

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

No.: ICC-01/04-01/06  
Date: 10 March 2008

**APPEALS CHAMBER**

**Before:** Judge Philippe Kirsch  
Judge Georgios M. Pikis  
Judge Navanethem Pillay  
Judge Sang-Hyun Song  
Judge Erkki Kourula

**Registrar:** Mr Bruno Cathala

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

**Public**

**Prosecution's Document in Support of Appeal against Trial Chamber I's  
18 January 2008 Decision on Victims' Participation**

**Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor  
Mr Fabricio Guariglia, Senior Appeals Counsel  
Mr Ekkehard Withopf, Senior Trial Lawyer

**Legal Representatives of Victims a/0001/06  
to a/0003/06 and a/0105/06**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

**Office of the Public Counsel for  
Victims**

Ms Paolina Massidda

## Introduction

This appeal concerns the manner in which applications by victims to participate are to be addressed and victim participation is to be realised under Article 68(3) of the Rome Statute.

The Rome Statute contains defining new provisions concerning victims of crimes, “victims of unimaginable atrocities that deeply shock the conscience of humanity”. The crimes they suffer are so serious that they are of concern to the international community as a whole. On this basis, the Rome Statute effects two landmark evolutions:

- (1) first, it contains a commitment of the international community to take responsibility for the protection of victims of the most serious crimes, should national States fail to uphold their responsibility to do so. To achieve this goal, the Statute gives a mandate to an independent prosecutor to investigate and prosecute the crimes, protecting the rights of the victims, respecting their interests , contributing to full and effective reparation<sup>1</sup> and respecting the rights of the accused;
- (2) second, it empowers victims as an actor in the international criminal justice system, with a right to express their views and concerns independently in proceedings where their personal interests are affected.

The framework thus established in the Rome Statute regarding victim participation represents a key innovative feature of this Court and is, in the Prosecution’s view, a milestone in international criminal justice.<sup>2</sup> It is part of a consistent pattern of evolution of international law, including but not limited to international criminal law, which recognizes victims as actors and not only passive subjects of the law, and grants them specific rights.<sup>3</sup>

It is a main feature of the Statute and the Rules that they seek to establish a comprehensive and concretely applicable participatory regime, by defining with as much precision as possible the nature of those rights (right to protection, right to participate, expressing views and

---

<sup>1</sup> The Basic Principles and Guidelines on the right to a remedy and reparations for victims of gross Violations of International Human Rights and serious violations of international humanitarian law, adopted by General Assembly Resolution 60/147 of 16 December 2005 , emphasize that domestically States should provide victims with full and effective reparations, an integral aspect of which is satisfaction, which includes the responsibility to ensure “ verification of the facts and full and public disclosure of the truth...” ; in the context of the Statute, it is the Prosecutor who bears this responsibility.

<sup>2</sup> See e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 6; *Situation in the DRC*, ICC-01/04-143, 24 April 2006, para. 7; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, para. 8; *Situation in Darfur*, ICC-02/05-81, 8 June 2007, para. 8; *Situation in Darfur*, ICC-02/05-123 OA, 15 February 2008, p. 1.

<sup>3</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985; 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, adopted by General Assembly resolution 60/147 of 16 December 2005.

concerns at all stages of the proceedings where their personal interests are affected) and the procedures to implement them. The challenge of the Court is to apply this innovative framework in each situation and case in a consistent manner, avoiding such varying criteria as to create a general uncertainty for the victims – and other participants. While implementation might vary according to the specific circumstances, as provided in the Statute and the Rules, the Prosecution considers that it is crucial to build upon the experience of the last three years of activities of the Court in this regard and address all issues of relevance to victims' participation in a clear, consistent and certain manner.

As Judge Blattmann said, victim participation “is ... a right accorded to victims by the Statute”.<sup>4</sup> The Prosecution submits in this regard that victims' rights to participate, while they must be decided on a case by case basis as established by the Appeal Chamber, should be based on consistent criteria. The Prosecution respectfully submits that the impugned Decision does not provide for the certainty required by the participants. Regarding the requirements and modalities of participation, the Prosecution further submits that the impugned Decision actually diverts from the Statute, the Rules and the existing jurisprudence.

The Appeals Chamber has already provided guidance, in its Decision of 13 June 2007, holding in particular that determinations of whether an applicant's personal interests are affected “require careful consideration on a case-by-case basis”, that “even when the personal interests of victims are affected within the meaning of article 68 (3) the Court is still required ... to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” and that “an assessment will need to be made in each case as to whether the interests asserted by victims, do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”<sup>5</sup> The Prosecution contends that participation should only be defined and allowed on the basis of a prior and comprehensive determination that the victims' personal interests are affected in relation to specific proceedings, that such personal interests are linked to the parameters set out in the charges and that such personal interests are distinct

---

<sup>4</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06-1119, 18 January 2008, Separate and Dissenting Opinion of Judge Blattmann, para. 13.

<sup>5</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

from the role of the Prosecution.<sup>6</sup> The Decision errs in those regards with the particular effect that the Chamber is expanding its jurisdiction beyond the parameters set out in the charges.

The Decision also errs in providing modalities of victims' participation beyond the expression of views and concerns as defined by Article 68(3) of the Statute. As the Prosecution has consistently argued, the introduction of evidence pertaining to the guilt or innocence of the accused by victims goes beyond the scope of "views and concerns" under Article 68(3); "fall[s] outside their personal interests and belong[s] instead to the role assigned to the Prosecutor";<sup>7</sup> disturbs the Statutory balance between the parties and burden of proof placed on the Prosecution, and serves to improperly expand the powers of Chambers rather than the rights of victims.

Finally, as a general matter, the Prosecution respectfully submits that Chambers of this Court should not interpret the provisions of the Statute and the Rules in a manner capable of negatively affecting the fair and expeditious conduct of the proceedings and the rights of participants, on the basis of the same Chamber's alleged ability to control such interpretations and to limit its detrimental effects.

