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

Date: **21 May 2008**

**THE APPEALS CHAMBER**

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

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

**Public Document**

**Victims' Observations on the Prosecution and Defence Appeals against the  
Decision of 18 January 2008**

**Source:** Victims a/0001/06 to a/0003/06

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Victims Participation and Reparations  
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**Other**

**CONTEXT**

1. By decision of 26 February 2008, the Trial Chamber granted the Defence leave to appeal the decision of 18 January 2008 on the following issue:

*a) Does the notion of victim necessarily imply the existence of personal and direct harm?*

2. The Chamber also granted both the Defence and the Prosecutor leave to appeal on two other issues:

- b) *Must the harm alleged by a victim and the concept of “personal interests” mentioned in article 68 of the Statute be linked with the charges brought against the accused?*
- c) *May the victims participating at trial lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of other evidence?*

3. No appeal was granted on other issues pertaining to the modalities of victim participation, such as for example the issue of whether a decision on participation must pertain to an entire phase of the proceedings or only to a specific step in the judicial proceedings, or the matters on which the victims may express views and concerns. Insofar as they exceed the scope delineated by the Trial Chamber’s decision, the grounds set out in the documents submitted by the Defence<sup>1</sup> and the Prosecution<sup>2</sup> are moot and the victims will not respond to them.

## OBSERVATIONS

### **1) Does the notion of victim necessarily imply the existence of personal harm?**

4. This issue is the subject of the appeal lodged by the Defence alone.<sup>3</sup> In its appeal, it maintains that the notion of victim necessarily implies the existence of both personal and direct harm by relying on a limited number of national and international laws.<sup>4</sup>

<sup>1</sup> Defence appeal (ICC-01/04-01/06-122), para. 22.

<sup>2</sup> Document filed by the Prosecutor in support of his appeal, introduction, ICC-01/04-01/06-1219.

<sup>3</sup> See the “Defence Appeal Against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation”, No. ICC-01/04-01/06-1220-tENG, 10 March 2008, paras. 17-32, pp. 6-9.

<sup>4</sup> In particular, the Defence maintains that: (i) the Trial Chamber erred in considering a definition as contained in 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” (the “Basic Principles”) which is neither binding nor a generally recognised principle of law; (ii) rule 85 of the *Rules of Procedure and Evidence* on the one hand requires the existence of personal harm linked to the notion of personal interest but on the other hand does not imply the existence of collective or indirect harm; and (iii) the recognition of the existence of indirect harm is contrary to the general principles of law drawn from national legal systems and international tribunals. See the

5. The Defence conflates the notion of victim, defined by rule 85, with that of the interest which a victim may have in participating in proceedings. The notion of personal interest is linked to the victims' exercise of their procedural rights under article 68(3) of the Rome Statute and bears no relation to the determination of victim status which they may be afforded under rule 85 of the *Rules of Procedure and Evidence*.

6. The matter of the personal interest which a victim must show to be granted leave to participate in the proceedings relating to a situation or case is the subject of the second issue for which leave to appeal was granted. The considerations put forward by the Defence on this matter in its single appeal are irrelevant.

7. As the Prosecution<sup>5</sup> states, at no point did Trial Chamber I find that victim status had to be granted to an applicant claiming only collective harm without demonstrating the existence of personal harm.<sup>6</sup> It is therefore not clear in which respect the decision of 18 January should be reversed.

8. The issue however merits a nuanced approach. The drafters of the Court's texts, particularly when envisaging victim participation in proceedings, took into account the fact that mass crimes often result in suffering which is both individual and collective. Thus, rule 90 of the *Rules of Procedure and Evidence* encourages victims' collective participation by explicitly providing for the participation of groups of victims, and allowing the Chamber to request or even oblige victims to come together and form groups for the purpose of common representation. The Trust Fund

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"Defence Appeal Against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", No. ICC-01/04-01/06-1220-tENG, paras. 17-32, pp. 6-9.

<sup>5</sup> "Prosecution's Response to 'Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes'", 19 March 2008, ICC-01/04-01/06-1233, p. 9.

