

**Cour
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**International
Criminal
Court**

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Date: 23 July 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

**on the appeals of The Prosecutor and The Defence against Trial Chamber I's
Decision on Victims' Participation of 18 January 2008**

Partly Dissenting Opinion of Judge Philippe Kirsch

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Ms Catherine Mabilie
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Legal Representatives of Victims
Mr Luc Walley
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REGISTRY

Registrar
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Partly Dissenting Opinion of Judge Philippe Kirsch

1. I agree with the judgment of the majority in relation to the first and second issues in this appeal. However, I dissent from the view of the majority in relation to the third issue on appeal, which was couched in the following terms:

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.

2. Unlike the majority, I answer the above question in the negative.

1. Leading evidence pertaining to guilt or innocence

3. The question raised is a narrow one. It does not call into question the ability of victims to be called by the Prosecutor as witnesses to give evidence against the accused as part of the prosecution case. It also does not affect the additional and significant number of rights that have been afforded expressly to victims under the legal instruments of the Court, of which the ability of victims to make representations to the Pre-Trial Chamber in relation to a request by the Prosecutor for the authorisation of an investigation¹ or to submit observations on the jurisdiction of the Court or the admissibility of a case² are but two important examples.

4. In its first part, the question on this appeal relates to the very different matter of victims themselves leading evidence relating to the guilt or innocence of the accused. Necessarily, such evidence would be additional to that presented by the parties (namely the Prosecutor and the Defence).

5. In my view, the leading of evidence on guilt or innocence belongs exclusively to the role assigned to the parties – and, more particularly in the context of evidence likely to be sought to be introduced by victims, to the Prosecutor.

¹ Article 15 (3) of the Rome Statute of the International Criminal Court (“the Statute”) and rules 50 (3) and (4) of the Rules of Procedure and Evidence (“the Rules”).

² Article 19 (3) of the Statute.

6. As made clear both in the majority judgment and in the partly dissenting opinion of Judge Pikis, it is the Prosecutor who is responsible, prior to trial, for initiating an investigation³ and investigating the crimes,⁴ submitting evidence for the purpose of applying for a warrant of arrest,⁵ formulating the charges on which it is intended to bring the person to trial,⁶ determining what evidence should be brought in relation to the charges at the hearing to confirm the charges,⁷ having specific disclosure obligations in relation to evidence⁸ and bearing the onus of proving the guilt of the accused.⁹

7. A number of obligations emanate from the responsibilities outlined above which are of relevance in the present context. Specifically, the scheme for the disclosure of evidence is set out in detail in several provisions of the Statute and the Rules. The Prosecutor may collect and examine evidence¹⁰ and is required, pursuant to article 54 (1) (a) of the Statute, to "investigate incriminating and exonerating circumstances equally".

8. Consistent with that general requirement, article 67 (2) of the Statute provides, in relevant part:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.

³ Article 53 of the Statute.

⁴ Article 54 of the Statute.

⁵ Article 58 of the Statute.

⁶ Article 61 of the Statute. It is for the Pre-Trial Chamber, pursuant to that article, to determine whether the charges should be confirmed and the person committed to a Trial Chamber for trial.

⁷ Article 61 (3) (b) of the Statute.

⁸ See, *inter alia*, articles 61 (3), 64 (3) (c) and 67 (2) of the Statute, and rules 76, 77, 81 and 82 of the Rules.

⁹ Article 66 (2) of the Statute.

¹⁰ Article 54 (3) (a) of the Statute.

9. Furthermore, prior to trial, the Trial Chamber shall provide for documents or information not previously disclosed¹¹ to be disclosed “sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”.¹²

10. The Rules provide further details of the disclosure obligations of the Prosecutor and the defence, which include the following provisions.

11. Pursuant to rule 76 (1), the Prosecutor is required to provide the defence with the names of, and copies of any prior statements made by, witnesses whom the Prosecutor intends to call to testify. Consistent with the provisions of article 64 (3) (c) of the Statute quoted above, this must be done, pursuant to the terms of rule 76 (1) “sufficiently in advance to enable the adequate preparation of the defence”.

12. Rule 77 obliges the Prosecutor to permit the defence to inspect, *inter alia*, any “objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial”. A similar provision relates to the defence, which is required to permit the Prosecutor to inspect objects in its possession or control “which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial”.¹³

13. In circumstances in which the defence is obliged to notify the Prosecutor of its intent to raise specific defences, it is required to do so sufficiently in advance to enable the Prosecutor to prepare adequately for trial and/or to respond.¹⁴

14. Restrictions on disclosure are also set out, in rule 81 of the Rules, with reference to the Prosecutor and the defence. Each party is entitled, in certain specifically defined circumstances, not to disclose certain material that would ordinarily be the subject of disclosure. In those circumstances, any such material and information may not

¹¹ Prior to the hearing which is held to decide whether the charges upon which the Prosecutor intends to seek trial should be confirmed, the person who is the subject of the hearing shall “be informed of the evidence on which the Prosecutor intends to rely at the hearing” (see article 61 (3) (b) of the Statute).

