

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

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APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public

Prosecution's 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"

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Introduction

1. The Prosecution hereby responds to the document entitled “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”, filed on 10 March 2008.
2. The first issue certified for this appeal concerns the notion of victim and whether it requires the existence of personal and direct harm. The second issue concerns the question whether the harm alleged by a victim and the concept of “personal interests” under Article 68(3) must be linked with the charges against an accused. The third issue concerns that manner in which victims may participate in trial proceedings and in particular whether it is possible for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.
3. The Prosecution opposes the Defence’s appeal on the first issue and submits that the Trial Chamber was correct in not excluding from the notion of victims pursuant to Rule 85(a) those persons who have suffered indirect harm as a result of the commission of a crime within the jurisdiction of the Court. Regarding the second and third issue, the Prosecution, having appealed the *Decision on the same issues*, does not oppose the Defence’s appeal.

Procedural background

1. On 29 and 30 October 2007, the Trial Chamber held a status conference which included discussion of the “role of victims in the proceedings leading up to, and during, the trial” and “common legal representation and the criteria for granting victims participating status”.¹
2. In preparation for the status conference, the legal representatives of victims filed a joint written submission on these issues on 28 September 2007,² followed by the Defence on 18 October 2007,³ and the Prosecution on 19 October 2007.⁴

¹ ICC-01/04-01/06-947, 5 September 2007; ICC-01/04-01/06-977, 9 October 2007; ICC-01/04-01/06-985, 17 October 2007.

² ICC-01/04-01/06-964, 28 September 2007. The legal representative of victims a/0001/06 to a/0003/06 filed a separate submission addressing the two additional issues added to the agenda of the October 29-30 Status Conference - ICC-01/04-01/06-992, 19 October 2007.

³ ICC-01/04-01/06-991, 18 October 2007.

⁴ ICC-01/04-01/06-993-Conf. This document was erroneously filed confidentially and was re-filed publicly on 23 October 2007, ICC-01/04-01/06-996 and ICC-01/04-01/06-996-Anx.

3. During the status conference, the Chamber granted leave to the OPCV to file written submissions on the issues discussed,⁵ which the OPCV filed on 9 November 2007.⁶
4. On 18 January 2008, the Trial Chamber rendered its “Decision on victims’ participation”.⁷
5. On 28 January 2008, the Prosecution and Defence sought leave to appeal the Decision.⁸
6. On 26 February 2008, the Trial Chamber granted the Defence’s applications for leave to appeal in part, certifying for appeal three of the issues for which the Defence had sought leave.⁹
7. On 10 March 2008, both the Prosecution and the Defence filed their respective Appeal Briefs on the Decision.¹⁰
8. The Prosecution hereby files its response to the Defence Appeal Brief pursuant to Regulation 65(5).

The Issues on Appeal and Existence of Overlapping Appeals

4. Out of the eight issues for which the Defence sought leave to appeal, leave was granted for three issues, namely:¹¹
 - “whether the notion of victim necessarily implies the existence of personal and direct harm” (“first issue”);
 - “whether 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 against the accused” (“second issue”); and
 - “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” (“third issue”).

⁵ ICC-01/04-01/06-T-58-ENG, 30 October 2007, p. 14.

⁶ ICC 01/04-01/06-1020, 9 November 2007.

⁷ ICC-01/04-01/06-1119, 18 January 2008 (“the Decision”).

⁸ ICC-01/04-01/06-1135 and ICC-01/04-01/06-1136, 28 January 2008.

⁹ ICC-01/04-01/06-1191 (“Decision Granting Leave”). The Prosecution also sought, and was granted, leave to appeal the second and third issue. The Trial Chamber rejected the Prosecution’s application for leave to appeal in relation to an additional issue.

¹⁰ ICC-04/01-06/01-1219 OA9, “Prosecution’s Document in Support of Appeal against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation”, 10 March 2008 (“Prosecution Appeal Brief”). ICC-04/01-06/01-1220 OA10, “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”, 10 March 2008 (“Defence Appeal Brief”).

¹¹ Decision Granting Leave, paras. 26-34, 38-43, 54.

5. The Prosecution will respond to the Defence's arguments on appeal relating to each issue separately.
6. Since the Prosecution was also granted leave to appeal against the Decision in respect of the second and the third issue,¹² the Prosecution requests that the Appeals Chamber consider treating the Prosecution appeal and the current appeal jointly, and entering a consolidated and comprehensive judgement. Such an approach would assist all parties and participants.