<sup>6</sup> The Trial Chamber merely quotes principle 8 of the Basic Principles in its entirety without importing its contents with respect to collective harm into the context of rule 85 of the *Rules of Procedure and Evidence*. See also the *Decision on victims' participation*, para. 92, p. 33. In this respect, see also the "Prosecution's Response to 'Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes'", para. 9, p. 5 and footnote 17 and the accompanying text.

for Victims, established under article 79 for the benefit of victims of crimes within the jurisdiction of the Court, may award collective reparations.

9. Rule 85 in itself does not *necessarily* appear to exclude those persons who allege that they belong to a group or collectivity (ethnic, national, religious, local....) which was the target of a crime within the Court's jurisdiction. Accordingly, membership of a group which was the victim of a mass crime will, moreover, result in at least mental harm to the individual, so that the Defence distinction between individual and collective suffering seems contrived and hypothetical.

10. The victims participating in this case, including those among them who are victims as the parent of a child enlisted in armed groups, have suffered personal harm. Such events, definitely when occurring under duress, can result in mental (and sometimes material) harm to individual family members, separate to the harm suffered by the children who are direct victims. Even a person who is an indirect victim of the crime may, in this way, suffer personal harm.

## **2) Does the notion of victim necessarily imply the existence of direct harm?**

11. This issue was also appealed by the Defence alone, whereas the Prosecution<sup>7</sup> objected to the Appeals Chamber's examination of this issue and requested that it dismiss the Defence appeal in this respect.<sup>8</sup>

12. The victims note that the *Rules of Procedure and Evidence* make a distinction between the organisations and institutions which must have "*sustained direct harm*" (rule 85(b)) and natural persons who must have "*suffered harm*" (rule 85(a)). This distinction between the two categories of victims suggests that the drafters of the

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<sup>7</sup> See the "Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", No. ICC-01/04-01/06-1219, 10 March 2008. See also the "Prosecution's Response to 'Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes', para. 3.

<sup>8</sup> See the "Prosecution's Response to 'Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes', paras. 3, 7-13 and 9-a.

*Rules of Procedure* wished to impose an additional condition on organisations and institutions that, *a contrario*, they did not wish to impose on natural persons.

13. The chambers of the Court in general have not considered the direct or indirect nature of harm suffered by a victim as a criterion for participation, but rather examined whether victims themselves had suffered personal harm. This stems *inter alia* from the decisions of Pre-Trial Chamber I<sup>9</sup> and Pre-Trial Chamber II. The Chambers mainly recognise the possibility of granting victim status to those natural persons who have suffered indirect but personal harm.<sup>10</sup>

14. The case law of the international courts in respect of human rights, in particular the European Court of Human Rights (ECHR) and the Inter-American

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<sup>9</sup> See *Corrigendum to the Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo* by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06 (Pre-Trial Chamber I), No. ICC-01/04-423-Corr., 31 January 2008, paras. 25, 53, 55, 61, 63, 65, 69, 71, 73, 75, 77, 79, 85, 87, 89, 91, 93, 95, 97, 99, 101, 105, 109, 111, 115, 118, 120, 122, 126, 128, 130 and 132. The Single Judge ruled that close relations of deceased persons may be considered to be victims of the commission of a crime falling within the jurisdiction of the Court if they provide evidence to demonstrate that they personally suffered harm as a result of the death of the direct victim. Also see *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants* a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I), ICC-02/05-111-Corr., 6 December 2007, para. 35, p. 18, in which the Single Judge ruled that “family members affected by the disappearance [of their relatives] could be considered victims under the Statute, the Rules and the Regulations, provided that they meet all the necessary criteria”. Also see *Decision on the Applications for Participation in the Proceedings of* a/0001/06, a/0002/06 and a/0003/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo* (Pre-Trial Chamber I), ICC-01/04-01/06-228, 28 July 2006, pp. 8-9, in which Pre-Trial Chamber I ruled that the status of victim can be granted to immediate family members or dependents of the direct victim as well as any person who has suffered harm by intervening to assist direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed.

