to appeal on the following issues:
 - a) Whether the requirements of Article 68(3) of the Rome Statute ("Statute"), by reference particularly to the "personal interests" of victims, allow for participation at trial beyond the parameters of the charges against the accused;
 - b) Whether the victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused;
 - c) Whether victims participating at trial have a right to access material in the prosecution's possession of control.
5. The legal representatives of victims a/0001/06 to a/0003/06 filed their response to the defence and prosecution's requests on 31 January 2008, asking the Trial Chamber to reject the parties' requests for leave to appeal.⁵
6. The legal representative of victim a/0105/06 filed her response to the defence and prosecution's requests on 4 February 2008, also opposing the requests.⁶ Pursuant to Regulation of the Court 65(3) this response was filed out of time and therefore the Chamber has not taken it into consideration.⁷

³ *Ibid*, paragraphs 12-13.

⁴ ICC-01/04-01/06-1136.

⁵ Corrigendum de la réponse des Représentant légaux des victimes a/0001/06 à a/0003/06 aux requêtes de la Défense et du Procureur sollicitant l'autorisation d'interjeter appel de la décision du 18 janvier 2008, ICC-01/04-01/06-1147-Corr

⁶ Réponse du représentant légal de a/0105/06 au[x] requête[s] de la défense et de l'accusation sollicitant autorisation d'aller en appel contre la décision du 18 janvier 2008, portant sur mode participation des victimes, ICC-01/04-01/06-1154.

⁷ Although the response is dated 1 February 2008, it was filed on 4 February 2008 at 13.43.

II. RELEVANT PROVISIONS

7. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered Article 82(1)(d) of the Statute:

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence.

[...]

- (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

III. SUBMISSIONS AND ANALYSIS

A. General remarks

8. In its examination of the parties' respective applications, the Trial Chamber has considered Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006,⁸ in which the Appeals Chamber set out the following:
- a) only an issue may form the subject-matter of an appealable decision;
 - b) an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is disagreement or conflicting opinion;
 - c) not every issue may constitute the subject of an appeal, but it must be one apt to affect significantly (i.e. in a material way), either the fair and expeditious conduct of the proceedings or the outcome of the trial; and

⁸ ICC-01/04-168, paragraphs 9-14.

- d) identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal insofar as the issue must be one for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
9. Accordingly, it has been necessary to examine the respective applications for leave to appeal against the following criteria:
- a) Whether the matter is an “appealable issue”;
 - b) Whether the issue at hand could significantly affect:
 - i) the fair and expeditious conduct of the proceedings, **or**
 - ii) the outcome of the trial,

and
 - c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.
10. The requirements a), b) and c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.⁹
11. The approach taken in this decision is in accordance with the conclusions of Pre-Trial Chambers I and II which have approached the above criteria in a similar way.¹⁰ Particular attention has been given to Pre-Trial Chamber II’s findings that “[t]he mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings

⁹ Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, a/0111/06 to a/0127/06, 20 December 2007, ICC-02/04-112, paragraph 17.

¹⁰ See *inter alia* Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58, issued by Pre-Trial Chamber II on 19 August 2005, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005, Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, issued by Pre-Trial Chamber I on 23 June 2006, ICC-01/04-01/06-166, Decision on Defence Motion for Leave to Appeal, issued by Pre-Trial Chamber I on 18 August 2006, ICC-01/04-01/06-338; Decision on Second Defence Motion for Leave to Appeal, issued by Pre-Trial Chamber I on 28 September 2006, ICC-01/04-01/06-489; Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, issued by Pre-Trial Chamber I on 14 December 2007, ICC-01/04-01/07-108

before the Court is not sufficient to warrant the granting of leave to appeal”, and that the party requesting leave shall demonstrate that the “the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings”.¹¹

12. As regards the requirement in Article 82(1)(d) that “an immediate resolution by the Appeals Chamber may materially advance the proceedings,” it is insufficient that an appeal would be legitimate or even necessary at some stage (as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings).¹² It is necessary for the Chamber to be vigilant in determining which issues truly require such a determination. Any lesser approach could lead to a lengthy delay in the proceedings.

13. An interlocutory appeal under Article 82(1)(d) of the Statute should be regarded as exceptional, not least because appeals can significantly delay the proceedings. In this regard, the jurisprudence of the *ad-hoc* tribunals as well as that of the Special Court for Sierra Leone has been noted, which have similarly described the exceptional nature of interlocutory appeals.¹³ As set out by Pre-Trial Chamber II, “[t]his case-law shows that in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the *ad hoc* Tribunals, and in the ICC Statute, favour as a principle the deferral of appellate

¹¹ ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21

¹² *Prosecutor v Emver Hadzihasanovic & Amir Kubura*, “Decision on Joint Defence Request for Certification of the ‘Decision on Motion for Leave to Amend the Amended Indictment’ dated 18 June 2003”, 25 July 2003, Case No. IT-01-47-PT, 14th unnumbered paragraph.