The first issue – whether the notion of victim necessarily implies the existence of personal and direct harm

7. The Trial Chamber found that for the purposes of Rule 85(a), “people can be the direct or indirect victims of a crime within the jurisdiction of the Court”.¹³ While the Trial Chamber did not further elaborate on the concepts of “direct” or “indirect” victim, it clarified that in this context it had considered, *inter alia*, Principle 8 of the Basic Principles,¹⁴ which states that “a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights”.¹⁵
8. The Defence challenges these conclusions and submits that the notion of victim pursuant to Rule 85 necessarily implies that a person suffered both personal and direct harm as a result of a crime within the jurisdiction of the Court.¹⁶
9. As far as the issue of “personal harm” is concerned, the Prosecution submits that at no point in time did the Trial Chamber find that a person who had not personally suffered harm as a result of a crime within the jurisdiction of the Court could be considered for the purposes of Rule 85. To the contrary, the Trial Chamber ruled that for the purposes of its determination it would “consider if there is evidence ... that *the applicant suffered any*

¹² Decision Granting Leave, pp. 6 and 15.

¹³ Decision, para. 91. See also Decision, para. 97: “The crimes under the Chamber's jurisdiction, as international crimes, may have many and various consequences for victims, of a direct and an indirect nature.”

¹⁴ 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 UN General Assembly as Resolution 60/147, 16 December 2005) (“Basic Principles”). See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by the UN General Assembly as Resolution 40/34 of 29 November 1985) (“Victims Declaration”). The quoted parts of the definition of victim remain the same in both in the Basic Principles and the Victims Declaration.

¹⁵ Decision, para. 92.

¹⁶ Defence Appeal Brief, paras. 13-32.

harm as a result of the commission of a crime within the jurisdiction of the Court”.¹⁷ Hence, the Defence’s arguments to the effect that Rule 85 requires proof of a personal character of the harm in question do not relate to any alleged error in the Decision and must accordingly be rejected.¹⁸

10. Concerning the issue of “direct harm”, the Prosecution submits that the Trial Chamber was correct not to generally exclude from the notion of “victim” in Rule 85(a) those persons who were not the direct targets of a crime, but who suffered indirect harm as a result of the commission of a crime within the jurisdiction of the Court.¹⁹ The Prosecution further notes that according to the consistent practice of Pre-Trial Chamber I,²⁰ and Pre-Trial Chamber II,²¹ persons who have indirectly suffered harm as a result of a crime within the jurisdiction of the Court may be considered victims under Rule 85 on the basis of their own suffering.²²

¹⁷ Decision, para. 90 (emphasis added). The Trial Chamber’s reference to collective harm, as opposed to individual harm (Decision, para. 92) must be interpreted in light of this ruling and does therefore not detract from the need of an applicant to show that he or she personally suffered harm as a result of the commission of a crime.

¹⁸ Defence Appeal Brief, paras. 17-24. In this context, the Prosecution also points out that the Defence’s arguments regarding the personal interests of victims relate to the exercise of the victims’ participatory rights under Article 68(3), and not to the notion of victim pursuant to Rule 85.

¹⁹ It has been suggested that the concept of “indirect victims” within the meaning of the Basic Principles includes “immediate family or dependants of the direct victim”, as referred to in Principles 8 of the Basic Principles (See Bassiouni, *International Recognition of Victims’ Rights*, in Human Rights Law Review, (Oxford University Press, 203, 2006) (“Bassiouni”), p. 24; see also Rombouts and Vandeginste, *Reparation for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim*, Third World Legal Stud. 89 (2000-2003), (“Rombouts and Vandeginste”), p. 94 and footnote 19.

“Direct victim” has been defined as “an individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act.” (Pennsylvania Statute, Crime Victims Act, 18 January 2005, § 11.103).

