

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 July 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

Order issuing public redacted version of the “Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial”

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Mr Simo Vaatainen

Detention Section

Victims Participation and Reparations Section

Ms Fiona McKay

Other

1. On 26 June 2009, the Chamber issued the confidential "Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial ", ("Decision"), which a) Adjourned the applications on behalf of victims a/0225/06, a/0229/06 and a/0270/07 to present their views and concerns in person; b) Granted the application of victims a/0225/06, a/0229/06 and a/0270/07 to give evidence; c) Required the three victims, with the assistance of the VWU, to file their final proposals as regards lifting anonymity vis-à-vis the parties and the participants confidentially by 10 August 2009; and d) Required witness statements or other comprehensive summary of the evidence that is to be given by each victim, together with their application forms (in full or with necessary redactions), to be filed confidentially by 10 August 2009.¹

2. During the hearing held on 26 June 2009, the Chamber ordered the following:

(...) a written decision has been handed down by the Bench today in relation to victims 225/06, 229/06, and 270/07. The legal representatives of those victims will need to consult with the VPRS so that jointly they can propose redactions so that a public version of that decision can be issued by the Chamber as soon as possible, and we set a deadline for those proposals for a week. So 4.00 p.m., Friday the 3rd of July, and the proposals can be sent by e-mail to the legal advisor to the division [...].²

3. On 2 July 2009, in consultation with the legal representative of victims a/0225/06, a/0229/06 and a/0270/07, the Registry's Victims Participation and Reparation Section submitted via email to the Legal Advisor to the Trial Division a proposed redacted version of the Decision. On 3 July 2009, a further redaction was requested via email to the Legal Advisor.³ The

¹ Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2002-Conf.


² ICC-01/04-01/06-T-200-CONF-ENG, page 57, lines 17-25.

³ Email communications from the Trial Chamber to the VPRS through the Legal Adviser to the Trial Division and from the VPRS to the Trial Chamber through the Legal Adviser to the Trial Division on 2 and 3 July 2009.

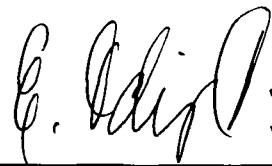
Chamber has reviewed the joint proposals and satisfied itself that the redactions are necessary for the protection of the victims concerned.

4. The Chamber hereby issues a public redacted version of the Decision.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 July 2009

At The Hague, The Netherlands

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Pénale
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TRIAL CHAMBER I

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***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
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Public Annex

Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial

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

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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 the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial.

I. Background and submissions

1. In an application submitted on 2 April 2009,¹ one of the legal representatives for victims, Mr Keta, requested that victims a/0225/06, a/0229/06 and a/0270/07 participate in person in order to make representations on what they had suffered and to present their views and concerns, in particular in relation to events in the region of [REDACTED] which have not thus far been the subject of witness testimony (“Request”). The assistance of the Victims and Witnesses Unit (“VWU”) was also requested in order to assess their security situation and to implement appropriate protective measures in order to facilitate their appearance before the Court. On 8 April 2009, the Chamber shortened the time-limit for the responses to the Request of the parties and participants.²

2. On 22 April 2009,³ the Office of the Prosecutor (“prosecution”) filed observations in relation to this Request. It submitted that it did not sufficiently specify the nature of the victims’ representations, namely whether they wished to “(i) lead evidence pertaining to the guilt or innocence of the accused; (ii) present “views and concerns” in accordance with Article 68(2), or (iii) provide submissions or evidence regarding the damage suffered in view of possible future reparations

¹ Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure, 2 April 2009 (notified on 3 April 2009), ICC-01/04-01/06-1812-Conf.

² Transcript of hearing on 8 April 2009, ICC-01/04-01/06-T-167-ENG, page 3.

