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Date: 30 May 2008

THE APPEALS CHAMBER

Before: Judge Navi 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
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Document

**Prosecution's Response to the "Observations des victimes quant aux appels du
Procureur et de la Défense contre la décision du 18 janvier 2008"**

Source: Office of the Prosecutor

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

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Introduction

The legal representatives of victims participating in the case of *The Prosecutor v Lubanga* have been granted permission to present their views and concerns on the issues in this appeal, which concerns three issues relating to the participation of victims in the trial.

The Prosecution agrees with the legal representatives of victims that Rule 85 requires that the victims have personally suffered harm, but that such harm need not necessarily be physical. Rather, the degree of proximity required between the applicant and the crime must be assessed on a case-by-case basis.

The Prosecution further submits that in the context of a trial, the scope of the proceedings and the authority of the Chamber are defined by the charges against the accused. The participation of victims, and the application of Rule 85 and Article 68(3), must be seen through this lens. The Trial Chamber may not make determinations of whether a person is a victim in relation to harm that goes beyond the scope of the case, or whether their personal interests are affected by considerations outside of the charges. Entering into such determinations would not conform with the conduct of efficient, expeditious and focussed trial proceedings.

The Prosecution finally submits that victims may not present evidence pertaining to the guilt or innocence of the accused. As the Appeals Chamber has previously held, the assessment of the interests of the victims must ensure that the interests asserted are not confused with the role of the Prosecutor. The presentation of evidence relating to the guilt or innocence of the accused lies with the parties, and the burden of proving the case is the sole function of the Prosecution. In addition, under Article 68(3) victims may only present their “views and concerns”; not evidence. Thus in relation to evidence, victims may only present their views and concerns regarding the admissibility of a given piece of evidence, if its admission would impact on their personal interests.

Procedural background

1. On 18 January 2008, the Trial Chamber rendered its “Decision on victims’ participation”,¹ which the Prosecution and Defence sought leave to appeal.²
2. On 26 February 2008, the Trial Chamber granted the applications for leave to appeal in part, certifying for appeal three of the issues raised.³
3. On 10 March 2008, the Prosecution⁴ and the Defence⁵ filed their documents in support of appeal. The Prosecution filed its response on 19 March 2008.⁶
4. On 12 March 2008, the legal representative of victims a/0001/06, a/0002/06 and a/0003/06 applied to participate in the appeals by the Prosecution and Defence against the Decision.⁷
5. On 18 March 2008, the Office of Public Counsel for Victims filed a request to participate in the appeals on behalf of unspecified “applicants”;⁸ and on 21 March 2008, the legal representatives of applicants a/0009/06, a/0106/06, a/0107/06, a/0108/06 and a/0109/06 also filed a request to participate in the appeals.⁹
6. Pursuant to an order of the Appeals Chamber,¹⁰ the Prosecution¹¹ and the Defence¹² responded to the victims’ applications to participate in the appeals on 7 April 2008. The Prosecution did not oppose the participation of victims a/0001/06, a/0002/06 and a/0003/06, who had already been granted the right to participate in

¹ ICC-01/04-01/06-1119, 18 January 2008 (“the Decision”). For the background to the proceedings leading up to the issuance of the Decision, see ICC-01/04-01/06-1219 OA9, 10 March 2008, paras. 1-3.

² ICC-01/04-01/06-1135 and ICC-01/04-01/06-1136, 28 January 2008.

³ ICC-01/04-01/06-1191 (“Decision Granting Leave”). The Defence was granted leave to appeal (1) whether the notion of victim necessarily implies the existence of personal and direct harm (“the first issue”). In addition, both the Prosecution and the Defence were granted leave to appeal the issues of (2) whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused (“the second issue”); and (3) whether victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of evidence (“the third issue”).

⁴ ICC-01/04-01/06-1219 OA9 (hereinafter “Prosecution Appeal Brief”).

⁵ ICC-01/04-01/06-1220 OA10.

⁶ ICC-01/04-01/06-1233 OA10 (hereinafter “Prosecution Response to Appeal”).