²⁰ See for instance *Situation in the DRC*, ICC-01/04-423, 24 December 2007, paras. 51, 53, 61, 67, 69, 77, 93, 95, 99, 103, 116, 120, 124, 126, 128 and 130. Note that the defence appealed this decision on the issue of “whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant’s relationship with this person”. The Defence did not appeal the fact that the Pre-Trial Chamber recognised persons as victims pursuant to Rule 85 based on the moral harm suffered as a consequence of a crime committed against another person (*Situation in the DRC*, ICC-01/04-455 OA5, 18 February 2008). See also *Situation in Darfur*, ICC-02/05-111-Corr, 14 December 2007, where the Pre-Trial Chamber found that “family members affected by the disappearance could be considered victims under the Statute, the Rules and the Regulations, provided that they meet all the necessary criteria” (para. 35). See further *Prosecutor v Lubanga*, ICC-01/04-01/06-228-tEN 16 August 2006.

²¹ *Situation in Uganda*, ICC-02/04-101, 10 August 2007. The Single Judge of the Pre-Trial Chamber acknowledged emotional harm caused by the loss of family members to fall within the scope of Rule 85 (see for example para. 60). See also *Situation in Uganda*, ICC-02/04-125, 14 March 2008, para. 65.

²² This view is widely supported by commentators. See for instance Bassiouni, p. 19. See also Donat-Cattin, *The Rights of Victims and International Criminal Justice*, in ELSA (ed.), *International Law as We Enter the 21st Century* (Berlin: Arno Spitz, 2001), p. 186; Stahn, Olásolo & Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, (2006) 4 *J. Int’l Crim. Just.*, p. 232. See further Victims Before the International Criminal Court, a Guide for Victims, their Legal Representatives and NGOs, Chamber IV: Participation (FIDH), p. 13.

11. The Defence seeks support in Judge Blattmann's Separate and Dissenting Opinion, where it is pointed out that the negotiating history of Rule 85 shows that the Basic Principles were not incorporated into the Rules of Procedure and Evidence on a wholesale basis.²³ The negotiating history indeed shows that the definition of victim, especially with respect to persons suffering indirect harm, was an intensively discussed topic and that in the absence of an agreement, the decision as to what groups of persons should be included in the definition was finally left for the Court to decide.²⁴ However, no category of victims was excluded from the outset from the purview of Rule 85, nor does anything in the negotiating history indicate that the Basic Principles were *rejected* by the drafters of the Rules in such a manner that would bar the Court from even considering them in its judicial determinations. In this context, the Prosecution submits that the fact that the Trial Chamber gave some weight to the Basic Principles in its analysis of the elements of Rule 85 cannot invalidate the Decision.
12. In light of the above, the Prosecution submits that it should be left to a Chamber to assess on a case-by-case basis the degree of proximity of a victim to the source of victimisation (i.e. the crime or crimes), and to determine whether in the circumstances of the instant case, the appropriate threshold of victimisation is met for a person to be considered a victim within the terms of Rule 85.²⁵ When conducting this examination, the Trial Chamber may find that there are degrees of indirect victimisation that fall outside the proper scope of Rule 85, but which are nevertheless covered by the provisions pertaining to reparation for victims.²⁶ The Trial Chamber's Decision correctly allows for these case-by-case determinations, and accordingly should not be overturned by the Appeals Chamber.

²³ *Prosecutor v Lubanga*, ICC-04/01-06/01-1119, Separate and Dissenting Opinion of Judge Blattmann, 18 January 2008, para. 4 ("Separate Opinion of Judge Blattmann").

²⁴ Birte Timm, *The Legal Position of Victims in the Rules of Procedure and Evidence*, in International and National Prosecution of Crimes Under International Law, *Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht*, 44 (2001), pp. 290-291. See also Fernández de Gurmendi, "Definition of Victims" in Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 428-433.

²⁵ This may apply to all forms of victimisation referred to in Principles 8 of the Basic Principle, namely to individual or collective suffering, as well as to physical, mental or emotional suffering and economic loss or substantial impairment of a victim's fundamental rights. With respect to the assessment of harm, see for instance Situation in the DRC, ICC-01/04-111-tEN-Corr, 22 March 2006, para. 81.

²⁶ The language in Article 75(1) indicating that reparations shall be made not only to victims, but also *in respect of* victims, extends the scope of application of Article 75 to indirect victims (see David Donat-Cattin, *Article 75: Reparations to victims*, in Commentary on the Rome Statute of the International Criminal Court (Otto Triffterer ed., 1999), p. 969). See also the Regulations of the Trust Fund for Victims (ICC-ASP/4/Res.3), in particular Regulations 46 and 48, which distinguish between "victims as defined in rule 85" on the one hand and "their families, affected directly or indirectly by the crimes" and "their families, who have suffered physical, psychological and/or material harm as a result of these crime" on the other hand.

