

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06 OA 9 OA 10

Date: 11 July 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

**on the appeals of The Prosecutor and The Defence against Trial Chamber I's
Decision on Victims' Participation of 18 January 2008**



Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley
Mr Franck Mulenda

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeals of the Prosecutor and the Defence against the decision of Trial Chamber I entitled "Decision on Victims' Participation" of 18 January 2008 (ICC-01/04-01/06-1119),

After deliberation,

Delivers, Judge Kirsch and Judge Pikis partly dissenting, the following,

JUDGMENT

The decision of Trial Chamber I entitled "Decision on victims' participation":

1. on the first issue:

(i) is confirmed to the extent that the Trial Chamber decided that for the purposes of rule 85 (a) of the Rules of Procedure and Evidence, the harm suffered by victims does not necessarily have to be direct.

(ii) is amended such that the Appeals Chamber also finds that the harm suffered under rule 85 (a) of the Rules of Procedure and Evidence, must necessarily be personal harm.

2. on the second issue:

is reversed to the extent that the Trial Chamber decided that neither rule 85 of the Rules of Procedure and Evidence nor the Rome Statute framework has the effect of restricting the participation of victims to the crimes contained in the charges confirmed by the Pre-Trial Chamber.

3. on the third issue:

is confirmed to the extent that the Trial Chamber decided that participating victims may possibly lead evidence pertaining to the guilt or innocence of the

accused when requested, and challenge the admissibility or relevance of evidence in the trial proceedings.

REASONS

I. KEY FINDINGS

1. Rule 85 (a) of the Rules of Procedure and Evidence (hereinafter: the “Rules”), defines who is a victim. The harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims.

2. For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused.

3. The right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defence. However, the Appeals Chamber does not consider these provisions to preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.

4. The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent



with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial. In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.

II. RELEVANT PROCEDURAL HISTORY

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

6. On 28 January 2008, the Defence² and the Prosecutor³ sought leave to appeal the Impugned Decision. On 26 February 2008, the Trial Chamber granted leave to appeal (hereinafter: “Decision Granting Leave to Appeal”)⁴ on three issues, which the Chamber identified as follows:

- a. Whether the notion of victim necessarily implies the existence of personal and direct harm;
- b. Whether the harm alleged by a victim and the concept of ‘personal interests’ under Article 68 of the Statute must be linked with the charges against the accused;
- c. Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.⁵

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

¹ ICC-01/01/01/06-1119.

² ICC-01/04-01/06-1135.

³ ICC-01/04-01/06-1136.

⁴ ICC-01/04-01/06-1191.

⁵ Ibid. at paragraph 54.

⁶ ICC-01/04-01/06-1219 OA9.

of the appeals. The Prosecutor filed his response on 19 March 2008 to the Defence Document in Support of the Appeal (hereinafter: “Prosecutor’s Response to Defence Document in Support”).⁸

8. On 11 March 2008, the legal representatives of victims a/0001/06, a/0002/06, and a/0003/06 filed the “Application of Victims a/0001/06, a/0002/06, a/0003/06 to Participate in the Proceedings Relating to the Appeals Taken by the Prosecutor and the Defence against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation.”⁹

9. On 18 March 2008, the Office of Public Counsel for Victims (hereinafter: “OPCV”) filed the “Request of the OPCV Acting as Legal Representative of the Applicants in the *Lubanga* Case for Participation in the Interlocutory Appeals Against Trial Chamber I’s Decision dated 18 January 2008.”¹⁰

10. On 20 March 2008, the Appeals Chamber issued an order directing timelines for the filing of applications for participation in the appeals and responses thereto (hereinafter: “Appeals Chamber Order of 20 March 2008”).¹¹

11. On 21 March 2008, the legal representatives of Victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 filed an application to participate in the appeals, entitled “Application for Participation Filed by Victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 Seeking Leave to Participate in the Appeals Proceedings against the Decision issued on 18 January 2008 by Trial Chamber I.”¹²

⁷ ICC-01/04-01/06-1220-tENG OA10.

⁸ ICC-01/04-01/06-1233 OA10. The Defence did not file a response to the Prosecutor’s Document in Support of the Appeal

⁹ ICC-01/04-01/06-1222-tENG.

¹⁰ ICC-01/04-01/06-1228

¹¹ “Order of the Appeals Chamber on the date of filing of applications for participation by victims and on the time of the filing of the responses thereto by the Prosecutor and the Defence” ICC-01/04-01/06-1239 OA9 and OA10.

¹² ICC-01/04-01/06-1241-tENG.

12. On 7 April 2008, the Prosecutor¹³ and the Defence¹⁴ filed their respective consolidated responses to the applications to participate in the appeals pursuant to the Appeals Chamber Order of 20 March 2008.

13. On 16 May 2008, the Appeals Chamber issued its “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation”¹⁵, in which the applications for participation by applicants represented by the OPCV and victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 were rejected. Victims a/0001/06, a/0002/06, and a/0003/06 were granted the right to participate in the appeals and were directed to present their submissions by 23 May 2008. The Prosecutor and the Defence were directed to file their responses to the submissions presented by the aforesaid victims by 30 May 2008.

14. On 21 May 2008, the legal representatives of victims a/0001/06, a/0002/06, and a/0003/06 filed the “Observations des victimes quant aux appels du Procureur et de la Défense contre la décision du 18 janvier 2008”¹⁶ (hereinafter: “Victims’ Observations”).

15. On 22 May 2008, the Appeals Chamber issued its “Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”¹⁷ which, *inter alia*, granted suspensive effect to certain decisions within the Impugned Decision which gave rise to the issues on appeal.

16. On 30 May 2008, the Prosecutor filed the “Prosecution’s Response to the ‘Observations des victimes quant aux appels du Procureur et de la Défense contre la décision du 18 janvier 2008’”¹⁸ (hereinafter: “Prosecutor’s Response to the Victims’ Observations”).

¹³ ICC-01/04-01/06-1266. A corrigendum to this response was filed on 8 April 2008 (ICC-01/04-01/06-1266-Corr and ICC-01/04-01/06-1266-Corr-Anx)

¹⁴ ICC-01/04-01/06-1264-tENG.

¹⁵ ICC-01/04-01/06-1335.

¹⁶ ICC-01/04-01/06-1345.

¹⁷ ICC-01/04-01/06-1347.

¹⁸ ICC-01/04-01/06-1361. The Defence did not file a response to the Victims’ Observations.

III. MERITS OF THE APPEAL

A. The first issue on appeal: Whether the notion of victim necessarily implies the existence of personal and direct harm

17. The first issue certified for appeal is raised by the Defence alone. The Prosecutor is opposed to the Defence's appeal on this issue.

1. Relevant part of the Impugned Decision

18. In assessing the concept of harm pursuant to rule 85 of the Rules the Trial Chamber held at paragraphs 90, 91 and 92 of the Impugned Decision:

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 the 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.

2. Arguments of the Defence

19. The Defence submit that "it is important to clarify the concept of victim so that victims admitted may not only effectively exercise their rights, but do so in a way that is not prejudicial to the rights of the accused."¹⁹

20. In support of this ground of appeal, the Defence maintain that the notion of victim necessarily implies the existence of personal and direct harm as articulated in national and international laws. In addition, the Defence argue that the Trial Chamber erred in

¹⁹ ICC-01/04-01-06-1220-tENG, paragraph 15.

adopting the wording of Principle 8 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*”²⁰ (hereinafter: the “Basic Principles of 2005”) to conclude that 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.²¹ The Defence, adopting the arguments of Judge Blattmann in his Separate and Dissenting Opinion to the Impugned Decision, argue that “the Basic Principles [of 2005] was given specific consideration before being rejected during the *travaux préparatoires* that led to the drafting of the Statute, and that the majority’s interpretation goes beyond what was approved by the legislator.”²² As a result, the Defence submit that “it would not be appropriate to refer to them [the Basic Principles of 2005] in defining the notion of victim and to expand the notion of harm to include indirect harm and collective harm.”²³

21. In relation to the concept of “indirect harm” the Defence submit that since victim participation in the proceedings affects the rights of the accused, their admission ought to be interpreted strictly and that “[n]owhere in the Statute or the Rules of Procedure and Evidence is it expressly stated that indirect harm may constitute a reason for such admission. On the contrary, Rule 85 highlights the causal link that must exist between the crime and the harm alleged.”²⁴ The Defense cites national jurisdictions and the Statute of the Extraordinary Chambers in the Courts of Cambodia, where the harm suffered by the victim applicant is required to be “the direct consequence of the offence, personal and have actually come into being.”²⁵

²⁰ Ibid. at paragraph 25. “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” adopted by the United Nations General Assembly, resolution 60/147, 16 December 2005.

²¹ Ibid

²² Ibid at paragraph 27

²³ Ibid at paragraph 28.

²⁴ Ibid at paragraph 30.

²⁵ Ibid. at paragraph 32.