⁷ ICC-01/04-01/06-1222 OA9 OA10.

⁸ ICC-01/04-01/06-1228 OA9 OA10.

⁹ ICC-01/04-01/06-1241 OA9-OA10. The cover page of this application refers only to four of the applicants, however the substance of the application (paras. 1 and 5) refer to all five.

¹⁰ ICC-01/04-01/06-1239 OA9 OA10, 20 March 2008.

¹¹ ICC-01/04-01/06-1266 OA9 OA10.

¹² ICC-01/04-01/06-1264-tENG OA9 OA10.

this case, however it opposed the participation of other applicants who had not been granted such rights in this case.

7. On 16 May 2008, the Appeals Chamber ruled that victims a/0001/06, a/0002/06 and a/0003/06 may participate in the appeal, but rejected the other applications.¹³ The participating victims were authorised to submit their views and concerns regarding their personal interests in the issues raised in the appeal by 23 May 2008. The Prosecution and Defence were permitted to respond by 30 May 2008.
8. The legal representatives of victims a/0001/06, a/0002/06 and a/0003/06 filed their views and concerns on 22 May 2008,¹⁴ in which they address five issues:
 - Whether the notion of victim necessarily implies the existence of personal harm (“the First Issue”);
 - Whether the notion of victim necessarily implies the existence of direct harm (“the Second Issue”);
 - Whether the harm alleged by a victim and the concept of “personal interests” under Article 68 must be linked with the charges against the accused (“the Third Issue”);
 - Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused (“the Fourth Issue”); and
 - Whether victims can challenge the admissibility or relevance of other evidence (“the Fifth Issue”).
9. The Prosecution hereby files its response to the Victims’ Observations, pursuant to the Appeals Chamber’s Order.

¹³ ICC-01/04-01/06-1335 OA9 OA10 (hereinafter “Appeals Chamber’s Order”). Judge Pikis filed a Separate Opinion on 20 April 2008 (ICC-01/04-01/06-1335-Anx OA9 OA10).

¹⁴ ICC-01/04-01/06-1345-tENG OA9 OA10 (hereinafter “Victims’ Observations”).

Scope of the Victims' Observations

10. The Appeals Chamber's Order "limit[ed] the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings."¹⁵
11. The Victims' Observations are directed towards the issues raised in this appeal. However the Prosecution notes that the Observations constitute largely legal submissions regarding the correctness of the Decision and the merits of the Appeal, albeit in relation to aspects which affect the interests of the victims, rather than a presentation of the views and concerns of the victims regarding how their interests are affected by the proceedings.

The First and Second Issues – whether the notion of victim necessarily implies the existence of personal and direct harm

12. The First and Second Issues raised by the legal representative address the first ground of appeal raised by the Defence. The Prosecution opposed this ground of appeal.
13. As noted by the legal representatives, "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."¹⁶
14. The Prosecution agrees, recalling its submission that "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." As such, "it should be left to a Chamber to assess on a case-by-case basis the degree

¹⁵ Appeals Chamber's Order, para. 50.

¹⁶ Victims' Observations, para. 13. The legal representatives refer to the jurisprudence of the Inter-American Court of Human Rights, which recognises that family members or direct dependents of the immediate victim may also be granted victim status in so far as they can demonstrate harm of their own (para. 14).

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.”¹⁷

The Third Issue – whether the harm alleged by a victim and the concept of “personal interests” must be linked with the charges against the accused

15. The legal representatives recall that the harm which the victims have suffered is directly linked with the charges against the accused.¹⁸ The Prosecution submits that, as is the case in this instance, the participation of victims must be linked with the parameters set out in the charges. Those charges define the limits of the Trial Chamber’s jurisdiction, including the power to rule on the harm which a victim claims to have suffered.¹⁹ Ruling on claims of harm outside of the scope of the charges, and admitting additional participants with no link to the charges, would exceed the competence of the Chamber and would also be inconsistent with the conduct of focussed and efficient proceedings.
16. The legal representatives discuss how the personal interests of the victims are correlated with the charges against the accused.²⁰ As the Prosecution has argued, “once a criminal case is brought against a person, the proper determination of personal interests for the purposes of victim participation requires a showing that the applicant’s personal interests are affected in connection to the charges, which

