

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 8 April 2009

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

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

Public

Redacted version of "Decision on 'indirect victims'"

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

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Legal Representatives of the Applicants

**Unrepresented Applicants for
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Section**

Ms Fiona McKay

Other

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision on indirect victims (“Decision”).

I. Background and Submissions

1. The circumstances in which victims may participate in this trial have been dealt with in a number of earlier decisions, and of particular relevance to the present decision is the Chamber’s “Decision on victims’ participation”¹ of 18 January 2008 which was considered by the Appeals Chamber in its judgment of 11 July 2008.² Although the Appeals Chamber emphasised that “personal harm” is a necessary qualifying element, for natural persons, in appropriate circumstances there can be participation by indirect victims. The present Decision addresses certain issues relating to that latter group of victims.
2. On 21 November 2008, the Registry filed written submissions in which it sought guidance in relation to approximately 200 applications to participate in the trial by applicants who allege they have suffered harm as a result of crimes committed by the UPC, including pillage, murder, rape, enslavement or inhuman treatment. The Registrar posed the question “whether any of these applicants might be considered to be indirect victims in the case, if they were victims of crimes committed by persons who had been conscripted or enlisted whilst under the age of fifteen or used to participate actively in hostilities.”³

¹ Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, and Separate and dissenting opinion of Judge Blattmann.

² Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 OA9 OA10 Judge Pikis and Judge Kirsch each issued partly dissenting opinions to the majority’s decision.

³ Second Report to Trial Chamber I on Victims’ Applications under Regulation 86.5 of the Regulations of the Court, 21 November 2008, ICC-01/04-01/06-1501-Conf-Exp, paragraph 4.

3. The Trial Chamber raised the issue at the status conference on 25 November 2008. It ordered the Victims Participation and Reparations Section ("VPRS") to file a representative selection from the victims in this category, in an appropriately redacted form by 28 November 2008, in order for the issue to be considered and determined.⁴ The Trial Chamber directed the parties and participants to file observations on whether applicants exemplified by this group should participate in the trial, on the basis that they are the indirect victims of crimes committed by children under the age of fifteen who, within the context of this trial, have been conscripted, enlisted or used to participate actively in hostilities.⁵
4. In the event, on 28 November 2008, the VPRS filed nineteen redacted sample applications.⁶
5. On 28 November 2008, the Office for Public Counsel for Victims ("OPCV") was directed to present general submissions in accordance with Regulation 81(4)(b) of the Regulations of the Court ("Regulations") on the issue of the participation by indirect victims in the case against Mr Thomas Lubanga Dyilo.⁷ However, because the OPCV had not received notification of the sample applications on time, the deadline for submissions was extended to 8 December 2008.⁸

⁴ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 12, lines 2-9, 13-15.

⁵ *Ibid*, page 12, lines 15-18, page 11, lines 11-15.

⁶ Transmission of redacted versions of a selection of applications for participation which fall within the category which might be considered indirect victims, implementing the Oral Decision of 25 November 2008, 28 November 2008, ICC-01/04-01/06-1519.

⁷ Email communication from the Trial Chamber to the OPCV through the Legal Adviser to the Trial Division on 28 November 2008.

⁸ Email communication from the OPCV to the Chamber through the Legal Adviser to the Trial Division on 1 December 2008; Email communication from the Chamber to the OPCV through the Legal Adviser to the Trial Division on 1 December 2008.

6. On 5 December 2008, the Office of the Prosecutor (“prosecution”) submitted its observations on the examples set out above.⁹ The prosecution relied on the jurisprudence of the Court which has established that there must be a link between the personal interests of the victims, the harm they allegedly suffered and the charges confirmed against the accused.¹⁰ It submitted that the applications by those who have suffered harm as a result of acts committed by persons under the age of 15 who were conscripted, enlisted or used by the UPC/FPLC to participate actively in hostilities meet the requirements for participation.¹¹ The prosecution suggested that the protection afforded by the provisions of the Rome Statute (“Statute”) relating to the recruitment and use of children under the age of fifteen years extends to third parties who suffered harm as a result of crimes committed by children within the ranks of the UPC/FPLC.¹² On the basis of the established criteria, the prosecution submitted that from the sample applications, a/0107/06, a/0109/06 and a/0188/06 meet the requirements for participation since the harm they allegedly suffered was as a result of the enlistment, recruitment or use of child soldiers.¹³

