



Original: French

No.: ICC-01/04-01/06

Date: 10 March 2008

THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Navi 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 Document

**Defence Appeal Against Trial Chamber I's 18 January 2008 Decision on Victims'
Participation**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

**Counsel for Victims a/0001/06 to
a/0003/06 and a/0105/06**

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

The Defence Team

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

BACKGROUND

1. On 18 January 2008, Trial Chamber I issued its decision on victim participation (“the Decision”), with a separate and dissenting opinion of Judge René Blattmann.¹
2. On 28 January 2008, the Defence applied for leave to appeal the Decision,² more particularly on the following issues:
 - a. What should be the modalities of identification for an individual applying to participate in the proceedings as a victim?
 - b. Should there be *prima facie* admissibility for applications for participation?
 - c. Does the notion of victim necessarily imply the existence of personal and direct harm?
 - d. Must the harm alleged be linked to the charges brought against the accused?
 - e. Should anonymous victims be allowed to participate in the proceedings?
 - f. Is it possible for victims to tender evidence during the trial and make submissions on the admissibility or relevance of evidence?
 - g. Should victims have access to prosecution evidence before trial?
 - h. What is the scope of regulation 56 of the *Regulations of the Court*?
3. On 28 January 2008, the Prosecutor also sought leave to appeal the Decision³ on the following three issues:

¹ *Decision on victims’ participation*, ICC-01/04-01/06-1119.

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

- a. Whether the requirements of article 68(3) of the *Rome Statute*, by reference particularly to the “personal interests” of victims, allow for participation at trial beyond the parameters of the charges against the accused;
 - b. Whether the victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused;
 - c. Whether victims participating at trial have a right to access material in the Prosecution’s possession.
4. On 31 January 2008, the Legal Representative of Victims a/0001/06 to a/0003/06 filed a response to the Defence and Prosecution applications, asking the Trial Chamber to reject the applications for leave to appeal the Decision.⁴
5. On 26 February 2008, Trial Chamber I issued its decision on the Defence and Prosecution applications for leave to appeal the Decision, with a separate and dissenting opinion of Judge René Blattmann.⁵
6. In the said decision, the Trial Chamber granted leave to appeal on the following three issues:
- a. Whether the notion of victim necessarily implies the existence of personal and direct harm.
 - b. Whether the harm alleged by a victim and the concept of “personal interests” under article 68 of the Statute must be linked with the charges against the accused.

³ Application for Leave to Appeal Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, ICC-01/04-01/06-1136.

⁴ *Corrigendum de la réponse des Représentants légaux des victimes a/0001/06 à a/0003-06 aux requêtes de la Défense et du Procureur sollicitant l’autorisation d’interjeter appel de la Décision du 18 janvier 2008*, ICC-01/04-01/06-1147-Corr. It should be noted that the Legal Representative of Victim a/0105/06 also filed a response to the Defence and Prosecution applications (ICC-01/04-01/06-1154); however, as it was submitted after the deadline, the Trial Chamber indicated that it was not taken into account in its decision.

⁵ *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.

- 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.⁶
7. In his separate opinion, Judge René Blattmann indicated that, in addition to the three above-mentioned issues, he would have granted leave to appeal on the following three issues:
- a. What should be the modalities of identification for an individual applying to participate as a victim?
 - b. Whether anonymous victims be allowed to participate in the proceedings.
 - c. What is the scope of regulation 56 of the *Regulations of the Court*?⁷
8. The Defence hereby submits to the Appeals Chamber its observations on the three issues for which Trial Chamber I granted leave to appeal.

OBSERVATIONS

General Comments

9. As the Defence argued before the Trial Chamber,⁸ the procedural arrangements with regard to victim participation established by the basic documents respond to three key concerns:
- To guarantee to victims the right to “express their views and concerns” as well as the right to obtain reparations for harm suffered;
 - The exercise of such rights must in no way be prejudicial to the rights of the accused and a fair and impartial trial;

⁶ *Idem*, para. 54.

⁷ *Idem*, Separate Opinion of Judge Blattmann, para. 28.

⁸ ICC-01/04-01/06-991, paras. 5-6.