¹⁷ Prosecution Response to Appeal, paras 10, 12. The legal representatives note (Victims’ Observations, para. 8) that the Statute and the Rules encourage the joint representation of victims in order to facilitate their participation in proceedings (Rule 90), and that the Victims’ Trust Fund may award collective reparations. However the Prosecution does not consider that these provisions indicate that any member of a group which has suffered harm will itself constitute mental suffering and qualify each member as a victim within the meaning of Rule 85 (as suggested in Victims’ Observations, para. 9). Prosecution reiterates that the degree of proximity between the victim-applicant and the relevant crime must be carefully assessed on a case-by-case basis.

¹⁸ Victims’ Observations, para. 20.

¹⁹ Prosecution Appeal Brief, paras. 15-17. See further Decision, Separate and Dissenting Opinion of Judge Blattmann, paras. 7-17.

²⁰ Victims’ Observations, para. 20.

form the subject-matter of the proceedings in which he or she seeks to participate.”²¹

17. The Prosecution does not dispute that the personal interests of these victims may be affected by various issues or procedures during the present case. Consistent with the recent Appeals Chamber’s Order, the views and concerns presented by the victims in the context of the trial should be limited to the extent that their personal interests are affected by the proceedings.²²
18. However the Prosecution submits that the victims do not have a personal interest in the establishment of the charges.²³ The Appeals Chamber has previously ruled that in the context of applications by victims to participate in proceedings, an assessment will need to be made in each case as to “whether the interests asserted by victims, do not in fact, fall outside the personal interest and belong instead to the role assigned to the Prosecutor”.²⁴ The legal representatives themselves recognise that the role of victims is different to that of the Prosecutor.²⁵
19. It is the Prosecution that has the responsibility “to establish the truth” and “investigate incriminating and exonerating circumstances equally”,²⁶ and alone bears the burden of proving the cases which it prosecutes.²⁷ While victims have a general interest in the determination of the truth in relation to the charges, such interests cannot be interpreted or applied in such a way that confuses them with the role of the Prosecutor. Thus any general interests in the proof of the case, or the conviction of the accused,²⁸ do not constitute a “personal interest” within the meaning of Article 68(3) and cannot alone serve as a foundation for victim participation.²⁹ to grant victims the claimed personal interest in convictions,³⁰ and

²¹ Prosecution Appeal Brief, para. 18.

²² ICC-01/04-01/06-1335 OA9 OA10, 16 May 2008, para. 50.

²³ Contrast with Victims’ Observations, para. 20, see also para. 23. See further, Prosecution Appeal Brief, paras. 19-22.

²⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

²⁵ Victims’ Observations, para. 23 – “The role of victims participating in the proceedings is different from the role of the Prosecution and the Defence.”

²⁶ Article 54(1)(a).

²⁷ Article 66(2).

²⁸ Victims’ Observations, para. 20 – “the victims have a personal interest in the charges being declared established”; see also para. 23.

²⁹ See further Prosecution Appeal Brief, para. 21.

allow participation to this end, would not respect the distinct roles of victim and Prosecutor which the legal representatives themselves recognise.³¹

The Fourth Issue – whether victims participating in the trial may lead evidence relating to the guilt or innocence of the accused

20. As outlined above, the Prosecution submits that whereas victims may have a general interest in the identification and punishment of those responsible for their harm, this does not constitute a personal interest, within the meaning of Article 68(3), in such identification and punishment – such general interest does not suffice to found participation by victims. Thus participation based on such interests, in particular presenting evidence pertaining to the guilt or innocence of the accused,³² falls outside the scope of Article 68(3). Indeed, even where a Chamber had expressly endorsed the rights of victims to the truth and to justice,³³ victims were still denied any autonomous right to propose the introduction of evidence at that stage.³⁴
21. The legal representatives themselves recognise that the role of victims is different to that of the Prosecutor.³⁵ The core of the Prosecutor's role under Article 54 is the conduct of impartial investigations, including incriminating and exonerating circumstances; and the presentation of the case, including the disclosure of potentially exculpatory evidence to the accused. Arguing that victims may be

³⁰ Victims' Observations, para. 20 – "the victims have a personal interest in the charges being declared established"; see also para. 23.

