

ICC TRIAL CHAMBER I'S DECISION ON VICTIMS' PARTICIPATION: RELISHING UNCERTAINTY?

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Abstract

On 18 January 2008, Trial Chamber I ("TC") of the International Criminal Court ("ICC") in the case against Thomas Lubanga Dyilo sought to provide parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings ("the TC Decision").³ The Chamber issued a landmark decision in which it reversed the consistent jurisprudence of the Pre-Trial Chambers ("PTC") of the ICC regarding the definition of victims under rule 85 of the Rules of Procedure and Evidence ("RoPE") and their general right to participate in proceedings before the Court under article 68 (3) of the Rome Statute.⁴ This paper intends, firstly, to flag two problematic elements of the definition of victims as propounded by the TC, which are currently also pending on appeal.⁵ First we will discuss whether the notion of victim necessarily implies the existence of personal and direct harm or whether it can also include indirect harm and secondly 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. Subsequently, we will discuss the lack of guidance by the TC as to what are the personal interests of victims in the proceedings, which the Chamber requires recognized victims to demonstrate in order to participate.

Interpretation of "suffered harm": the issue of indirect harm & indirect victims

The Chamber states in paragraphs 91 and 92 of the TC Decision that the concept of "harm" is not defined in the RoPE. It therefore uses the 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 as guidance for what is meant by 'harm'. Principle 8 defines victims as "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights".⁶

The wording of article 85 of the RoPE further does not specify whether natural persons need to have suffered "direct harm" to be recognized as a victim. The TC states in paragraph 91 that "in relation to the link between the harm allegedly suffered and the crime, whereas Rule 85(b) of the Rules provides that legal persons must have "sustained direct harm", Rule 85(a) of the Rules does not include that stipulation for

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³ ICC, TCI (Lubanga), Decision on victims' participation (18 January 2008), §84.

⁴ Rule 85 reads: "(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". Article 68 (3) reads: "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."

⁵ ICC, TCI (Lubanga), Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008 (26 February 2007).

⁶ 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, UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147.

natural persons, and applying a purposive interpretation, it follows that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.”

It is not clear, however, what is meant by indirect harm and indirect victims. The TC points to the definition in the Basic Principles which takes account of the possible inclusion of the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. PTC I, in its decision of 29 June 2006 also pointed to the Basic Principles, when it said victim status would be granted to persons who “*ha[ve] suffered harm directly linked to the crimes contained in the arrest warrant or ha[ve] suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes*”, while in a later decision it granted victim status to family members of “targeted victims” on the basis of emotional suffering.⁷ In its decision of 26 February 2008, the TC granted leave to appeal the issue whether the notion of victim necessarily implies the existence of personal and direct harm or can also include indirect harm. In their brief on appeal, the Defence referred to the Dissenting Opinion of Judge Blattmann, who questioned the application of the Basic Principles’ definition and argued that a too broad a definition of ‘victim’ could delay the proceedings.⁸ It can be expected that the Appeals Chamber provides clarity in the scope of direct versus indirect harm.

Interpretation of “harm as a result of the commission of any crime within the jurisdiction of the Court”: the issue of the causal link-requirement

When PTC I on 17 January 2006 found that the statutory framework of the Court already at the investigation stage provided for the participation of victims, it differentiated between victims of a situation and victims of a case. In the light of this distinction, it stated that “*the status of victim [of a situation] will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the RoPE*” and set out certain criteria in order to be allowed to participate, namely that the applicant have suffered harm; that the crime from which the harm resulted must fall within the jurisdiction of the court; and that there must be a causal link between the crime and the harm.⁹ It further stated that once a case ensues from the investigation of the situation, a situation victim can become victim of a case. In its decision of 29 June 2006, PTCI elaborated on the causal link requirement at the case stage, requiring that “*an applicant must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant*”¹⁰ A similar test was put forward by PTC II in its decision of 10 August 2007.¹¹

In the TC decision, the Chamber, conversely, disconnects the causal link-requirement from the charges. In paragraphs 93 and 94, it states that Rule 85 does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by the PTC, nor does

⁷ ICC, PTCI (Lubanga), 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 (29 June 2006), page 7; ICC, PTCI (Lubanga), Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo (28 July 2006), page 10.