- The implementation of these rights must not impinge on the effectiveness and expeditiousness of the proceedings.
10. The texts distinguish two types of proceedings in which victims may participate:
- Applications for reparations (articles 75 and 76, rules 94 to 99 and rules 89 and 91, regulation 88 of the *Regulations of the Court*);
 - Applications for participation in the proceedings and in the trial (article 68, rules 89 to 91, regulation 86 of the *Regulations of the Court*);
11. These proceedings have different objectives and involve different interests. At the application for reparations stage, there is full victim participation, whereas at the review of the charges stage, the founding texts impose significant limitations and restrictions on victim participation.
12. The Decision has a significant impact on the fair and efficient conduct of the proceedings. The Trial Chamber's definition of the concept of victims, which allows for participation in the proceedings of a large number of persons with no link to the charges confirmed by the Pre-Trial Chamber, jeopardizes the fairness and expeditiousness of the trial.
- A. Does the notion of victim necessarily imply the existence of personal and direct harm?**
13. Rule 85 defines the term "victims" as follows:
- (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.

14. As pointed out by Judge Blattmann in his separate opinion, an imprecise definition of victims will not allow for an effective exercise of the participation rights of victims afforded to them by the Statute. He added that it is important “to remember that victims are not abstract entities but rather concrete persons or group of individuals who have suffered harm as a result of conduct attributed or specified in a particular case or situation and their rights must be upheld.”⁹
15. 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.
16. In analysing the concept of victim, the Chamber was wrong to take into consideration a definition that is neither binding nor a generally recognized principle of law. The Defence maintains that the notion of victim necessarily implies the existence of personal and direct harm as articulated in national and international laws.

A.I Requirement of personal harm

- Analysis of rule 85

17. Rule 85 specifically states that the harm must affect either a natural person as such or a specifically identified organisation. There is no reference to collective harm that could bear a relation to membership of a nation or community.

- Prosecutor’s monopoly over the defence of “collective interests”

18. The defence of collective interests affected by the crimes being prosecuted, usually grouped together under the concept of general interest, is the

⁹ See ICC-01/04-01/06-1119, Separate and Dissenting Opinion of Judge René Blattmann, para. 6.

exclusive domain of the Prosecution and cannot be indirectly delegated to individuals through an excessive extension of the concept of harm.

- Concept of personal interest

19. The effect of the majority decision is to broaden the scope of the concept of harm beyond the limits provided for under the Statute: the victims' right to express their views and concerns is indeed limited by the link to their personal interests.¹⁰ Reliance on the concept of collective interests thus grants rights to victims that they do not otherwise have under the texts – to the detriment of the rights of the Defence.
20. An applicant with victim status – or his or her legal representative – who seeks leave from the Chamber to intervene, must show that his or her personal situation and “personal interests” are specifically and directly affected by the proceedings before the Court.¹¹
21. The concept of “personal interest” does not refer to the general interests shared by the victims as a whole by mere dint of having been recognized, *prima facie*, as victims of one of the crimes being prosecuted. Just because someone has been recognized as a victim of one of the crimes being prosecuted does not confer the right to participate at all stages of the proceedings and with regard to all matters raised therein, whether directly or through a legal representative.
22. The Statute and the Regulations specifically provide for situations where the personal interests of the victims are clearly affected, either when their protection is in issue or in relation to proceedings for reparations.¹² The Appeals Chamber underscored the need to ensure that “the interests asserted

¹⁰ Article 68(3); see ICC-01/04-01/06-925, Majority, para. 26.

¹¹ *Supra*, footnote 24, Separate Opinion of Judge Pikis, para. 13.

¹² See articles 68(1), 68(2) and 75 and rules 87 and 88.

by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor”.¹³ The views and concerns of the victims must be exclusively related to the very issue that distinguishes them from other victims:¹⁴ their personal interests, to the extent that they are affected by the proceedings.