³ Prosecution’s Response to the legal representative’s “Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure”, 22 April 2009, ICC-01/04-01/06-1824-Conf

under Article 75(3)".⁴ The prosecution submitted the Request should be dismissed or supplemented with further information identifying in greater detail the nature of the proposed intervention *in personam* of each victim.⁵

3. The defence filed its observations on 23 April 2009.⁶ The defence submitted that the request was "inadmissible" since the victims concerned are currently anonymous and their appearance in Court to give evidence would in those circumstances affect the right of the accused to a fair trial. The defence highlighted, in particular, the rights of the accused pursuant to Articles 67(1)(a) and (b) of the Rome Statute ("Statute"), and the stipulation in Article 68(3) that the manner in which views and concerns are presented should not be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. In the event that the Chamber granted the Request, the defence submitted that (i) a detailed written statement is disclosed twelve weeks in advance, revealing the complete identity of the victims concerned, (ii) the questioning of the victim(s) is led by the legal representative in accordance with the Chamber's previous rulings, and (iii) the defence has the right to question them.⁷

4. On 8 May 2009,⁸ the Trial Chamber instructed the legal representative of the victims to provide the Chamber with additional information and a filing was duly submitted on 18 May 2009.⁹ The legal representative submitted, first, that the information the victims sought to provide, relating to the recruitment of child soldiers in the [REDACTED] region, had not previously been considered by the Court, and that it is in the victims' interests to present views on the matter, in

⁴ *Ibid.*, paragraph 5.

⁵ *Ibid.*, paragraph 10.

⁶ Réponse de la Défense à la « Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure », déposée le 2 avril 2009, 23 April 2009 (notified on 24 April 2009), ICC-01/04-01/06-1826-Conf.

⁷ *Ibid.*, paragraph 14

⁸ Transcript of hearing on 8 May 2009, ICC-01/04-01/06-T-171-CONF-ENG, page 37, lines 4-25 and page 38, lines 1-6. The Trial Chamber also shortened the time-limit for the filing of responses.

⁹ Informations complémentaires concernant la « Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure » déposée le 2 avril 2009, 18 May 2009, ICC-01/04-01/06-1883-Conf.

light of reparations proceedings. Second, it was submitted that the request for the victims to give evidence under oath was in accordance with the decision of the Appeals Chamber of 11 July 2008;¹⁰ specifically that the application of 2 April 2009 constituted a discrete application to give evidence under oath that had been notified to the parties; that it demonstrated, together with the supplementary information, the personal interests of the victims which are affected by the trial proceedings; that more complete disclosure of the basis for the application and the supplementary information was intended, with the assistance of the VWU; and that the request is appropriate and compatible with the rights of the accused, and particularly as regards the requirements of a fair trial. Third, the legal representative submitted that it was appropriate for evidence to be given by the victims, since this would (i) allow the defence the opportunity to question the victims, (ii) enable the victims to express themselves in person, thereby providing the Court with details concerning the affected populations, and (iii) provide the Chamber with a better appreciation of the importance of victims and to assist the Court in its dealings with them. Fourth, it was submitted that their intervention should come after the prosecution case, rather than as part of the submissions at the end of the proceedings, due to the significance of the information that may be provided by the victims and in order to allow the defence to respond fully, thereby enabling the accused properly to defend himself. Last, it was submitted that anonymity vis-à-vis the public should be maintained, in light of the security situation in Ituri, but it may be lifted vis-à-vis the defence (in consultation with the VWU) subject to redactions to protect others (such as intermediaries and other victims).¹¹

5. In its response filed on 22 May 2009,¹² the prosecution reiterated its objection to the participation of these victims in person, submitting that the second request

¹⁰ 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.

¹¹ ICC-01/04-01/06-1883-Conf, paragraphs 14 to 16.