<sup>10</sup> See *Decision on victims’ applications for participation* a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Pre-Trial Chamber II), ICC-02/04-101, 10 August 2007, para. 60 in which the Single Judge ruled that close family relations of the deceased person can be considered as victims of a crime within the jurisdiction of the Court since they suffer emotional harm due to the death of one of their close relations. See also *Decision on victim’s application for participation* a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Pre-Trial Chamber II), ICC-02/04-125, 14 March 2008, para. 65 in which the Single Judge ruled that a person may be considered a victim of a crime falling within the jurisdiction of the Court if they experienced events of an exceedingly violent and shocking nature or lost a close relation during these events.

Court of Human Rights (IACHR), also recognises the possibility of granting victim status to close family members and dependents of the direct victim so long as proof of personal harm has been demonstrated.<sup>11</sup> The ECHR has interpreted the notion of victim broadly since it recognizes that not only the indirect victims, but also the "potential victims"<sup>12</sup> and "collateral victims"<sup>13</sup> can claim the guarantees of the European Convention on Human Rights.

15. A study of the preparatory works that led to the adoption of the Rome Statute clearly shows that from the outset the intention of the drafters was to include a definition of victim, not in the text of the Statute, but first and foremost, in the *Rules of Procedure and Evidence* of an international criminal court.<sup>14</sup> The idea of defining the term "victim" based on the one found in paragraphs 1 and 2 of *Declaration of Basic*

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<sup>11</sup> See ECHR, Case of *Burghartz v. Switzerland*, judgment of 22 February 1994, para. 18; Case of *Yasa v. Turkey*, judgment of 2 September 1998, paras. 61-66; IACHR, Case of *Velasquez Rodriguez v. Honduras*, judgment of 29 July 1988, paras. 127-139; Case of *Fairen-Garbi and Solis-Corrales v. Honduras*, judgment of 15 March 1989, paras. 130-136; Case of "Street Children" (*Villagran-Morales et al v. Guatemala*), judgment of 19 November 1999, paras. 174-177 and Case of "Panel Blanca" (*Paniagua-Morales et al v. Guatemala*), Reparations, Statement at public hearing before the Court, 11 August 2000, pp. 144-175.

<sup>12</sup> See ECHR, Case of *Klass and others v. Germany*, 6 September 1978, para. 34: the ECHR specifically ruled that "an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him". In this regard, see also ECHR, Case of *Dudgeon v. The United Kingdom*, judgment of 22 October 1981, paras. 37-63 in which the ECHR ruled that the very existence in the criminal law in force in North Ireland of various offences which might apply to male homosexual conduct continuously and directly affects the private life of the applicant and represents a permanent infringement of his right to respect for his private life. This interpretation of the notion of "potential victim" was approved and developed in the subsequent judgments of the ECHR, notably: ECHR, Case of *Soering v. The United Kingdom*, 7 July 1989, paras. 81-111 (existence of risk of the applicant being placed under "death row" conditions if extradited to the United States). See also ECHR, Case of *Modinos v. Cyprus*, judgment of 22 April 1993, paras. 17-24 (existence of legal restrictions in the Cypriot Criminal Code that could be applied to male homosexual conduct). See also ECHR, Case of *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, paras. 55-80 (general prohibition of the Supreme Court of Ireland against the communication of information to pregnant women on abortion possibilities abroad).

<sup>13</sup> See ECHR, Case of *Burghartz v. Switzerland*, judgment of 22 February 1994, paras. 16-18: the ECHR recognised the status of "collateral victim" for the spouse of the applicant who had been refused the right to change his family name.

<sup>14</sup> The Draft Statute for an international criminal court prepared in 1994 by the International Law Commission did not contain any definition of victim. The first definition of victim was included in the draft Rules of Procedure and Evidence of the international criminal court prepared, in 1996 by the Preparatory Committee on Establishment of an International Criminal Court. See *Draft Set of Rules of Procedure and Evidence for the International Criminal Court, Working paper submitted by Australia and the Netherlands*, UN Doc. A/AC.249/L.2, 26 July 1996, p. 10.