7. On 5 December 2008, the defence submitted its observations in relation to indirect victims.¹⁴ It contended that each of the sample applications were based on harm caused by crimes other than those confirmed by the Pre-Trial Chamber.¹⁵ In the circumstances, it was submitted that the applications are manifestly inadmissible.¹⁶ In particular, the defence highlighted the decision of the Appeals Chamber requiring a link between the personal interests of the

⁹ Prosecution’s observations on examples of applications for participation in the case of persons who might be considered indirect victims, 5 December 2008, ICC-01/04-01/06-1544.

¹⁰ *Ibid*, paragraphs 3 and 4.

¹¹ *Ibid*, paragraph 6.

¹² *Ibid*, paragraph 6.

¹³ *Ibid*, paragraphs 7-9.

¹⁴ Observations de la Défense sur les 15 demandes de participation à la procédure et les 30 demandes de participation complémentaires communiquées le 27 novembre 2008; Réponse de la Défense aux observations des représentants légaux relatives aux 105 demandes de participation communiquées le 20 mai 2008; et Observations de la Défense relatives aux victimes indirectes, 5 December 2008, ICC-01/04-01/06-1536.

¹⁵ *Ibid*, paragraph 49.

¹⁶ *Ibid*, paragraph 50.

applicants, the alleged harm suffered and the confirmed charges.¹⁷ The defence also reiterated the approach of the Appeals Chamber that an indirect victim may be someone with a close personal relationship to another victim, such as that between a child soldier and his or her parents, since they all may suffer when the child is recruited as a child soldier.¹⁸ Otherwise, the defence contended that applicants who suffered harm as a result of crimes other than those confirmed against the accused do not meet the criteria of indirect victims in the present case,¹⁹ and it submitted that the Chamber would exceed its competence if it granted applications in such circumstances.²⁰

8. On 8 December 2008, the OPCV submitted its observations.²¹ It also rehearsed the jurisprudence of the Trial Chamber and the Appeals Chamber which provides for participation by indirect victims, subject to relevant criteria.²² The OPCV addressed the definition of “victim”, and its legal history, and submitted that a broad definition that includes indirect victims is consistent with Article 75 of the Statute and other relevant provisions.²³ It highlighted the jurisprudence of the Court in which the status of victim has been granted to close family members of a direct victim, including parents, an aunt, a cousin and a nephew, on the basis they could demonstrate they had suffered personal harm as a result of crimes within the jurisdiction of the Court committed against a direct victim.²⁴ The OPCV referred to international jurisprudence which recognises the existence of indirect victims, along with decisions of the Court (referred to above).²⁵ As regards the sample applications, the OPCV argued that indirect victims meet the necessary

¹⁷ *Ibid*, paragraph 51.

¹⁸ *Ibid*

¹⁹ *Ibid*, paragraph 52.

²⁰ *Ibid*, paragraph 54.

²¹ Observations du BCPV relatives aux demandes de participation présentées par les demandeurs pouvant être qualifiés de victimes indirectes dans le cadre de l'affaire *Le Procureur c Thomas Lubanga Dyilo* conformément à la norme 81-4-b du Règlement de la Court, 8 December 2008, ICC-01/04-01/06-1546.

²² *Ibid*, paragraphs 7 and 8.

²³ *Ibid*, paragraphs 9-11.

²⁴ *Ibid*, paragraph 12.