### **Procedural background**

1. On 29 and 30 October 2007, the Trial Chamber held a status conference which included discussion of the "role of victims in the proceedings leading up to, and during, the trial" and "common legal representation and the criteria for granting victims participating status".<sup>8</sup>
2. In preparation for the status conference, the legal representatives of victims filed a joint written submission on these issues on 28 September 2007,<sup>9</sup> followed by the Defence on 18 October 2007,<sup>10</sup> and the Prosecution on 19 October 2007.<sup>11</sup>
3. During the status conference, the Chamber granted leave to the OPCV to file written submissions on the issues discussed,<sup>12</sup> which the OPCV filed on 9 November 2007.<sup>13</sup>

<sup>6</sup> A different criterion should be applied for the purposes of reparations, since proceedings under Article 75 of the Statute are open to any victim making claims for reparations

<sup>7</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

<sup>8</sup> ICC-01/04-01/06-947, 5 September 2007; ICC-01/04-01/06-977, 9 October 2007; ICC-01/04-01/06-985, 17 October 2007.

<sup>9</sup> ICC-01/04-01/06-964, 28 September 2007. The legal representative of victims a/0001/06 to a/0003/06 filed a separate submission addressing the two additional issues added to the agenda of the October 29-30 Status Conference - ICC-01/04-01/06-992, 19 October 2007.

<sup>10</sup> ICC-01/04-01/06-991, 18 October 2007.

<sup>11</sup> ICC-01/04-01/06-993-Conf. This document was erroneously filed confidentially and was re-filed publicly on 23 October 2007, ICC-01/04-01/06-996 and ICC-01/04-01/06-996-Anx.

4. On 18 January 2008, the Trial Chamber rendered its “Decision on victims’ participation”.<sup>14</sup>
5. On 28 January 2008, the Prosecution and Defence sought leave to appeal the Decision.<sup>15</sup>
6. On 26 February 2008, the Trial Chamber granted the applications for leave to appeal in part, certifying for appeal two of the issues for which the Prosecution had sought leave.<sup>16</sup>
7. The Prosecution hereby files its document in support of appeal, pursuant to Regulation 65(4).

### **Application for Suspensive Effect**

8. The Prosecution hereby requests the Appeals Chamber grant suspensive effect to this appeal under Article 82(3) and Rule 156(5). This request is strictly confined to those aspects of the Decision which are included in the Prosecution’s grounds of appeal.<sup>17</sup> Implementation of the disputed terms of the Decision will be onerous, and demand time and resources for the parties as well as for the Trial Chamber, which will be unnecessary if this appeal succeeds. In particular, the Trial Chamber should refrain from making any new determinations of victim participation based on its impugned rulings, and/or to allow any presentation of evidence, even in a preliminary fashion, by those victims which have been granted participant status.

### **The Issues on Appeal**

9. The Trial Chamber certified two issues for which the Prosecution had sought leave to 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.<sup>18</sup>

---

<sup>12</sup> ICC-01/04-01/06-T-58-ENG, 30 October 2007, p. 14.

<sup>13</sup> ICC 01/04-01/06-1020, 9 November 2007.

<sup>14</sup> ICC-01/04-01/06-1119, 18 January 2008 (“the Decision”).

<sup>15</sup> ICC-01/04-01/06-1135 and ICC-01/04-01/06-1136, 28 January 2008.

<sup>16</sup> ICC-01/04-01/06-1191 (“Decision Granting Leave”). The Defence also sought, and was granted, leave to appeal the same two issues; and the Trial Chamber also granted the Defence leave to appeal a third issue, namely “Whether the notion of victim necessarily implies the existence of personal and direct harm.”

<sup>17</sup> In particular the orders of the Trial Chamber contained at points (b), (d) and (e) of para. 138 of the Decision. The Prosecution does not object to the Trial Chamber considering pending applications for participation by victims which are directly linked to the charges in this case.

<sup>18</sup> The Prosecution sought leave to appeal on whether the requirements of Article 68 3) of the Statute, by reference particularly to the “personal interests” of victims, allow for participation at trial beyond the parameters set out in the charges against the accused.

- Whether victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of evidence.

10. In respect of each of these issues, the Prosecution submits that the Trial Chamber made errors of law, erring in its interpretation of the relevant provisions.<sup>19</sup>

**The First Error – the Trial Chamber erred by dissociating the requirement of “personal interests” from the charges**

11. The Decision adopts a system whereby applicants and victim participants and their personal interests must not necessarily be linked with the specific crimes with which an accused is charged.
12. The Trial Chamber found that in order to determine which victims will have the right to participate in this trial, it would have to consider first, whether the applicant is a victim of a crime under the jurisdiction of the Court, as provided for in Rule 85, and second, whether the interests of the victim are affected in the proceedings in accordance with Article 68(3).<sup>20</sup> The Trial Chamber further found that neither the Statute nor Rule 85 limit the participation of victims to the crimes contained in the charges.<sup>21</sup> Consequently, the Trial Chamber concluded that a victim of any crime within the jurisdiction of the Court can potentially participate.<sup>22</sup>
13. Regarding personal interests, the Trial Chamber found that for victims to participate at trial they had to demonstrate that they were affected by the evidence or an issue arising in the case or considered by the Chamber in its investigation of the charges.<sup>23</sup> In his dissenting opinion, Judge Blattmann properly framed the issue by finding that the

---

<sup>19</sup> The Prosecution submits that for errors of law, the appropriate standard is *de novo* review by the Appeals Chamber. The Appeals Chamber ought to review any alleged errors of law in the impugned decision to determine whether the decision was correct, and substitute its own judgment on the correct legal interpretation, without showing any deference to the finding of the original Chamber. As the ICTY and ICTR Appeals Chambers have consistently held, the Appeals Chamber is “the final arbiter of the law of the International Tribunal” – see e.g. *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para 14; *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para 10; *Rutaganda v Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para 20.

<sup>20</sup> Decision, para. 86.

<sup>21</sup> Decision, para. 93.

<sup>22</sup> Decision on Victims’ Participation, para. 95. The Trial Chamber granted leave to appeal this aspect of the Decision on Victims’ Participation (ICC-01/04-01/06-1191).

<sup>23</sup> Decision, paras. 95 and 97. While paragraph 95 of the Decision provides that the requirements of the evidentiary and the issue arising during the trial apply in the alternative, paragraph 97 appears to suggest that both requirements have to be met in order to establish the personal interest of a victim. In view of the structure in which para. 95 sets out the two requirements, the Prosecution interprets the decision to intend that they are met in the alternative.