¹² Prosecution's Reponse to the legal representative's "Informations complémentaires concernant la « Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne » déposé (sic), 22 May 2009, ICC-01/04-01/06-1895-Conf.

still failed to satisfy the relevant test established by the Appeals Chamber. The prosecution highlighted what it submitted is the general approach adopted by the Appeals Chamber¹³ and the Trial Chamber,¹⁴ namely victims may only lead evidence exceptionally and upon clear justification. The prosecution put the matter thus:

6. As confirmed by the Appeals Chamber, victims do not have an unfettered right to lead evidence on the guilt or innocence of the accused because, “presumptively, it is the Prosecutor’s function to lead evidence on the guilt of the accused”. Instead, victims may seek to lead evidence exceptionally, and only upon showing how their personal interests are affected and by complying with a set of criteria established by the Appeals Chamber.

7. In relation to the possibility of victims making representations in person, instead of through the Legal Representative, the Trial Chamber has made clear that any such intervention must be limited to exceptional circumstances and the justification must be detailed and clear.¹⁵

6. The prosecution submitted that the application does not clearly identify whether the victims seek to present their views and concerns in person or instead to give evidence on issues relevant to the guilt or innocence of the accused. It submitted that the Request provides neither the necessary justification for personal participation nor the exceptional circumstances that are said to be required in order to give evidence. Further, it submitted that the Request fails to provide an outline of the evidence the victims propose to give or its relevance to the issues in this trial. The prosecution submitted that the information to be introduced by victims a/0225/06 and a/0229/06 may duplicate evidence already called by the prosecution. The prosecution contended that evidence relevant to sentence should not be introduced at this stage of the proceedings and should be called at the sentencing and reparations stage. In light of the above, the prosecution submitted that the Request should either be dismissed or supplemented by

¹³ ICC-01/04-01/06-1432.

¹⁴ Transcript of hearing on 12 January 2009, ICC-01/04-01/06-T-101-ENG page 43, line 4 to page 44, line 3.

¹⁵ ICC-01/04-01/06-1895-Conf, paragraphs 6 and 7.

necessary further details, and in particular: (i) whether the victims exclusively intend to restrict their submissions to the harm they suffered, and (ii) the precise matters on which they wish to give evidence, and the justification for each area that is to be covered.

7. The defence further submitted observations on 25 May 2009.¹⁶ The defence opposed the application and supported the stance of the prosecution, as described in paragraphs 8 and 10 of its filing of 22 May 2009 (*viz.* that the Request does not comply with the approach established by the jurisprudence of the Court). The defence further reiterated its arguments of 24 April 2009, regarding the impact of this proposed participation on the rights of the accused. In the event that the application is granted, the defence repeated their request that a detailed written statement is disclosed to them three months before each victim testifies, containing their full identity and signed by them.
8. Following an oral decision by the Chamber on 2 June 2009¹⁷ in which the bench requested the legal representative of the victims concerned to make contact with the VWU in order to discuss the safety and security concerns of these victims, and in particular, to ascertain what measures the VWU could invoke should the Chamber grant this application, the legal representative of these victims made a further written submission, filed on 22 June 2009, informing the Chamber as to the outcome of these discussions with the VWU.¹⁸
9. The legal representative submitted that victim a/0270/07 consents to lifting his anonymity for the defence, but he has indicated that he wishes to remain

¹⁶ Réponse de la Défense aux « Informations complémentaires concernant la « Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure », déposée le 18 mai 2009, 25 May 2009, ICC-01/04-01/06-1898-Conf. The defence was granted an extension to file its response on 12 May 2009: transcript of hearing on 12 May 2009, ICC-01/04-01/06-T-172-CONF-ENG, page 12

¹⁷ Transcript of hearing on 2 June 2009, ICC-01/04-01/06-T-184-CONF-ENG, page 1, lines 17-25 and page 2, lines 1-9.