²⁵ *Ibid*, paragraphs 13-15.

criteria if they suffered personal harm (in the case of natural persons) or direct material harm (in the case of legal persons) which is linked to the criminal enlistment or conscription of children under the age of fifteen or their active participation in hostilities, as alleged against Mr Thomas Lubanga Dyilo, (within the relevant timeframe).²⁶ The OPCV set out four categories of indirect victims which it submitted satisfy the criteria. First, the parents of victims;²⁷ second, those who suffered harm while intervening to aid direct victims or to prevent others from becoming victims of a crime;²⁸ third, those who suffered harm during attacks on, and crimes generally directed at, the civilian population, perpetrated by UPC militias containing children under the age of fifteen (*e.g.* attacks against civilians and civilian positions);²⁹ and fourth, those who suffered harm from crimes targeted at them, when committed by children under the age of fifteen (*e.g.* intentional killing, mutilation, rape, sexual enslavement).³⁰ Whilst some of the information necessary for making a decision has been redacted in some of the applications,³¹ the OPCV submitted that two of the sample applications fall into the third category, and five may come within the fourth category.³² As regards that latter category, the OPCV suggested that it would be difficult to provide sufficient proof that the crimes had been committed by children under the age of fifteen in order to support the application.³³ Lastly, the OPCV drew attention to applicants a/0006/07 and a/0254/07, who claimed to have been conscripted by the UPC and should, it was submitted, be considered as direct victims.³⁴

²⁶ *Ibid*, paragraph 16.

²⁷ *Ibid*, paragraph 18.

²⁸ *Ibid*, paragraph 20.

²⁹ *Ibid*, paragraphs 22-26.

³⁰ *Ibid*, paragraphs 27-29.

³¹ *Ibid*, paragraph 25.

³² *Ibid*, paragraphs 26 and 29.

³³ *Ibid*, paragraph 28.

³⁴ *Ibid*, paragraph 30.

9. On 9 December 2008, the defence filed a response to the observations of the OPCV,³⁵ in which it submitted that the indirect victims described by the OPCV in paragraphs 22 to 29 of its submissions, and referred to by the prosecution (in paragraphs 6 to 9 of its filing), are not indirect victims as defined by the Appeals Chamber,³⁶ as they are victims of crimes committed by people other than the present accused.³⁷ The fact that the crimes, hypothetically, may have been committed by child soldiers, or in the course of military operations that child soldiers participated in, does not establish a sufficient link with the crimes proscribed in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute.³⁸ The defence submitted that the commission of war crimes, crimes against humanity or acts of genocide cannot be considered to be the normal or natural consequence of participation in hostilities, whether or not the combatants are children below the age of fifteen.³⁹ If the harm suffered, direct or indirect, is not a normal consequence of the crimes currently prosecuted, but instead may be the result of another crime, the applicants in question cannot sustainably claim to be indirect victims in the present case.⁴⁰ It also submitted that the applications to participate from anonymous victims constitute fresh accusations relating to crimes that the accused has not been notified of and for which he would be unable to prepare a defence, thereby gravely violating his fundamental rights.⁴¹ The defence submitted that the applicants a/0006/07, a/0234/06, a/0250/07 and a/0254/07 did not suffer harm as a result of the confirmed crimes as they were above the age of fifteen when they were enrolled.⁴² As regards applicants a/0106/06, a/0107/06, and a/0076/06, the defence submitted that the alleged events

³⁵ Réponse de la Défense aux "Observations du BCPV relatives aux demandes de participation présentées par les demandeurs pouvant être qualifiés de victimes indirectes dans le cadre de l'affaire Le Procureur c. Thomas Lubanga Dyilo conformément à la norme 81-4-b du Règlement de la Cour", 9 December 2008, ICC-01/04-01/06-1549.

³⁶ Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 OA9 OA10.

³⁷ ICC-01/04-01/06-1549, paragraphs 5 and 6

³⁸ *Ibid*, paragraph 7.

³⁹ *Ibid*, paragraph 8

⁴⁰ *Ibid*, paragraph 9.

⁴¹ *Ibid*, paragraphs 13 and 14.

⁴² *Ibid*, paragraphs 15 and 16.

founding their respective applications do not fall within the time period of the confirmed charges.⁴³ Finally, applicant a/0154/06 has not indicated when the relevant events took place.⁴⁴ Therefore, the defence requested the Chamber to dismiss any applications based on crimes other than those properly before the Chamber, and submitted that the particular applicants set out above do not fulfil the requirements of Rule 85 of the Rules of Procedure and Evidence ("Rules").