3. *Prosecutor's Response to the Defence Arguments*

22. The Prosecutor opposes the arguments raised by the Defence in respect of the first issue on appeal. He submits, in the Prosecutor's Response to the Defence Document in Support of the Appeal, in relation to the issue of "personal harm" that "at no point in time did the Trial Chamber find that a person who had not personally suffered harm as a result of a crime within the jurisdiction of the Court could be considered for the purposes of Rule 85."²⁶ He argues that the Trial Chamber, to the contrary, ruled that for the purposes of its determination it would "consider if there is evidence ... that the *applicant suffered any harm* as a result of the commission of a crime within the jurisdiction of the Court."²⁷ Accordingly, the Prosecutor submits that the Defence's arguments to the effect that rule 85 requires proof of a personal character of the harm in question do not relate to any alleged error in the Impugned Decision and must be rejected.

23. In relation to the issue of "direct harm" the Prosecutor submits that the Trial Chamber was correct not to exclude from the notion of "victim" in rule 85 (a) of the Rules those persons "who were not the direct targets of a crime, but who suffered indirect harm as a result of the commission of a crime within the jurisdiction of Court."²⁸ He avers that the negotiating history of rule 85 shows that the definition of victim, especially with respect to persons suffering indirect harm was an intensively discussed topic and that in the absence of an agreement, the decision as to what groups of persons should be included in the definition was finally left to the Court to decide. He contends that no category of victims was excluded from the outset from the purview of rule 85, nor does anything in the negotiating history indicate that the Basic Principles were rejected by the drafters of the Rules in such a manner that would bar the Court from even considering them in its judicial determinations.²⁹

24. In light of the above, the Prosecutor submits that "it should be left to a Chamber to assess on a case-by-case basis the degree of proximity of a victim to the source of victimisation (i.e. the crime or crimes), and to determine whether in the circumstances of

²⁶ ICC-01/04-01/06-1233, paragraph 9.

²⁷ *Ibid*

²⁸ *Ibid* at paragraph 10.

²⁹ *Ibid.* at paragraph 11



the instant case, the appropriate threshold of victimisation is met for a person to be considered a victim within the terms of rule 85 of the Rules. When conducting this examination, the Trial Chamber may find that there are degrees of indirect victimisation that fall outside the proper scope of rule 85, but which are nevertheless covered by the provisions pertaining to reparation for victims.”³⁰ The Prosecutor argues that the Impugned Decision correctly allows for these case-by-case determinations and should not be overturned by the Appeals Chamber.

4 Victims' Observations

25. In relation to the issue of “personal harm” the legal representatives concur with the Prosecutor that the Trial Chamber did not determine that “victim status had to be granted to an applicant claiming only collective harm without demonstrating the existence of personal harm. It is therefore not clear in which respect the decision of 18 January should be reversed.”³¹ In addition the legal representatives submit that the issue “merits a nuanced approach” and that the “drafters of the Court’s texts, particularly when envisaging victim participation in proceedings, took into account the fact that mass crimes often result in suffering which is both individual and collective.”³² The legal representatives observe that “[r]ule 85 in itself does not necessarily appear to exclude those persons who allege that they belong to a group or collectivity (ethnic, national, religious, local...) which was the target of a crime within the Court’s jurisdictions. Accordingly, membership of a group which was the victim of a mass crime will, moreover, result in at least mental harm to the individual, to the extent that the Defence’s distinction between individual and collective suffering seems contrived and hypothetical.”³³

26. In relation to the issue of “direct harm” the legal representatives submit that “the distinction between the two categories of victims [in rule 85 (a) and (b) of the Rules] suggests that the drafters of the Rules of Procedure wished to impose an additional condition on organisations and institutions that, *a contrario*, they did not wish to impose

³⁰ Ibid at paragraph 12.

³¹ ICC-01/04-01/06-1345-tENG, paragraph 7.

³² Ibid, paragraph 8

³³ Ibid at paragraph 9.

on natural persons.”³⁴ Contrary to the argument put forward by the Defence, the legal representatives assert that “there is no evidence in the preparatory works to indicate that the *Declaration of Basic Principles [of Justice for Victims of Crime and Abuse of Power]*, adopted by the United Nations General Assembly, resolution 40/34 of 29 November 1985 (hereinafter: Declaration of Principles of 1985)] was rejected by the delegations because it lacked normativity or relevance to the extent that the Court would be precluded from applying the [Declaration of Principles of 1985] as a universally recognised source of international law in the exercise of its judicial function.”³⁵ Similarly, they submit that “there are no grounds for considering that the drafters of the Court’s texts had the express intention of excluding from the definition certain categories of victims that are generally recognised in international law, such as indirect victims.”³⁶

27. The legal representatives aver that if the Declaration of Basic Principles of 1985 could not serve as a valid and relevant source of the law applicable under article 21 (1) (b) of the Statute, the mere reference to it by the Trial Chamber in the Impugned Decision, “cannot per se challenge the validity and/or relevance of that decision.”³⁷

5. *Prosecutor’s Response to the Victims’ Observations*

28. The Prosecutor does not oppose the observations of the victims on the issue of indirect harm and recalls his own submission that “persons who have indirectly suffered harm as a result of a crime within the jurisdiction of the Court may be considered victims under rule 85 on the basis of their own suffering”.³⁸

³⁴ Ibid. at paragraph 12.

³⁵ Ibid. at paragraph 17

³⁶ Ibid.

³⁷ Ibid. at paragraph 18.

³⁸ ICC-01/04-01/06-1361, paragraph 14.



6. *Determination by the Appeals Chamber*

29. Rule 85 of the Rules provides:

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.

30. The Trial Chamber in its analysis of the link between "the harm allegedly suffered and the crime"³⁹ juxtaposed rule 85 (a) and rule 85 (b) of the Rules, finding significance in the omission of the word "direct" in rule 85 (a) and concluding that on a purposive interpretation of rule 85 (a) "people can be the direct or indirect victims of a crime within the jurisdiction of the Court."⁴⁰ The Appeals Chamber notes that rule 85 (b) of the Rules, limits the definition of organizational or institutional victims to those that have sustained "direct harm to any of their property". The type of "harm" referred to relates to organizations or institutions rather than natural persons. It is therefore different from the type of harm set out in rule 85 (a) of the Rules, which is harm to natural persons.

31. The word "harm" in its ordinary meaning denotes hurt, injury and damage.⁴¹ It carries the same meaning in legal texts, denoting injury, loss, or damage⁴² and is the meaning of "harm" in rule 85 (a) of the Rules.

32. The Appeals Chamber considers that the harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship

³⁹ ICC-01/01/01/06-1119, paragraph 91.

⁴⁰ Ibid.

⁴¹ Shorter Oxford English Dictionary, Volume 2, 5th Edition 2002, at page 1199.

⁴² Blacks Law Dictionary 8th Edition 2004, at page 734.

between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. It is in this sense that the Appeals Chamber understands the Trial Chamber's statement that "people can be the direct or indirect victims of a crime within the jurisdiction of the Court". The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.

33. The Appeals Chamber notes that the Trial Chamber in referring to the Basic Principles of 2005 was "guided" by the language set forth in Principle 8. However, as noted above, its decision was based on its analysis of rule 85 (a) and rule 85 (b) of the Rules. The Appeals Chamber finds no error in the Trial Chamber's reference to the Basic Principles of 2005 for the purpose of guidance.

34. As stated above at paragraph 18, the Trial Chamber noted that in accordance with Principle 8 of the Basic Principles of 2005 "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." The Defence contends that the Trial Chamber erred in adopting the wording of Principle 8 to conclude that a victim may suffer either individually or collectively.

35. The Appeals Chamber considers that there may clearly be harm that could be both personal and collective in nature. The fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court. The issue for determination is whether the harm is personal to the individual victim. The notion of harm suffered by a collective is not, as such, relevant or determinative.

36. The Trial Chamber at paragraph 90 of the Impugned Decision, in considering the concept of "harm" under rule 85 of the Rules, determined that once it had established that an applicant for victim participation was a natural or legal person it would consider



whether the applicant had suffered *any* harm as a result of the commission of a crime within the jurisdiction of the Court.

37. The Defence contends that this finding of the Trial Chamber is open to an interpretation that those who did not suffer harm personally could be considered victims under rule 85. The Appeals Chamber, noting the views expressed by both the Prosecutor and the legal representatives of the victims in this regard, finds that the Trial Chamber omitted to make an affirmative finding that only persons who have suffered personal harm would be considered as victims for the purposes of rule 85 (a) of the Rules. Such an omission appears to have been the outcome of its preoccupation with the interpretation of rule 85 of the Rules in the context of “direct and indirect harm” instead of a focus on requiring that the harm be personal to the victim under rule 85 (a) of the Rules.

38. The Appeals Chamber determines the first issue on appeal as follows: the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm.

39. Accordingly, the Appeals Chamber confirms the finding of the Trial Chamber to the extent that the Trial Chamber determined that harm suffered by victims does not necessarily have to be direct and amends the decision to include that harm suffered by a victim applicant for the purposes of rule 85 (a) must be personal harm.



B. The second issue on appeal: 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.

40. The second issue on appeal as certified by the Trial Chamber is being appealed by both the Prosecutor and the Defence.

1. Relevant part of the Impugned Decision

41. In relation to the second issue on appeal the Trial Chamber held at paragraphs 93, 95 and 96 of the Impugned Decision:

93. 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.