³¹ Victims' Observations, para. 23: "The role of victims participating in the proceedings is different from the role of the Prosecution and the Defence."

³² The Prosecution notes that the legal representatives argue that this issue is limited to evidence tendered for the purposes of determination of guilt or innocence, rather than evidence tendered by the victims for other purposes (Victims' Observations, para. 22). The Prosecution submits that the victims do not have a right to tender evidence, within the meaning of Article 69. Article 69 covers the submission of "evidence relevant to the case" (Article 69(3)). Even if victims are required to present material to substantiate their interventions, this does not constitute "evidence", and cannot be considered by the Trial Chamber in its decision on guilt or innocence under Article 74. Therefore the Prosecution submits that the legal representatives' arguments regarding the impossibility of knowing ahead of time whether an item will ultimately pertain to the guilt or innocence of the accused (Victims' Observations, para. 27) are irrelevant, as no material presented by the victims during the trial may be considered, as "evidence", in the determination of guilt or innocence.

³³ On which the legal representatives rely - Victims' Observations, para. 26.

³⁴ i.e. during the confirmation hearing - *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-474, 13 May 2008, paras. 98-113.

³⁵ Victims' Observations, para. 23.

permitted to present evidence going to guilt or innocence thus fundamentally undermines the distinction between their proper role and that of the Prosecution and defence.

22. As the Prosecution has already demonstrated, the submission of evidence pertaining to guilt or innocence is limited, under the system established by the Statute and the Rules, to the parties.³⁶ Article 69(3) expressly recognises that evidence is presented by the parties,³⁷ and it is within the context of this system that it empowers the Chamber to request the presentation of evidence. Such a request could only be made to those who are able to present evidence, i.e. the parties. Therefore, contrary to the legal representatives' arguments,³⁸ it does not form a procedural basis for the submission of evidence pertaining to guilt or innocence by victims.³⁹
23. Further, the Prosecution challenges the legal representatives' assertion that Article 68(3) indirectly provides them with the right to submit evidence pertaining to guilt or innocence.⁴⁰ Victims are permitted, pursuant to that article, to present their "views and concerns". This has been described as "a highly qualified form of participation limited to the voicing of their views and concerns", with Judge Pikis going on to clarify that victims may not "proffer or advance anything other than their 'views and concerns'."⁴¹ Nothing in the ordinary meaning of "views and concerns",⁴² or in the context or object and purpose of Article 68(3),⁴³ indicates that this must be read so as to include the right to submit evidence pertaining to guilt or innocence.

³⁶ Prosecution Appeal Brief, paras. 30-34; see in particular paras. 31-32 and authorities cited therein.

³⁷ "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" (emphasis added).

³⁸ Victims' Observations, para. 25.

³⁹ See further Prosecution Appeal Brief, paras. 40-46; see in particular paras. 44-45.

⁴⁰ Victims' Observations, para. 25.

⁴¹ *Prosecutor v Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, para. 15.

⁴² Prosecution Appeal Brief, paras. 35-36.

⁴³ Prosecution Appeal Brief, para. 36. As the Appeals Chamber has confirmed, the Statute is to be interpreted, pursuant to the *Vienna Convention on the Law of Treaties*, "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 33). In addition, consistent with Article 32 of the *Vienna Convention on the Law of Treaties*, this interpretation is further confirmed by the drafting history of the Statute – see Prosecution Appeal Brief, para. 37.

