

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 May 2008

TRIAL CHAMBER I

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

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

Public Document

Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Catherine Bapita Buyangandu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

TRIAL CHAMBER I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision inviting the parties’ observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08 (“applicants”).

I. Procedural Background

1. On 9 November 2007 the Chamber rendered its “Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5)”, in which it delineated the general contents of the reports to be prepared by the Registry under the relevant provisions and ordered that they are not to be provided to the parties unless the Trial Chamber orders otherwise.¹
2. On 18 January 2008 the Trial Chamber delivered its “Decision on victims’ participation”, establishing general guidelines on all matters that relate to the participation of victims throughout the proceedings.²
3. On 27 February 2008 the Trial Chamber gave leave to appeal the above decision on the following issues:³
 - i. Whether the notion of victim necessarily implies the existence of personal and direct harm.

¹ ICC-01/04-01/06-1022, paragraphs 19 and 27.

² ICC-01/04-01/06-1119, paragraph 84.

³ Decision on the defence and prosecution requests for leave to appeal the decision on victims’ participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 28.

- ii. 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.
 - iii. 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.
4. On 11 April 2008 the Registrar filed *ex parte* (only available to the Registry), its "First Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court" ("report") along with the applications of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08.⁴
 5. These 105 applicants are all natural persons and request individually that their status as victims is recognised in the trial of Mr Thomas Lubanga Dyilo.
 6. Six of the above applicants have also submitted applications for reparations.

II. Relevant Provisions

7. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions under the Rome Statute framework.
8. Article 68 of the Statute ("Protection of the victims and witnesses and their participation in the proceedings"):

⁴ ICC-01/04-01/06-1275-Conf-Exp.

1 The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[. .]

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

[..]

9. Rule 87(1) of the Rules of Procedure and Evidence (“Rules”), “Protective measures”:

Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

10. Rule 89(1) of the Rules (“Application for participation of victims in the proceedings”):

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

11. Regulation 80 of the Regulations of the Court (“Regulations”), “Appointment of legal representatives of victims by a Chamber”:

1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.

2. The Chamber may appoint counsel from the Office of Public Counsel for victims.

12. Regulation 86 of the Regulations (“Participation of victims in the proceedings under rule 89”):

1 For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, subregulation 2 [...]

[]

3 Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate.

[..]

5. The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.

6. Subject to any order of the Chamber, the Registrar may also submit one report on a number of applications received in accordance with sub-regulation 1 to the Chamber seized of the case or situation in order to assist that Chamber in issuing only one decision on a number of applications in accordance with rule 89, sub-rule 4. Reports covering all applications received in a certain time period may be presented on a periodic basis.

[...]

III. Pending Appeals

13. Although the Trial Chamber's decision of 18 January 2008 is under consideration by the Appeals Chamber, the Chamber has determined that a limited category of applications may properly be considered in this Decision, namely those that relate to individuals who allege they are the direct victims of the charges confirmed against the accused.

14. The Chamber emphasises that it is not disputed by the parties and the participants that this group (viz. direct victims of the charges against the accused) should be granted the status of victims in this trial and, accordingly, this discrete element of the Decision on victims' participation is not an issue currently pending before the Appeals Chamber. In these circumstances, the Chamber has decided it is appropriate to consider the merits of these particular applications, in advance of the outcome of the interlocutory appeal.

IV. Legal Representation

15. The Trial Chamber notices with regard to legal representation that 94 of the

applicants have set out in their application forms that they have secured legal representatives, whilst the remainder seemingly have no representation to date. As regards 9 applicants without legal representation who have also applied to participate during the investigation phase of the Situation of the Democratic Republic of Congo, they have been represented for those purposes by the Office of Public Counsel for Victims in accordance with Pre-Trial Chamber's I decision of 17 August 2007.⁵

16. In light of the Trial Chamber's decision of 7 March 2008, the Office of Public Counsel for Victims shall continue to represent these 9 applicants in these proceedings until the Chamber issues a decision on their application to participate.⁶
17. It follows that 2 applicants are currently without legal representation while the Chamber considers their requests to be granted the status of victims in the case.
18. In order to avoid those two applicants being placed in an unfavourable situation vis-à-vis the other applicants, the Chamber orders the Office of Public Counsel for Victims to represent them, pending a decision on their status as victims and (if relevant) their legal representation.

V. Protective Measures

19. In accordance with Rule 89(1) of the Rules, the Office of the Prosecutor ("prosecution") and the defence are to be provided with a copy of the applications, and they have the right to reply to them within the time-limit set by the Chamber.

⁵ Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374.

⁶ Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, ICC-01/04-01/06-1211, paragraph 41(1).