¹² Article 64 (3) (c) of the Statute.

¹³ Rule 78 of the Rules.

¹⁴ Rules 79 and 80 of the Rules

subsequently be introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the other party.

15. None of the above provisions relating to disclosure refer to any disclosure obligations on the part of victims. Given the specificity of these provisions, had it been the intention of the drafters of the relevant provisions to permit victims to lead evidence relating to guilt or innocence, this would have been stated expressly, and the provisions relating to the disclosure of evidence would have provided for disclosure by victims in such circumstances.

16. The specific provisions on disclosure set out above are designed to ensure the fairness of the proceedings. There are specific obligations upon the Prosecutor to disclose evidence of assistance to the defence; and there are provisions that enable both parties appropriately to prepare for trial. The fact that no requirements in relation to disclosure are placed upon victims indicates that it was not envisaged that victims would disclose, and thereafter lead, evidence relating to guilt or innocence.

17. Entirely consistent with the regime making provision for disclosure between the parties, are the provisions relating to the presentation of evidence at the trial itself.

18. In this context, article 69 (3) provides:

The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

19. It follows from the fact that it is the parties who disclose evidence relating to guilt or innocence that it is the parties who present such evidence at trial. The first sentence of article 69 (3) is unambiguous in that regard. It defines it as “the parties” who may submit evidence. The reference to the submission of evidence in the second sentence refers, in my view, to the ability of the Court to request the parties to submit all evidence that is necessary for the establishment of the truth.

20. Furthermore, article 69 (3) expressly refers to article 64. Significant in this context is article 64 (6) (d), which permits the Trial Chamber, as necessary, to:

Order the production of evidence in addition to that already collected prior to the trial or presented during the trial *by the parties*. (my emphasis)

21. Once again, the Statute is unambiguous in its reference to evidence at trial being presented by the parties – not by any other participant, such as the victims.

22. These provisions concerning leading evidence relating to guilt or innocence at trial contrast with the provisions that apply to reparations. For example, pursuant to article 75 (3) of the Statute, prior to making any order relating to reparations to victims, the Court may invite and shall take account of representations from or on behalf of, *inter alia*, victims. Pursuant to rule 94 (1) (g) of the Rules, a request of a victim for reparations shall contain, *inter alia*, to the extent possible, “any relevant supporting documentation, including names and addresses of witnesses”. This provision therefore explicitly foresees the leading of evidence by victims on reparations. The restrictions on victims questioning witnesses that apply to the legal representatives of victims at the trial do not apply to this aspect of the proceedings.¹⁵ In addition, a legal representative of the victims adversely affected by an order relating to reparations may appeal that order, under the provisions of article 82 (4) of the Statute. Conversely, I note that only the parties are permitted to appeal decisions concerning the guilt or innocence of the accused.¹⁶

23. My reading of the various provisions of the Statute and the Rules referred to above leads me to the conclusion that it was not the intention of the drafters that victims should lead evidence on guilt or innocence. In addition, determining that it is the parties that lead evidence on guilt or innocence, and not the victims, is consistent with the overall desire to ensure that proceedings at the ICC are both fair and expeditious.¹⁷

24. First, this conclusion results in the accused being faced by one Prosecutor, in accordance with the scheme of the Statute, rather than, potentially, multiple accusers. Significant in this context are the provisions of article 66 (2) of the Statute, making it clear that it is the Prosecutor who bears the onus of proving guilt at the trial, entailing the related responsibility to lead evidence as to guilt or innocence at trial.

¹⁵ See rules 91 (3) and (4) of the Rules.

¹⁶ See article 81 of the Statute.

¹⁷ See article 64 (2) of the Statute.

25. Second, the proceedings can take place in a streamlined fashion, ensuring that evidence on guilt and innocence emanates from the parties. The different roles played by the Prosecutor and the victims must be kept distinct if the proceedings are to run in an orderly fashion which best protects the interests of all parties and participants involved.

26. I note that the Trial Chamber itself, in granting leave to appeal, foresaw that the leading of evidence by victims on issues of guilt or innocence “may materially affect the content and the substance of the evidence introduced during the trial and its length, since this is likely to affect the nature and extent of the evidence called and the issues to be raised”.¹⁸

27. I recognise that the majority judgment states that the Trial Chamber did not create an unfettered right for victims to lead evidence, but rather left open “the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth”, pursuant to article 69 (3) of the Statute.¹⁹ Thereafter, if the Trial Chamber decides that the evidence should be presented, it could, according to the majority judgment, “rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence”.²⁰ I further acknowledge that the majority judgment opines that the Trial Chamber can ensure the fairness of the proceedings, by closely regulating the leading of evidence on guilt and innocence by victims in the manner set out in the judgment.²¹

28. Nevertheless, this fails to assuage my concerns, starting with the concern that this position is contrary to my reading of the statutory provisions, as set out above. In addition, once one accepts the principle that victims can lead evidence, applications by

¹⁸ *The Prosecutor v Thomas Lubanga Dyilo*, 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, 26 February 2008, paragraph 42.