Decision does not consider that victims' participation should be encased by the charges confirmed by the Pre-Trial Chamber.<sup>24</sup>

14. The Prosecution contends that, for the purposes of trial proceedings, verifying the requirements of participation, including the interpretation of the pivotal requirement of "personal interests" in Article 68(3) cannot be performed in an abstract fashion, but require (1) a determination connected with the parameters set out in the charges; and (2) a determination recognizing the specificity of victims' personal interest to participate in proceedings, distinct from the role of the Prosecutor. The Prosecution contends that the Decision erred in these two aspects and that the approach to the requirements of participation included in the Decision has the potential to adversely impact on the fair and expeditious conduct of the trial.<sup>25</sup>

*The links of participatory rights with the parameters set out in the specific charges*

15. The Prosecution contends that the Decision potentially expands the scope of Chamber's intervention beyond the facts and circumstances of the case, as included in the charges. The Prosecution submits that, like any other matter to be ruled on by a Chamber, victims' participation must be determined through the lens of the competency afforded to the decision maker.<sup>26</sup> This applies in particular to the relevant personal interest, which must be linked to the subject matter of the instant proceedings in which victims seek to participate. The parameters set out in the charges set the limits to the Chamber's authority, to the issues that can be discussed during trial and to the actors that may intervene in the specific proceedings.
16. The Prosecution does not challenge the Trial Chamber's finding that Rule 85 *per se* does not limit the definition of victims to persons who suffered harm as a result of the crimes contained in the specific charges. However, the Prosecution contends that, during the trial phase, the proper application of the provisions of the Statute and the Rules, including Rule 85, the scope of the proceedings, and the authority of the Chamber, are defined and limited by the specific charges against an individual.<sup>27</sup> The Trial Chamber is not vested with the authority or the competence to make any assessment, including those regarding victim participation, which steps outside the strict boundaries of the charges against an

<sup>24</sup> Separate Opinion of Judge Blattmann, para. 21.

<sup>25</sup> Article 64(2).

<sup>26</sup> *Situation in the DRC*, ICC-01.04-423, 24 December 2007, para. 4. See also, *Situation in the DRC*, ICC-01/04-101-tEN-Corr, 17 January 2006, paras. 83-84; Separate Opinion of Judge Blattmann, para. 8.

<sup>27</sup> The Prosecution submits that the limitations on the Chamber's own jurisdiction, are defined, among other things, by the parameters of a situation or a case before it (see Article 19(1); see also Separate Opinion of Judge Blattmann, paras. 7 and 9).

individual.<sup>28</sup> Any such determination would be made in a legal and factual vacuum.<sup>29</sup> As stated by Judge Blattmann in his dissenting opinion, “the Majority envisages that victims must have interests which are affected by the issue or evidence arising in the case, but does not believe that victims’ participation should be encased by the charges confirmed by the Pre-Trial Chamber”.<sup>30</sup>

17. The Prosecution also notes that Pre-Trial Chamber I has consistently ruled that for the purposes of victim participation during the prosecution of a case, it is required proof of a causal link between the victim applicant and a crime included in an arrest warrant or the charges.<sup>31</sup> This approach was also followed by Pre-Trial Chamber II.<sup>32</sup> There is no reason for the Trial Chamber to depart from this jurisprudence, much less in light of its self-imposed standard pertaining to the status of decisions of the Pre-Trial Chamber in trial proceedings.<sup>33</sup>
18. In addition, the Prosecution respectfully submits that, contrary to the Trial Chamber’s ruling, once a criminal case is brought against a person, the proper determination of personal interests for the purposes of victim participation requires a showing that the applicant’s personal interests are affected in connection to the charges, which form the

<sup>28</sup> Evidence submitted to the Trial Chamber must be “relevant to the case” (Article 69(3)). The decision of the Trial Chamber “shall not exceed the facts and circumstances described in the charges and amendments to the charges” (Article 74(2)). The Trial Chamber’s may order reparations “directly against a convicted person” (Article 75(2)), which limits the Trial Chamber’s powers in this respect to ordering reparation for victims who have suffered harm as a result of a crime of which a person has been convicted. Separate Opinion of Judge Blattmann, para. 11.

<sup>29</sup> The drafting history of the Rome Statute supports the view that the jurisdiction *ratione materiae* of the Trial Chamber is limited to the charges confirmed by the Pre-Trial Chamber. The “preparatory works” of article 74(2) show that the rationale behind limiting the Trial Chamber’s decision to the “facts and circumstances described in the charges and any amendments to the charges” was the so-called “principle of consistency”, whereby the court may not hand down a judgement on acts which have not been included in the indictment against the accused (see Rules of Procedure: Working Paper / Submitted by Argentina, UN Doc. A/AC.249/L.6, 13 August 1996, rule 104(C)).

<sup>30</sup> Separate Opinion of Judge Blattmann, para. 21. The Prosecution notes that the system adopted in the Decision could even lead to Chambers of the Court entering findings pertaining to situations in relation to which the jurisdiction of the Court has not been activated following the proper statutory mechanisms.

<sup>31</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-172-tEN, 29 June 2006, pp. 6-8; *Prosecutor v. Lubanga*, ICC-01/04-01/06-228-tEN, 28 July 2006, pp. 8-10. See also Separate Opinion of Judge Pikis, para. 13; and Separate Opinion of Judge Blattmann, paras. 8 and 15-17.

<sup>32</sup> In relation to the case the Single Judge of Pre-Trial Chamber II only analyses “the merits of applications relating to the Case” which are those that “relate to incidents included in the warrants of arrest” (*Prosecutor v. Kony et al.*, ICC-02/04-01/05-252, 10 August 2007, paras. 11 and 22). In addition, the Single Judge found that “rule 85 of the Rules [...] refers to the harm having been suffered ‘as a result of’ the alleged crime [...] the alleged incident” (para. 14).