¹³ *Prosecutor v Shalom Ntahobali & Pauline Nyiramasuhuko*, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible, 18 March 2004, Case No. ICTR-97-21-T”, paragraph 14; *Prosecutor v Casimir Bizimungu et al*, Decision on Bicamumpaka’s request pursuant to Rule 73 for Certification to Appeal the 24 November 2004 Decision on Bicamumpaka’s Urgent Motion to Declare Parts of the Testimony of Witness GTA and DCII Inadmissible, 25 February 2005, Case No. ICTR-99-50-T, paragraph 8; *Prosecutor v Issa Hassan Sesay*, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004, Case No. SCSL-2004-15-P1, paragraph 10.

proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions.”¹⁴

14. Given that some of the issues raised by the defence and the prosecution in their applications overlap, they will be addressed in a single decision combining both requests for leave to appeal.
15. Thus, the following issues have been evaluated in order to decide whether or not the requirements under Article 82(1)(d) of the Statute are met:
 - a) The modalities for identification for an individual applying to participate as a victim (defence request).¹⁵
 - b) The *prima facie* admissibility of applications (defence request).¹⁶
 - c) Whether the notion of victim necessarily implies the existence of a personal and direct harm (defence request).¹⁷
 - d) Whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused (defence and prosecution request).¹⁸
 - e) Whether anonymous victims should be allowed to participate in the proceedings (defence request).¹⁹
 - f) Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence (defence and prosecution request).²⁰
 - g) Whether the evidence of the Prosecutor must be communicated to the victims before trial and whether victims participating at trial have a

¹⁴ ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 19.

¹⁵ ICC-01/04-01/06-1135, paragraphs 14 to 17.

¹⁶ *Ibid.*, paragraphs 18-21

¹⁷ *Ibid.*, paragraphs 22-26

¹⁸ ICC-01/04-01/06-1135, paragraphs 28-32; ICC-01/04-01/06-1136, page 4.

¹⁹ ICC-01/04-01/06-1135, paragraphs 33-39.

²⁰ ICC-01/04-01/06-1135, paragraphs 40-46; ICC-01/04-01/06-1136, page 4.

right to access material in the prosecution's possession or control (defence and prosecution request).²¹

h) The scope of Regulation 56 of the Regulations of the Court (defence request).²²

16. As explored in detail below, certain aspects of the impugned decision require immediate resolution by the Appeals Chamber, most particularly because it provides general guidelines for the implementation of victims' rights under Article 68(3) of the Statute, which are to be applied to each of the applications by victims in this trial to participate. As the participation of victims involves important principles of criminal law that have yet to be resolved finally, the general subject matter is one of importance for the determination of the case. In the context of the Situation in Uganda, Single Judge Politi observed that "to state that the right of victims to participate may have a profound impact on the overall fairness of the proceedings before the Court does not mean *per se* that every matter addressed in the context of a decision involving victims' participation would significantly affect the fair and expeditious conduct of the proceedings".²³ This approach has been applied in this decision.

17. Although properly facilitated participation by victims does not have the capacity to render the trial unfair, there are issues relating to the extent and the circumstances of participation by victims that are of considerable significance for the conduct of this trial in terms of its content and length, in that they are likely to affect the nature and extent of the evidence called and the issues raised, and in the event the Chamber is persuaded that aspects of the impugned decision therefore touch upon matters that can properly constitute grounds of appeal at this stage. Although the decision as a whole contains some

²¹ ICC-01/04-01/06-1135, paragraphs 47-50; ICC-01/04-01/06-1136, page 4

²² ICC-01/04-01/06-1135, paragraphs 51-56.

²³ ICC-02/04-112, paragraph 25.

“appealable issues”, as analysed hereafter, this determination has been made on an issue-by-issue basis.

18. In the analysis that follows, those discrete areas that fulfil the criteria for an interlocutory appeal have been identified. It is to be emphasised that it would be premature to grant leave to appeal on all issues arising out of the impugned decision, since not all of them can be said to have a material effect on the fair and expeditious conduct of the case of Thomas Lubanga Dyilo or the outcome of the trial, and that an immediate resolution would materially advance the proceedings.
19. Judge Politi noted that “arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted”.²⁴ Where arguments have been raised by the parties which pertain to the merits of a substantive issue rather than whether the matter meets the test for leave to appeal, this decision has not addressed the substantive arguments and instead a determination has been made solely as to whether the matter raised meets the test to grant leave to appeal. Thus, consideration has been given to whether the party requesting the leave to appeal has merely presented material challenges to the impugned decision, or whether it has satisfied the requirements of Article 82(1)(d).²⁵ It follows that a mere rehearsal of substantive submissions advanced before the Trial Chamber is likely to be insufficient in this regard.

²⁴ *Ibid.*, paragraph 50, referring to ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 22.

²⁵ *Prosecutor v Pauline Nyiramasuhuko*, Decision on Nyiramasuhuko’s Motion for Certification to Appeal the ‘Decision on Nyiramasuhuko’s Oral Motion Regarding Prosecutor’s Use of Material Under Seal’, 18 March 2004, Case No. ICTR-97-21-T, paragraph 16.