*Principles of Justice for Victims of Crime and Abuse of Power* adopted by the United Nations General Assembly (the “*Declaration of Basic Principles*”)<sup>15</sup> was inspired by the positions adopted by the United Nations Economic and Social Council<sup>16</sup> and was supported by the Preparatory Committee on Establishment of an International Criminal Court (“the Preparatory Committee”).<sup>17</sup> The Committee immediately suggested that this definition be included, with express reference to the Declaration of Basic Principles, in the text of the draft Rules of Procedure and Evidence of an International Criminal Court,<sup>18</sup> and, at the same time, took some initiatives to include this definition in the text of the draft Statute.<sup>19</sup> Since these initiatives did not enjoy sufficient support from the delegations, they were abandoned.<sup>20</sup>

16. A study of the preparatory works that led to the adoption of the Court’s *Rules of Procedure and Evidence* leaves no doubt that the *Declaration of Basic Principles* played a central role throughout the negotiations on defining the term “victim” insofar as it served as the basis for the proposals of the majority of the delegations.<sup>21</sup> Although,

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<sup>15</sup> See *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the 40<sup>th</sup> session of the United Nations General Assembly through resolution No. 40/34, UN Doc. A/RES/40/34, 29 November 1985. According to paragraph 2 of this Declaration, “The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

<sup>16</sup> See United Nations Economic and Social Council resolution No. 1996/14 adopted at the 45<sup>th</sup> plenary session of 23 July 1996, UN Doc. E/RES/1996/14, para. 6.

<sup>17</sup> See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Committee sessions of March-April and August 1996)*, UN Doc. A/51/22, 13 September 1996, para. 280.

<sup>18</sup> See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals)*, UN Doc. A/51/22, 13 September 1996, p. 206.

<sup>19</sup> In particular, the Preparatory Committee suggested that an express reference to the definition of victim as found in the *Declaration of Basic Principles*, be included in a footnote first in article 73 “Reparations to victims” and then in article 68 “Protection of the victims and witnesses and their participation in the proceedings” of the Draft Statute. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for an international criminal court*, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 119, footnote 22 and the *Report of the Working Group on Procedural Matters*, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.8, 15 July 1998, p. 7, footnote 5.

<sup>20</sup> See FERNANDEZ DE GURMENDI (S. A.), “Definition of victims and general principle”, in LEE (R. S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, p. 429.

<sup>21</sup> At the end of the Paris Seminar, the delegations adopted a definition of victim different from the one found in the *Declaration of Basic Principles* in that it did not specify persons who may be considered indirect victims, but did have a definition of the term “harm” and also included under the term “victim” “organizations or institutions which might have been directly harmed”: See UN Doc. PCNICC/1999/WGRPE/INF2, 6 July 1999, p. 3, Rule X. However, at the next stage of the preparatory



the definition of the term “victim” based on the *Declaration of Basic Principles* was supported all through the negotiations by the majority of the delegations,<sup>22</sup> it was not retained, solely because no wording satisfactory to all the delegations could be found.<sup>23</sup> A General Assembly resolution has since adopted 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*<sup>24</sup> whose draft, prepared by ECOSOC, had already served as the basis for the discussions among delegates.

17. Contrary to the Defence argument, there is no evidence in the preparatory works to indicate that the *Declaration of Basic Principles*<sup>25</sup> was rejected by the delegations because it lacked normativity or relevance to the extent that the Court would be precluded from applying the *Declaration* as a universally recognized source of international law in the exercise of its judicial function.<sup>26</sup> The *Declaration of Basic Principles* was adopted unanimously by the United Nations General Assembly. Similarly, there are no grounds for considering that the drafters of the Court’s texts

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work, the delegations returned to the broader definition of victim as found in the Declaration, nevertheless including under the term “victim” “*organisations or institutions that have been directly harmed*”: See UN Doc. PCNICC/2000/WGRPE(2)/RT.3, 29 March 2000. This definition of victim was repeated almost to the letter in a document adopted at the end of the intersession meeting held in Mont-Tremblant: See UN Doc. PCNICC/2000/WGRPE/INF/1, 24 May 2000, p. 75, Rule Q.

<sup>22</sup> See FERNANDEZ DE GURMENDI (S.A.), *op. cit.*, pp. 430-433.