¹⁹ See *The 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, paragraphs 98 and 99.

²⁰ *Ibid.*, at paragraph 100.

²¹ *Ibid.*, at paragraphs 98 to 100 and 104.

victims to take such a role could, understandably, be frequent and numerous. This invitation to victims to apply to lead evidence relating to guilt or innocence may slow down the proceedings considerably, leading to inefficiency and potential unfairness.

29. The role of the victims in the trial proceedings is specifically defined and is very different from the notion of leading evidence on guilt or innocence. Article 68 (3) of the Statute provides:

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.

30. Once they have established that their personal interests are affected, what victims are entitled to present are their “views and concerns”. On an ordinary understanding of those words, they do not equate to an ability to lead evidence on guilt. It would, in my view, be perfectly legitimate for victims to present their views and concerns in relation to the evidence submitted by the parties where it affects their personal interests. However, there is a sizeable difference between presenting views and concerns in relation to issues that arise at the trial that affect the personal interests of victims and presenting a prosecution case by leading additional evidence – independent of that led by the Prosecutor – on guilt.

31. I am also not persuaded by the interpretation given by the majority²² to rule 91 (3) of the Rules, which provides as follows:

- (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.
- (b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to

²² Ibid, at paragraph 102.



article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

32. Rule 91 (3) regulates the limited manner in which victims may be permitted to put questions to a witness. Far from lending support to the idea that victims should be permitted independently to lead evidence on guilt, it emphasises, in my view, the more limited role that was assigned to the victims during the course of a trial, when compared with that provided to the parties. Rule 91 falls within a subsection of the Rules relating specifically to the participation of victims in the proceedings. For the determination of the question at issue in the present appeal, I find it striking that there is no reference to victims leading evidence pertaining to guilt or innocence in rule 91 itself or within the section of the Rules in which it appears. On a matter of such fundamental importance, a provision to deal with this subject would have been expressly included, had it been the intention of the drafters for victims to lead such evidence.

2. *Challenging the admissibility or relevance of evidence*

33. I also answer the second part of this issue on appeal – namely whether it is possible for victims participating at trial to challenge the admissibility or relevance of evidence – in the negative.

34. Article 64 (9) of the Statute provides, in relevant part:

The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; ...

35. Whereas the Trial Chamber may rule on admissibility or relevance on its own motion, I note that the provision refers to applications relating to admissibility or relevance being made by *a party*. There is no reference to such applications being made by a participant, who, for the purposes of this appeal, would equate to a victim. Furthermore, I read the provisions of article 69 (4) of the Statute to relate to how the

Chamber would rule on the relevance or admissibility of any evidence, as opposed to who may make an application concerning relevance or admissibility.²³

36. Indeed, in line with my views above in relation to the leading of evidence on guilt or innocence, I would not regard it as appropriate for victims to be permitted routinely to challenge, for example, the relevance of evidence intended to be introduced by the accused. Equally, I would not regard it as appropriate for victims to challenge the admissibility of evidence – which relates, *inter alia*, to the probative value of evidence that a party seeks to introduce to establish its case on guilt or innocence.²⁴ Challenges to admissibility and relevance of evidence pertaining to guilt or innocence are for those who are entitled to lead such evidence – namely the parties.

37. I believe that the fact that specific provision is made, in rule 72 of the Rules, for a victim to be able to be heard in relation to the admissibility or relevance of evidence that a victim consented to an alleged crime of sexual violence and related matters, further indicates that where it is intended that a victim has a direct role to play in relation to the admissibility or relevance of evidence, specific provision is made to that effect. Rule 72 is, in my view, the separately regulated exception to the general rule, as set out above, that it is for the parties to challenge admissibility or relevance.

38. However, the fact that the victims are not routinely entitled to challenge the relevance or admissibility of evidence does not mean that they do not have any role to play when certain evidence that a party intends to admit into evidence could affect their personal interests. In such circumstances, under the ordinary terms of article 68 (3) of the Statute that I have addressed above, they could, where appropriate, present their views and concerns in relation to those personal interests. So, for example, in instances where a certain piece of evidence could affect the safety of a victim, that victim would be able to express that concern to the Trial Chamber, which could take any necessary measure as a result.

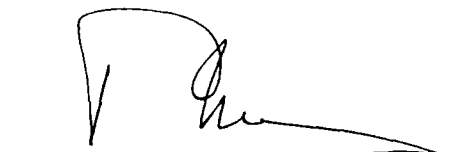
²³ Article 69 (4) of the Statute provides: “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.

²⁴ See article 69 (4) of the Statute.



39. I believe that this interpretation of the role of victims in relation to challenges to the admissibility and relevance of evidence respects the plain meaning of the statutory texts; the different roles assigned to the parties and the victims; and the ability of victims to express their views and concerns in relation to evidence where their personal interests are affected.

Done in both English and French, the English version being authoritative.



Judge Philippe Kirsch

Dated this 23rd day of July 2008

At The Hague, The Netherlands