¹⁸ Soumission, 19 juin 2009, ICC-01/04-01/06-1977-Conf.

anonymous as regards the public for fear of the repercussions that may follow.¹⁹ No further information was provided on the position of the two other victims. In addition, the legal representative submitted that the VWU has indicated it must have full details of the victims' circumstances, their specific fears and other general and administrative information, and in this regard the legal representative has furnished the VWU with certain supplementary information on the security concerns, as expressed by the victims, and [REDACTED].²⁰ As regards specific measures which could be implemented, as well as the time it would take to put these measures in place, the legal representative set out that the VWU recommends the following measures:²¹

- a. The identity of the victims must not at any time be communicated to the public;
- b. The identity of the victims cannot be communicated to the parties until the IRS is in place;
- c. VWU need 3 – 4 weeks to put the IRS in place, with the proviso that the preliminary study which is taking place next week confirms the feasibility of an IRS in the area concerned;
- d. Where a victim is brought to The Hague to testify or participate in hearings, 35 days or more would be necessary in order to put in place all necessary steps for a secure transfer.

II. Relevant Provisions

10. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions under the Rome Statute framework.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

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

¹⁹ ICC-01/04-01/06-1977-Conf, paragraphs 4 and 5.

²⁰ ICC-01/04-01/06-1977-Conf, paragraphs 6 and 7.

²¹ ICC-01/04-01/06-1977-Conf, paragraph 9.

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.

Article 69

Evidence

3. 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.

11. Rule 91 of the Rules and Procedure and Evidence (“Rules”) states that:

Rule 91

Participation of legal representatives in the proceedings

[...]

2. 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.

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.
- (b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

12. Rule 87 of the Rules enables the Chamber to order protective measures in regards to victims:

Rule 87

Protective measures

1. 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.

13. Pursuant to Regulation 56 of the Regulations of the Court ("Regulations"):

Regulation 56

Evidence under article 75

The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.

III. Analysis and Conclusions

14. These three participating victims have advanced two distinct requests in this application: first, to address the court in person in order to present their views and concerns, and, second, to give evidence under oath. Although these requests raise different considerations, they are inextricably linked, thereby meriting joint resolution.
15. In summary, these participating victims wish to address the court on four discrete issues, by way of presenting their views and concerns or by giving evidence:
- i. their individual histories, within the context of the charges faced by the accused;
 - ii. the harm they individually experienced;
 - iii. the approach to be taken to reparations, focussing particularly on any relevant facts not canvassed thus far during the trial (in accordance with Article 68(3) of the Statute); and
 - iv. the issue, including the extent, of child recruitment in [REDACTED] region;²²
16. It will be necessary to determine in this Decision whether these issues properly arise for consideration in the context of this trial, and, if so, how each is to be presented by these participating victims, but first it is convenient to set out the principles that are to be applied to applications of this kind.

²² ICC-01/04-01/06-1812-Conf, page 4; ICC-01/04-01/06-1883-Conf, paragraphs 4(b), 5 and 6.

17. As rehearsed above, Article 68(3) establishes the unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected, although the opportunity is expressly created for their legal representatives to undertake this task on their behalf, if the Court considers that course appropriate. However, any intervention by victims must be in a manner which is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. Accordingly, the content and the circumstances of their participation must not undermine the integrity of these criminal proceedings.
18. The Trial Chamber has focussed on these and related issues in previous decisions. In the Decision on Victims' participation, the Chamber expressed the following:

115. By Article 68(3) of the Statute it is clear that victims have the right to participate directly in the proceedings, since this provision provides that when the Court considers it appropriate the views and concerns of victims may otherwise be presented by a legal representative.

116. The Chamber is aware, however, that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims' common views and concerns may sometimes be better presented by a common legal representative (i.e. for reasons of language, security or expediency), the Trial Chamber will decide either *proprio motu*, or at the request of a party or participant, whether or not there should be joint representation of views and concerns by legal representatives at any particular stage in the proceedings ...²³

19. As regards the right to give evidence, in the same decision the Chamber described the issue thus:

108. The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity

²³ Decision on victims' participation, 18 January 2009, ICC-01/04-01/06-1119, paragraphs 115 and 116.

to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.²⁴

20. The Appeals Chamber, in approving this approach, elaborated on the requirements that are necessary in order to allow victims to tender and examine evidence:²⁵

4. The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial. In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.²⁶

21. It is to be observed that the prosecution in its submissions has misdescribed the effect of the decision of the Appeals Chamber, when it submitted that these applications should be dismissed, *inter alia*, because the applicant victims have not demonstrated "exceptional circumstances" in order to justify introducing this evidence.²⁷ The Appeals Chamber did not establish or endorse this suggested

²⁴ *Ibid*, paragraph 108

²⁵ ICC-01/04-01/06-1432, paragraphs 4 and 104.