B. Whether the requirements of Article 82(1)(d) of the Statute are met***First Issue: The modalities of identification for an individual applying to participate as a victim***

20. Leave to appeal on this point was requested solely by the defence, which contended that the above issue is of such a nature as to affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It argued that acceptance by the Trial Chamber of unofficial identification documents or the attestation of two witnesses in support of victims' applications may provide difficulties for the defence, since its ability to verify the validity of a victim's application for participation would be limited.²⁶
21. In its application, the defence has failed to provide any foundation for the proposition that permitting unofficial documents to serve as proof as identification significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Notwithstanding that failure, this issue has been independently addressed. Focussing on each part of the test in turn, first there is no apparent foundation for the suggestion that participation by victims who have been identified in this way will have a material adverse impact on the fairness of the trial. The Chamber will only permit evidence to be called or investigated which is relevant and admissible. Accordingly, so long as the Chamber ensures that the views and the concerns of victims generally are presented in a fair and proportionate manner, the accused's position will be protected. Second, although the participation of any additional victims may, to an extent, add to the length of the case, there is no basis for suggesting that the expeditious conduct of the proceedings or their outcome will be affected significantly as a result of the involvement of victims who have been identified in this way. Given the extent to which there is likely to be joint representation

²⁶ ICC-01/04-01/06-1135. paragraphs 14-17

of, and joint presentation of common issues by, participating victims, it is likely that this will not add more than slightly to the overall length of the case. Third, for these reasons there is no basis for suggesting that an immediate resolution of this matter would materially advance the proceedings.

22. Consequently, the request for leave to appeal on this point is refused.

Second Issue: The prima facie admissibility of applications

23. Leave to appeal on this issue is sought solely by the defence. It is contended that the determination of the Trial Chamber to allow victims to participate if, *prima facie*, there are credible grounds to believe that the applicant suffered harm as a result of the commission of a crime within the jurisdiction of the Court affects the fair and expeditious conduct of the proceedings and the outcome of the trial, since it would be wrong to allow victims to participate simply on the basis of their applications, without any further verification of the credibility of the information set out therein.²⁷

24. In its submission, the defence appears to have misinterpreted the Chamber's conclusions, as the impugned decision imposes upon the Chamber an obligation to consider the credibility of the information contained in the victims' application forms ("[...] the Chamber will [...] ensure that there are, *prima facie*, credible grounds for suggesting [...]").²⁸ The impugned decision does not exempt the Chamber from its obligation to assess the veracity of the information contained in the victims' application forms. Rather, it simply affirms it is impossible to make a substantive assessment of the veracity of an application, since any final determination of that kind could infringe on the presumption of innocence enshrined in Article 66 of the Statute. It was explained in the

²⁷ *Ibid.*, paragraphs 18-21

²⁸ ICC-01/04-01/06-1119, paragraph 99

impugned decision that in reaching its *prima facie* determination, the Chamber will consider the information in a victim's application form as well as his or her statements (if available) to ensure that the necessary link with the case is established.²⁹ Additionally, other available sources can be drawn on to corroborate the information. Similar conclusions have been reached when these matters have arisen for consideration by Pre-Trial Chamber I.³⁰

25. Consequently, on a proper interpretation of the impugned decision, the issue raised by the defence is not an "appealable issue" as it is based on a misunderstanding of the decision and therefore the request for leave to appeal on this particular issue is refused.

Third Issue: Whether the notion of victim necessarily implies the existence of a personal and direct harm

26. Leave to appeal on this ground was requested by the defence alone. The defence argued that the Chamber relied to a large extent on the "Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" ("Basic Principles") to define the notion of "harm" under Rule 85 of the Rules of Procedure and Evidence ("Rules"). It further contended that the Chamber, relying on the Basic Principles and the difference in the drafting of Rule 85(a) and (b) of the Rules, came to the erroneous conclusion that natural persons may be granted victim status if they have suffered direct or indirect harm as the result of a crime within the jurisdiction of the Court. The defence submitted that the adoption by the Trial Chamber of such a broad definition of 'victim' could entail long debates and

²⁹ *Ibid.*

³⁰ Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(c) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 3 December 2007, ICC-02/05-110, paragraph 8; Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 14 December 2007, ICC-02/05-111-Corr, paragraph 5

thus delay the proceedings. The defence also referred to the separate opinion of Judge Blattmann, as regards the applicability of these Basic Principles.³¹

27. This issue is integrally linked to the “fourth issue” (the link between the harm alleged by a victims, his or her personal interests and the charges). Given that the concept of “harm” is of importance to both issues, it would be unrealistic to grant leave to appeal on one and not on the other. Furthermore, permitting victims who suffered indirect harm to participate may significantly affect the number of victims who are involved in the case and the issues that will fall to be canvassed during the proceedings. Accordingly this could affect significantly the fairness and expeditious conduct of the trial and, given its importance, it requires immediate resolution by the Appeal’s Chamber.
28. For the reasons set out above, the request for leave to appeal on this particular issue is granted.

Fourth Issue: Whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused

29. Both the defence and the prosecution requested leave to appeal this issue.
30. The defence argued that the right of the accused to a fair trial would be endangered by what is submitted to be a broad and imprecise definition of victims. It further submitted that the Trial Chamber only has competence within the limits of the charges against the accused and to act outwith them infringes the principle of legality.³²

³¹ ICC-01/04-01/06-1135, paragraphs 22-26.