24. The additional context provided by the Rules of Procedure and Evidence further supports this conclusion. Rule 91(3) creates an express and clearly defined right for victims, through their legal representatives, to present their views and concerns by posing questions to a witness.⁴⁴ The fact that such an express power is required, and that it is subject to a carefully regulated procedure, further demonstrates that Article 68(3) can not itself contain a broad and unregulated power to submit evidence relating to guilt or innocence.⁴⁵
25. Finally, the requirement for the Chamber to take into consideration, for the purposes of sentencing, a variety of factors regarding the victims and the harm caused provides no support for the legal representatives' submissions.⁴⁶ Nothing in Article 76 or Rule 145 grants victims a right to present evidence: Rule 145 only refer to the factors to be considered; Article 76 refers to evidence presented during the trial, which the Statute only contemplates by the parties,⁴⁷ and also submissions made; and the only indirect reference to victims is through the reference to representations regarding reparations being made at the same time. Indeed, the distinction between "representations" regarding reparations⁴⁸ and "evidence or submissions relevant to sentence"⁴⁹ underscores the difference between the roles of the parties and victims regarding the ability to present evidence.

**The Fifth Issue – whether victims participating in the trial may challenge the
admissibility or relevance of evidence**

26. In relation to the Fifth Issue, the Prosecution largely concurs with the views and concerns presented by the legal representatives.

⁴⁴ The Prosecution submits that, pursuant to Article 68(3), such questions would have to relate to the personal interests of the victims.

⁴⁵ See further Prosecution Appeal Brief, paras. 38-39.

⁴⁶ Victims' Observations, para. 25.

⁴⁷ Furthermore, the opportunity to make such additional submissions or present additional evidence for the purposes of sentence can be requested by the Prosecution or the accused, or granted by the Trial Chamber on its own motion (Article 76(2)); no mention is made of victims.

⁴⁸ Article 75(3), 76(3).

⁴⁹ Article 76(2), see also (1).

27. The examples provided by the legal representatives to demonstrate that victims may need to be heard in relation to evidence essentially identify specific instances in which the admission of a given item of evidence may impact on the personal interests of the victims.⁵⁰ The Prosecution has already recognised that in such situations, “[i]f an issue of evidence relates to the personal interests of victims, then it may be appropriate for the victims to present their views and concerns regarding that issue.”⁵¹
28. In this regard, the discussion of the admissibility of evidence is not monopolised by the parties if it relates to evidence which affects the personal interests of a victim.⁵² However the examples presented by the legal representatives also do not support a general right of victims to make submissions or challenges regarding the admissibility and relevance of every piece of evidence.
29. The Prosecution further submits that the generic possibility that an item of evidence may have consequences for a claim for reparations⁵³ does not support or justify a general right to challenge the admissibility or relevance of any piece of evidence. Such a right might exist to the extent that a Trial Chamber chose to examine a given piece of evidence for the purposes of a decision on reparations at the same time as for the purposes of trial under Regulation 56. Alternatively, the victim would be able to make representations regarding the relevance of the item to any claim for reparations, pursuant to Article 75(3), at the appropriate stage.
30. The Prosecution submits that the ability to present views and concerns regarding the admissibility of a piece of evidence, where its admission would affect the personal interests of the victim, addresses the concerns raised in the Victims’ Observations while respecting and fully implementing the terms of the Statute.

⁵⁰ Rule 72(2), referred to in para. 28 of the Victims’ Observations concerns to hearing the views of a witness or victim of sexual violence regarding the admission of evidence regarding the words, conduct, silence, consent or lack of resistance of that witness or victim. The admission of such evidence does manifestly affect the personal interests of that victim. Similarly, para. 29 of the Victims’ Observations discusses situations where the production of evidence may prejudice the victim concerned.

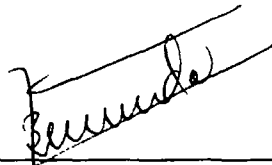
⁵¹ Prosecution Appeal Brief, para. 50. However as further submitted by the Prosecution, “these must be personal views or concerns of the victims, not supplementary legal arguments. While the Trial Chamber may take them into consideration in appropriate circumstances, such submissions do not constitute a challenge to admissibility.”

⁵² Contrast Victims’ Observations, para. 30.

⁵³ Victims’ Observations, para. 29.

Relief Sought

31. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber to consider the submissions above in its resolution of this appeal.



Fatou Bensouda, Deputy-Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 30th day of May, 2008

At The Hague, The Netherlands