<sup>33</sup> The Trial Chamber ruled that it “should only disturb the Pre-Trial Chamber’s Decisions if it is necessary to do so. Not least for reasons of judicial comity, [the Trial] Chamber should follow the Pre-Trial Chamber unless that would be an inappropriate approach” (*Prosecutor v. Lubanga*, ICC-01-04-01-06-1084, 13 December 2007, para. 6). Moreover, the system put in place by the Trial Chamber does not take into consideration those victims who have already been granted status after fulfilling the requirements established by the Pre-Trial Chamber (Separate Opinion of Judge Blattmann, para. 10).



subject-matter of the proceedings in which he or she seeks to participate.<sup>34</sup> In this context, Judge Pikis specified that for the purposes of Article 68(3), the personal interests at stake are only those of the victims who have suffered harm from the crime or crimes which are the subject matter of the respective stage of the proceedings.<sup>35</sup> These findings show that the Trial Chamber's unqualified test is in error.<sup>36</sup>

*The Role of the Prosecutor and the interest of the victims*

19. The Prosecution further submits that the Decision erred by including in an unqualified manner the "general interests of victims" in relation to participation an "interest in verifying particular facts and establishing the truth".<sup>37</sup> The Prosecution contends that many references in the decision to a necessary link between the victims and the evidence in order to show that a victim's personal interest are affected also may be further demonstrative of a confusion between the interest of the victims and the role of the Prosecution.
20. The Statute empowers victims to participate in proceedings where their personal interests are affected. However as stated by the Appeals Chamber personal interests must properly belong to the victims and not to the Prosecutor.<sup>38</sup> The Appeals Chamber held that an assessment will need to be made in each case as to "whether the interests asserted by victims, do not in fact, fall outside the personal interest and belong instead to the role assigned to the Prosecutor".<sup>39</sup>
21. While victims have a general "interest" in the determination of the truth in relation to the particular charges,<sup>40</sup> 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. Personal interests cannot be interpreted in a way that overlaps with the Prosecutor's role. The Statute empowers victims to participate in proceedings where their personal interests are affected. It also mandates an international Prosecutor to investigate and prosecute crimes which affected thousands, potentially

<sup>34</sup> The Prosecution has previously submitted that in the contradistinction to the investigation of a situation, at the case level more meaningful and comprehensive findings of personal interests under Article 68(3) could be entered. See *Situation in the DRC*, ICC-01/04-454 OA6, 18 February 2008, footnote 16. See also *Situation in Darfur*, ICC-02/05-125 OA 2, 18 February 2008, footnote 15.

<sup>35</sup> Separate Opinion of Judge Pikis, para. 13. See also Separate Opinion of Judge Blattmann, para. 8; and *Prosecutor v Kony et al.*, ICC-02/04-01/05-252, 10 August 2007, para. 9.

<sup>36</sup> The Chamber only specifies that what is required is a "real evidentiary link" or "an issue" that engages the victim's personal interests "in a real sense".

<sup>37</sup> Decision, para. 97.

<sup>38</sup> Appeals Chamber, ICC-01/04-01/06-925, 13 June 2007, para. 28.

<sup>39</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

<sup>40</sup> See footnote 1, above.

millions, of victims and which therefore are of concern to the international community as a whole. Under Article 54, the Prosecutor shall establish the truth, investigating both incriminating and exonerating circumstances. The Prosecutor does not purport to represent and express all the views and concerns of victims; the Statute acknowledges this through the key innovation of granting victims a separate and independent voice.

22. However establishing the guilt or innocence of the accused should not be confused with the interest of the victims to participate under Article 68.<sup>41</sup> That crimes should be effectively investigated and prosecuted is the core of the Prosecutor's mandate. While it is also an overriding interest of the international community as a whole, and of the victims specifically, it is not one that should be the basis for victims' participation in specific proceedings under Article 68(3).

*Erroneous approach to Rule 89*

23. The Prosecution further notes that the Chamber's broad approach to the pivotal requirements of victim participation has led to a system whereby the Chamber is in no position to properly determine the appropriate stages of participation while granting participation.<sup>42</sup> Neither Article 68(3) nor Rules 85 and 89(1), however, vest Chambers with the authority to make determinations on, and grant participation to, victim applicants in a sequential or piecemeal fashion, i.e. determining first some of the critical elements, and effectively deferring the determinations on the remaining ones for later stages. Rather, the plain language of the provisions, in particular that of Rule 89(1), mandates that all elements underpinning victim participation be jointly determined by Chambers. The Prosecution accordingly submits that the emerging system is inconsistent with the relevant legal provisions, as well as applicable Appeals Chamber's jurisprudence,<sup>43</sup> and is detrimental to the certainty of trial proceedings.

---

<sup>41</sup> As Judge Pikis has noted, victims may not express their views and concerns "in relation to the proof of the case or the advancement of the defence", and the proof of guilt lies squarely within the mandate of the Prosecution (*Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 16).

<sup>42</sup> See Decision, para. 96.

<sup>43</sup> See *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 47-48.

### Impact of the Decision

24. By expanding its jurisdiction beyond the facts and circumstances of a case, including through its finding in relation to the interests of victims, the Trial Chamber adopts an approach that fosters uncertainty as to who is allowed to participate.<sup>44</sup>
25. The Decision entails detrimental consequences for the proper exercise of participatory rights by victims. On its face the Decision forces victims to make at least two different applications for participation: an initial application in order to obtain a general status of participant which the Prosecution submits is unfounded in the Statute; and a second one (a “discrete written application”) to intervene in relation to a specific item of evidence or issue.<sup>45</sup> By so doing, the Decision places an onerous burden on victims to exercise their participatory rights. It also unnecessarily leads to uncertainty as to who may participate at which stages, instead of crystallizing from the very outset of the proceedings the identity and number of victim participants and the scope and modalities of their participation.<sup>46</sup>
26. Further, the system can force the parties to deal with factual and legal issues unrelated to the case, affecting their resources and potentially compromising their ability to address the core issues.<sup>47</sup> It may also include the presentation of unsubstantiated legal and factual allegations and materials unrelated to the crimes charged, but that nonetheless adversely impact on the efficient presentation of evidence by the parties. In this sense, the Prosecution respectfully submits the Decision not only can severely affect the expeditious conduct of the proceedings but also on their fairness, which the Trial Chamber has the duty to protect.<sup>48</sup>

---

<sup>44</sup> Separate Opinion of Judge Blattmann, paras. 6 and 11.

<sup>45</sup> Decision, paras. 95-97; Separate Opinion of Judge Blattmann, para. 22. The Prosecution notes that the logic of the Decision would appear to imply that there will be two different approaches to the requirement of “personal interests”: an initial and more general scrutiny, sufficient to justify participation; and a second, and more specific examination, pertaining to the concrete instance of participation. The Decision does not provide any guidance as to the scope of these different showings, or their compatibility with Article 68(3). It only provides some examples of the types of general interests that it will consider (presumably sufficient for the granting of participant status) at para. 97. Whether this approach to the critical requirement of personal interests is compatible with the letter and spirit of Article 68 (3), and the Appeals Chamber’s own jurisprudence, is a matter that should be examined by the Appeals Chamber.