<sup>23</sup> Since the *Declaration of Basic Principles* could not serve as a basis for a compromise on the definition of victim, the delegations were invited to abandon the definition contained in the *Declaration* in order to find another approach making it possible to reach the required compromise. Consequently, the delegations opted for a very broad definition, leaving the Court the latitude to judge its scope. See also FERNANDEZ DE GURMENDI (S.A.), “Definition of victims and general principle”, pp. 431-433.

<sup>24</sup> United Nations General Assembly, resolution 60/147, 16 December 2005.

<sup>25</sup> In the Decision of 18 January, resolution 60/147 is cited, but the text was already in circulation as an ECOSOC draft in 1998.

<sup>26</sup> Furthermore, the *Declaration of Basic Principles* served as the basis for 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 the 64<sup>th</sup> Session of the United Nations General Assembly by resolution No. 60/147, UN Doc. A/RES/60/147, 16 December 2005.

had the express intention of excluding from the definition certain categories of victims generally recognized in international law, including indirect victims.<sup>27</sup>

18. Assuming that the Declaration of *Basic Principles* could not serve as a valid and relevant source of the law applicable under article 21(1)(b) of the Rome Statute, the victims, like the Prosecution,<sup>28</sup> consider that the mere fact that the Trial Chamber referred to this *Declaration* in its decision of 18 January 2008 cannot, *per se*, challenge the validity and/or relevance of that decision.

19. Whatever the case, and even if the parents are considered "indirect victims", the victims represented by the undersigned have all suffered harm that stems directly from the acts of which the accused is charged, either by being enrolled in a militia group and/or being forced to participate in fighting or seeing their children become the direct target of these crimes.

**3) Must the harm alleged by a victim and the concept of "personal interests" mentioned in article 68 of the Statute be linked with the charges brought against the accused?**

20. The harm suffered by the victims participating in this appeal has a direct correlation with the charges brought against the accused. As they have in particular already filed an application for reparations or intend to do so, they also have a personal interest that correlates with the charges against the accused. Indeed, article 75 provides explicitly that the Court may issue an order against a convicted person indicating the reparations that should be given to the victims. Given that such reparations depend on the conviction of the accused, the victims have a personal interest in the charges being declared established.

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<sup>27</sup> In this regard, see *Prosecution's Response to 'Acte d'appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes'*, para. 11, p. 6.

<sup>28</sup> *Ibid.*

21. The legal representatives rely on the wisdom of the Court to decide on possible participation in the proceedings by victims who have suffered harm only indirectly related to the charges brought against the accused or who invoke an interest not related to those charges in any way.

**4) May the victims participating at trial lead evidence pertaining to the guilt or innocence of the accused?**

22. In the context of this appeal, at issue is not the right of victims to lead evidence (to support their views and concerns, justify their intervention, prove the harm to them etc.), but their right to lead evidence pertaining to (or which may pertain to?) the guilt or innocence of the accused.

23. The role of victims participating in the proceedings is different from the role of the Prosecution and the Defence. They do not carry the burden of proving the guilt of the accused, and it is self-evident that in the Court's system, an accused should not be convicted solely on the basis of the evidence presented by victims. However, they do have an interest in seeing that at the end of the proceedings, the judicial truth corresponds to the historical truth. Although the punishment to be applied to the convicted person and the arrangements for the execution of the punishment are the sole preserve of the prosecutor, it is in the interests of the victims that justice is done, that those responsible for their suffering are identified and punished. It may also be in their interests that the actual people responsible are prosecuted and convicted, not an innocent scapegoat. When victims wish to participate in criminal proceedings, such concerns generally come first, even before obtaining reparations, and under article 68(3) of the Statute, it should be possible to set them out and examine them.