95. [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: [...]. Applying that essential requirement, the interests of many victims even of the Situation in the Democratic Republic of the Congo will be unrelated to the substance of the present case (the issues and the evidence), and in consequence granting participation rights to them would not serve any useful purpose. The critical question is whether either of the following is established by the contents of the standard application form, supported by the report to the Chamber of the Registry’s Victims Participation and Reparations Section:

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

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



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 [...] 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.

2 *Arguments of the Prosecutor*

42. In respect of the second issue on appeal, the Prosecutor submits that the Trial Chamber erred in its approach to the requirements for participation by victims in the trial phase of the proceedings. In support of his argument the Prosecutor contends that victim participation in the trial proceedings must be determined within the competency of the Trial Chamber. The Trial Chamber's competency is limited to the parameters set out in the charges and it is not vested with the authority to make any assessment, including those regarding victim participation, which exceeds the strict boundaries of the charges against an individual.⁴³ Thus, the Prosecutor submits that once a criminal case is brought against a person, the proper determination of personal interests for the purposes of victim participation requires a demonstration that the applicant's personal interests are affected in connection with the charges.⁴⁴

43. Furthermore, the Prosecutor submits that the Trial Chamber erred, at paragraph 97 of the Impugned Decision, by conflating the general interests of victims in relation to participation, in particular, "an interest in verifying particular facts and establishing the truth" with the role of the Prosecutor. Whilst recognising that victims have a general "interest" in the determination of the truth in relation to the particular charges, the Prosecutor submits that such an interest cannot form the "sole or main basis of participation as it is a responsibility and function granted to the Prosecutor under the Statute to investigate the crimes and establish the truth".⁴⁵

44. Moreover, the Prosecutor contends that the approach adopted by the Trial Chamber in relation to victim participation places an onerous burden on victims to exercise their participatory rights. It also leads to uncertainty as to who may participate at which stages,

⁴³ ICC-01/04-01/06-1219, paragraph 15

⁴⁴ Ibid. at paragraph 18.

⁴⁵ Ibid. at paragraph 21.



instead of determining from the outset the identity and number of victim participants and the scope and modalities of their participation. This he submits impacts on the expeditious and fair conduct of the proceedings.⁴⁶

3. *Arguments of the Defence*

45. The Defence, placing emphasis on the dissenting opinion of Judge Blattmann, is opposed to the finding of the Trial Chamber that the harm suffered and the personal interests of victims are not restricted to the crimes charged.

46. In support of its argument the Defence submit that by not requiring a link between a victim's status and his/her participatory rights on the one hand, to the charges against the accused would result in an infringement of the principle of legality.⁴⁷

47. The Defence argue that articles 5, 11, and 12 of the Statute establishes a framework that serves to limit the jurisdiction of the Court and that the Trial Chamber's jurisdiction is defined by the parameters set out in the charges brought against the accused. Further, the Defence submit that the charges confirmed by the Pre-Trial Chamber constitute the "temporal, geographical, and personal framework within which the Trial Chamber has jurisdiction". Hence the harm alleged by a victim must be linked to the charges as must the victim's personal interests.⁴⁸

48. Finally, the Defence, whilst observing that the Pre-Trial Chambers have consistently required a causal link between the harm alleged by an applicant for the status of victim and the crimes charged, submit that the effect of the Impugned Decision would result in the accused being "made to face evidence and interventions that bear no relation to the charges brought against him."⁴⁹

⁴⁶ Ibid at paragraph 24 to 26.

⁴⁷ ICC-01/04-01/06-1220-tENG, paragraph 34.

⁴⁸ Ibid. at paragraphs 35 and 36.

⁴⁹ Ibid at paragraphs 38 and 39..



4. *Prosecutor's Response to Defence Arguments*

49. The Prosecutor notes his own appeal against the Impugned Decision in respect of the second issue on similar grounds as those raised by the Defence and therefore is not opposed to the Defence's appeal on this issue.⁵⁰

5. *Victims' Observations*

50. The legal representatives of the victims authorised to participate in the appeals aver that the harm suffered by the victims concerned as well as their personal interest in receiving reparations are directly correlated with the charges against Mr Lubanga.⁵¹ Indeed, they assert that “[g]iven that such reparations depend on the conviction of the accused, the victims have a personal interest in the charges being declared established.”⁵²

51. The legal representatives “rely on the wisdom of the Court to decide on possible participation in the proceedings by victims who have suffered harm only indirectly related to the charges [...] or who invoke an interest not related to the charges in any way.”⁵³

6. *Prosecutor's Response to the Victims' Observations*

52. The Prosecutor observes that victims granted participatory rights in the instant case have linked their harm to the charges. In similar vein the participation of victims must be linked with the parameters set out in the charges.⁵⁴ However, the Prosecutor disagrees with the legal representatives' assertion that the victims have a personal interest in the establishment of the charges. He argues, “[w]hile victims have a general interest in the determination of the truth in relation to the charges, such interests cannot be interpreted or applied in such a way that confuses them with the role of the Prosecutor”.⁵⁵

⁵⁰ ICC-01/04-01/06-1233, paragraph 14 and 15.

⁵¹ ICC-01/04-01/06-1345-tENG, paragraph 20.

⁵² *Ibid.*

⁵³ *Ibid.* at paragraph 21.

⁵⁴ ICC-01/04-01/06-1361, paragraph 15.

⁵⁵ *Ibid.* at paragraph 19.

7. *Determination by the Appeals Chamber*

53. As noted in paragraph 41 above, the Trial Chamber stated that “[r]ule 85 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.”

54. The Appeals Chamber acknowledges that rule 85 does not have the effect of restricting the participation of victims to the crimes charged. However, the provision must be read in context and in accordance with its object and purpose.

55. The interpretation of the Statute is governed by the general principle of interpretation of treaties as set out in article 31 (1) of the Vienna Convention on the Law of Treaties,⁵⁶ according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” The same principle of interpretation applies to the Rules.

56. The Appeals Chamber recalls its judgment on the “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”⁵⁷ in which reference is made to article 31 (1) of the Vienna Convention on the Law of Treaties as follows:

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.⁵⁸

57. On a contextual interpretation of rule 85, the Appeals Chamber notes that it is situated in Chapter 4 of the Rules: “Provisions relating to various stages of the proceedings”, Section III: “Victims and witnesses”, Subsection 1: “Definition and general

⁵⁶ Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, 18232.

⁵⁷ ICC-01/04-168

⁵⁸ *Ibid.* at paragraph 33.



principle relating to victims". The location of rule 85 in the Rules is indicative of a general provision relating to victims, applicable to various stages of proceedings.

58. In relation to the object and purpose of rule 85, the Appeals Chamber considers that the rule does not have the effect of mandating participation of victims instead the object and purpose of rule 85 is to define who are victims. Thus, whilst the ordinary meaning of rule 85 does not *per se*, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges.

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

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

60. Rule 89 (1) of the Rules provides:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

61. Participation of victims at trial will first and foremost, take place through the procedure of rule 89 (1) of the Rules. By way of written applications, applicants will have to demonstrate, firstly, that they are victims within the meaning of rule 85 of the Rules. Secondly, pursuant to article 68 (3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns 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.



62. Given that the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged, and that the application under rule 89 (1) of the Rules in this context is for participation in the trial, only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests. Therefore, only victims who are victims of the crimes charged may participate in the trial proceedings pursuant to article 68 (3) of the Statute read with rule 85 and 89 (1) of the Rules. Once the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged.

63. The Appeals Chamber agrees with the Prosecutor's contention that the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber's authority to the determination of those issues.⁵⁹ Therefore, any determination of the Trial Chamber under article 68 (3) of the Statute read with rules 85 and 89 (1) of the Rules, in relation to a victim's status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework.

64. It is for the Trial Chamber to determine within this framework whether an applicant is a victim, because he or she suffered harm in connection with the particular crimes charged, and if so, whether the personal interests of the applicant are affected. If the applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be appropriate under article 68 (3) read with rule 85 and 89 (1) of the Rules for his or her views and concerns to be presented.⁶⁰

65. The Appeals Chamber therefore upholds the second issue on appeal and affirms that for the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused.

⁵⁹ ICC-01/04-01/06-1219, paragraph 15.

⁶⁰ In addition to the procedure under rule 89 (1) of the Rules, the Appeals Chamber notes the possibility of victim participation pursuant to rule 93, second sentence, of the Rules. This provision vests the Chamber with a discretion to call "other victims" which could potentially include victims who are not victims of the crimes for which the accused person has been charged.



66. Accordingly, the Appeals Chamber reverses the finding of the Trial Chamber that neither rule 85 of the Rules nor the Rome Statute framework has the effect of restricting the participation of victims to the crimes contained in the charges confirmed by the Pre-Trial Chamber.

C. The third issue on appeal: 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

67. The third issue certified for appeal by the Trial Chamber comprises two sub-issues, namely, (i) whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and (ii) whether it is possible for victims participating at trial to challenge the admissibility or relevance of evidence. These issues are being appealed by both the Prosecutor and the Defence who submit that the Trial Chamber erred in its determination in respect of both sub-issues.