<sup>46</sup> This emerging uncertainty must be contrasted with the clarity and predictability of the system adopted by Pre-Trial Chamber I for the purposes of regulating victim participation at the confirmation hearing, whereby it was clear to all parties and participants from the very start of the proceedings the number of victim participants allowed to intervene and the modalities of their intervention (*Prosecutor v Lubanga*, ICC-01/04-01/06-462, 22 September 2006).

<sup>47</sup> In the Decision Granting Leave, the Trial Chamber found that “the participation of victim of crimes other than those included in the charges, could lead to the Chamber considering additional material in the trial” (para. 32).

<sup>48</sup> See Article 64(2). See also Separate Opinion of Judge Blattmann, para. 31. Further, and as also noted by Judge Blattmann, these potentially detrimental consequences for the fairness of the trial and the rights of the

**The Second Error – the Trial Chamber erred by holding that victims may present evidence relating to the guilt or innocence of the accused**

27. The Prosecution submits 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. The introduction of evidence pertaining to the guilt or innocence of the accused by victims: (a) goes beyond the scope of “views and concerns” under Article 68(3); (b) is not a right of the victims because “fall[s] outside their personal interests and belong[s] instead to the role assigned to the Prosecutor”;<sup>49</sup> (c) disturbs the statutory balance between the parties and burden of proof placed on the Prosecution; and (d) gives victims the *de facto* status of party prior to reparations phase.
28. The Rome Statute is built on the parties presenting the evidence, and the burden of proof lying on the Prosecutor, who has been charged with the investigation and prosecution of the most serious crimes of concern to the international community as a whole. In discharging the burden placed upon it to present the case and prove the guilt of the accused, the Prosecution has a range of obligations to investigate incriminating and exonerating circumstances equally, and to disclose or provide access to evidence.<sup>50</sup> In contrast, victims may participate in the trial in order to present their independent perspective. Under the Statute, while the parties may submit evidence, including at the request or order of the Trial Chamber, victims independently present their “views and concerns”.

*The presentation of evidence relating to guilt or innocence rests with the parties*

29. The Prosecution submits that the Trial Chamber erred, first and foremost, in holding that “the right to introduce evidence ... is not limited to the parties”<sup>51</sup> and that victims can present evidence. In examining this error, the Prosecution recalls that the Appeals Chamber has stated that the Statute and Rules are to be interpreted in accordance with the ordinary principles of treaty interpretation.<sup>52</sup>

---

accused do not provide any tangible benefits for victims (paras. 10 and 30. See also Decision Granting Leave, para. 32).

<sup>49</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

<sup>50</sup> Articles 54(1)(a) and 67(2), and Rules 76 and 77.

<sup>51</sup> Decision, para. 108.

<sup>52</sup> “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” - *Vienna Convention on the Law of Treaties*, Article 31(1); see e.g. *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 33. Article 32 goes on to set out “supplementary

30. There does not appear to be any dispute that victims are not parties, nor that their role and rights differs from that of the Prosecution and the Defence.<sup>53</sup> This reflects the balance of the Statute.<sup>54</sup>
31. A range of provisions show that the submission of evidence going to the guilt or innocence of the accused is limited to the parties. Most prominently, Article 69(3) states that “The parties may submit evidence relevant to the case.”<sup>55</sup> The Rules of Procedure and Evidence also draw a crucial distinction between the roles of the parties and victims in relation to the submission of evidence.<sup>56</sup> Commentaries on the Statute and the Rules further confirm that the submission of evidence is limited to the parties.<sup>57</sup>
32. The Prosecution submits that the Rome Statute and the Rules establish a consistent system in this regard. A range of provisions flow from the fact that only the parties are granted the right to present evidence. Only the parties have obligations of disclosure. In particular, the Prosecution must disclose to the defence both the evidence which it intends to present at the trial sufficiently in advance to allow the adequate preparation of the

---

means of interpretation”, including the *travaux préparatoires*, which may be used to “confirm” the meaning resulting from the application of Article 31.

<sup>53</sup> “the victim does not become a true party to the trial” - Jorda and de Hemptine “The Status and Role of the Victim” in Cassese (et al) (eds) *The Rome Statute of the International Criminal Court* (2002) at p. 1404-05 (hereinafter “Jorda and de Hemptine in Cassese”). See also Caianiello and Illuminati “From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court” (2001) *North Carolina Journal of International Law and Commercial Regulation* at p. 453 (“Caianiello and Illuminati”). The Statute, Rules and Regulations use the broader term “participant” when they intend to include victims who have been granted the right to express their views and concerns on a given matter or their legal representative.

<sup>54</sup> The Statute created a *sui generis* system in which victims are neither limited to the role of witness nor are they assimilated to a party, but are rather granted a right to participate autonomously in proceedings by presenting their views and concerns where their personal interests are affected and when appropriate. See Bitti and Friman, “Participation of Victims in the Proceedings” in Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2002) at p. 457 (“Bitti and Friman in Lee”); Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence” in Fischer (et al) (eds) *International and National Prosecution of Crimes Under International Law* (2001) at pp. 293, 299 (“Timm in Fischer”); Caianiello and Illuminati at p. 453.

<sup>55</sup> This provision also provides for the Chamber to request the submission of additional evidence by the parties (see also Articles 64(6)(b) and (d) – see further paras.40-46, below).

However even the manner in which this power is framed reinforces that the Statute contemplates the parties, rather than any other participants, presenting the evidence. According to Article 64(6)(b), a Chamber may “order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties” (emphasis added).

<sup>56</sup> Contrast Rule 140 with Rule 91(3)(b) – see footnote 73, below.

<sup>57</sup> Terrier lists the first general principle relating to the presentation of evidence as “The Principle of Presentation of Evidence by the Parties” - Terrier, “The Procedure Before of the Trial Chamber” in Cassese (et al) (eds) *The Rome Statute of the International Criminal Court* (2002) at p. 1290 (“Terrier in Cassese”); see also p. 1295, “The parties may present evidence relevant to the case in accordance with the provisions of Article 64.”