23. Even when the personal interests of victims are affected within the meaning of article 68(3) of the Statute, 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 a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁵
24. Any determination relating to the personal interests of victims must be made on a case-by-case basis.¹⁶

A.II Requirement of a direct causal link

- The arguments relied on by the Trial Chamber are not relevant

25. The Trial Chamber bases its definition of the concept of harm or damage primarily on 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*” (hereinafter the “Basic Principles”).¹⁷ It adopts the wording of Principle 8 to conclude that a victim may suffer, either individually or collectively, from harm in a variety of

¹³ ICC-01/04-01/06-925, Majority, para. 28.

¹⁴ *Idem*, Separate Opinion of Judge Pikis, para. 22.

¹⁵ *Ibid.*, Majority, para. 28.

¹⁶ *Ibid.*, Majority, para. 28.

¹⁷ United Nations General Assembly Resolution, 60/147 (2005)

different ways, such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.¹⁸

26. On the basis of the *Basic Principles* as well as the difference in wording between paragraphs (a) and (b) of rule 85, the Chamber held that natural persons can be direct or indirect victims of a crime within the jurisdiction of the Court.
27. In his separate opinion, Judge Blattmann points out that the definition of the concept of victim enshrined in the *Basic Principles* was given specific consideration before being rejected during the *travaux préparatoires* that led to the drafting of the Statute,¹⁹ and that the majority's interpretation goes beyond what was approved by the legislator. The Defence adopts the arguments of Judge Blattmann on this matter.
28. As reference to the *Basic Principles* was specifically rejected, it would not be appropriate to refer to them in defining the notion of victim and to expand the notion of harm to include indirect harm and collective harm.
29. Moreover, as the *Basic Principles* are considered to be an instrument of *soft law*, they are in no way binding under international law.²⁰

- Nowhere do the provisions of the statutes suggest the existence of indirect harm

30. As the decision to allow a victim to participate in the proceedings affects the rights of the accused, the rules governing such admission must be interpreted strictly. Nowhere in the Statute or the *Rules of Procedure and Evidence* is it expressly stated that indirect harm may constitute a reason for such

¹⁸ ICC-01/04-01/06-1119, para. 92.

¹⁹ *Idem*, separate opinion, para. 5. See also Donat-Cattin in Triffterer, pp. 884/885; Amnesty International – e.g. in http://www.amnesty.org/en/alfresco_asset/9302c545-c1a1-11dc-ac4a-8d7763206e82/ior400061999en.pdf at p. 4 ff. See also Triffterer, pp. 969 and 884/885.

²⁰ The Basic Principles are the result of a United Nations General Assembly resolution.

admission. On the contrary, rule 85 highlights the causal link that must exist between the crime and the harm alleged.

- General principles of law derived from national legal systems and international tribunals

31. In those domestic jurisdictions which allow victim participation in criminal proceedings or compensation to victims for harm suffered, the victims must prove that they have personally suffered harm as a direct result of the crime alleged.²¹
32. For example, with regard to the definition applied in the case of participation in proceedings as a civil party, the Extraordinary Chambers in the Courts of Cambodia require the harm suffered by the victim applicant to be “the direct consequence of the offence, personal and have actually come into being”.²²

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

33. The majority of the Trial Chamber considers that rule 85 does not have the effect of restricting the participation of victims to proceedings relating to the crimes contained in the charges confirmed by Pre-Trial Chamber I, as such a restriction is not expressly provided for in the Statute.²³ The Trial Chamber uses the test of the existence, or not, of “*a real evidential link between the victim and the evidence which the Court will be considering during Mr Thomas Lubanga Dyilo’s trial (in the investigation of the charges he faces), leading to the conclusion*”

²¹ **France:** *Nouveau Code de procédure pénale* (adopted 1 March 1993), article 2; **Germany:** L. Markus, *The Victim In Criminal Proceedings: A Systematic Portrayal Of Victim Protection Under German Criminal Procedure Law*, p. 35, http://www.unafei.or.jp/english/pdf/PDF_rms/no70/p031-40.pdf; Code de procédure pénale, section 395(2) (Strafprozeßordnung, StPO); **United Kingdom:** Archbold, *Criminal Pleading, Evidence and Practice*, Sweet & Maxwell Ltd, 2004, Section 5-415, pp. 713 and 714. See also: *Alcock v. Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 (Hillsborough case) and *White and Others v. Chief Constable of South Yorkshire and Others* (House of Lords), [1999] 2 AC 455; **Canada:** *Crime Victims Compensation Act*, L.R.Q., Chapter I-6, paragraph 3(a); **United States:** *Victims of Crime Act of 1984*, 42 U.S.C. § 10602 (b).