24. The interest of victims in participating in the proceedings before the Court to contribute to justice being served is acknowledged by the basic documents of the

Court.<sup>29</sup> It also forms part of the fundamental principles of international human rights law as identified *inter alia*, by the IACHR<sup>30</sup> and the ECHR.<sup>31</sup> It is fully consonant with the requirements of a fair and impartial trial and is neither prejudicial to nor inconsistent with the rights of the Defence. Furthermore, the possibility for victims to present evidence is also not inconsistent with the provisions of articles 69(3) and 74(2) of the Rome Statute,<sup>32</sup> insofar as such participation is supposed only to “*relate to the evidence and the issues the Chamber will be considering in its investigation of the charges brought against [the accused]*”.<sup>33</sup>

25. The documents of the Court indirectly grant victims the possibility of presenting evidence going to the guilt or innocence of the accused in two procedural forms, namely, within the context of presenting their views and concerns pursuant to

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<sup>29</sup>In particular, pursuant to article 65(4) of the Rome Statute, in the context of proceedings on an admission of guilt, the Trial Chamber may be of the opinion that a more complete presentation of the facts of the case is required “*in the interests of justice, in particular the interests of the victims*” and, hence, decide not to take account of the admission of guilt. Furthermore, pursuant to rule 93 read with rule 191 of the *Rules of Procedure and Evidence*, a Chamber may seek the views of victims *inter alia* in respect of the granting of an assurance to a witness or an expert pursuant to article 93(2) of the Statute “that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of the person from the requested State”. The fact that the *Rules of Procedure and Evidence* provide that victims may be heard with regard to such an assurance attests to the interest of victims that justice is done. See also the *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case* (Pre-Trial Chamber I), ICC-01/04-01/07-474, 13 May 2008, paras. 30-44.

<sup>30</sup> In its judgment in *Blake v. Guatemala*, the IACHR ruled, *inter alia*, that Article 8(1) of the American Convention [right to a fair trial] “recognizes the right of Mr. Nicholas Blake’s relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained”. See IACHR, *Blake v. Guatemala*, Judgment of 24 January 1998, para. 98, cited in document UN E/CN.4/2002/71, para. 29.

<sup>31</sup> In its judgment in *Kiliç v. Turkey*, the ECHR ruled that “[g]iven the fundamental importance of the right to protection of life, Article 13 [of the European Convention on Human Rights] requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life [...]”. See ECHR, *Kiliç v. Turkey*, Judgment of 28 March 2000, Application no. 22492/93, para. 91.

<sup>32</sup> Under article 69(3) of the Rome Statute, evidence submitted to the Trial Chamber must be “relevant to the case”. Under article 74(2) of the Rome Statute, the Trial Chamber’s decision “shall not exceed the facts and circumstances described in the charges and any amendments to the charges”.

<sup>33</sup> See the *Decision on victims’ participation*, *supra*, footnote **Error! Bookmark not defined.**, para. 97, p. 36 (emphasis added).

article 68(3) of the Rome Statute<sup>34</sup> on the one hand, and, on the other, through the questioning of witnesses, experts and the accused pursuant to rule 91(3) of the *Rules of Procedure and Evidence*.<sup>35</sup> Furthermore, under article 69(3) of the *Rome Statute*, the Chamber has the authority to request that victims submit all evidence that it considers necessary for the determination of the truth.<sup>36</sup> As to the appellants' argument that article 69(3) of the Rome Statute provides insufficient statutory and regulatory framework to enable the Chamber to request victims to submit evidence,<sup>37</sup> the Rome Statute even permits the Trial Chamber to order the presentation of relevant evidence concerning the victims for the purposes of sentencing pursuant to article 76 of the Rome Statute, in the same context as for the trial.<sup>38</sup>

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<sup>34</sup> Just as for the preparatory work governing the adoption of article 68 of the *Rome Statute* as examined *supra* [see footnote **Error! Bookmark not defined.**], the comments on the article also confirm that the wording of article 68(3) does not rule out the possibility for victims to submit to the Court any evidence to support their "views and concerns". In this sense, see DONAT-CATTIN (D.), "Article 68", in TRIFTERER (O), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 199, p. 880. Moreover, Pre-Trial Chamber I also acknowledged that the right of victims to be heard pursuant to article 68(3) of the *Rome Statute* implies the right to present views and concerns and the right to file relevant documents: see the *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, (Pre-Trial Chamber I), 17 January 2006, ICC-01/04-101, para. 71.

<sup>35</sup> In the absence of any explicit restriction in this respect, victims participating in the proceedings may question witnesses, experts and the accused, if the Chamber so authorises them. Victims are supposed to be authorised to ask any relevant questions in order to determine the bases of the criminal responsibility of the accused, and not solely questions pertaining to reparations, whenever their personal interests are affected by the evidence in question.