1 Relevant part of the Impugned Decision

68. In assessing the modalities of participation for victims in the trial proceedings and, in particular, with regard to evidence, the Trial Chamber held at paragraphs 108 and 109 of the Impugned Decision:

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 reparation 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 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.

2. *Arguments of the Prosecutor*

69. The Prosecutor contends that the Trial Chamber "committed a legal error" when it held that victims may introduce evidence pertaining to the guilt or innocence of the accused, and to the extent that it permits victims to challenge the admissibility or relevance of evidence.⁶¹

70. In relation to the first sub-issue, the Prosecutor advances four arguments each of which are set out separately below.

(a) **The presentation of evidence relating to guilt or innocence rests with the parties.**

71. Under this head, the Prosecutor argues that "[t]here does not appear to be any dispute that victims are not parties, nor that their role and rights differ from that of the Prosecution and the Defence. This reflects the balance of the Statute."⁶² He submits that the Rome Statute and the Rules establish a consistent system in relation to the submission of evidence by the parties. In this regard, only the parties have obligations of disclosure. The Prosecutor submits therefore, that to allow victims who have no disclosure obligations to present evidence relating to the guilt or innocence of the accused could have serious implications "both for proper trial management and for the rights of the defence."⁶³ In addition, the Prosecutor argues that allowing victims to present evidence of guilt or innocence could lead to "shifting the burden of proof, which the Statute in Article 66 (2), places clearly and exclusively upon the Prosecution."⁶⁴ Finally, the Prosecutor submits that "the right of the parties to submit evidence carries a number of practical and

⁶¹ ICC-01/04-01/06-1219, paragraph 27.

⁶² Ibid. at paragraph 30.

⁶³ Ibid.

⁶⁴ Ibid. at paragraph 33.



logistical consequences” that the Statute accounts for by providing the Prosecution and the Defence “with means to collect such evidence, and in particular by providing at all times for the security of their personnel involved in such activities.”⁶⁵ The Prosecutor observes that there are no such provisions for victims and to allow them to collect and present evidence could affect their security and the security of persons at risk on account of the information collected.⁶⁶

(b) The presentation of “views and concerns” under Article 68 (3) does not include introducing evidence relating to guilt or innocence.

72. The Prosecutor argues that under article 68 (3) of the Statute victims have the right to present their views and concerns. He submits that the “language of Article 68 (3) thus provides that victims have been granted a right to present their personal perspective or opinion on an issue. ‘Views and concerns’ does not constitute the submission of evidence.”⁶⁷ The Prosecutor avers that the drafting history of article 68 (3) confirms the interpretation that victims do not have the right to present evidence and points to early drafts of the Statute which included a provision granting legal representatives “the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility”, which he submits “was removed from the Statute during the negotiations at Rome.”⁶⁸ The Prosecutor advances that “the Rules of Procedure and Evidence elaborate on the manner in which victims can participate, and comprehensively prescribe the system of victim participation.” He argues that this comprehensive regime of victim participation makes no mention of victims having a right to present evidence during the trial. In fact, the Rules covering the questioning of witnesses by victims and by the parties actually confirm that only the parties have the right to introduce evidence.⁶⁹

⁶⁵ Ibid at paragraph 34

⁶⁶ Ibid.

⁶⁷ Ibid at paragraph 36.

⁶⁸ Ibid at paragraph 37.

⁶⁹ Ibid. at paragraphs 38 and 39

(c) The Trial Chamber's powers under Articles 64 (6) (d) and 69 (3) do not provide a basis for victims or other participants to submit evidence pursuant to a request

73. Under this head, the Prosecutor submits that the provisions of Articles 64 and 69 cannot be interpreted to mean that victims could or should present evidence pertaining to the guilt or innocence of the accused. He argues that "the erroneous conflation of the interests of the victims and the role of the Prosecution" led to the Trial Chamber's ruling that victims will be allowed "to tender and examine evidence if in the view of the Chamber it will assist in the determination of the truth."⁷⁰

74. Moreover, he argues that "the Trial Chamber links the modalities of victims participation not to the autonomous and victims-specific provisions of Article 68 but to provisions regulating the functions and powers of the Chambers. This is not consistent with the specific participatory regime created by the Statute."⁷¹ In addition the Prosecutor submits that Article 69 (3) and Article 64 (6) (d) "provide the Chamber with an important, though residual, power to monitor and regulate the presentation of evidence by the parties, without affecting the rights of the victims."⁷² He argues that the language of these provisions do not create an independent basis for the submission of evidence by a participant. In the context of the drafting history of the Statute, the Prosecutor submits that "states moved away from a position where the Court had a duty to call evidence itself".⁷³ Instead, he avers that the purpose of the provisions under consideration is "to ensure that the Chamber was not constrained by the evidence that the parties chose to provide and could ask the parties to present further evidence in their possession under certain circumstances."⁷⁴

⁷⁰ Ibid. at paragraph 41

⁷¹ Ibid. at paragraph 42.

⁷² Ibid. at paragraph 44.

⁷³ Ibid. at paragraph 45.

⁷⁴ Ibid.



(d) The nature of victim participation in the reparation phase

75. The Prosecutor submits that “it is only during reparations proceedings that victims may submit material to the Chamber for the purposes of supporting a claim or influencing the determination of the ultimate issue.”⁷⁵

76. In relation to the second sub-issue, the Prosecutor advances that “[a]rticle 64 (9) refers to the Trial Chamber exercising its powers to rule on admissibility ‘on application of a party or on its own motion’”.⁷⁶ Thus the Prosecutor submits that the Trial Chamber erred to the extent that it granted the request of the legal representatives of victims to have the opportunity to challenge evidence.⁷⁷

3. Arguments of the Defence

77. The Defence submits that the Trial Chamber erred in allowing victims to lead evidence and to challenge the admissibility and relevance of evidence.

78. In support of this argument, the Defence avers that the right to present evidence relating to guilt or innocence rests with the parties.⁷⁸ The Defence submits that “[a]uthorising victims to submit evidence or to express their opinion on the evidence would mean forcing the defendant to confront more than one accuser, which would violate the principle of equality of arms, one of the necessary elements of a fair trial.”⁷⁹ In addition the Defence argue that “[t]he texts are clear in setting out the Prosecutor’s disclosure obligations, as well as those of the Defence- in the rare cases that this applies. The total absence of any provisions governing the disclosure of evidence by victims only serves to confirm that they may not lead evidence during the trial.”⁸⁰

4. Prosecutor’s Response to Defence Arguments

79. The Prosecutor is not opposed to the Defence’s appeal in relation to the third issue on appeal.

⁷⁵ Ibid. at paragraph 47.

⁷⁶ Ibid. at paragraph 49

⁷⁷ Ibid

⁷⁸ ICC-01/04-01/06-1220-tENG, paragraph 46.

⁷⁹ Ibid. at paragraph 48

⁸⁰ Ibid. at paragraph 50.



5. *Victims' Observations*

80. On the first sub-issue, the legal representatives assert that the “documents of the Court indirectly grant victims the possibility of presenting evidence going to the guilt or innocence of the accused in two procedural forms, namely, within the context of presenting their views and concerns pursuant to article 68 (3) of the Rome Statute on the one hand, and on the other, through the questioning of witnesses, experts and the accused pursuant to rule 91 (3) of the *Rules of Procedure and Evidence*.⁸¹ In response to the Prosecutor’s argument that article 69 (3) of the Statute provides insufficient statutory and regulatory framework to enable the Chamber to request victims to submit evidence, the legal representatives argue that the Statute permits “the Trial Chamber to order the presentation of relevant evidence concerning the victims for the purposes of sentencing pursuant to article 76 of the Statute, in the same context as for the trial.”⁸²

81. Moreover, the legal representatives argue that the issue of guilt or innocence of the accused directly affects the victims and “it is for the Chamber to ensure that the intervention of victims remains appropriate and that they do not take the place of the Prosecutor (or the Defence).”⁸³

82. On the second sub-issue, the legal representatives advance that the mere fact that Rule 72 (2) of the Rules permits victims to be heard on the relevance or admissibility of evidence in certain circumstances does not preclude victims from challenging the admissibility or relevance of evidence in other circumstances.⁸⁴ They argue further that the personal interests of the victims may be affected by the evidence presented or proposed. Such interest may result from the consequences that flow from the presentation of evidence that may bear on their right to reparations as well as be directly prejudicial to them.⁸⁵

⁸¹ ICC-01/04-01/06-1345-tENG, paragraph 25

⁸² *Ibid.*

⁸³ *Ibid.* at paragraph 27.

⁸⁴ *Ibid.* at paragraph 28.

⁸⁵ *Ibid.* at paragraph 29.