²² Rule 23(2) of the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* (Rev. 1) 1 February 2008.

²³ ICC-01/04-01/06-1119, para. 93(i).

that the victim's personal interests are affected".²⁴ Hence, it would be sufficient for the victim to have suffered harm resulting from a crime specified under article 5 of the Statute, committed in the territory of a State Party after 1 July 2002.²⁵

34. Dissenting on this issue, Judge Blattmann points out that the Chamber must determine whether the person requesting victim status has suffered harm as a result of a crime contained in the charges brought against the accused.²⁶ Not to link victim status and the right to participate to the charges confirmed against the accused would fly in the face of the fundamental principles of criminal law, such as the principle of legality.²⁷
35. In the view of Judge Blattmann, the inclusion of articles 5, 11 and 12 in the Statute establishes a framework to act as the limiting agent of the jurisdiction of the Court rather than to expand that of any particular Chamber, thereby violating the rights of the accused. If articles 5, 11 and 12 restrict the jurisdiction of the Court, Trial Chamber I must define its jurisdiction according to the responsibilities or powers conferred upon it by the parameters set out by the charges brought against Thomas Lubanga by the Prosecution.²⁸
36. The Defence submits that the charges confirmed against the accused by the Pre-Trial Chamber constitute the temporal, geographical and personal²⁹ framework within which the Trial Chamber has jurisdiction. It follows that the harm alleged by a victim must be linked to these charges – as must the victim's "personal interest".

²⁴ *Idem*, para. 95.

²⁵ *Ibid.*, para. 94.

²⁶ ICC-01/04-01/06-1119, Separate and Dissenting Opinion of Judge René Blattmann, para. 17.

²⁷ *Idem*, para. 21.

²⁸ *Ibid.*, para. 7.

²⁹ ICC-01/04-423, para. 4.

37. To date, the case law of the Court has consistently held that victim participation cannot go beyond the jurisdiction of the Chamber in a case. Both the Decision issued on 24 December 2007 by the Single Judge of Pre-Trial Chamber I³⁰ and the separate opinion filed by Judge Pikis on 13 June 2007³¹ appear to indicate that victim participation must be determined through the lens of the competency afforded the judge making the decision.³²
38. Judge Blattmann adds that “it is important to note that both Pre-Trial Chambers I and II have required, in order to determine the status of victims, that a causal link be found between the harm a victim applicant has suffered and the crimes that the accused has been charged with. The Appeal Chamber has never overruled this important causal link requirement and no party has questioned the validity of maintaining this”.³³
39. The Defence submits that the majority decision may affect the fairness and proper conduct of the proceedings, thus infringing the basic rights of the accused. The accused would be made to face evidence and interventions that bear no relation to the charges brought against him.³⁴ This risk is all the greater in that the Trial Chamber may, in principle, hear witnesses and examine evidence pertaining to reparations in the context of the trial.³⁵

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

40. The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited only to the Parties.³⁶ This conclusion is based on the fact that the Trial Chamber may request the presentation of all evidence it

³⁰ ICC-01/04-01/06-423.

³¹ ICC-01/04-01/06-925, Separate Opinion of Judge Pikis.

³² See ICC-01/04-01/06-1119, Separate and Dissenting Opinion of Judge René Blattmann, para. 8.

³³ *Idem*, para. 17.

³⁴ Article 67.

³⁵ Article 75 and regulation 56 of the *Regulations of the Court*; leave to appeal was sought on this issue, but was rejected by the Trial Chamber (ICC-01/04-01/06-1191).

³⁶ ICC-01/04-01/06-1119, para. 108.

considers necessary for the determination of the truth, and on rule 91(3), which enables participating victims to question witnesses with the leave of the Chamber.