13. For these reasons, the Prosecution opposes the Defence's appeal on the first issue.

The second issue – whether the harm alleged by a victim and the concept of ‘personal interests’ under Article 68(3) must be linked with the charges against the accused

14. The Defence submits that the Trial Chamber erred by dissociating the application of Rule 85 and the requirement of “personal interests” from the charges.²⁷ In particular, the Defence argues that the charges confirmed by the Pre-Trial Chamber constitute the temporal, geographical and personal limitations to the jurisdiction of the Trial Chamber;²⁸ that the harm alleged by a victim as well as his or her personal interests must be linked with the charges;²⁹ and that the Decision has the potential to adversely impact on the fair and expeditious conduct of the trial.³⁰
15. The Prosecution notes that it also appealed against the Decision in respect of this issue on similar grounds,³¹ and therefore the Prosecution does not oppose the Defence's appeal on the second issue.³²

The third issue – 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

16. The Defence submits that the Trial Chamber erred by holding that victims may present evidence relating to the guilt or innocence of the accused and by permitting victims to challenge the admissibility or relevance of evidence.³³ In particular, the Defence argues that the right to present evidence relating to the guilt or innocence rest with the parties,³⁴ that the presentation of views and concerns does not include introducing evidence relating

²⁷ Defence Appeal Brief, paras. 33-39. See also Prosecution Appeal Brief, paras. 11-18.

²⁸ Defence Appeal Brief, para. 36. See also Prosecution Appeal Brief, paras. 15-16.

²⁹ Defence Appeal Brief, paras. 36-38. See also Prosecution Appeal Brief, paras. 15-18 and 19-21.

³⁰ Defence Appeal Brief, para. 39. See also Prosecution Appeal Brief, paras. 14 and 24-26.

³¹ Prosecution Appeal Brief, paras. 11-26.

³² In this context, the Prosecution also point out the most recent decision of the Single Judge of Pre-Trial Chamber II: *Situation in Uganda*, ICC-02/04-125, 14 March 2008, para. 10.

³³ Defence Appeal Brief, paras. 40-51. See also Prosecution Appeal Brief, paras. 27-50.

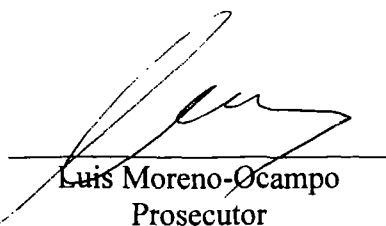
³⁴ Defence Appeal Brief, paras. 46-47. See also Prosecution Appeal Brief, paras. 29-34.

to the guilt or innocence;³⁵ and that the victims' role should be limited to their personal interests and should not be confused with the role of the Prosecutor.³⁶

17. The Prosecution also appealed against the Decision in respect of this issue. While it thus does not oppose the Defence's appeal in respect of the third issue, it does not agree with every argument raised by the Defence. In particular, the Prosecution disagrees with the Defence that the findings of the Trial Chamber with respect to anonymous victims are relevant in this context.³⁷ The Trial Chamber stated that when deciding on an application for anonymous victims, it will exercise "extreme care" and that their participation "cannot be allowed to undermine the fundamental guarantee of a fair trial". The Trial Chamber further found that "[t]he greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself".³⁸ Therefore, the Decision on its face does not appear to permit anonymous victims to present evidence against the accused or to challenge the admissibility or relevance of evidence.

Relief Sought

9. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber:
- a. dismiss the appeal in respect to the first issue; and
 - b. grant the appeal and reverse the Decision in respect of the second and the third issue.



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Prosecutor

Dated this 19th day of March 2008
At The Hague, The Netherlands

³⁵ Defence Appeal Brief, paras. 44-45. See also Prosecution Appeal Brief, paras. 35-39.

³⁶ Defence Appeal Brief, paras. 48-49. See also Prosecution Appeal Brief, paras. 27, 31, 41 and 43; see further paras. 19-22.

³⁷ Defence Appeal Brief, para. 51. Decision paras. 130-131. The Prosecution notes that the Defence's request seeking leave to appeal the Decision on the issue of whether anonymous victims should be allowed to participate in the proceedings was refused by the Trial Chamber (Decision Granting Leave, paras. 35-37).

³⁸ Decision, para. 131.