6. *Prosecutor's Response to the Victims' Observations*

83. In response to the victims' observations on the first sub-issue, the Prosecutor contends that "the submission of evidence pertaining to guilt or innocence is limited, under the system established by the Statute and the Rules, to the parties."⁸⁶ The Prosecutor argues that article 69 (3) expressly provides for the presentation of evidence by the parties and in this context the Chamber is empowered to request the presentation of evidence from those who are able to present evidence, i.e. the parties. Therefore, he argues, "it does not form a procedural basis for the submission of evidence pertaining to guilt or innocence by victims."⁸⁷

84. Further, the Prosecutor challenges the legal representatives assertion that article 68 (3) indirectly provides them with the right to submit evidence pertaining to guilt or innocence. He argues that "[n]othing in the ordinary meaning of 'views and concerns', or in the context or object and purpose of Article 68 (3), indicates that this must be read so as to include the right to submit evidence pertaining to guilt or innocence."⁸⁸ Finally, the Prosecutor disagrees with the argument of the legal representatives that article 76 or Rule 145 requires the Chamber to order the presentation of evidence from victims.⁸⁹

85. In response to the victims' observations on the second sub-issue, the Prosecutor states that he largely concurs with the views and concerns presented by the legal representatives.⁹⁰ Whilst recognising that the personal interests of victims may be affected by evidence in specific instances, the Prosecutor argues that this does not give rise to a general right of victims to challenge the admissibility or relevance of every piece of evidence.⁹¹ The Prosecutor submits that "the ability to present views and concerns regarding the admissibility of a piece of evidence, where its admission would affect the

⁸⁶ ICC-01/04-01/06-1361, at paragraph 22.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at paragraph 23.

⁸⁹ *Ibid.* at paragraph 25.

⁹⁰ *Ibid.* at paragraph 26.

⁹¹ *Ibid.* at paragraph 28



personal interests of the victim, addresses the concerns raised in the Victim's Observations while respecting and fully implementing the terms of the Statute."⁹²

7. *Determination by the Appeals Chamber*

86. In establishing a framework for the right of victims participating at trial to lead evidence and to challenge the admissibility or relevance of evidence the Trial Chamber stated, at paragraph 108 of the Impugned Decision, that "victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist in the determination of the truth, and if in this sense the Court has 'requested' the evidence." At paragraph 109 of the Impugned Decision, the Chamber stated further that "there is no provision within the Rome Statute framework which prohibits the Trial Chamber from ruling on the admissibility 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". Earlier in the Impugned Decision, at paragraph 96 the Trial Chamber decided that "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."

87. The Trial Chamber, in reaching these conclusions, relied on the following provisions of the Statute and the Rules:

88. Article 69 (3) of the Statute, with emphasis on the second sentence, which provides:

The parties may submit evidence relevant to the case, in accordance with Article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

89. Rule 91(3) of the Rules provides:

⁹² Ibid. at paragraph 30.

(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 the 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.

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

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. [...]

91. Article 69 (4), in relevant part, provides:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial [...]

92. The Trial Chamber determined at paragraph 96 and 108 of the Impugned Decision, that the Chamber had competency to permit victims participating in the case to tender and examine evidence, in appropriate circumstances following an application by the victims. The parties have challenged this finding on appeal, on the ground that it acknowledges a right to victims, equivalent to that held by the parties, to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence. The Impugned Decision lacks clarity in this regard.

93. The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties,

namely, the Prosecutor and the Defence. The first sentence of article 69 (3) is categorical: “[t]he parties may submit evidence relevant to the case, in accordance with article 64.” It does not say “parties and victims may.” The language of article 69 (3) cited above, and article 64 (6) (d) which provides that the Court shall have the authority to “[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties” clearly envisions that evidence presented during the trial would be presented by the parties. The Rome Statute framework contains numerous provisions which support this interpretation such as those pertaining to the role assigned specifically to the Prosecutor in, *inter alia*, investigating the crimes, formulating the charges and determining what evidence should be brought in relation to the charges (articles 15, 53, 54, 58 and 61 (5) of the Statute). Article 66 (2) of the Statute provides: “[t]he onus is on the Prosecutor to prove the guilt of the accused”. Presumptively, it is the Prosecutor’s function to lead evidence of the guilt of the accused. In addition, the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims.

94. However, the Appeals Chamber does not consider these provisions to preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.

95. While mindful that the Prosecutor bears the onus of proving the guilt of the accused, it is nevertheless clear that “the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth” (article 69 (3) of the Statute). The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that “must be convinced of the guilt of the accused beyond reasonable doubt” (article 66 (3) of the Statute).

96. Indeed, the Statute by virtue of article 68 (3) establishes the right for victim participation, for the first time, in international criminal proceedings. This right may be exercised where the personal interests of victims are affected 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.

97. To give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.

98. The framework established by the Trial Chamber, as outlined in paragraph 86 above, is premised on an interpretation of article 69 (3), second sentence, read with article 68 (3) and rule 91 (3) of the Rules, pursuant to which the Chamber, in exercising its competent powers, leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.

99. In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation. For example, should a victim demonstrate that his or her personal interests would be negatively affected if a particular witness (who could attest to the harm suffered by the victim) was not called to testify or if a piece of evidence (which would have ramifications on the safety and security of the victim) were to be declared admissible, then the victim would be able to move the Chamber to exercise its powers under article 69 (3) to present the evidence or challenge the admissibility of the evidence respectively.

100. In deciding each application the Trial Chamber, being vigilant in safeguarding the rights of the accused could take into account, *inter alia*, whether the hearing of such evidence would be appropriate, timely or for other reasons should not be ordered. If the



Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence.

101. In relation to the right afforded to victims to challenge the admissibility or relevance of evidence, the Trial Chamber relied on its general powers under article 69 (4) to declare any evidence admissible or relevant. The provision is silent as to who may challenge such evidence. Under article 64 (9) of the Statute, the Trial Chamber has the power to rule on the admissibility or relevance of evidence on its own motion. These provisions must be seen in light of the provisions on victims' participation, in particular article 68 (3) of the Statute and rules 89 and 91 of the Rules. In light of these provisions, nothing in articles 69 (4) and 64 (9) excludes the possibility of a Trial Chamber ruling on the admissibility or relevance of evidence after having received submissions by the victims on said evidence. The approach of the Trial Chamber in interpreting its powers, once again does not result in an unfettered right for victims but is subject to the application of article 68 (3), which is the founding provision governing victim participation in the proceedings.

102. In addition the Trial Chamber finds support for this approach in the provision under rule 91 (3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the legal representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate. To exemplify this position one may envisage the adduction of evidence irrelevant to or inadmissible with regard to identification of the harm suffered by the victim. The evidence may have a source lacking credibility or may not bear relevance to the identification of such harm. In some such situations, participating victims may challenge the admissibility or relevance of evidence to be adduced where its admission would affect their personal interests.



103. Other instances noted by the legal representatives of the victims merit consideration. In paragraph 29 of the Victims' Observations the legal representatives aver that:

The personal interest of the victims may be affected by the presentation of a piece of evidence, and that they may have an interest in challenging its admissibility or relevance. That may even be one of the motivating factors for their participation in the proceedings. Such interest may result from the consequences which the evidence presented or proposed may have on their possible right to reparations, but also because the presentation of certain pieces of evidence may be directly prejudicial to them. By way of example, we can mention evidence:

- which violates the rules of confidentiality, in particular, if the confidentiality affects victim protection (article 69 (5))
- which is obtained by a means which violates an internationally recognised human right of the victim or a family member (article 69 (7))
- whose presentation might be harmful to their security and safety or dignity
- which would violate rules 70 and 71 in the case of sexual violence
- which would violate an arrangement with the victim or a family member pursuant to article 54 (d).

104. The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.

105. Accordingly, the Appeals Chamber confirms the decision of the Trial Chamber allowing participating victims the possibility to lead evidence pertaining to the guilt or



innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings.

IV. APPROPRIATE RELIEF

106. Rule 158 (1) of the Rules of Procedure and Evidence provides that the Appeals Chamber may “confirm, reverse or amend the decision appealed”.

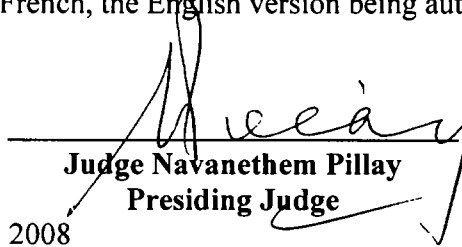
107. In relation to the first issue on appeal the Appeals Chamber confirms the finding of the Trial Chamber to the extent that harm suffered by victims does not necessarily have to be direct. The Appeals Chamber confirms that the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm.

108. In relation to the second issue on appeal the Appeals Chamber reverses the finding of the Trial Chamber that neither rule 85 of the Rules nor the Rome Statute framework has the effect of restricting the participation of victims to the crimes contained in the charges confirmed by the Pre- Trial Chamber.

109. In relation to the third issue on appeal the Appeals Chamber confirms the finding of the Trial Chamber that victims participating in the trial proceedings may, in principle, lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of the evidence.

Judge Pikis appends a partly dissenting opinion to this judgment. The partly dissenting opinion of Judge Kirsch will follow and will be filed as an annex to this judgment.

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



Judge Navanethem Pillay
Presiding Judge

Dated this 11th day of July 2008
At The Hague, The Netherlands

Partly Dissenting opinion of Judge G.M. Pikis

1. The following three issues were certified by the Trial Chamber as subjects of appeal arising from its decision on victims' participation of 18 January 2007:

- 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"¹.