41. The Chamber is also of the opinion that victims will be able to challenge the admissibility or relevance of evidence when their interests are engaged, and that the right to make submissions on matters of evidence is not reserved to the Parties.³⁷
42. The Defence submits that the Statute limits victim participation to certain proceedings in the context of very specific circumstances. They may make representations when investigations are initiated (article 15(3)), and during proceedings relating to the jurisdiction of the Court or the admissibility of a case (article 19(3)). They may make representations relating to reparations in the event of a conviction (article 75(3) and 76(3)).
43. The Rules allow victims to be heard *in camera* with regard to sexual violence (rule 72(2)) and on the consequences of an individual's release (rule 119(3)).
44. The only other provision enabling victims to participate in proceedings before the Court is article 68(3),³⁸ which reads as follows:

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. [...]

45. Victims who are not party to the proceedings may only express their "views and concerns"³⁹ when their personal interests are directly affected. They may

³⁷ *Idem*, para. 109.

³⁸ ICC-01/04-01/06-925, Separate Opinion of Judge Pikis, paras. 8 to 10.

³⁹ *Ibid.*, para. 15.

not, however, express their views and concerns in relation to the submission of evidence, whether incriminating or exculpatory.⁴⁰

46. Pursuant to the Statute and the Rules, only the “Parties” and, where applicable, the Chamber, are entitled to present and challenge evidence in the trial leading up to the verdict determining guilt, and prior to any hearing on reparations.⁴¹
47. The only circumstances under which a victim may question a witness are provided for under rule 91(3), which stipulates that a victim’s legal representative may, with the permission of the Chamber, question a Prosecution or Defence witness.
48. The burden of proof lies squarely with the Prosecutor,⁴² and it is not the victims’ domain either to reinforce the Prosecution or dispute the defence.⁴³ The Prosecutor may seek evidence from the victims.⁴⁴ Authorising 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.⁴⁵
49. The role of victims in the trial cannot be to reinforce the Prosecution or dispute the defence.⁴⁶ The Decision indirectly affords victims rights that the legislator clearly attributed to the Parties only.⁴⁷ It is not the domain of the Chamber to grant victims a role or powers to which they are not otherwise entitled pursuant to the basic texts, but rather to ensure that the scales are held even between the Prosecution and the Defence, and to guarantee the fairness of the proceedings.

⁴⁰ *Idem*, Separate Opinion of Judge Pikis, para. 16.

⁴¹ Articles 64(6)(d), 64(8)(b) and 69(3); rule 140(2)(a).

⁴² Article 66(2).

⁴³ *Ibid.*, Separate Opinion of Judge Pikis, para. 16.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, para. 19.

⁴⁶ *Ibid.*, para. 16.

⁴⁷ Article 64(9)(a) and rule 63(3).

50. One of the basic rights of the accused is to obtain prior disclosure of all evidence that will be used in the trial. The 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.
51. As certain victims are allowed to participate in the proceedings anonymously,⁴⁸ the Defence might find itself in the position not only of not having obtained prior disclosure of certain evidence, but of not even knowing the identity of the person submitting this evidence at trial.

Stay of the proceedings

52. Given the importance of the issues raised herein and, more specifically, the impact they will have on the conduct of the trial, the Defence requests that the proceedings be stayed for the duration of the appeal.
53. Were the trial to commence on the basis of unfair rules, the Defence would find itself in a situation which might be impossible to remedy, even if its appeal were to be allowed by the Appeals Chamber.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

ORDER an immediate stay of the proceedings for the duration of the appeal;

REVERSE Trial Chamber I's 18 January 2008 Decision on victims' participation;

ALLOW this appeal;

⁴⁸ The Defence sought leave to appeal on this issue, but leave was refused by the majority of the Chamber, with a dissenting opinion from Judge Blattmann, see ICC-01/04-01/06-1191, para. 37.

FIND that the notion of victim implies the existence of personal and direct harm;

FIND that the harm alleged by a victim and the concept of “personal interest” under article 68 of the Statute must be linked with the charges against the accused;

FIND that the victims participating at trial may not lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of evidence.

[signed]

Ms Catherine Mabile, Principal Counsel

Dated this 10 March 2008, at The Hague