²⁶ *Ibid*, paragraph 4.

²⁷ ICC-01/04-01/06-1895-Conf, paragraph 11.

criterion, and victims do not have to satisfy the Chamber that they come within an “exceptional” category in order to tender and examine evidence.

22. The Chamber addressed the stage at which evidence on reparations is to be introduced:

122. [...] The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.²⁸

23. During a status conference on 12 January 2009, the Chamber made the following *ex tempore* observation:

It is clear from the filings that have been made that a number, a not insignificant number, of victims have indicated that they wish to participate in person. No details have been given about this at all at this stage.

It needs to be remembered that this is a court of law and, in particular, this is the criminal trial of the accused, and the presumption is that those who participate in the proceedings will be lawyers, lawyers acting for individuals or for bodies, for entities.

If individuals are to be allowed to participate in person, there would have to be cogent, indeed powerful, reasons for that exceptional course [...] because [...] people without legal training coming to talk about very difficult things that have happened to them could have a real capacity for destabilising these court proceedings.²⁹

24. Therefore, the Appeals Chamber and the Trial Chamber have addressed issues of principle, as well as the trial management implications that may arise, when victims apply to participate. The Trial Chamber has sought to ensure that any personal intervention by victims, particularly if a significant number are

²⁸ ICC-01/04-01/06-1432, paragraph 122.

²⁹ ICC-01/04-01/06-T-101-ENG, page 43, lines 11-20.

participating, does not have a negative impact on the trial, because, for instance, the individuals participating lack legal training and the issues may be complex.

25. Finally, it needs to be stressed that the process of victims “expressing their views and concerns” is not the same as “giving evidence”. The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence.³⁰ In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.

26. In the result, careful decisions will need to be made by victims as to whether to give evidence under oath, or to present their views and concerns, or both. If they wish to express their views and concerns, they will need to determine whether they are best placed to undertake this exercise or whether the relevant matters would be more effectively introduced by their legal representatives. Furthermore, the Chamber will need to ensure that issues and facts are not unnecessarily repeated (*e.g.* first in a victims’ personal presentation of his or her views and concerns, then repeated by them in evidence and finally addressed on a third occasion by the legal representatives in submissions). Although evidence can be commented upon in submissions or during the process of presenting views and concerns, overall this exercise must be proportionate and consistent with a fair trial.

27. It would be undesirable – indeed impossible – for the Chamber to describe in greater detail the circumstances in which the personal intervention by victims in order to express their views and concerns will be appropriate. Fact-specific

³⁰ Article 74(2) of the Statute.

decisions will be required, taking into account the circumstances of the trial as a whole. For instance, the personal contributions of a few victims are unlikely have the same impact on the proceedings as when a large number of victims individually wish to express their views and concerns. To take an extreme example, if all the participating victims in this case (94) sought to present their views and concerns, depending always on the circumstances of their discrete interventions, that course may be antithetical to the fair trial of the accused. Accordingly, it will be necessary for the Chamber to consider these applications on their individual merits, balancing a wide variety of factors that will include the requirements and circumstances of the trial as a whole. This is an area in which the legal representatives have a crucial role to play: it is of undoubted importance that the participating victims receive careful and comprehensive advice as to the most appropriate form of participation by them in this trial.