Behrens states that “the Statute makes it clear that any evidence will have to be brought forward by either of the parties” - Behrens and Piragoff, “Article 69”, in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) at p. 903 (“Behrens and Piragoff in Triffterer”).

Jorda and de Hemptine further clarify that “the entire body of evidence will be produced not *via* any such case file but by the parties to the proceedings” - Jorda and de Hemptine in Cassese at p. 1412.

defence, and must disclose or provide access to evidence and material which is exculpatory or may assist the defence.<sup>58</sup> Allowing victims, who have no disclosure obligations, to present evidence relating to the guilt or innocence of the accused could have serious implication both for proper trial management<sup>59</sup> and for the rights of the defence.<sup>60</sup>

33. 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. In granting leave to appeal, the Trial Chamber stated that its ruling permitting victims to introduce evidence “may materially affect the content and the substance of the evidence introduced during the trial” and “may result in the Chamber considering evidence that otherwise would not be available.”<sup>61</sup> Thus while the Trial Chamber denied that the Decision affected the burden of proof *per se*, according to its own interpretation of the Decision the Trial Chamber recognises that it could lead to some shifting of the burden of proof in particular circumstances. This conflict with an express provision of the Statute reinforces the erroneous nature of the Decision in this regard.
34. Finally, the right of the parties to submit evidence carries a number of practical and logistical consequences that the Statute takes into consideration, 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. There are no such provisions for victims; allowing them to collect and present evidence could therefore affect their security and the security of persons who are at risk on account of the information collected.

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

35. Victims have the right under the Statute to present their “views and concerns”. The ordinary meaning of the words “views and concerns” does not extend to presenting evidence relating to the guilt or innocence of the accused. A victim’s “views” are their opinions or personal perspectives on a matter under consideration;<sup>62</sup> “concerns” give

<sup>58</sup> Article 67(2) and Rules 76 and 77.

<sup>59</sup> The presentation of such evidence during the proceedings might also require significant delays in order to allow the parties to investigate the issues raised by that evidence and possibly lead evidence in response or rebuttal (see Rule 91(2)), further impacting on the expeditious conduct of the trial (Article 64(2)).

<sup>60</sup> See e.g. Articles 61(1)(a), (b) and (c).

<sup>61</sup> Decision Granting Leave, para. 42.

<sup>62</sup> View (n) has been defined to mean: “II. 10. c. *pl* Opinions, ideas or theories of an individual or speculative character, held or advanced with regard to some subject.” (*The Oxford English Dictionary (2<sup>nd</sup> Edition)* (Clarendon Press, Oxford, 1989), Volume XIX, at p. 620); “7. Manner of looking at a things; opinion; judgment;

victims the opportunity to inform the Chamber about the effect of the proceedings on their personal interests.<sup>63</sup>

36. 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.<sup>64</sup> “Views and concerns” does not constitute the submission of evidence.<sup>65</sup> This is consistent with the system established by the Statute and Rules, in which the parties present the evidence (including at the request of the Chamber) and in which the burden of proof lies on the Prosecution.
37. The drafting history of Article 68(3) confirms the interpretation that victims do not have the right to present evidence relating to guilt or innocence. Early drafts of the Statute had included a provision granting legal representatives of “the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility”.<sup>66</sup> This provision was removed from the Statute during the negotiations at Rome.<sup>67</sup>

---

belief” (*The New International Webster’s Dictionary & Thesaurus (Encyclopedic Edition)* (Trident Press International, 2002) at p. 1084); “3. Opinion. Somebody’s opinion or judgement on something or particular way of interpreting or thinking about something.” (*Bloomsbury English Dictionary (2<sup>nd</sup> Edition)* (Bloomsbury Publishing Plc, 2004) at p. 2066).

<sup>63</sup> Concern (n) has been defined to mean: “6. a. A matter or subject that relates or appertains to some person or thing ... 7. a. A matter or subject that affects or touches one, and that ought to engage one’s active interest and attention.” - *The Oxford English Dictionary (2<sup>nd</sup> Edition)* (Clarendon Press, Oxford, 1989), Volume III, at p. 656); “1. That which concerns one; something affecting one’s interest or welfare;” (*The New International Webster’s Dictionary & Thesaurus (Encyclopedic Edition)* (Trident Press International, 2002) at p. 208); “1. Worry or a cause of worry” (*Bloomsbury English Dictionary (2<sup>nd</sup> Edition)* (Bloomsbury Publishing Plc, 2004) at p. 391).

Judge Pikis has previously stated that “concerns” are matters that interest or preoccupy a person, especially in light of the French text – see generally Separate Opinion of Judge Pikis, para. 15.

<sup>64</sup> The underlying rationale for the participation of victims was “to ensure, during the course of the proceedings, that the Court is fully appraised of their personal suffering.” – Jorda and de Hemptine in Cassese at 1400. This purpose does not relate to, or require, assessment of the guilt or innocence of the accused, but rather focuses on the suffering of the victim themselves.

<sup>65</sup> As has been previously observed, victims are limited to the presentation of their views and concerns, which is a qualified form of participation, and it is not their role to either “reinforce the prosecution or dispute the defence” - Separate Opinion of Judge Pikis, paras. 15-16.

<sup>66</sup> See e.g. *Article 43, Protection Of The [Accused]. Victims And Witnesses And Their Participation In The Proceedings, Revised Abbreviated Compilation*, A/AC.249/1997/WG.4/CRP.9, 14 August 1997, article 43(8); *Report Of The Inter-Sessional Meeting From 19 To 30 January 1998 In Zutphen, The Netherlands*, A/AC.249/1998/L.13, 04 February 1998, article 61[43](8); *Report Of The Preparatory Committee On The Establishment Of An International Criminal Court · Addendum*, A/CONF.183/2/ADD.1, 14 April 1998, article 68(8)

<sup>67</sup> See *Proposal Submitted By Canada*, A/CONF.183/C.1/WGPM/L.58/Rev.1, 6 July 1998; *Report Of The Working Group On Procedural Matters*, A/CONF.183/C.1/WGPM/L.2/ADD.6, 11 July 1998 (noting the deletion of the previous para (8) of article 68, which had contained the power of victims’ legal representatives to submit evidence).