20. However, when making these applications available to the parties the Chamber must apply Article 68(1) of the Statute, which mandates the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims.
21. Most of the applicants request that their identity, along with other information included in their application forms, is not disclosed to the prosecution, the defence, the State Parties or the general public. Most applicants refer to their fears of retaliation and the safety of their own lives and those of their families as the main reasons for requesting these protective measures.
22. The Trial Chamber has not received specific detailed information as to the individual security risks of the applicants, although it is aware of the potential high levels of insecurity in relevant parts of the Democratic Republic of Congo.
23. In order to make an informed decision on individual protective measures for each applicant the Trial Chamber would need the assistance of the Victims and Witnesses Unit so as to assess the individual levels of risk that each applicant faces. Nonetheless, the Chamber is aware of the cost and time involved in the Victims and Witnesses Unit carrying out this procedure as regards all 105 applicants.
24. At this stage the Chamber is essentially conducting a preliminary assessment on the merits of the applications that may lead to some of them being rejected and this could result in applicants not being granted the status of participants in the proceedings. For this limited purpose, the Chamber adopts the observations of Single Judge Politi when addressing a similar issue, namely that “[g]iven the practical and financial obstacles necessarily associated with measures other than redactions (in particular, measures in the field or relocation)[...] the adoption of any measures other than redactions would

exceed the scope of the present proceedings and would therefore be unjustified".⁷

25. The Trial Chamber has carefully applied the principle of proportionality approved by the Appeals Chamber, that protective measures should:⁸

- i) restrict the rights of the suspect or accused only as far as necessary;
- ii) be put in place where they are the only sufficient and feasible measure.

26. The Trial Chamber deems that the above two requirements are met given that:

- i) In light of the current and significant insecurity situation in relevant parts of the Democratic Republic of Congo, non-disclosure of the applicants' identities is necessary. This will not restrict the rights of the accused at this moment, or create an irreversible situation that cannot be corrected in due course, given that the Trial Chamber will make any necessary judgements as to these redactions at the time any of the applicants are granted status as victims, in order to guarantee the fairness of proceedings.
- ii) Consistent with the Chamber's 18 January Decision on victims' participation, if victims are granted status to participate in the proceedings, their active role in the trial will depend on additional discrete applications in which they must set out specifically how their interests are affected at a given phase of the proceedings. At

⁷ The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on 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, 1 February 2007, ICC-02/04-01/05-134, paragraph 20.

⁸ Judgment on the prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paragraph 37, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First decision on the prosecution request and amended requests for redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, paragraphs 33 to 34

that stage the Chamber will take into account whether the victim is requesting continued anonymity for the purposes of determining the appropriate form of participation.⁹ At this preliminary juncture, however, redactions to applications are necessary and appropriate and are the only feasible and appropriate measures at this stage of the proceedings, namely the initial application process.

27. Therefore, all applications for participation must be provided to the prosecution and defence in a confidential redacted form, whereby all information which may lead to the identification of the applicants and their individual whereabouts has been expunged. The Trial Chamber concurs with the reasoning of Pre-Trial Chamber I in a decision on a similar issue, in that “the scope of the redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation”.¹⁰

28. Hence, the following redactions are authorised:

- i) name of applicant ;
- ii) name of parents;
- iii) place of birth;
- iv) exact date of birth (year of birth shall not be redacted);
- v) tribe or ethnic group;
- vi) occupation;
- vii) current address;
- viii) phone number and email address;
- ix) name of other victims of, or of witnesses to, the same incident;

⁹ ICC-01/04-01/06-1119, paragraph 96.

¹⁰ Decision appointing ad hoc counsel and establishing a deadline for the prosecution and the ad hoc counsel to submit observations on the applications of applicants a/0001/06 to a/0003/06, 18 May 2006, ICC-01/04-147, page 3.

- x) identifying features of the injury, loss or harm allegedly suffered;
- xi) name and contact details of the intermediary assisting the victim in filing the application.

29. As set out above, these redactions shall be further considered by the Trial Chamber for those applicants granted victim status. At that moment in time the Chamber will then re-evaluate the appropriateness of the protective measures in light of the participation of victims in the proceedings on a fact-specific basis.

30. Redacted applications are to be transmitted to both parties alike in light of “fundamental considerations of fairness (namely, the need to preserve the equality of arms), which require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them both by the statutory texts”.¹¹

VI. Reparations

31. The six applications for reparations received by the Chamber are from individuals who are also applying to participate in the proceedings. The Trial Chamber will firstly determine whether these 6 individuals have the status of victims before considering their applications on reparations.

32. Their applications for reparations shall be transmitted to the parties for their observations at a latter stage of the proceedings.

VII. Orders

33. The Trial Chamber hereby orders the Registry:

¹¹ ICC-02/04-01/05-134, paragraph 25.

- i) to consult immediately with the Office of Public Counsel for Victims as regards the latter's ability to represent the 2 applicants currently without legal representation until such time as a decision is taken on their status as victims in the case and their legal representation;
- ii) to transmit the applications for participation to both parties (prosecution and defence) in confidential redacted form, whereby any information which may lead to the identification of the applicants and their whereabouts will have been expunged no later than Monday 12 May 2008.

34. The parties are ordered to submit their observations within 20 days of notification of the redacted applications.

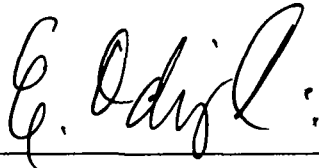
35. So as not to expose victims to further risks, applicants should not be contacted directly by any organ of the Court, but only through their legal representatives, the Victims Participation and Reparations Section or the Victims and Witnesses Unit.¹²

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

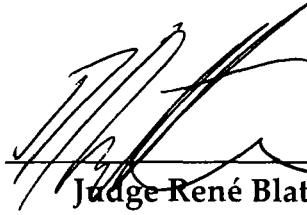
¹² Decision authorising the filing of observations on applications for participation in the proceedings, 23 May 2007, ICC-01/04-329, pages 4 and 5



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 6 May 2008

At The Hague, The Netherlands