II. Summary of the sample victim applications

VPRS/1⁴⁵

10. Applicant VPRS/1 is a [REDACTED] from Irumu who claims to have been harmed during events in [REDACTED] 2002. The applicant submits that her husband was killed in the course of an attack by members of a Hema militia, when he returned home to recover their belongings. The militia members shot him and left him inside the house, which they then set on fire. Whilst fleeing they were robbed by [REDACTED], and at about this time the widow's daughters and nephews were killed in [REDACTED] by Hema belonging to the UPC. The applicant knows the identities of some of those who killed her husband; however, she makes no mention of child soldiers.

Applicant a/0016/06⁴⁶

11. Applicant a/0016/06 is a woman living in Ituri who claims to have been raped by [REDACTED] members of the UPC militia, together with several other women, around [REDACTED] 2003. Since the incident she has had continuous health problems and may have [REDACTED]. She also does not mention child soldiers in her account.

⁴³ *Ibid*, paragraph 16.

⁴⁴ *Ibid*

⁴⁵ ICC-01/04-01/06-1519-Conf-Anx1.

⁴⁶ ICC-01/04-01/06-1519-Conf-Anx2.

Applicant a/0076/06⁴⁷

12. Applicant a/0076/06 is a young woman who claims to have been detained by UPC militias in [REDACTED] 2002, when she was [REDACTED] or [REDACTED] years old. She submits she was held in [REDACTED] together with at least one other girl for [REDACTED]. During that time they were beaten, tortured, raped and submitted to inhuman and degrading treatment at the hands of the men under the command of the accused. She was able to flee [REDACTED] [REDACTED] one night; she was emaciated and covered with wounds. She still suffers from pain and trauma, claiming that she cannot work and her husband has to care for her. However, she does not mention child soldiers and the events she describes do not fall within the relevant period, as confirmed by the Pre-Trial Chamber.

Applicant a/0080/06⁴⁸

13. Applicant a/0080/06 is a young woman who claims to have been detained together with [REDACTED] other women by [REDACTED] members of the UPC militia in [REDACTED] 2003. She states that whilst the men with them were killed, the women were taken to a camp for [REDACTED] months. There they were allegedly raped, tortured, turned into sexual slaves and forcibly wed. During this period Thomas Lubanga allegedly visited the camp and stayed there a few days. She describes how she still suffers pain and trauma from the incidents. She also does not mention child soldiers.

Applicant a/0106/06⁴⁹

14. Applicant a/0106/06 is a man whose father and brother were allegedly killed by UPC members during an attack (against the FNI) that took place in [REDACTED] 2003. The family's belongings were taken, the house was set on fire

⁴⁷ ICC-01/04-01/06-1519-Conf-Anx3.

⁴⁸ ICC-01/04-01/06-1519-Conf-Anx4.

⁴⁹ ICC-01/04-01/06-1519-Conf-Anx5

and a field of [REDACTED] was pillaged. The applicant claims to have seen many child soldiers with the UPC forces several days after the attack. Although they were armed like adults, they were recognisable as children on account of their size, their appearance, their language and their general behaviour.

Applicant a/0107/06⁵⁰

15. Applicant a/0107/06 is a man who claims that his brother was killed by UPC combatants during an attack (against the FNI) in [REDACTED] 2003. The family's belongings were taken, the house was set on fire and a field of [REDACTED] was pillaged. This applicant appears to be the [REDACTED] of applicant a/0106/06. He also claims to have seen many children among the UPC who returned once the Lendu forces had left. The children allegedly participated in the military operations like adults. Indeed, he maintains they were the most active among the group: using arms, killing, torturing and pillaging.

Applicant a/0109/06⁵¹

16. Applicant a/0109/06 is a woman who claims that her father was killed by members of the UPC militia when they returned to [REDACTED] in [REDACTED] 2003. While the applicant did not see the killing, she states that several witnesses arrived shortly afterwards. They saw the house being plundered and told her that there were children among the group taking away their belongings. When the applicant herself returned, the UPC was still operational and she saw many children among the group.