2. I join the majority judgment with regard to the resolution of issue B, and endorse the reversal of the decision of the Trial Chamber and the affirmation that "the harm alleged by a victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused"².

3. In relation to issue A, I agree that to qualify as a victim under rule 85 (a) of the Rules of Procedure and Evidence³, the claimant of that status must have personally suffered harm. The word harm denotes, as explained in the majority judgment of the Appeals Chamber, hurt, injury and damage. I also associate myself with the determination that "material, physical and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim"⁴. Sequentially, I am in agreement with the finding that to qualify as a victim under rule 85 (a), the harm suffered must necessarily be personal harm. On the other hand, I disagree with the position that

¹ *Prosecutor v. Lubanga Dyilo* "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008" 26 February 2008 (ICC-01/04-01/06-1101), para. 54

² Majority Judgment, para. 64.

³ Hereinafter "the Rules"

⁴ *Ibid.*, para. 31.



“the harm suffered by victims does not necessarily have to be direct”⁵. There must be a direct nexus between the crime and the harm, in the sense of cause and effect. Psychological harm may, no doubt, be suffered without prior physical harm, but the crime itself must be the cause generating the harm, as may be the case with the destruction, violation or humiliation of persons near and dear to the victims.

4. I dissent from the majority judgment with regard to the resolution of issue C, both aspects of it, namely whether it is possible for victims participating at the criminal trial a) to lead evidence pertaining to the guilt or innocence of the accused and b) to challenge the admissibility or relevance of evidence.

5. My answer to both questions is in the negative. Victims can neither adduce evidence on the guilt or innocence of the accused nor challenge the admissibility or relevance of evidence. My reasons for so holding are explained below.

6. The Statute does not permit the participation of anyone in the proof or disproof of the charges other than the Prosecutor and the accused. Exclusive responsibility is cast on the Prosecution for the investigation of a case, the collection of evidence, the arrest of the person, the substantiation of the charges at the confirmation hearing, and their proof at the trial.

7. The Prosecutor is the authority upon whom power is reposed to carry out investigations into a crime referred to him or coming to his notice. If he concludes that there is a reasonable basis for holding an investigation, he must seek authorisation from the Pre-Trial Chamber to hold an investigation.⁶ The initiation of an investigation is the prelude to any steps that may be taken thereafter for bringing a person to justice.

8. The investigatory and prosecutorial processes are entwined in the person of the Prosecutor.⁷ The Prosecutor is the organ of the Court to whom power is vested to apply for the issuance of a warrant of arrest or the issuance of a summons calling the person to

⁵ *Ibid*, page 3.

⁶ See article 15 (3) of the Statute.

⁷ See, *inter alia*, article 53 of the Statute.



appear.⁸ Article 54 of the Statute binds the Prosecutor to extend the investigation to all facts relevant to determining whether there appears to be criminal responsibility on the part of a person. In so doing, he is bound to investigate “incriminating and exonerating circumstances equally”⁹.

9. It is the duty of the Prosecutor to provide the person under investigation with a copy of the document containing the charges and the evidence on which the Prosecutor intends to rely at the confirmation hearing.¹⁰ Moreover, he is duty-bound to disclose to the person all evidence relevant to the cause, subject to any exceptions sanctioned under rule 81 of the Rules, and to make available for inspection to him/her material in his possession or control.¹¹ The accused is not put on trial upon the charges preferred by the Prosecutor. The charges must be approved by the Pre-Trial Chamber upon the Prosecutor supporting “each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged”¹². The confirmation of the charges depends on the discharge of this burden. No one other than the Prosecutor is vested with authority to adduce evidence at the confirmation hearing, evidence that may be challenged by the person who is also entitled to object to the charges, to challenge evidence presented by the Prosecutor, and to present evidence himself.¹³

10. Rights comparable to those of the accused are assured to the person against whom the charges are directed at the confirmation hearing.¹⁴ Like the Pre-Trial Chamber, the Trial Chamber too must, prior to the commencement of the trial, make provision for the disclosure of documents or information not previously disclosed in order to afford an opportunity to the accused to prepare for the trial. Disclosure of evidence in the form of witness statements and material bearing on the charges is a prerequisite for the holding of a confirmation hearing and the trial. This is the norm laid down in the Statute, reflecting the norms of a fair trial.

⁸ See article 58 of the Statute.

⁹ See article 54 (1) (a) of the Statute.

¹⁰ See article 61 (3) of the Statute.

¹¹ See rule 77 of the Rules

¹² See article 61 (5) of the Statute.

¹³ See article 61 (6) of the Statute.

¹⁴ See articles 67 and 55 of the Statute and rule 121 (1) of the Rules.

11. It must be reminded that upon constitution of the Trial Chamber, the record of the proceedings before the Pre-Trial Chamber, that is, the record of the confirmation hearing, must be transmitted to the Trial Chamber.¹⁵

12. The burden of proving the charges is on the Prosecutor. Article 66 (2) of the Statute provides, "The onus is on the Prosecutor to prove the guilt of the accused." The Prosecutor is the only authority the accused has to confront in relation to the charges. The two sides are locked into a conflict upon the denial of the charges by the accused. Neither the Trial Chamber nor the Pre-Trial Chamber is concerned with the collection of evidence. The Trial Chamber, as provided in article 69 (3) of the Statute, may request either party to submit all evidence that it considers necessary for the determination of the truth; such evidence, no doubt, is the evidence of which it is apprised by the record of the confirmation hearing before it. The Trial Chamber is vested with a like power in the case of a plea of guilty, as it emerges from the provisions of article 65 (3) of the Statute.

13. The Trial Chamber is bound to assure a fair and expeditious trial¹⁶, with due regard to the rights of the accused and the protection of victims and witnesses, whose protection is envisaged by the provisions of article 68 (1) of the Statute. The obligation to hold a trial in accordance with the norms of a fair trial is also imposed by the provisions of article 21 (3) of the Statute.¹⁷ A fair trial entails an adversarial hearing, warranted, *inter alia*, by the rights of the accused, the sustenance of which is an inseverable element of a fair trial. Timely prior disclosure of the evidence that will be adduced at the trial, necessary for the preparation of the defence, is assured as a right of the accused by the provisions of article 67 of the Statute.

¹⁵ See rule 130 of the Rules

¹⁶ See article 64 (2) of the Statute.

¹⁷ *Prosecutor v. Lubanga Dyilo* "Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" 12 September 2006 (ICC-01/04-01/06-424), para. 3; *Prosecutor v. Lubanga Dyilo* "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), para. 37.



14. A series of decisions of the European Court of Human Rights identify the nature of a hearing conforming to the norms of a fair trial. An adversarial hearing¹⁸ casts the Prosecution and the defence in opposition, confronting one another in a process designed to determine whether the burden cast on the Prosecution is discharged at the end of the day. Fair trial imports equality of arms, as stressed in the case of *Brandstetter v. Austria*.¹⁹ Adversarial proceedings, it was said, entail the right, in a criminal case, “that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party”²⁰. Adversarial proceedings are “intended above all to secure the interests of the parties and those of the proper administration of justice”²¹. It is worth mentioning that in *Dombo Beheer BV v. Netherlands*²², the Chamber underlined that the requisites of an adversarial hearing must be strictly observed in criminal cases. In sum, in an adversarial hearing the two sides are cast in the position of adversaries, in connection with the determination of the only issue raised before the Chamber, the guilt or innocence of the accused. The adversary of the accused is the Prosecutor and none other. The defendant cannot have more than one accuser. It is not for the accused to prove his innocence. He is presumed to be innocent. The ultimate question is whether the Prosecution proved its case beyond reasonable doubt.

15. The participation of victims in the proceedings is confined to the expression of their views and concerns. As explained in my separate, concurring opinion in the decision of the Appeals Chamber of 13 June 2007²³, participation of victims is confined to the

¹⁸ S.J. Summers, “*The European Criminal Procedural Tradition and the European Court of Human Rights*”, Oxford and Portland, Oregon, Hart Publishing, 2007, pages 6-7. It is noted that the term “adversarial” is occasionally used interchangeably with the term “accusatorial.”

¹⁹ European Court of Human Rights, *Brandstetter v. Austria*, Judgment of 28 August 1991, Application no. 11170/84; 12876/87; 13468/87, para. 66; See also European Court of Human Rights, *Borgers v. Belgium*, Judgment of 30 October 1991, Application no. 12005/86, para. 24.

²⁰ European Court of Human Rights, *Brandstetter v. Austria*, Judgment of 28 August 1991, Application no. 11170/84, 12876/87; 13468/87, para. 66.

²¹ European Court of Human Rights, *Niderost-Huber v. Switzerland*, Judgment of 27 January 1997, Application No. 104/1995/610/698, para. 30; European Court of Human Rights, *Acquaviva v. France*, Judgment of 21 November 1995, Application No. 45/1994/492/574, para. 66.

²² European Court of Human Rights, *Dombo Beheer BV v. Netherlands*, Judgment of 27 October 1993, Application no. 14448/88, para. 32.