<sup>36</sup> Article 69(3) of the Rome Statute does not restrict the authority of the Chamber to request the submission of additional evidence solely to the parties, and such was never the intention of the drafters of the Statute. In this sense, see BEHRENS, H.-J., PIRAGOFF, D.K., "Article 69. Evidence", in TRIFFTERER, O. (ed.), *op. cit.*, pp. 891-892. It follows that the Trial Chamber has the authority to request the submission of *any* evidence necessary for the determination of the truth from *all of the participants in the proceedings*, including victims.

<sup>37</sup> Article 69(3) of the Rome Statute read in conjunction with article 68(3) which grants the Chamber alone the discretion to determine the modalities of victims' participation in the proceedings constitute a sufficient regulatory framework to allow the Trial Chamber to request the victims to submit any evidence necessary for the determination of the truth.

<sup>38</sup> For the purposes of sentencing pursuant to article 76 of the Rome Statute, the Trial Chamber must take into account the submissions and relevant evidence tendered throughout the trial, as set out in rule 145 of the *Rules of Procedure and Evidence*, which deals with, *inter alia*: (i) the harm caused to the victims and their families; (ii) the efforts by the person to compensate the victims; (iii) commission of the crime where the victim is particularly defenceless; (iv) commission of the crime with particular cruelty; and (v) the number of victims.

26. In her decision of 13 May 2008,<sup>39</sup> the Single Judge of Pre-Trial Chamber I confirmed that the issue of the guilt or innocence of the accused directly affects the victims:

35. As a result, the Single Judge considers that the issue of the guilt or innocence of persons prosecuted before this Court is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth.

27. The undersigned agree with the points made on this matter in that decision. Nevertheless, the issue appears, in part, to be the wrong one. The parties may indeed challenge any evidence presented by victims, and it is for the Chamber to ensure that the intervention of victims remains appropriate and that they do not take the place of the prosecutor (or the Defence). Furthermore, it will often be impossible to determine in advance whether a testimony or a document is such as to have an impact on the deliberations on guilt. Evidence presented by victims – where applicable, at the request of the Chamber pursuant to article 69(3) – even their statements alone, may influence those deliberations, regardless of the victims' intent – in the same way as evidence presented by the Defence may be used against it, or a prosecution witness may provide exculpatory evidence. The possible implications of the presentation of a piece of evidence cannot be judged *a posteriori* and at the end of the proceedings.<sup>40</sup>

### **5) Can the victims challenge the admissibility or relevance of other evidence?**

28. Rule 72(2) explicitly provides that, in certain circumstances, the victim **MUST** be heard in relation to the relevance or admissibility of evidence. That does not

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<sup>39</sup> *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case* (Pre-Trial Chamber I), ICC-01/04-01/07-474, 13 May 2008, paras. 30-44.

<sup>40</sup> The mere fact that a piece of evidence submitted by the victims can influence the debates could not make that evidence inadmissible, otherwise a victim would have to be prohibited from submitting his or her birth certificate, since that document could become a constituent element in the determination of the charges against the accused. Evidence relating to harm suffered by victims may show aggravating or mitigating circumstances for the accused: the conditions of a victim's enlistment in a militia and his or her participation in hostilities may, according to the circumstances, be considered by the Prosecutor to be incriminating evidence (forced enlistment accompanied by mistreatment), or by the Defence as exculpatory evidence (voluntary and enthusiastic enlistment with parental consent), but we fail to see how the evidence could be excluded from the debates on this ground, considering, in particular, the right bestowed on the Chamber by article 69(3).

mean, however, that this can make it possible to infer that victims could not challenge the admissibility of evidence in other circumstances – on the contrary.

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

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

30. Hence the Trial Chamber rightly considered that challenging the admissibility or relevance of a piece of evidence is not the sole preserve of the Prosecution and the Defence – particularly since it decided to apply, at least partially, regulation 56 of the *Regulations of the Court*.

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

**TO DISMISS THE APPEALS**

**[signed]**

**Luc Walley and Franck Mulenda (absent when signed)**

Dated this 21 May 2008

At Brussels