

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/08**

Date: **4 November 2009**

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elisabeth Odio-Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Public document

**Prosecution's Submission on whether the Chamber should adopt or depart from the
existing jurisprudence on victim's participation at trial**

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court*
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Introduction

1. During the status conference of 7 October 2009, Trial Chamber III (“the Chamber”) addressed the issue of the established jurisprudence of the Court on victim’s participation at trial. The Chamber requested the parties and participants to review the existing jurisprudence of the Trial Chambers on this issue and submit proposals on whether or not it should depart from that jurisprudence.¹ The Office of the Prosecutor (“the Prosecution”) respectfully submits its observations on the matter.

2. The Prosecution divides its submissions into two parts. First, the Prosecution will address those aspects of the existing jurisprudence that it does not dispute and which it proposes that the Chamber adopt; and second, it will address one limited procedure adopted by Trial Chamber I with which it disagrees.

Prosecution’s submission

I. Existing jurisprudence that the Prosecution requests the Chamber to adopt

Requirements of victims’ participation

3. The Prosecution will address three separate issues under this category, consistent with its characterization by Chambers of this Court. These categories are (i) the conditions for victims’ participation; (ii) criteria for the granting of victim status; and (iii) the requirements of demonstrating personal interests under Article 68(3) of the Statute.

4. In relation to the conditions for victims’ participation, the Appeals Chamber has established that participation will be granted if all of the following conditions are satisfied:

¹ ICC-01/05-01/08-T-14-ENG, p. 28, lines 16-28.

- a. The individual is a victim within the meaning of Rule 85 of the Rules of Procedure and Evidence (“the Rules”);
- b. The individual has personal interests affected by the proceedings at hand, i.e. by the legal or factual issues raised therein;
- c. The individual’s participation is appropriate;
- d. The manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²

5. In respect of victim status, the Chambers have established that in order for individuals to be granted the status of a victim under Rule 85(a) of the Rules:

- (i) The applicant must be a natural person;
- (ii) The applicant must have suffered harm;
- (iii) The crime from which the harm resulted must fall within the jurisdiction of the Court; and
- (iv) There must be a link between the crime and the harm.³

6. In its decision of 11 July 2008 in *Lubanga*, the Appeals Chamber recognized that material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim⁴ and that there may be harm that could be both personal and collective in nature.⁵

² “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation”, ICC-01/04-01/06 OA 9 and OA 10, 16 May, 2008, para. 36

³ See, for instance, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-01/04-01/07-578-Conf, 10 June 2008, para. 65.

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para.1.

⁵ *Ibid* at para. 35.

7. In relation to personal interests, the Appeals Chamber confirmed that an assessment will need to be made in each case as to whether the interests asserted by victims fall outside their personal interests and belong instead to the role assigned to the Prosecutor.⁶

8. The Appeals Chamber also held that for the purposes of participation in the trial proceedings, both the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Statute must be linked with the charges confirmed against the accused.⁷

Timing of victims' participation

9. The Appeals Chamber stated that Article 68(3) of the Statute correlates victim participation to "proceedings,"⁸ and the trial phase is an appropriate stage of the proceedings for victims to participate.

Modalities of victims' participation

a. Personal intervention of victims at hearings

10. Trial Chamber I in *Lubanga* held that Article 68(3) of the Statute establishes the statutory right for victims to present their views and concerns in person when their personal interests are affected, although the Court can determine that the legal

⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007, para. 28.

⁷ *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", ICC-01/04-01/06-1432, 11 July 2008, para. 2.

⁸ *Situation in DRC*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para. 45.

representatives should undertake this task on their behalf. The Chamber must ensure that any intervention by victims be conducted in a manner which is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial, particularly if a significant number are participating.⁹

b. Right to tender and examine evidence

11. The right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defence. Exceptionally, victims may tender and examine evidence if they satisfy the following criteria established by the Appeals Chamber and applied by Trial Chamber I: “(i) a discrete application by victims to that effect; (ii) notice to the parties; (iii) demonstration of personal interests that are affected by the specific proceedings; (iv) compliance with disclosure obligations and protection orders; (v) a determination of appropriateness; and (vi) consistency with the rights of the accused and a fair trial.”¹⁰

c. Access to records

12. The Trial Chamber in *Lubanga* found that because confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution’s investigations, there is a presumption that the legal representatives shall have access only to public filings, which they may share

⁹ *Prosecutor v. Thomas Lubanga Dyilo* “Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence during the Trial”, ICC-01/04-01/06-2002-Conf, 26 June 2009, para. 17.