²³ *Prosecutor v. Lubanga Dyilo*, “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), Separate Opinion of Judge Georgios M. Pikis.

expression of their “views and concerns,” whereafter I added, “It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their ‘views and concerns’”²⁴ In relation to what can victims express their views and concerns was the next subject I addressed in the above case. “Not in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor (article 66 (2) of the Statute). Provision is made in the Statute (article 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject-matter of the proceedings. That the judicial process should follow its ordained course is a cause common to all; its sustenance is the responsibility of the Court, the guardian of the judicial process. It is not the victims’ domain either to reinforce the prosecution or dispute the defence.”²⁵ The views and concerns of victims are, as indicated in the same opinion, “...referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings.”²⁶

16. The rights of the person under charge at the confirmation hearing and the accused assure them “...of prior knowledge of evidence and information founding the case against him/her. Such knowledge must be gained prior to the confirmation hearing or the trial in order to enable the person under charge or the accused to prepare the defence to the case against him/her.”²⁷

17. Rule 91 of the Rules aims to elicit the parameters of participation. It is made clear that victims cannot question witnesses as of right. They may do so after the prior authorisation of the Chamber, and in a manner prescribed by the Chamber. Such questions must necessarily relate to the personal interests of the victims that legitimise

²⁴ *Ibid.*, para. 15

²⁵ *Ibid.*, para. 16.

²⁶ *Ibid.*, para. 16.

²⁷ *Prosecutor v Lubanga Dyilo*, “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), Separate Opinion of Judge Georgios M. Pikis, para 18



their participation. Moreover, account must be taken of the rights of the accused²⁸, and in a manner that is neither prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial. It would not, for instance, be permissible for victims to raise questions relating to facts of which the accused was not forewarned by the disclosure of evidence on the subject. Under the Statute, the entire process, from investigation to trial, is fashioned on the principles of an adversarial hearing.

18. Victims may themselves be witnesses. Concerns about their safety and their right to reparations are no doubt subjects of concern to them. Participation of a victim at the trial, it must be clarified, is not a prerequisite for claiming reparations. Rule 94 of the Rules identifies the particulars to be provided by a victim claiming reparations. But reparations under the scheme of the Statute can only be claimed against a convicted person (article 77 (2)).

19. Amenity on the part of victims to challenge the admissibility or relevance of evidence is the next issue to be addressed. The test for the reception of evidence is relevance to the subject-matter of the proceedings, that is, the charges. Relevant evidence is admissible unless the Court, for reasons laid down in the Statute, holds it to be inadmissible. Such reasons are identified in article 69 (4) and (7) of the Statute. Evidence may be rejected on account of its probative value, or more accurately lack of it, and prejudice it may occasion to a fair trial or a fair evaluation of the testimony of a witness. Relevant evidence may also be rejected if obtained in breach of human rights if the violation casts doubts on the reliability of the evidence or where its admission would be antithetical or seriously damaging to the integrity of the proceedings. Logic is the guide to the determination of the relevance of evidence to the subject-matter of the proceedings, defined by the charges confronting the accused. The proof or disproof of the charges is a matter affecting the adversaries. The victims have no say in the matter. Their interest is that justice should be done, coinciding with the interest of the world at large that the criminal process should run its course according to law, according to the norms of a fair trial. Both the submission of evidence and its reception affect the parties to the adversity. It is not the victims' concern, a matter directly related to the reception of evidence, to

²⁸ See article 91 (3) (b) of the Statute.



either prove or disprove the charges. The interests of justice are safeguarded by the Chamber, trusted to ensure that only relevant and admissible evidence, in the context earlier defined, can be received in proceedings before it. The presumption of innocence leaves no room for anyone other than the Prosecutor to assert the contrary and seek to prove it by the adduction of relevant evidence, admissible in the criminal proceedings before the Chamber.

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



Judge Georghios M. Pikis

Dated this 11th day of July 2008

At The Hague, The Netherlands

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06 OA 9 OA 10

Date: 23 July 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

**on the appeals of The Prosecutor and The Defence against Trial Chamber I's
Decision on Victims' Participation of 18 January 2008**

Partly Dissenting Opinion of Judge Philippe Kirsch



Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims
Mr Luc Walley
Mr Franck Mulenda

REGISTRY

Registrar
Ms Silvana Arbia

Partly Dissenting Opinion of Judge Philippe Kirsch

1. I agree with the judgment of the majority in relation to the first and second issues in this appeal. However, I dissent from the view of the majority in relation to the third issue on appeal, which was couched in the following terms:

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.

2. Unlike the majority, I answer the above question in the negative.

1. Leading evidence pertaining to guilt or innocence

3. The question raised is a narrow one. It does not call into question the ability of victims to be called by the Prosecutor as witnesses to give evidence against the accused as part of the prosecution case. It also does not affect the additional and significant number of rights that have been afforded expressly to victims under the legal instruments of the Court, of which the ability of victims to make representations to the Pre-Trial Chamber in relation to a request by the Prosecutor for the authorisation of an investigation¹ or to submit observations on the jurisdiction of the Court or the admissibility of a case² are but two important examples.

4. In its first part, the question on this appeal relates to the very different matter of victims themselves leading evidence relating to the guilt or innocence of the accused. Necessarily, such evidence would be additional to that presented by the parties (namely the Prosecutor and the Defence).

5. In my view, the leading of evidence on guilt or innocence belongs exclusively to the role assigned to the parties – and, more particularly in the context of evidence likely to be sought to be introduced by victims, to the Prosecutor.

¹ Article 15 (3) of the Rome Statute of the International Criminal Court (“the Statute”) and rules 50 (3) and (4) of the Rules of Procedure and Evidence (“the Rules”).

² Article 19 (3) of the Statute.



6. As made clear both in the majority judgment and in the partly dissenting opinion of Judge Pikis, it is the Prosecutor who is responsible, prior to trial, for initiating an investigation³ and investigating the crimes,⁴ submitting evidence for the purpose of applying for a warrant of arrest,⁵ formulating the charges on which it is intended to bring the person to trial,⁶ determining what evidence should be brought in relation to the charges at the hearing to confirm the charges,⁷ having specific disclosure obligations in relation to evidence⁸ and bearing the onus of proving the guilt of the accused.⁹

7. A number of obligations emanate from the responsibilities outlined above which are of relevance in the present context. Specifically, the scheme for the disclosure of evidence is set out in detail in several provisions of the Statute and the Rules. The Prosecutor may collect and examine evidence¹⁰ and is required, pursuant to article 54 (1) (a) of the Statute, to "investigate incriminating and exonerating circumstances equally".

8. Consistent with that general requirement, article 67 (2) of the Statute provides, in relevant part:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.

³ Article 53 of the Statute.

⁴ Article 54 of the Statute.

⁵ Article 58 of the Statute.

⁶ Article 61 of the Statute. It is for the Pre-Trial Chamber, pursuant to that article, to determine whether the charges should be confirmed and the person committed to a Trial Chamber for trial.

⁷ Article 61 (3) (b) of the Statute.

⁸ See, *inter alia*, articles 61 (3), 64 (3) (c) and 67 (2) of the Statute, and rules 76, 77, 81 and 82 of the Rules.

⁹ Article 66 (2) of the Statute.

¹⁰ Article 54 (3) (a) of the Statute.

9. Furthermore, prior to trial, the Trial Chamber shall provide for documents or information not previously disclosed¹¹ to be disclosed “sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”.¹²

10. The Rules provide further details of the disclosure obligations of the Prosecutor and the defence, which include the following provisions.

11. Pursuant to rule 76 (1), the Prosecutor is required to provide the defence with the names of, and copies of any prior statements made by, witnesses whom the Prosecutor intends to call to testify. Consistent with the provisions of article 64 (3) (c) of the Statute quoted above, this must be done, pursuant to the terms of rule 76 (1) “sufficiently in advance to enable the adequate preparation of the defence”.

12. Rule 77 obliges the Prosecutor to permit the defence to inspect, *inter alia*, any “objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial”. A similar provision relates to the defence, which is required to permit the Prosecutor to inspect objects in its possession or control “which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial”.¹³

13. In circumstances in which the defence is obliged to notify the Prosecutor of its intent to raise specific defences, it is required to do so sufficiently in advance to enable the Prosecutor to prepare adequately for trial and/or to respond.¹⁴

14. Restrictions on disclosure are also set out, in rule 81 of the Rules, with reference to the Prosecutor and the defence. Each party is entitled, in certain specifically defined circumstances, not to disclose certain material that would ordinarily be the subject of disclosure. In those circumstances, any such material and information may not

¹¹ Prior to the hearing which is held to decide whether the charges upon which the Prosecutor intends to seek trial should be confirmed, the person who is the subject of the hearing shall “be informed of the evidence on which the Prosecutor intends to rely at the hearing” (see article 61 (3) (b) of the Statute).

¹² Article 64 (3) (c) of the Statute.

¹³ Rule 78 of the Rules.

¹⁴ Rules 79 and 80 of the Rules

subsequently be introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the other party.