³² *Ibid*, paragraphs 28-32.

31. The prosecution argued that the decision of the majority to grant victim status to those suffering harm as a result of “any crime falling within the jurisdiction of the Court” may affect the whole scheme of participation and the fairness and expeditiousness of the proceedings, as well as upsetting the important balance between victims’ right to participate and the right of the accused to a fair trial. The prosecution further submitted that the majority decision may cause delays and legal uncertainty and lead the Chamber to making determinations on the basis of evidence outside the scope of the charges against the accused. The prosecution further argued that by applying a broad scope, the Trial Chamber has opened the door to a large number of applicants for participation, which could have an impact on the expeditious conduct of the proceedings and on the workload of parties and organs of the Court.³³
32. As stated in relation to the third issue, which is intrinsically related to the issue at hand, the participation of victims of crimes other than those included in the charges, could lead to the Chamber considering additional material in the trial against the accused. As a result, the Chamber is persuaded that this issue could significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial.
33. The resolution of this aspect of involvement by victims in the proceedings could significantly affect the content and length of the case because the extent of their participation is likely to affect the nature and extent of the evidence called and the issues raised, and a decision by the Appeals Chamber defining the Court’s position as regards victims’ participation will be beneficial by bringing legal certainty to the Chamber’s consideration of each of the applications to participate. This in turn will materially advance the proceedings.
34. The Trial Chamber therefore grants leave to appeal on this ground.

³³ ICC-01/04-01/06-1136, paragraphs 6-13.

Fifth Issue: Whether anonymous victims will be allowed to participate in the proceedings

35. Leave to appeal on this point was requested solely by the defence. The defence recognised that the Trial Chamber has explained in the impugned decision that it is preferable in principle for the identities of the victims be disclosed to the parties, but nevertheless it sought leave to appeal the decision on the basis that in certain cases anonymous victims may be authorised to participate in the proceedings. The defence argued that the principle of equality of arms and the right to a fair trial require that the accused be aware of the identities of all participants in the trial against him. This is said to be due to the fact that whenever a victim speaks about harm suffered, he or she will make an accusation against the accused. The defence further contended that the identity of victim applicants is necessary in order for the parties to make representations on the applications, as well as the stage of the proceedings when the interests of victims are affected.³⁴
36. The legal representatives of victims a/0001/06 to a/0003/06 contended that nowhere in the statutory provisions is anonymity prohibited. The legal representatives argued that the issue at hand is general since no individual decision has been taken by the Chamber.³⁵
37. The defence in its application essentially repeated its original arguments on the merits rather than giving any focussed justification for the assertion that the fair and expeditious conduct of the proceedings or the outcome of the trial will be significantly affected, reasons which are of particular significance given that the impugned decision anticipates anonymous witnesses will constitute an

³⁴ ICC-01/04-01/06-1135, paragraphs 33-39

³⁵ ICC-01/04-01/06-1147-Corr, paragraph 36.

exceptional category. It is likely that only a few, indeed if any, victims will be allowed to participate on this basis. Furthermore, the Chamber will take into account the fact that a victim is anonymous in determining the extent of his or her participation, thus safeguarding the fairness of the proceedings. In particular, the extent of participation by a victim on any issue that has a bearing on the Chamber's determination of the charges is likely to be significantly limited if a victim is anonymous. Against that background, the hypothetical possibility of participation, in exceptional circumstances, by anonymous victims is not an issue that could significantly affect either the fairness or the expeditiousness of the proceedings or the outcome of the trial, and accordingly there is no foundation for suggesting it will materially advance the proceedings. Leave to appeal this issue is refused.

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

38. Both the defence and the prosecution requested leave to appeal on this issue.
39. The defence argued that if the accused were to face more than one accuser (as it suggests will be the result of this aspect of the decision), the principle of equality of arms will be violated. It further asserts that the Chamber's decision tends to give to victims certain rights which the Statute grants to the parties alone and the Chamber is reminded that the burden of proof rests exclusively with the prosecution. Finally, the defence argued that allowing victims to present evidence or comment on the admissibility of evidence could have a direct impact on the length and expeditiousness of the trial proceedings.³⁶

³⁶ ICC-01/04-01/06-1135, paragraphs 40-46.