28. Turning, first, to the merits of the requests to give evidence, written applications have been submitted and notified to the parties.³¹ Therefore, the first two requirements, as approved by the Appeals Chamber (see paragraph 20 above), have been satisfied.

29. As to whether the personal interests of the victims are affected and whether their testimony may be relevant to the charges against the accused, the issue of child recruitment in [REDACTED] region,³² and its extent, are of *prima facie* relevance to the suggested use, recruitment or enlistment of child soldiers during the relevant period by Thomas Lubanga Dyilo. Moreover, this evidence may assist the Chamber in its consideration of reparations for certain victims, if these arise later in the proceedings.³³ The [REDACTED] region is a relevant area in the Democratic Republic of Congo ("DRC"), falling potentially under the alleged

³¹ ICC-01/04-01/06-1812-Conf; ICC-01/04-01/06-1883-Conf.

³² ICC-01/04-01/06-1883-Conf, paragraph 4(a).

³³ ICC-01/04-01/06-1119, paragraph 122.

control or influence of the accused during the timeframe of the charges, and this evidence may therefore assist the Chamber in its determination of the truth.³⁴

30. The Chamber has considered the relevant history for each of these individuals as reflected in their victims' application forms, on the assumption that their evidence will, at least in part, reflect this material.

31. Victims a/0229/06 and a/0225/06 will be able to testify about their alleged recruitment by the UPC when they were under the age of 15 in the region of [REDACTED], Ituri-Oriental Province, DRC. Their evidence can properly cover their alleged training and the use that was made of them to participate actively in relevant hostilities. Furthermore, they will be in a position to give evidence of the harm they suffered as a result of these events.³⁵

32. Victim a/0270/07 is in a position to give evidence on the alleged recruitment of children [REDACTED] in the region of [REDACTED], Ituri-Oriental Province, DRC and his involvement in these events, and particularly his efforts to [REDACTED]. Moreover, his evidence will cover the harm that certain individuals experienced as a result of the relevant events.³⁶

33. Against that background, the Chamber has considered the application forms of these three victims, along with the Prosecution's Updated Summary of Presentation of Evidence and Annexes ("prosecution's summary of evidence") and the charges read to the accused at the commencement of this trial, in order to

³⁴ ICC-01/04-01/06-1883-Conf, paragraph 4(a).

³⁵ Application for participation of the victim: a/0225/06, 11 April 2008, ICC-01/04-01/06-1275-Conf-Exp-Anx11; Application for participation of the victim: a/0225/06, 11 April 2008, ICC-01/04-01/06-1275-Conf-Exp-Anx76; Annex 4 to "Report on supplementary information received and missing information concerning the applications for participation dealt with in the "First Report to Trial Chamber I on Victims' Applications under Regulation 86.5 of the Regulations of the Court, 6 June 2008, ICC-01/04-01/06-1380-Conf-Exp-Anx4; Confidential Ex parte Annex A 1 to the Order issuing Annexes to the "Decision on the applications by victims to participate in the proceedings" of 15 December 2008, 19 December 2008, ICC-01/04-01/06-1563-Conf-Exp-AnxA1, pages 42 to 45 and 98 to 100.

³⁶ Rappports individuels, 11 April 2008, ICC-01/04-01/06-1275-Conf-Exp-Anx2, pages 162 to 163; Application for participation of the victim: a/0270/07, 11 April 2008, ICC-01/04-01/06-1275-Conf-Exp-Anx81; ICC-01/04-01/06-1563-Conf-Exp-AnxA1, pages 230 to 233.

establish whether the evidence likely to be given by these three participating victims is relevant in the case.³⁷

34. The charges read to the accused on 26 January 2009 were in the following terms:

Thomas Lubanga Dyilo is responsible as co-perpetrator for enlisting and conscripting of children under 15 in the FPLC and for using them actively in hostilities under 8(2)(b)(xxvi) between early September 2002 to 2 June 2003.