38. The Rules of Procedure and Evidence elaborate on the manner in which victims can participate,<sup>68</sup> and comprehensively prescribe the system of victim participation.<sup>69</sup> Under this scheme, victims do not have the right to present evidence or to call their own witnesses during the trial phase.<sup>70</sup> Rather, the Rules provide for the legal representative to present the views and concerns of victims by posing particular questions to a witness who has been called by a party or the Chamber.<sup>71</sup> In granting this additional right, the drafters created a system of procedures and safeguards to control any questioning by, or on behalf of, a legal representative of victims.<sup>72</sup>
39. The drafters thus saw the need to explicitly provide for, and regulate, anything beyond the direct submission of “views and concerns” (such as questioning a witness). Nowhere is there any suggestion of victims having a right to present evidence during the trial; to the contrary, 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.<sup>73</sup> The lack of any such mention in a comprehensive participatory regime intended to enumerate the

<sup>68</sup> The examples provided, opening and closing statements (Rule 89(1)) and oral and written submissions (Rule 91(2)), provide mechanisms for the victims (through their legal representatives) to present their opinion and perspective on the case or a given issue to the Chamber, consistent with the ordinary meaning of “views and concerns” set out above.

<sup>69</sup> The “approach was to consolidate a truly comprehensive coverage of victims’ participation leaving no gaps” (Bitti and Friman in Lee, at 458-459). Thus the Rules were intended to cover the field. The fact that they include limited provisions for questioning witnesses, yet nothing for presenting evidence, strongly suggests that the presentation of evidence was not intended to be part of the participation of victims. In addition, “The insertion of ‘submissions’ in addition to ‘observations’ was part of the compromise aiming at providing a general and comprehensive scheme for victims’ participation.” (Bitti and Friman in Lee at 466). Thus in order to be comprehensive, the scheme was actually extended to a limited extent. However despite this, nowhere does it hint at the presentation of evidence going to guilt or innocence.

<sup>70</sup> “A victim does not enjoy the same rights as the other parties to the proceedings. He may not participate in the investigation undertaken by the Prosecutor, have access to the evidence gathered by the parties, nor call witnesses to testify at the hearing.” - Jorda and de Hemptine in Cassese at p. 1406.

“It is worth noticing that victims or their legal representatives are not entitled to call a witness or expert to testify in the criminal proceedings” - Bitti and Friman in Lee (ed) at 467-68.

<sup>71</sup> In this regard, the Prosecution does not disagree with the Trial Chamber’s statement that the questioning of witnesses under Rule 91(3) is not necessarily limited to reparations issues; rather, it must relate to the way in which the witnesses testimony impacts on the personal interests of victims, and constitute a presentation of the victim’s views (or concerns) regarding that testimony.

<sup>72</sup> These limitations were imposed to ensure the efficient conduct of the proceedings, and to protect both the defence and the integrity of the Prosecution case. See in particular Bitti and Friman in Lee, at p. 468.

<sup>73</sup> Rule 140(2)(a) states that “A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness”; whereas Rule 91(3)(b), on the other hand, when discussing the questioning of witnesses by a legal representative of victims only refers to “directions on ... the production of documents”. Thus while parties may submit evidence through a witness, the Rules do not contemplate any analogous right when a victims’ legal representative questions a witness. A Chamber may order the documents be produced to assist the legal representative in his or her questioning; in appropriate circumstances they may even question the witnesses regarding the documents; but the legal representative of the victims cannot introduce the document itself into evidence.



rights of legal representatives<sup>74</sup> further indicates that victims may not exercise such a power.<sup>75</sup>

*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*

40. In the Decision, the Trial Chamber refers to its power to “request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3)”<sup>76</sup> in order to support its ruling that the right to introduce evidence is not limited to the parties. The Prosecution submits that the provisions of Articles 64 and 69 do not mean, and should not be interpreted as implying, that victims could or should present evidence pertaining to the guilt or innocence of the accused.
41. First, as argued above, this position of the Trial Chamber appears to flow from the erroneous conflation of the interests of the victims and the role of the Prosecution. The Trial Chamber expanded the interest of the victims to include interests that belong to the Prosecution and, apparently based upon such an expanded concept of personal interest, ruled 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”.<sup>77</sup>
42. Second, this position of 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. As stated by Judge Blattmann, “It is necessary to state, first and foremost, the important notion that victims' participation is not a concession of the Bench, but rather a right accorded to victims by the Statute. The Chamber should remain mindful that the right to participate when victims' interests are affected is the consequence of a legal protected interest of the victim.”<sup>78</sup>
43. It is clear, therefore, that the modalities of victim participation can not be defined in relation to Chamber powers, and the legally protected personal interest of the victims should not be confused with or replaced by the role of the Chamber in the determination

<sup>74</sup> Timm in Fischer at p. 299-300. Also “Rule 91 deals with the manner in which a legal representative may participate in the proceedings, i.e., the incentives for having a legal representative” – Bitti and Friman in Lee at 463.

<sup>75</sup> The independent submission of evidence by a victim is at least as intrusive into the conduct of the trial and the presentation and proof of the case against the accused as is the questioning of a witness called by the parties. The questioning of a witness under Rule 91(3) was itself considered “a very contentious form of participation” – Bitti and Friman in Lee at 467.

<sup>76</sup> Decision, para. 108.

<sup>77</sup> Decision, para. 108.

<sup>78</sup> Separate Opinion of Judge Blattmann, paras. 12-13.

of the truth.<sup>79</sup> The Prosecution accordingly submits that Chambers should not give victims the role of “reinforc[ing] the prosecution or disput[ing] the defence”.<sup>80</sup>

44. In a subsidiary manner, the Prosecution submits that Article 69(3), and also 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. Article 69(3) authorises the Court to “request the submission of all evidence that it considers necessary for the determination of the truth.” Article 64(6)(d) empowers the Trial Chamber to “[o]rder the production of evidence in addition to that already collected prior to trial or presented during the trial by the parties”. This language is not that of an independent basis for the submission of evidence by a participant. Rather it is a power of the Chamber to request or order the submission of evidence.<sup>81</sup> Such a request or order could only be made to those actors who have the power to comply by presenting the evidence, namely the parties.<sup>82</sup>
45. The participatory rights of the victims cannot be interpreted in order to expand the role of Chambers in relation to evidence. In the drafting of the Statute, states moved away from a position where the Court had a duty to call evidence itself,<sup>83</sup> “clarifying the roles of the Court and the parties in the submission of evidence”.<sup>84</sup> Commentaries to the Statute confirm that these provisions do not empower additional participants to present evidence, or provide for the Chamber to seek evidence except from the parties.<sup>85</sup> The purpose is to

<sup>79</sup> There are separate provisions in the Statute when the Chambers are specifically requested to act ‘in the interest of the victims’, but again in a manner distinct from the participation regime.