40. The prosecution agreed with the defence submission that the burden of proof rests exclusively with the Prosecutor, and suggested that the Chamber in its decision has diluted this burden, transferring part of the responsibility to the victims and to the Chamber itself. The prosecution further contended that the Trial Chamber's decision in effect created a third party and this could affect the prosecution's case, by allowing the introduction of material that could steer the trial, at least in certain areas, away from its proper focus. The prosecution also argued that the impugned decision failed to impose disclosure obligations on the victims and given they do not have the resources or expertise of the prosecution, the right to present evidence could lead to the presentation of unreliable, prejudicial or tainted evidence. Additionally, this decision is said to have the potential consequence of affecting the expeditiousness of the proceedings, since it could lead to additional submissions on the admissibility, relevance or probative value of evidence. The prosecution argued that the presentation of evidence by victims, if permitted, could affect the outcome of the trial, having supplemented or damaged the prosecution case.³⁷
41. The legal representatives of victims a/0001/06 to a/0003/06 contended that the impugned decision did not grant victims the right to present evidence pertaining to the guilt or innocence of the accused, but with the aim of "determining of the truth." The legal representatives submitted that if, as suggested by the prosecution, victims attempt to introduce evidence which is unreliable or of dubious origin, the prosecution could request a ruling on admissibility. The legal representatives argued that the victims' right to present evidence is explicitly provided for in Rule 91(3)(b) of the Rules, subject to control by the Chamber.³⁸

³⁷ ICC-01/04-01/06-1136, paragraphs 14-17.

³⁸ ICC-01/04-01/06-1147-Corr, paragraphs 20-24.

42. In light of the submissions of the parties and participants, it is accepted that issues arising under this proposed ground of appeal could significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. Although the impugned decision does not have the effect *per se* of shifting the burden of proof, it could lead, in particular circumstances and in some degree, to such an effect, and this could significantly affect the fairness of the proceedings pursuant to Article 67(1)(i) of the Statute. In summary, the introduction of evidence touching on the issue of the guilt or innocence of the accused may materially affect the content and the substance of the evidence introduced during the trial and its length, since this is likely to affect the nature and extent of the evidence called and the issues to be raised. Indeed, this decision may result in the Chamber considering evidence that otherwise would not be available. Thus, the ability of victims to lead and to challenge evidence meets the test for granting leave to appeal in that it could significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial.
43. In light of the above, an immediate resolution by the Appeals Chamber would materially advance the proceedings. In the result all the elements of the test are met and this application for leave is granted.

Seventh Issue: Whether the evidence of the prosecutor must be communicated to the victims before trial and whether victims participating at trial have a right to access material in the prosecution's possession or control

44. Both the defence and the prosecution requested leave to appeal on this particular issue.
45. The defence reiterated its arguments relating to the presentation of evidence by victims, stating that for the reasons cited above, whether the evidence of the

prosecutor must be communicated to victims before trial affects the fair and expeditious conduct of the proceedings. The defence further argued that allowing victims to submit requests for access to specific items of evidence would necessarily entail extensive argument in order to establish the link with their personal interests, and would thus substantially impact upon the expeditiousness of the trial proceedings.³⁹

46. The prosecution argued that the right granted in the impugned decision would affect the fairness of the proceedings, particularly as regards the prosecution, since this would affect the prosecution's independence and its right to exercise control over its evidence, subject only to the provisions of the Statute and the Rules on disclosure and inspection. In the prosecution's submission, it could lead to victims presenting evidence during trial that in its own assessment should not be introduced. Furthermore, the prosecution contended that "organized actors with specific interests in the outcome of the Court's investigations and proceedings" could seek to participate in order to interfere with the proceedings. Finally, the prosecution argued that granting victims this right would affect the expeditiousness of the proceedings, since it would introduce a fundamentally new process of inspection and provision of material.⁴⁰
47. The legal representatives of victims a/0001/06 to a/0003/06 argued that a decision by the Appeals Chamber in this regard is not necessary and that none of the points raised by the parties could jeopardise the fair and impartial nature of trial.⁴¹
48. The additional requirements of inspection and provision of material could affect the expeditiousness of the proceedings, to the extent that this may have an

³⁹ ICC-01/04-01/06-1135, paragraphs 47-50.

⁴⁰ ICC-01/04-01/06-1136, paragraphs 18-22

⁴¹ ICC-01/04-01/06-1147-Corr, paragraphs 27-32

impact on the evidence and the issues canvassed during the trial. However, the suggestion is rejected that this could affect the fair conduct or the outcome of the proceedings. Access to materials by victims is a separate issue from their ability to lead evidence during trial, and, as set out above, the Chamber will ensure that only relevant and admissible evidence is introduced. For these reasons, this application is without apparent merit, and furthermore there is no basis for suggesting that an immediate resolution of this issue will materially advance the proceedings.

49. In addition, the prosecution's argument is not made out that the fairness of the proceedings will be affected because, as the prosecution claims, it has a fundamental right to exercise control over its evidence, subject only to the provisions of the Statute and Rules. Whatever the correct answer is to that claim, the prosecution has failed to demonstrate how this could have a significant impact on the fairness of the trial proceedings, given the Chamber is the arbiter of admissibility.
50. Therefore, the Trial Chamber refuses leave to appeal on this ground.