Applicant a/0137/06⁵²

17. Applicant a/0137/06 is a woman acting on behalf of her deceased husband. She claims that he, together with [REDACTED] of their children, were killed by Thomas Lubanga's men from the UPC in [REDACTED] 2003 near [REDACTED]. She lost her

⁵⁰ ICC-01/04-01/06-1519-Conf-Anx6.

⁵¹ ICC-01/04-01/06-1519-Conf-Anx7.

⁵² ICC-01/04-01/06-1519-Conf-Anx8.

house and possessions. However, the applicant does not mention child soldiers.

Applicant a/0138/06⁵³

18. Applicant a/0138/06 is the [REDACTED] of applicant a/0137/06. His father, his brother and his [REDACTED] sisters were allegedly killed by members of the UPC militia in [REDACTED] 2003.

Applicant a/0154/06⁵⁴

19. Applicant a/0154/06 is a man acting on behalf of his deceased wife. His wife, their daughter and his [REDACTED] had left to harvest their crops near [REDACTED], and he claims that all [REDACTED] women were killed by Thomas Lubanga's men from the UPC in [REDACTED] 2003. He states that he knows the person, a UPC member, who killed his wife. In addition, he sets out that his house was destroyed and all his belongings, including [REDACTED], were pillaged. He does not mention child soldiers.

Applicant a/0188/06⁵⁵

20. Applicant a/0188/06 is a [REDACTED], which was allegedly looted and destroyed in [REDACTED] 2003 by men from the FPLC, allegedly the armed branch of Thomas Lubanga's UPC. The members of the militia are said to have occupied the [REDACTED], burned [REDACTED] as firewood, stolen [REDACTED] materials, food supplies, and a [REDACTED], and destroyed [REDACTED] material and documents. The person acting on behalf of the [REDACTED] mentions that when this happened, several girls were raped and many [REDACTED] under the age of fifteen were forcibly enrolled. [REDACTED] was allegedly occupied with the aim of enrolling [REDACTED] into the FPLC.

⁵³ ICC-01/04-01/06-1519-Conf-Anx9.

⁵⁴ ICC-01/04-01/06-1519-Conf-Anx10.

⁵⁵ ICC-01/04-01/06-1519-Conf-Anx11.

Applicant a/0234/06⁵⁶

21. Applicant a/0234/06 is a young man born in 1984 who claims to have been forcibly enrolled in the armed group of Thomas Lubanga's UPC in [REDACTED] 2003. He claims to have been trained for several weeks, during which he was maltreated. He states he was forced to kill. He claims to have been physically tortured; he has pain in the region of the [REDACTED]; and was exposed to drugs and deafening noise. It is to be observed that he was not under the age of 15 at the time of the events.

Applicant a/0006/07⁵⁷

22. Applicant a/0006/07 was born in 1979 and was allegedly forced to join the armed forces of the UPC around [REDACTED] 2002. He was with groups in [REDACTED] and [REDACTED] and was forced to participate in hostilities against the FNI in two other localities. He was subjected to physical torture [REDACTED]; he lost the opportunity of proper education; and he is [REDACTED] due to injuries caused from [REDACTED] wounds. Again, this applicant was not under the age of 15 at the time of the relevant events.

Applicant a/0042/07⁵⁸

23. Applicant a/0042/07 is a man who claims that Thomas Lubanga ordered the pillaging of his private home and his [REDACTED] in [REDACTED], including the theft of [REDACTED]. He states these events took place in [REDACTED] in [REDACTED] 2002. He was forced to flee on foot. However, the applicant does not mention child soldiers and these events do not fall into the period covered by the charges confirmed by the Pre-Trial Chamber.

⁵⁶ ICC-01/04-01/06-1519-Conf-Anx12.

⁵⁷ ICC-01/04-01/06-1519-Conf-Anx13.

⁵⁸ ICC-01/04-01/06-1519-Conf-Anx14.

Applicant a/0163/07⁵⁹

24. Applicant a/0163/07 is a man who claims to have been detained in [REDACTED] 2002 by the UPC, who accused him of [REDACTED]. He was “acquitted” and released [REDACTED] later. The applicant claims that UPC combatants looted his belongings and burned his house when they returned and occupied [REDACTED] in [REDACTED] 2003. He also does not mention child soldiers.