15. None of the above provisions relating to disclosure refer to any disclosure obligations on the part of victims. Given the specificity of these provisions, had it been the intention of the drafters of the relevant provisions to permit victims to lead evidence relating to guilt or innocence, this would have been stated expressly, and the provisions relating to the disclosure of evidence would have provided for disclosure by victims in such circumstances.

16. The specific provisions on disclosure set out above are designed to ensure the fairness of the proceedings. There are specific obligations upon the Prosecutor to disclose evidence of assistance to the defence; and there are provisions that enable both parties appropriately to prepare for trial. The fact that no requirements in relation to disclosure are placed upon victims indicates that it was not envisaged that victims would disclose, and thereafter lead, evidence relating to guilt or innocence.

17. Entirely consistent with the regime making provision for disclosure between the parties, are the provisions relating to the presentation of evidence at the trial itself.

18. In this context, article 69 (3) provides:

The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

19. It follows from the fact that it is the parties who disclose evidence relating to guilt or innocence that it is the parties who present such evidence at trial. The first sentence of article 69 (3) is unambiguous in that regard. It defines it as "the parties" who may submit evidence. The reference to the submission of evidence in the second sentence refers, in my view, to the ability of the Court to request the parties to submit all evidence that is necessary for the establishment of the truth.

20. Furthermore, article 69 (3) expressly refers to article 64. Significant in this context is article 64 (6) (d), which permits the Trial Chamber, as necessary, to:

Order the production of evidence in addition to that already collected prior to the trial or presented during the trial *by the parties*. (my emphasis)

21. Once again, the Statute is unambiguous in its reference to evidence at trial being presented by the parties – not by any other participant, such as the victims.

22. These provisions concerning leading evidence relating to guilt or innocence at trial contrast with the provisions that apply to reparations. For example, pursuant to article 75 (3) of the Statute, prior to making any order relating to reparations to victims, the Court may invite and shall take account of representations from or on behalf of, *inter alia*, victims. Pursuant to rule 94 (1) (g) of the Rules, a request of a victim for reparations shall contain, *inter alia*, to the extent possible, “any relevant supporting documentation, including names and addresses of witnesses”. This provision therefore explicitly foresees the leading of evidence by victims on reparations. The restrictions on victims questioning witnesses that apply to the legal representatives of victims at the trial do not apply to this aspect of the proceedings.¹⁵ In addition, a legal representative of the victims adversely affected by an order relating to reparations may appeal that order, under the provisions of article 82 (4) of the Statute. Conversely, I note that only the parties are permitted to appeal decisions concerning the guilt or innocence of the accused.¹⁶

23. My reading of the various provisions of the Statute and the Rules referred to above leads me to the conclusion that it was not the intention of the drafters that victims should lead evidence on guilt or innocence. In addition, determining that it is the parties that lead evidence on guilt or innocence, and not the victims, is consistent with the overall desire to ensure that proceedings at the ICC are both fair and expeditious.¹⁷

24. First, this conclusion results in the accused being faced by one Prosecutor, in accordance with the scheme of the Statute, rather than, potentially, multiple accusers. Significant in this context are the provisions of article 66 (2) of the Statute, making it clear that it is the Prosecutor who bears the onus of proving guilt at the trial, entailing the related responsibility to lead evidence as to guilt or innocence at trial.

¹⁵ See rules 91 (3) and (4) of the Rules.

¹⁶ See article 81 of the Statute.

¹⁷ See article 64 (2) of the Statute.

25. Second, the proceedings can take place in a streamlined fashion, ensuring that evidence on guilt and innocence emanates from the parties. The different roles played by the Prosecutor and the victims must be kept distinct if the proceedings are to run in an orderly fashion which best protects the interests of all parties and participants involved.

26. I note that the Trial Chamber itself, in granting leave to appeal, foresaw that the leading of evidence by victims on issues of guilt or innocence “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”.¹⁸

27. I recognise that the majority judgment states that the Trial Chamber did not create an unfettered right for victims to lead evidence, but rather left open “the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth”, pursuant to article 69 (3) of the Statute.¹⁹ Thereafter, if the Trial Chamber decides that the evidence should be presented, it could, according to the majority judgment, “rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence”.²⁰ I further acknowledge that the majority judgment opines that the Trial Chamber can ensure the fairness of the proceedings, by closely regulating the leading of evidence on guilt and innocence by victims in the manner set out in the judgment.²¹

28. Nevertheless, this fails to assuage my concerns, starting with the concern that this position is contrary to my reading of the statutory provisions, as set out above. In addition, once one accepts the principle that victims can lead evidence, applications by

¹⁸ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, paragraph 42.

¹⁹ See *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, OA9 OA10, 11 July 2008, paragraphs 98 and 99.

²⁰ *Ibid.*, at paragraph 100.

²¹ *Ibid.*, at paragraphs 98 to 100 and 104.

victims to take such a role could, understandably, be frequent and numerous. This invitation to victims to apply to lead evidence relating to guilt or innocence may slow down the proceedings considerably, leading to inefficiency and potential unfairness.

29. The role of the victims in the trial proceedings is specifically defined and is very different from the notion of leading evidence on guilt or innocence. Article 68 (3) of the Statute provides:

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.

30. Once they have established that their personal interests are affected, what victims are entitled to present are their “views and concerns”. On an ordinary understanding of those words, they do not equate to an ability to lead evidence on guilt. It would, in my view, be perfectly legitimate for victims to present their views and concerns in relation to the evidence submitted by the parties where it affects their personal interests. However, there is a sizeable difference between presenting views and concerns in relation to issues that arise at the trial that affect the personal interests of victims and presenting a prosecution case by leading additional evidence – independent of that led by the Prosecutor – on guilt.

31. I am also not persuaded by the interpretation given by the majority²² to rule 91 (3) of the Rules, which provides as follows:

- (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

²² Ibid. at paragraph 102.

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.

32. Rule 91 (3) regulates the limited manner in which victims may be permitted to put questions to a witness. Far from lending support to the idea that victims should be permitted independently to lead evidence on guilt, it emphasises, in my view, the more limited role that was assigned to the victims during the course of a trial, when compared with that provided to the parties. Rule 91 falls within a subsection of the Rules relating specifically to the participation of victims in the proceedings. For the determination of the question at issue in the present appeal, I find it striking that there is no reference to victims leading evidence pertaining to guilt or innocence in rule 91 itself or within the section of the Rules in which it appears. On a matter of such fundamental importance, a provision to deal with this subject would have been expressly included, had it been the intention of the drafters for victims to lead such evidence.

2. *Challenging the admissibility or relevance of evidence*

33. I also answer the second part of this issue on appeal – namely whether it is possible for victims participating at trial to challenge the admissibility or relevance of evidence – in the negative.

34. Article 64 (9) of the Statute provides, in relevant part:

The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; ...

35. Whereas the Trial Chamber may rule on admissibility or relevance on its own motion, I note that the provision refers to applications relating to admissibility or relevance being made by *a party*. There is no reference to such applications being made by a participant, who, for the purposes of this appeal, would equate to a victim. Furthermore, I read the provisions of article 69 (4) of the Statute to relate to how the

Chamber would rule on the relevance or admissibility of any evidence, as opposed to who may make an application concerning relevance or admissibility.²³

36. Indeed, in line with my views above in relation to the leading of evidence on guilt or innocence, I would not regard it as appropriate for victims to be permitted routinely to challenge, for example, the relevance of evidence intended to be introduced by the accused. Equally, I would not regard it as appropriate for victims to challenge the admissibility of evidence – which relates, *inter alia*, to the probative value of evidence that a party seeks to introduce to establish its case on guilt or innocence.²⁴ Challenges to admissibility and relevance of evidence pertaining to guilt or innocence are for those who are entitled to lead such evidence – namely the parties.

37. I believe that the fact that specific provision is made, in rule 72 of the Rules, for a victim to be able to be heard in relation to the admissibility or relevance of evidence that a victim consented to an alleged crime of sexual violence and related matters, further indicates that where it is intended that a victim has a direct role to play in relation to the admissibility or relevance of evidence, specific provision is made to that effect. Rule 72 is, in my view, the separately regulated exception to the general rule, as set out above, that it is for the parties to challenge admissibility or relevance.

38. However, the fact that the victims are not routinely entitled to challenge the relevance or admissibility of evidence does not mean that they do not have any role to play when certain evidence that a party intends to admit into evidence could affect their personal interests. In such circumstances, under the ordinary terms of article 68 (3) of the Statute that I have addressed above, they could, where appropriate, present their views and concerns in relation to those personal interests. So, for example, in instances where a certain piece of evidence could affect the safety of a victim, that victim would be able to express that concern to the Trial Chamber, which could take any necessary measure as a result.

²³ Article 69 (4) of the Statute provides: “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.

²⁴ See article 69 (4) of the Statute.

39. I believe that this interpretation of the role of victims in relation to challenges to the admissibility and relevance of evidence respects the plain meaning of the statutory texts; the different roles assigned to the parties and the victims; and the ability of victims to express their views and concerns in relation to evidence where their personal interests are affected.

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



Judge Philippe Kirsch

Dated this 23rd day of July 2008

At The Hague, The Netherlands