Eighth Issue: The scope of Regulation 56 of the Regulations of the Court

51. The leave to appeal this decision was requested solely by the defence.
52. In its request, the defence merely repeated its previous submission that Regulation 56 should be applied restrictively, and it failed to provide reasons why the fair and expeditious conduct of the proceedings or the outcome of the trial would be significantly affected by the issue.⁴² The Regulation enables the Chamber to consider evidence relating to reparations during the trial process. These are entirely separate considerations, and the Bench will be able, without

⁴² ICC-01/04-01/06-1135, paragraphs 51-56.

difficulty, to separate “reparations issues” from “trial issues”, ensuring that evidence concerning reparations does not have an impact on the decision on the charges. If at any stage the Chamber concludes that receiving material relating to reparations may adversely affect its fair consideration of the trial issues, the evidence will be excluded during the trial. In those circumstances, there is no basis for suggesting that a non-restrictive operation of Regulation 56 will significantly affect the expeditiousness and the fairness of the proceedings, or the outcome of the trial, and in the result an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

53. In the premises, the Trial Chamber refuses the request for leave to appeal on this issue.

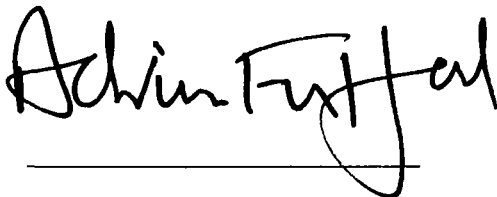
IV. CONCLUSIONS

54. For the reasons set out above, the Trial Chamber concludes that leave is to be granted on the following issues:
- a) Whether the notion of victim necessarily implies the existence of personal and direct harm.
 - b) Whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused.
 - c) Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.

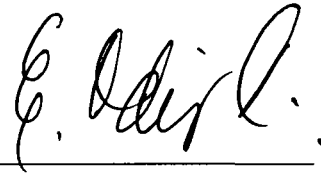
55. The Trial Chamber has no jurisdiction to grant or refuse the requests by the parties to stay the proceedings since under Article 82(3) of the Statute and Rule 156(5) of the Rules the Appeals Chamber alone has the power to determine an application.

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 26 February 2008

At The Hague, The Netherlands

Separate and Dissenting Opinion of Judge René Blattmann

1. Following the Trial Chamber's Decision on victims' participation with a Separate and Dissenting Opinion of Judge René Blattmann, both the defence and the prosecution filed requests to grant leave to appeal on 28 January 2008.¹
2. In total, the defence requested leave to appeal on eight specific issues while the prosecution requested leave on three issues. Considering overlap between the parties' requests, the decision of the Majority of the Trial Chamber consolidates the issues into eight identifiable issues which require a determination by the Trial Chamber regarding whether to elevate those issues to the Appeals Chamber for a determination on the matter.²
3. I dissent with the Majority Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims Participation of 18 January 2008 in both its approach to the application of Article 82(1)(d) as well as with some of its reasoning and eventual conclusions on the issues. In particular, I believe that leave to appeal should be granted with regard to the issues of 1) the modalities of identification of victim applicants, 2) the definition of harm under Rule 85, 3) the linkage of a victims' personal interests with the charges confirmed against the accused, 4) the possibility of anonymous victims to participate in proceedings, 5) the possibility of victims leading evidence relevant to the guilt or innocence of the accused during trial proceedings, and 6) the scope of Regulation 56 which would allow the possibility of reparations materials to be introduced during trial proceedings.

¹ Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' Participation in *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-1136). Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Decision on Victims' Participation' rendue le 18 janvier 2008 in *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-1135)

² Majority opinion, paragraph 15.

- I. General approach of a chamber to grant leave to appeal on victims' issues.**
4. Article 82(1)(d) of the Statute is the provision which guides the possibility for appeal against decisions other than a final judgement or sentence. This article, in turn, must guide the Trial Chamber in its decision as to whether granting leave to appeal is warranted.
 5. An important aspect of the appeals regime set by the Rome Statute is the unique allowance it grants the chamber which has delivered the impugned decision to determine whether to grant or deny leave to appeal.³ This system helps to maintain the possibility of interlocutory appeals only for those issues which are truly important and rids the court of the burden of slowing the process with countless interlocutory appeals on irrelevant issues. However, the counter balance to that is that the chamber must tread carefully to apply the test provided in Article 82(1)(d), resisting any temptation to decide upon the substantive issues involved as that is reserved for the Appeals Chamber itself to determine.
 6. In the application of Article 82(1)(d), lower chambers have been further guided by the Appeals Chamber in its 13 July 2006 Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal.⁴ In this judgment the Appeals Chamber presented its interpretation of Article 82(1)(d) as well as providing specific analysis regarding the application of the test identified within the article. I find this appeals judgement to be extremely useful in guiding the Trial Chamber's deliberation and have strived in my analysis of the issues to apply Article 82(1)(d) with strict adherence to the Appeals Chamber's guidelines.

³ Rule 155. paragraph 1 of the Rules of Procedure and Evidence reads: "When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal".

⁴ Judgment on the Prosecutor's Application for Extraordinary Review of Pre Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal in the *Situation in the Democratic Republic of the Congo* (ICC-01/04-168).