¹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 104; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial”, [ICC-01/04-01/06-2032-Anx](#), 26 June 2009, para. 28-39.

with the victims they represent.¹¹ However, it recognized that if confidential filings were of material relevance to their personal interests, consideration shall be given to providing relevant victims with access to them, subject to other protective measures that need to remain in place.¹²

d. Participation of anonymous victims

The Trial Chamber in *Lubanga* accepted the possibility of participation of anonymous victims at the trial stage on an exceptional basis.¹³

Mechanisms for the exchange of information between the Prosecution and legal representatives of victims, including those representing victims with dual witness status

13. Trial Chamber I in *Lubanga* decided on the practicalities for the exchange of information between the parties and legal representatives of victims, including victims with dual status. The Prosecution requests the Chamber to adopt and follow those modalities.¹⁴

Treatment of victims authorized by the Pre-Trial Chamber to participate in the proceedings

14. Trial Chamber I considered in *Lubanga* that victims allowed to participate at the pre-trial stage of the case were provisionally admitted to participate at the trial stage pending a new decision on the Chamber on each individual application for

¹¹ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para. 106.

¹² *Ibid.*

¹³ *Ibid.* at para. 131.

¹⁴ ICC-01/04-01/06-1379

participation.¹⁵ On the other hand, Trial Chamber II in *Katanga and Ngudjolo* decided that the victims authorized by Pre-Trial Chamber I to participate in the proceedings are authorized to participate in the trial, without having to re-register their applications.¹⁶ The Prosecution requests that the Chamber follow the jurisprudence of Trial Chamber II, subject to the proviso that the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Statute be linked with the charges *confirmed* against the accused.¹⁷

II. Existing Jurisprudence that the Chamber should not adopt

15. The Prosecution requests that the Chamber depart from a limited aspect of the jurisprudence regulating modalities of contact with individuals enjoying dual status. Trial Chamber I determined that “if a person with dual status requests to contact the parties and participants, the VWU will facilitate the contact, which will not be revealed to other parties and participants.”¹⁸ The Prosecution suggests that the Chamber finds that the Prosecution may maintain direct contact with dual status persons rather than through the Victims and Witness Unit. The Prosecution is better placed to respond in timely manner to requests and concerns relating to contact by dual status persons. Direct contact will also facilitate the Prosecution’s discharge of its obligation to protect victims and witnesses pursuant to Article 68(1).

16. In relation to victim’s access to confidential records, Trial Chamber I determined in *Lubanga* that if confidential filings were of material relevance to their personal interests,

¹⁵ ICC-01/04-01/06-1119, para. 112

¹⁶ ICC-01/04-01/07-933-tENG, p.23.

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/06-1432, 11 July 2008, para. 2. Also, the Appeals Chamber found in *Lubanga* that Regulation 86(8) of the Regulations of the Court which provides that “a decision taken by a Chamber under Rule 89 shall apply throughout the proceedings in the same case” is confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation. See Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo” 13 February 2007, ICC-01/04-01/06-824, para. 43.

¹⁸ ICC-01/04-01/06-1379, para. 59(b).

consideration shall be given to providing relevant victims with access to them, subject to other protective measures that need to remain in place.¹⁹ In the Prosecution's view, access to confidential portions of the record by Legal Representatives should only be granted in highly exceptional situations when an applicant has established, on a case-by-case basis, a compelling case that the material in question directly affects his or her interests.²⁰ The Prosecution agrees however that, should access be granted on this exceptional basis, other protective measures should remain unaffected.

Conclusion

17. In light of the foregoing, the Prosecution requests that the Chamber adopt for the purpose of this trial, those aspects of the jurisprudence set out in Part I above and reject the limited aspect set out in Part II above.



Luis Moreno-Ocampo, Prosecutor

Dated this 4th day of November 2009

At The Hague, The Netherlands

¹⁹ ICC-01/04-01/06-1119, para. 106

²⁰ *Situation in Democratic Republic of the Congo*, "Prosecution's response to the "Request of the OPCV to access documents in the situation record related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06", [ICC-01/04-413](#), 8 November 2007, para. 3.