⁸ ICC, (Lubanga), 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), §§ 27-32.

⁹ ICC, PTCI (DRC), Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6 (17 January 2006), §66, 68 and 79.

¹⁰ PTCI, 29 June 2006 Decision, page 6.

¹¹ ICC, PTCII (Kony et al.), Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (10 August 2007).

the regulatory framework as a whole. According to the Chamber the only statutory restrictions to the participation of victims are those set out in articles 5, art 11 and art 12 of the Statute, namely the material, temporal, territorial and personal jurisdiction of the Court and no additional limitative element can be found.¹² The Chamber thus abandoned the distinction between victims of a situation and victims of a case as set out by the PTC. This is obviously a very broad interpretation of rule 85, and could, *in absurdum*, lead to victims of crimes against humanity in, for example, the Sudan, approaching the Court to be heard as victims in the case against Thomas Lubanga Dyilo, as any victim of any crime within the jurisdiction of the Court can potentially participate in the proceedings.

Judge Blattmann submits in his Dissenting Opinion, that “*to not require that this element [the causal link to the charges] be met, threatens the rights of the Accused by leaving the possibility open of granting victim status that goes beyond the framework of the case brought against Mr. Lubanga by the Prosecutor*”.¹³ The Defence has made similar submissions.¹⁴ The Prosecutor in his brief in support of his appeal against this issue in his turn also purports, *inter alia*, that the TC is not vested with the authority or the competence to make any assessment, including those regarding victim participation, which steps outside the strict boundaries of the charges against an individual and points subsequently to the possible detrimental consequences for the parties to the proceedings.¹⁵

It is only after its initial broad assessment of victims application and the award of general participant status to such a broad category of victims, that the TC requires such victims to make a second application to show they have interests which are affected by the issue or evidence arising in the case in order to decide at which specific stage in the proceedings they may participate. Here the TC rightfully recognizes that “*the interests of many victims even of the Situation in the DRC will be unrelated to the substance of the present case [...], and in consequence granting participation rights to them would not serve any useful purpose.*” It therefore requires victims at any specific stage of the proceedings to establish either of the following disjunctive tests in order to participate:

1. Is there a real evidential link between the victim and the evidence that the Court will be considering during Mr. Lubanga’s trial (in the investigation of the charges he faces), leading to the conclusion that the victim’s personal interests are affected? Or:
2. Is the victim affected by an issue arising during Mr. Lubanga’s trial because of his or her personal interest in a real sense engaged by it?¹⁶

The fact that they have a general interest in the outcome in the proceedings would not be sufficient for their participation; applications therefore will be looked at on a case-by-case basis. Examples of factors that the chamber will look for when granting the right to participate are involvement in or presence at a particular incident in the case under scrutiny, and whether the victim has suffered identifiable harm from that incident.

According to Judge Blattmann, regardless of this subsequent assessment, to not link the status of victim and consequent rights of participation to the charges confirmed against the accused, victims’ participation is against fundamental principles of criminal law, such as the

¹² A question outside the scope of this paper would be whether in its limitation, the TC properly delineates the jurisdictional framework of the Court and does not overlook the particularities of, for example, Security Council referrals.

¹³ ICC, TCI (Lubanga), Separate and Dissenting Opinion of Judge René Blattmann appended to TCI, 18 January 2008 Decision, § 17.

¹⁴ Acte d’appel de la Défense, §§ 36-39.

¹⁵ ICC, (Lubanga), Prosecution’s Document in Support of Appeal against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, § 16 and 27.

¹⁶ TCI, 18 January 2008 Decision, § 95.

principle of legality. Finally, he also criticized the system proposed by the TC, because it would require (at least) two applications of victims, while according to him the appropriate moment of participation should be extracted by the Chamber from the information provided in the original victim application.¹⁷

We tend to concur with the criticism expressed by Judge Blattmann in his Dissenting Opinion and by the Prosecutor and the Defence in their respective briefs of appeal. Although the interpretation by the TC of Rule 85 reflects the literal wording of the provision and appears *prima facie* beneficiary towards victims – as it is no longer necessary to show a link to the charges to obtain victim status in a case – several difficulties arise. Not only does such interpretation poses several legal problems, but also raises serious concerns over the expeditiousness and fairness of the proceedings. Moreover, the obligation for victims to apply at every specific stage of the proceedings they want to participate in represents a very tedious burden. The next part of this paper will discuss how the TC failed to offer a remedy to the latter issue.