7. As found in the Majority opinion, the test to apply when determining a leave to appeal, pursuant to Article 82(1)(d) and specifically enumerated in the appeals decision, is that either party may appeal a decision which involves an issue that would significantly affect either 1) the fair **AND** expeditious conduct of the proceedings **OR** 2) the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
8. The Appeals Chamber decision separates this test into two cumulative components. In the first component the Appeals Chamber confirms that there must be a finding that either the outcome of the trial or **BOTH** fairness and expeditiousness would be significantly affected.⁵ As well, the Appeals Chamber states that, “[t]he term proceedings as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto”.⁶ Further, it discusses the importance of the Chamber to exercise an ability to “forecast consequences” giving further understanding to the importance of the Chamber being able to look ahead at the impact of the issue on the future proceedings within the trial.
9. The second component of Article 82(1)(d) is discussed by the Appeals Chamber as an issue which “must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.⁷ Within this component, it importantly notes as crucial, the term “advance”. It explains that, in fact, in the particular context this cannot be associated with expeditiousness and instead the “meaning conveyed by advance [...] is move forward, by ensuring that the proceedings

⁵ *Ibid.*, paragraph 10 and 11

⁶ *Ibid.*, paragraph 12

⁷ ICC-01/04-168, paragraph 14

follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings".⁸ Further, the Appeals Chamber importantly states, "[a] wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back".⁹

10. It is against this framework that I believe it is necessary to assess the issues pertaining to victims' participation. There are many aspects of procedural decisions which would be important for an interlocutory appeal decision upon, but I believe that victims' participation and victims' status issues hold a particular importance in this regard. We have little to no jurisprudence on these issues and are guided in our implementation of a victims' participation framework principally by the Statute, with minor reference to national systems which have implemented victims' participation. However, the difference between the crimes which victims have suffered in national systems and those that come before the International Criminal Court does not allow for a direct application of victims' procedures from national systems. Therefore, the issues pertaining to victims' participation have not been extensively examined through international jurisprudence and the implications of our decisions on the issues are largely untested. In this regard, I also believe that we have a great responsibility to the field of international criminal law to provide jurisprudence on victims' participation which will move us forward in this important new element of this field.
11. It has not escaped my attention that Pre-Trial Chamber I seems also to have recognized the fragility of victims' participation decisions, the potential for

⁸ *Ibid*, paragraph 15.

⁹ *Ibid*, paragraph 16.

fairness and expeditiousness to be impacted by these particular decisions and the necessity of clear and concrete appeals decisions where victims' participation issues are concerned. While originally denying leave to appeal on victim's issues in its decision of March 2006,¹⁰ Pre-Trial Chamber I has recently granted leave to appeal on a number of issues pertaining to victims' participation that are similar to those denied previously. It is interesting to observe that many of the issues which Pre-Trial Chamber I has granted leave to appeal on are similar in nature to those before the Trial Chamber in the present applications.¹¹ In their decision granting leave to appeal on victims' issues, the Pre-Trial Chamber considered that Pre-Trial Chamber I and Pre-Trial Chamber II have "interpret[ed] the relevant provisions of the Statute, the Rules and the Regulations in a significantly different manner".¹² It went on to state:

"CONSIDERING therefore that an immediate resolution of this issue would provide legal certainty; than an 'authoritative determination' by the Appeals Chamber which 'map[s] a course of action along the right lines' on the issue will move the proceedings forward and 'ensure that the proceedings follow the right course', and that, therefore, the Single Judge is of the view that an immediate resolution by the Appeals Chamber of the issue raised by the OPCD may materially advance the proceedings..."¹³

It might also be noted that in its first decision denying leave to appeal, the Pre-Trial Chamber was not assisted by the subsequent decision from the Appeals Chamber which outlined the analysis to be undertaken under Article 82(1)(d) in order to assess the validity of an application for leave to appeal from a party.

¹⁰ Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6 in the *Situation in the Democratic Republic of the Congo* (ICC-01/04-135-tEN).

¹¹ Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" in the *Situation in the Democratic Republic of the Congo* (ICC-01/04-438), page 4 Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation in the *Situation in the Democratic Republic of the Congo* (ICC-01/04-444), pages 6 and 7

¹² Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", in the *Situation in the Democratic Republic of the Congo* (ICC-01/04-438), page 7

¹³ *Ibid*, pages 7-8.

12. Therefore, I believe the issues of consideration in the applications for leave to appeal from both the prosecution and the defence, which solely encompass victims' participation, to be particularly ripe for review. As well, concrete decisions from the Appeals Chamber on these issues will provide certainty for parties and participants in the advancement of cases before the court and therefore should be assessed in that light, applying the test provided in Article 82(1)(d) in order to weed out particular issues which will burden the court unnecessarily and will not advance the proceedings in a material way.

II. The application of Article 82(1)(d) to the specific issues identified in requests for leave to appeal

A. The modalities of identification for an individual applying to participate as a victim

13. On this issue, I disagree with the Majority opinion application of Article 82(1)(d) as well as the conclusion reached.
14. First, with regard to the element of the effect of the issue on the fairness of the proceedings, I am not persuaded by the Majority argument that "so long as the Chamber ensures that the views and the concerns of victims generally are presented in a fair and proportionate manner, the accused's position will be protected."¹⁴ I do not consider a general assurance by the Majority that the Trial Chamber will ensure fairness to be a judicial safeguard against unfairness, nor does it provide legal certainty to the parties. As such, I am not convinced of this as a valid argument.
15. Rather, I would consider that the use of non official documents to verify the identity of victims could potentially significantly impact the fairness of proceedings if the verification process was rendered impossible for the defence. Further, if the verification process became impossible, the potential could exist for persons improperly identified as a victim to participate in

¹⁴ Majority opinion, paragraph 21.

proceedings. This would, in turn, have an impact on the fairness of the proceedings for the accused.

