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**Public Document Judgement**  
**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**

***Headline***

DRC, *The Prosecutor v. Thomas Lubanga Dyilo*—Judge Kirsch delivers partly dissenting opinion to Appeals Chamber's 11 July 2008 judgment on victim participation.

***Brief Summary***

On 23 July 2008, Judge Kirsch delivered his partly dissenting opinion to the Appeals Chamber's 11 July 2008 judgment<sup>1</sup> on the appeals against Trial Chamber I's "Decision on victims' participation"<sup>2</sup>.

In his partly dissenting opinion, Judge Kirsch stated that he dissented from the view of the majority only in relation to the third issue on appeal, namely "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". Unlike the majority, he answered the question in the negative.

In Judge Kirsch's 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 Prosecution.

Judge Kirsch pointed out that a number of obligations emanate from the responsibilities vested in the Prosecution that are relevant in this context. Regarding the scheme of disclosure of evidence, none of the provisions regulating the scheme refer to any disclosure obligations on the part of victims. Given the specificity of these provisions, had it been the intention of the drafters to permit victims to lead evidence relating to guilt or innocence, this would have been stated expressly. The same applies to provisions relating to the presentation of evidence at the trial itself.

According to Judge Kirsch, the role of victims in the trial proceedings is specifically defined and is very different from the notion of leading evidence on guilt or innocence. Under article 68(3) of the Statute<sup>3</sup>, once victims have established that their personal interests are affected, they are entitled only to

<sup>1</sup> 11 July 2008 Appeals Chamber Judgment (ICC-01/04-01/06-1432).

<sup>2</sup> 18 January 2008 Trial Chamber I Decision (ICC-01/04-1119).

<sup>3</sup> Article 68(3) of the ICC Statute.

present their “view and concerns”, which does not include the ability to lead evidence on guilt or innocence.

Recalling article 64(9)<sup>4</sup> which stipulates the Trial Chamber’s power to rule on the admissibility or relevance of evidence on a party’s or its own motion, Judge Kirsch noted that no reference to such applications are made to participants. Furthermore, in his view, article 69(4) relates 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.

Judge Kirsch did not consider it appropriate for victims to be permitted routinely to challenge, for example, the relevance of evidence intended to be introduced by the accused. Nor did he 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. This right is vested in those that are entitled to lead such evidence – namely, the parties.

However, where the victims’ interests are affected by evidence admitted by a party, under the ordinary terms of article 68(3) they could, where appropriate, present their views and concerns in relation to those personal interests.

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<sup>4</sup> Article 64(9) of the ICC Statute.