Applicant a/0250/07⁶⁰

25. Applicant a/0250/07 is a young man born in 1987. He claims to have enrolled in the militia of the UPC in [REDACTED] 2003 in order to stop the UPC from repeatedly returning to his village to loot goods and rape young girls. However, the applicant was not under the age of 15 at the time of the relevant events.

Applicant a/0254/07⁶¹

26. Applicant a/0254/07 is a young man born in 1986 who claims he was stopped in [REDACTED] 2002 by the UPC militias on his way home from school and was forcibly enrolled. The men told him they would kill him when he tried to refuse. The applicant was over the age of 15 at the time of these events.

Applicant a/0116/08⁶²

27. Applicant a/0116/08 is a woman who claims that her husband and his brother were detained, tortured and killed by men belonging to Thomas Lubanga’s UPC in [REDACTED] 2003. She has lost her husband and her means of living as he sustained the family. She fears that now that her husband is dead, her children are at risk of becoming street children. It is to be noted that she does

⁵⁹ ICC-01/04-01/06-1519-Conf-Anx15.

⁶⁰ ICC-01/04-01/06-1519-Conf-Anx16.

⁶¹ ICC-01/04-01/06-1519-Conf-Anx17

⁶² ICC-01/04-01/06-1519-Conf-Anx18

not mention whether there were children among the group that detained and killed her husband.

Applicant a/0128/08⁶³

28. Applicant a/0128/08 is a [REDACTED] in Ituri. The person acting on behalf of [REDACTED] claims that men from Thomas Lubanga's UPC used the premises as a base from [REDACTED] 2002 to [REDACTED] 2003. During that time much of the [REDACTED] property was destroyed, for example [REDACTED] were used as firewood, and [REDACTED] and [REDACTED] were abused.

III. Applicable Law

29. Pursuant to Article 21(1) of the Statute, the Trial Chamber has considered the following provisions under the Rome Statute framework.

30. Article 68(1) and (3) on "Protection of the victims and witnesses and their participation in the proceedings":

1. The Court shall take the appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. [..]
[...]

3. 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. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

31. Article 67(1)(a)-(c) on the "Rights of the accused":

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence,
- (c) To be tried without undue delay;

⁶³ ICC-01/04-01/06-1519-Conf-Anx19.

32. Article 64(2) on “Functions and powers of the Trial Chamber”:

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

33. Rule 85 of the Rules on “Definition of victims”:

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

34. Rule 91(2) of the Rules on “Participation of legal representatives in the proceedings”:

A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

35. Regulation 81(4)(b) on the “Office of Public Counsel for victims”:

The Office of Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate:

[...]

- (b) Appearing before a Chamber in respect of specific issues

IV. Analysis and Conclusions

36. By way of a preliminary issue, the Chamber notes that the defence submitted a response to the general submissions of the OPCV under Rule 91(2) of the Rules. As set out above, this provision provides for the right to reply “to any oral or written observation by the legal representative for victims”.

37. The OPCV had been requested to submit observations in accordance with Regulation 81(4)(b) of the Regulations. Although the OPCV was not acting as a legal representative for any of these applicants, it had been asked to submit

observations in order to provide support and assistance to them on the specific issue of whether they come within the category of indirect victims.

38. The Chamber notes that neither the Statute nor the Rules provide for the participation of the OPCV in the proceedings. This office was established by the Regulations of the Court with a mandate to provide support and assistance to the legal representatives and the victims after the adoption of the Statute and the Rules. In the judgment of the court, the circumstances of the creation of the OPCV should not have the consequence of diminishing the rights of the defence.

39. In the circumstances, the Chamber determines that whenever the OPCV is performing the functions of, or is acting akin to, a legal representative of a victim - not least to protect the accused - the Rome Statute framework shall be applied as if it is an "ordinary" legal representative. It follows that these observations, in the view of the Chamber, are to be treated as if they were made by a legal representative under Rule 91(2) of the Rules.