16. Second, with regard to the effect of the modalities of identification of victim applicants, I agree with the defence that a more burdensome verification process may well take extra time to complete and therefore has the potential to significantly affect the expeditiousness of the trial.
 17. Having found that both fairness and expeditiousness are affected, I believe that a resolution from the Appeals Chamber on this issue will materially advance the proceedings, in that certainty will be provided and the important work of the court to identify victims will move forward in a progressive manner. Therefore, I would grant the request for leave to appeal on this issue.
- B. Whether anonymous victims will be allowed to participate in the proceedings*
18. Once again, I am not persuaded by the Majority reasoning with regard to this issue. After applying the test, I would grant leave to appeal on the issue of anonymous victims' participation in the proceedings.
 19. The Majority opinion states that, "the Chamber will take into account the fact that a victim is anonymous in determining the extent of his or her participation, thus safeguarding the fairness of the proceedings".¹⁵ I do not believe that this provides certainty to the parties as to the parameters of anonymous victims' participation and therefore, depending on what those parameters are, the fairness of the proceedings may be significantly affected.
 20. Further, the expeditiousness of the proceedings could be affected by 1) the possibility of requiring extensive litigation for each victims' application to participate anonymously and 2) the possibility that a much larger number of victims would apply with the understanding that they may remain

¹⁵ Majority opinion, paragraph 37.

anonymous thereby requiring a significant amount of additional work in processing victims' applications.

21. The potential for the participation of anonymous victims to impact the proceedings makes it important that this issue is decided upon with certainty in order to allow the proceedings to move forward. Therefore, I would grant leave for appeal on the issue of anonymous victims' participation in the proceedings.

C. *The scope of Regulation 56 of the Regulations of the Court*

22. Once again, the Majority's reason for failing to find that this issue touches upon the fairness of the proceedings lies in the argument that the Trial Chamber will ensure that the fairness is not impacted.¹⁶ As I remain unpersuaded by the validity of this argument, I have undertaken to assess Article 82(1)(d) separately, and have come to the conclusion that it meets the requirements as stated in the article and should be advanced to the Appeals Chamber for a final determination on the matter.
23. Similar to the issue of anonymous participation, without more specific guidance from the Trial Chamber on its implementation of Regulation 56, the possibility exists that particular reparations materials could be presented during the trial phase which significantly affect the fundamental rights of the accused necessarily having an impact on the fairness of the proceedings.
24. When approaching the consideration of the effect of the issue on the expeditiousness of the proceedings, I am persuaded that the expeditiousness would be significantly affected by the addition of reparations materials during the trial proceedings. Not only will the body of evidence be greater, but the potential for objections to the materials being submitted by the parties

¹⁶ Majority opinion, paragraph 52.

and ensuing litigation on the points raised makes it likely that the expeditiousness will indeed be significantly affected.

25. Consequently, with the issue of the introduction of reparations materials being such an important one and the potential for an erroneous decision on this matter to set the trial back in a substantial way, an instructive decision from the Appeals Chamber as to how to implement Regulation 56 of the Regulations of the Court is necessary. Therefore, I would grant leave to appeal on the issue of the implementation of Regulation 56.


III. Conclusion

26. In my analysis of each of the eight issues brought for leave to appeal, I have been specifically conscious to strictly apply the guidelines as provided under Article 82(1)(d) and the subsequent Appeals Chamber decision which provided the parameters under which the article must be assessed. I am keenly aware of the unique nature of this provision within the framework of interlocutory appeals in international and national systems. The fact that the body which has decided upon an issue is responsible for the evaluation of whether to grant leave to appeal on that decision provides a power and imposes a responsibility upon that body to decide the matter with full consideration for the strict application of the law.
27. I am also keenly aware of the stage that we are in with regards to implementing an effective victims' participation regime in the field of international criminal law and the need for certainty on the issues before us in order to avoid setbacks in our trials.
28. Against this backdrop I have assessed the eight issues which have been requested by the parties to have granted the opportunity to appeal, and have been persuaded that six of the eight issues meet the requirements provided under the Statute to grant leave to appeal. I agree with the Majority opinion

that neither the issue of the *prima facie* admissibility of applications nor the issue of the right of victims to access material in the prosecution's control should be granted leave to appeal. I further agree with the Majority opinion that the issues of direct versus indirect harm of a victim, the linking of personal interests of a victim to the charges and the possibility of victims to lead evidence at trial should be elevated to the Appeals Chamber for a final determination. However, I dissent in the reasoning and conclusions of the Majority in the following issues:

- 1) The modalities of identification for an individual applying to participate as a victim;
- 2) Whether anonymous victims will be allowed to participate in the proceedings; and
- 3) The scope of Regulation 56 of the Regulations of the Court.

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



Judge René Blattmann

Dated this 26 February 2008

At The Hague, The Netherlands