Interpretation of “where the personal interests of the victims are affected”: the issue of reparations

After having established who is a victim eligible to participate in the proceedings before the Court, the next step is to decide how and when such input should take place. Article 68 (3) of the Rome Statute provides guidance thereto, as it endows victims with a general (potential) right to participate in the proceedings and regulates their participation. The interpretation of this provision in the TC Decision and its approach to an abstract framework of victim participation therein, which merely related to a brief analysis of the concept of “personal interest”, is in our opinion not satisfactory as a general parameter for the concrete modalities of victim’s participation, which are discussed afterwards in the Decision. The lack is illustrated by the third issue in our case for which leave to appeal was granted by the TC, namely whether it is possible for victims participating at trial to present evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence. Both the Defence and the Prosecutor objected to such participatory right, because in their opinion such input goes beyond the distinct interest of the victim as opposed to the Prosecutor, arguing that the burden of proof rests exclusively with the Prosecutor. Moreover, according to the Defence, the award of such right would make victims *de facto* a party to the proceedings in violation of the principle of equality of arms. Interesting enough, the Prosecutor agreed partially with this, and stated that this could affect the Prosecution’s case by allowing the introduction of material that could steer the trial away from its proper focus.

As to the requirement of “personal interest”, we agree to the finding by the TC in its 18 January Decision that it is critical in order for victims to participate in the trial, that their interests must relate to the evidence or the issues the Chamber will be considering in its investigation of the charges brought.¹⁸ We do not feel that it is sufficient that the personal interests would merely relate to the acts allegedly committed by the accused. Such interpretation, in our opinion, would blur the distinctive requirements of rule 85 of the RoPE, in order to get victim status, and article 68 (3) in order to participate in the proceedings and could potentially lead to “case victims” participating in all proceedings. However, in order to be able to settle from the outset when a victim will be able to participate in certain specific proceedings and to avoid a multiplication of applications, we are of the opinion that it is of a crucial importance to first have a comprehensive

¹⁷ Separate and Dissenting Opinion of Judge René Blattmann, §§ 21-22.

¹⁸ TCI, 18 January 2008 Decision, § 97.

understanding of what the personal interests of victims are *in abstracto* – i.e. what the purpose is of their participation, their general interest in the proceedings – before examining whether such interest is judicially recognisable in the concrete issue raised or the evidence presented.

The TC, in paragraphs 97 and 98, only very briefly discussed what it considers to be the personal interest of a victim in the proceedings:

“The general interests of the victims are very wide-ranging and include an interest in receiving reparations, an interest in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being recognised as victims in the case, among others.

In the view of the Trial Chamber it is necessary to stress that the participation of victims in the proceedings is not limited to an interest in receiving reparations: Article 68(3) of the Statute provides for participation by victims whenever their personal interests are affected, and these are self-evidently not limited to reparations issues”.

We do not find this broad statement very convincing in the light of the wording of article 68 (3). First, account should be given to the distinction between the interests of victims and those of the Prosecutor, as demonstrated by the aforesaid appeal. Second, article 68 makes it clear that the victims’ right to participate is subordinate to the rights of the accused and the requirements of fair trial. This limitation is in line with the former requirement, as victims cannot present the same argumentation as the Prosecutor this would be a violation of the equality of the arms.