<sup>80</sup> Separate Opinion of Judge Pikis, para. 16. The accused also may not be required to confront a second accuser (para. 19).

<sup>81</sup> Both Article 69(3) and Article 64(6)(d) reflect Rule 98 of the ICTY Rules of Procedure and Evidence, which provides that “A Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance” (emphasis added). See Bitti, “Article 64”, in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) at p. 820; Behrens and Piragoff in Triffterer at p. 892.

<sup>82</sup> The Prosecution notes that even in the context of proceedings on an admission of guilt, where the Trial Chamber can request the presentation of additional evidence “in particular in the interests of victims”, the Statute clearly set out that the request can only be that the Prosecutor present such additional evidence; this analogous power cannot be used to authorise the victims to present such evidence themselves. See Article 65(4)(a). The consideration of the admission is also based solely on the charges and material submitted by the Prosecutor and accepted by the accused, and any “other evidence ... presented by the Prosecutor or the accused” – Article 65(1)(c)(iii).

<sup>83</sup> Earlier drafts of the Statute had provided that “The Court has the authority and duty to call all evidence that it considers necessary for the determination of the truth” – see Behrens and Piragoff in Triffterer at p. 892.

<sup>84</sup> During the drafting, discussions focused on whether the Court should have the power to call the evidence itself, or rather whether it should have the authority to order the parties to submit additional evidence. This issue was resolved by granting the Court the power to order parties to present the evidence. See Behrens and Piragoff in Triffterer at p. 892; see also p. 903.

<sup>85</sup> Behrens and Piragoff in Triffterer at p. 903 (below). Terrier confirms that “the judges ... have important prerogatives enabling them to monitor, regulate and guide the presentation by the prosecution and defence of

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.<sup>86</sup>

46. The power of the Chamber to order the parties to present additional evidence where required to establish the truth does not alter the essential characteristics of the Court, and in particular cannot: alter the fact that the parties introduce the evidence; expand the meaning of “views and concerns”; or provide an independent procedural basis on which victims can introduce evidence.

*The nature of victim participation in the reparation phase*

47. The Prosecution 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.
48. The Statute and Rules provide additional rights for victims during reparations proceedings: lifting the restrictions on the questioning of witnesses during hearings on reparations under Article 75;<sup>87</sup> and providing for victims to submit “relevant supporting documentation” when submitting a claim for reparations,<sup>88</sup> in contrast to the “views and concerns” permitted at other stages.<sup>89</sup>

*Victims cannot challenge the admissibility and relevance of evidence.*

49. The right to challenge the admissibility or relevance of a piece of evidence, like the right to present evidence, is reserved to the parties. Article 64(9) refers to the Trial Chamber exercising its powers to rule on admissibility “on application of a party or on its own

---

their evidence. ... The Chamber may order production of additional evidence by either party and itself call witnesses to appear” (Terrier, “The Powers of the Trial Chamber” in Cassese (et al) (eds) *The Rome Statute of the International Criminal Court* (2002) at p. 1272 (emphasis added)). Terrier places this in the context that “the parties, essentially the defence and the prosecution, are placed on an approximately equal footing, having not the same rights but the same means of procedure in the presentation of evidence” (at p. 1271); and “the judges in a concern to bring out the truth [may] ask the parties for additional evidence”, and may also themselves require the attendance of witnesses – see Terrier in Cassese at p. 1296.

<sup>86</sup> Behrens confirms that the power of the Court is to compel the parties to present additional evidence where required, so that “the parties are not free to withhold evidence what the Court considers to be important” - Behrens and Piragoff in Triffterer at p. 903.

<sup>87</sup> Rule 91(4).

<sup>88</sup> Rule 94(1)(g).

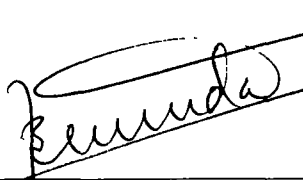
<sup>89</sup> The enhanced rights of victims during the reparations phase are further evident in relation to appeals. During the investigation and trial, only the parties may initiate an appeal (Articles 81 and 82(1)). However in relation to orders on reparations, victims may lodge an appeal (Article 82(4)). The Prosecution submits that this distinction is closely related to the degree to which a participant may present evidence and be considered a “party”. During the trial, only the parties may (a) present evidence, and (b) appeal. In relation to reparations, however, victims are permitted to present materials, can thus be seen as analogous to a party, and therefore they are permitted to appeal.

motion”.<sup>90</sup> Thus 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.

50. Similarly, the Prosecution submits that the Trial Chamber erred to the extent that it held that victims may make legal submissions relating to the admissibility of evidence. The victims are not parties to the proceedings, acting either to support or oppose the Prosecution or the Defence, and their participation does not extend to making legal submissions (or refuting those of the parties).<sup>91</sup> If an issue of evidence relates to the personal interests of victims, then it may be appropriate for the victims to present their views and concerns regarding that issue. However these must be personal views or concerns of the victims, not supplementary legal arguments. While the Trial Chamber may take them into consideration in appropriate circumstances, such submissions do not constitute a challenge to admissibility.<sup>92</sup>

### Relief Sought

51. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber grant the appeal and reverse the Decision in respect of these two issues.



Luis Moreno-Ocampo  
Prosecutor

Dated this 10<sup>th</sup> day of March 2008  
At The Hague, The Netherlands

<sup>90</sup> Terrier interpreted the draft Rules as setting out “the procedure applicable where a party intends to challenge the relevance or admissibility of evidence” – Terrier in Cassese at p. 1299 (emphasis added)

<sup>91</sup> Refuting the case of the defence is a matter which is exclusively within the prerogative of the Prosecution, and is therefore not a basis on which victims can express their views and concerns – *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28; see also Separate Opinion of Judge Pikis, paras. 16, 18, 19.

<sup>92</sup> In the context of the admissibility or relevance of evidence, such interventions by victims are likely to be rare. Matters of the admissibility of a given piece of evidence will often be technical in nature, and are therefore unlikely to be appropriate matters on which the victims could present their views and concerns.