40. Turning to the central issue, the Registry has asked the Trial Chamber to determine whether applicants who are the victims of crimes committed by persons conscripted or enlisted whilst under the age of fifteen, or used to participate actively in hostilities, can be considered "indirect victims". It is necessary in those circumstances for the Chamber to provide guidance on the ambit of this concept for purposes of applications to participate in this trial.

41. This Chamber in its "Decision on victims' participation"⁶⁴ decided that while Rule 85(b) requires that legal persons must have suffered "direct harm" to be defined as a victim, the absence of such a requirement in Rule 85(a) for

⁶⁴ Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, and Separate and dissenting opinion of Judge Blattmann.

natural persons means, applying a purposive interpretation, that “people can be the direct or indirect victims of a crime within the jurisdiction of the Court.”⁶⁵

42. The Appeals Chamber has given guidance on these issues.⁶⁶ First, it clarified that “harm” in Rule 85(a) means “injury, loss or damage”.⁶⁷ Second, harm suffered by a natural person is “personal harm” and the forms of harm that can be suffered personally include material, physical and psychological harm.⁶⁸ Third, the Appeals Chamber found that, for natural persons:

[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. It is in this sense that the Appeals Chamber understands the Trial Chamber's statement that “people can be the direct or indirect victims of a crime within the jurisdiction of the Court”. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.⁶⁹

43. The Appeals Chamber, therefore, confirmed:

the finding of the Trial Chamber to the extent that the Trial Chamber determined that harm suffered by victims does not necessarily have to be direct and amends the decision to include that harm suffered by a victim applicant for the purposes of rule 85(a) must be personal harm.⁷⁰

44. The result, self-evidently, is that two categories of victims can participate. First, “direct” victims: those whose harm is the “result of the commission of a

⁶⁵ ICC-01/04-01/06-1119, paragraph 91.

⁶⁶ Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 OA9 OA10.

⁶⁷ *Ibid*, paragraph 31.

⁶⁸ *Ibid*, paragraph 32.

⁶⁹ *Ibid*

⁷⁰ *Ibid*, paragraph 39.

crime within the jurisdiction of the Court”.⁷¹ Second, “indirect victims”: those who suffer harm as a result of the harm suffered by direct victims.

45. In light of the jurisprudence set out above, a causal link must exist between the crimes charged and the harm alleged, both for direct and indirect victims. This is consistent with the approach of Pre-Trial Chamber I which required evidence of a causal link between the harm suffered and the crimes contained in the arrest warrant issued against Mr Lubanga Dyilo, as a precondition of granting leave to participate.⁷² Indeed, the Appeals Chamber put the matter beyond doubt when it found:

only victims who are victims of the crimes charged may participate in the trial proceedings pursuant to article 68(3) of the Statute read with rule 85 and 89(1) of the Rules. Once the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged.⁷³

46. The need for this link is further underscored by Rule 85(a) of the Rules which establishes:

“Victims” means natural persons who have suffered harm as a *result* of the commission of any crime within the jurisdiction of the Court. (Emphasis added)

47. The Appeals Chamber found, therefore, that for direct victims, a causal link must exist between the crimes charged and the victims’ harm: the injury, loss or damage suffered by natural persons must be a result of the crimes confirmed against Thomas Lubanga Dyilo. The direct victims of these crimes are the children below fifteen years of age who were allegedly conscripted, enlisted or used actively to participate in hostilities by the militias under the control of the accused within the time period confirmed by the Pre-Trial Chamber.

⁷¹ *Ibid*, paragraph 32.

⁷² Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the prosecutor v. Thomas Lubanga Dyilo, 20 July 2006, ICC-01/04-01/06-172-tEN, page 8.

⁷³ ICC-01/04-01/06-1432 OA9 OA10, paragraph 62.

48. The offences with which the accused is charged (*viz.* conscripting, enlisting and using children under the age of 15 to actively participate in hostilities) were clearly framed to protect the interests of children in this age group,⁷⁴ against the backcloth of Article 77(2) of Additional Protocol I to the Geneva Conventions, entitled “Protection of children” and Article 38 of the Convention on the Rights of the Child,⁷⁵ which are each directed at the protection of children. Criminalising the conscription, enlistment and use of children actively to participate in hostilities affords children with additional safeguards, recognizing their vulnerability, and the Statute has in those circumstances made them “direct victims” for these purposes.

49. Indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.

50. Furthermore, the Appeals Chamber has determined that close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims.⁷⁶ In the view of the Trial Chamber, the harm suffered by these indirect victims may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.

⁷⁴ M. Bothe, War Crimes, in: Cassesse [...] (ed.), The Rome Statute of the International Criminal Court, p. 416.

⁷⁵ C. Garraway, Article 8(2)(b)(xxvi), in Roy. S. Lee (ed) The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence (2001), page 205. See also: M. Cottier, in: O. Triffterer (ed), Commentary on the Rome Statute (1999), article 8, margin No. 225. Article 4(3)(c) of Additional Protocol II to the Geneva Conventions contains a provision comparable to article 77(2) of Additional Protocol I to the Geneva Conventions, which is, however, applicable in non-international armed conflicts.

⁷⁶ Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 OA9 OA10, paragraph 32.

51. Another situation which can serve as a basis for an application of an indirect victim to participate in the proceedings is when a person intervenes to prevent one of the crimes alleged against the accused. Given that the harm of the indirect victim must arise out of harm to the direct victim, the Chamber will need to investigate, if necessary, whether the direct victim has suffered any “relevant” harm. However, on this issue, depending on the individual facts, psychological harm to a direct victim may be inflicted once they become aware that an attempt is being made to conscript, enlist or to use them actively to participate in hostilities. In these circumstances, the loss, injury or damage suffered by the person intervening may be sufficiently linked to the direct victim’s harm by the attempt to prevent the child from being further harmed as a result of a relevant crime.⁷⁷

52. Excluded from the category of “indirect victims”, however, are those who suffered harm as a result of the (later) conduct of direct victims. The purpose of trial proceedings at the ICC, as stated by the Appeals Chamber, “is the determination of the guilt or innocence of the accused person of the crimes charged” and it is only victims “*of the crimes charged*” who may participate in the trial proceedings pursuant to Article 68(3), when read together with Rules 85 and 89(1).⁷⁸ The charges confirmed against the accused in this case are confined to the conscription, enlistment or use of children to participate actively in hostilities. Indirect victims, therefore, are restricted to those whose harm is linked to the *harm* of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise. Although a factual overlap may exist between the use of the child actively to participate in hostilities and

⁷⁷ In its “Decision on the applications by victims to participate in the proceedings” issued on 15 December 2008, the Trial Chamber granted the applications to participate in the proceedings of a limited number of indirect victims: an indirect victim who allegedly tried to prevent the recruitment of his students by the UPC (ICC-01/04-01/06-1556, paragraphs 105-109, victim a/0270/07); parents of alleged former child soldiers (ICC-01/04-01/06-1556, paragraphs 54-57, and ICC-01/04-01/06-1563, Annex 2, pages 4-5, victim a/0003/06). The Chamber instructed the Registry to contact parents of former alleged child soldiers who, acting on behalf of their children, claimed to have suffered harm (ICC-01/04-01/06-1556, paragraphs 117-118).

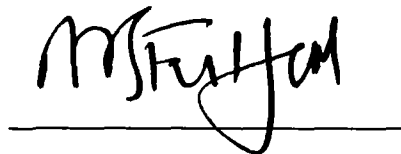
⁷⁸ ICC-01/04-01/06-1432 OA9 OA10, paragraph 62 (emphasis added).

an attack by the child on another, the person attacked by a child soldier is not an indirect victim for these purposes because his or her loss is not linked to the *harm* inflicted on the child when the offence was committed.

53. This is not to undermine the possibility that individuals in these circumstances may well be victims of other crimes within the jurisdiction of the Court.

54. Bearing in mind the nineteen examples set out above, applicants who are alleged to be the victims of crimes committed by children who had been conscripted or enlisted whilst under the age of fifteen or used to participate actively in hostilities do not qualify as (indirect) victims of the crimes confirmed against Mr Lubanga Dyilo.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 8 April 2009

At The Hague, The Netherlands