The first requirement was mentioned in the Decision of the Appeals Chamber (“AC”) of 13 June 2007 where it was said that on a case-by-case basis *“an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor”*.¹⁹

In his Separate Opinion to this Decision, Judge Pikiş elaborated on this by explaining the distinct interest of victims. According to him, *“victims have an interest that the loss or injury they have suffered, a matter of individual concern, should surface in the proceedings and be brought to light. Such evidence would presage any claim to reparations as well as illuminate the gravity of the crime”*.²⁰

Along the same lines, the PTC in its decision of 17 January 2006, when it allowed a number of victims to participate in the DRC situation, already stated that:

*“a victims’ personal interests are affected because at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment. [...] given the effect such an investigation can have on future orders for reparation”*²¹

Also the Prosecutor consistently set victim participation in the context of establishing the legal basis for reparations, in reference to the drafting history of the Statute (e.g. Prosecution's Response to "Observations concernant les modalités de la participation des Victimes" of 25 August 2006). In his appellate brief of 10 March, it adds that *“establishing the guilt or innocence of the accused should not be confused with the interest of the victims to participate under Article 68. That crimes should be effectively investigated and prosecuted is the core of the Prosecutor's mandate. While it is also an overriding*

¹⁹ ICC, AC (Lubanga), Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007 (13 June 2007), § 28.

²⁰ ICC, AC (Lubanga), Separate Opinion of Judge Georgios M. Pikiş appended to AC, 13 June 2007 Decision, § 16.

²¹ PTCl, 17 January 2006 Decision, § 72.

*interest of the international community as a whole and of the victims specifically, it is not one that should be the basis for victims' participation in specific proceedings under Article 68(3).*²²

Besides reparations, Judge Pikiš also points out a victim's own security and safety as a personal interest: *"Another area involving the personal interests of victims is their protection and support in the proceedings, for which provision is made in several parts of the Statute and the Rules"*.²³

We concur to this view and contend that participation in the proceedings is an instrument awarded to victims in order to secure their discrete interests, namely, on the one hand, their safety and security, and, on the other hand, their right to reparations under article 75 of the Statute, which, according to article 75 (2) are wider than merely compensation and can also include, *inter alia*, restitution and rehabilitation.

It are those participatory purposes which underlay those provisions throughout the Statute and the RoPE which explicitly allow victims to voice their concern (e.g. articles 68 (1) and 75, rules 72 and 119) and which found the provision generally allowing victims to participate and regulating such participation (article 68 (3)). Participation is not limited to the procedure under rule 94, because the eventual request for reparations will be affected by the preceding proceedings. In order to receive reparations, a victim has the interest that the proceedings will determine the criminal liability of the accused and that the course of the criminal process will allow to do so, hence the explicit participatory rights in, for example, articles 15 and 19 of the Statute. Yet, all participation by victims should serve their discrete goals of reparations and safety.

The assertion of such a close link between victim participation and seeking reparations is not shared by all. As said, the TC Decision seems to hold a wider interpretation of what are a victim's personal interests in the proceedings. Judge Song, in his Separate Opinion to the AC 13 June 2007 Decision asserts that the particular interest of a victim of a crime that the person allegedly responsible for his or her suffering is being prosecuted and brought to justice, qualifies as a personal interest under article 68 (3).²⁴ We fail to see, however, how such an interest outside a reparative framework is distinct from the interests represented by the Prosecutor and even more how such interest could translate into procedural actions taken by the victim which depart from the truth establishing duties of the Prosecutor.

In our opinion, singling out the search for reparations and safety and security as the sole discrete interests of victims in Court proceedings does not only seem to reflect the ICC's regulatory victim's scheme, but also answers to the concerns that we expressed in conclusion of the first part of this paper. It is not only necessary for the parties in the proceedings to be able to know at the outset of a trial who will be participating – i.e. who are the victims – but it is of equal importance that both parties and participants upon the admittance of victims in the proceedings know when and how participating victims can make their input. It would therefore be desirable for a Chamber, when deciding on victim status, to also express itself on what are the abstract personal interests of victims and when and how those interests convert into procedural action. However, on both those issues, the current TC decision fails to offer sufficient guidance and leaves crucial questions unanswered.

²² Prosecution's Document in Support of Appeal, § 22.

²³ Separate Opinion of Judge Georghios M. Pikiš, § 16.

²⁴ ICC, AC (Lubanga), Separate opinion of Judge Sang-Hyun Song appended to AC, 13 June 2007 Decision, § 13.