Thomas Lubanga Dyilo is responsible as a co-perpetrator of 10 enlisting and conscripting children under the age of 15 into the FPLC and using them to participate actively in hostilities in the context of an armed conflict under Articles 8(2)(e)(vii) of the Rome Statute between 13 the 2nd of June, 2003, and the 13th of August, 2003.³⁸

35. In the prosecution's summary of evidence it referred to the UPC/FPLC's policy of recruitment, the large-scale of enlistment and conscription of child soldiers, the existence of training camps, and the use of child soldiers to participate in hostilities.³⁹

36. Addressing the location of these events, the territory of [REDACTED] was referred to in the prosecution's summary of evidence: reference was made to the district of Ituri, and its five territories: Djugu, Irumu, Aru, Mahagi and Mambasa.⁴⁰ The prosecution allege that the armed conflict that provides the context for the crimes confirmed against the accused occurred in the district of Ituri, and the DRC Eastern Provinces in general.⁴¹ Furthermore, the prosecution allege that the UPC/FPLC leadership, including Thomas Lubanga Dyilo, received information about military operations, and other relevant events, from within the entirety of Ituri, including in [REDACTED].⁴²

37. During the course of this trial the Chamber has heard testimony from a number of alleged former child soldiers. The prosecution submits that the testimony of a/0229/06 and a/0225/06 would merely duplicate evidence that has already been

³⁷ ICC-01/04-01/06-1354-Conf; ICC-01/04-01/06-T-107-ENG, page 2, lines 4-13.

³⁸ ICC-01/04-01/06-T-107-ENG, page 2, lines 4-13.

³⁹ ICC-01/04-01/06-1354-Conf-AnxA, paragraphs 37-44.

⁴⁰ ICC-01/04-01/06-1354-Conf-AnxA, footnote 5.

⁴¹ ICC-01/04-01/06-1354-Conf-AnxA, paragraph 6

⁴² ICC-01/04-01/06-1354-Conf-AnxA, paragraph 67.

given.⁴³ However, the account of each former child soldier is unique – none of their personal histories are the same – and furthermore these two participating victims propose to give evidence on the recruitment and enlistment of children under the age of 15, and the use that was made of them to participate in hostilities, in the region of [REDACTED]. Although this region has been referred to in evidence, the recruitment, enlistment and use of child soldiers in that area has not been addressed thus far.⁴⁴

38. As regards a/0270/07, he is an alleged indirect victim of the crimes confirmed against the accused, and he is in a position to provide evidence not given hitherto: he is an adult who states that he [REDACTED] the enforced recruitment of children from [REDACTED] and he will describe [REDACTED].⁴⁵ These events, as alleged, occurred in the region of [REDACTED], and are thus within the ambit of the charges.
39. In all the circumstances, these applicants have each demonstrated that the evidence they seek to present affects their personal interests and, in each instance, it is directly related to the charges brought against the accused. Therefore, they may give evidence.
40. Once the three participating victims have completed their evidence, they will be in the best position, at that stage, to determine whether they wish to express their views and concerns personally. As set out above, the Chamber expects the legal representatives to give detailed and careful advice on this issue, and it will entertain oral submissions at the relevant time. Although as a matter of principle it is open to these participating victims to request an opportunity to present their views and concerns personally on issues such as the harm they individually experienced and the approach to be taken to reparations, if they have chosen to give evidence on all relevant matters within their knowledge and experience, it

⁴³ ICC-01/04-01/06-1895-Conf, paragraph 11.

⁴⁴ [REDACTED]

⁴⁵ ICC-01/04-01/06-1895-Conf, paragraph 11.

may be more appropriate for any additional submissions (which may involve complex legal issues) to be advanced by their legal representatives. However, the Chamber will deal with the position of each victim following their evidence, once the individual circumstances of, and the detail of the requests from, each of these three participating victims are clear. At that stage the Chamber will determine, if relevant, when and by whom any views and concerns are to be presented, bearing in mind the situation of the victims and the need to ensure that the trial of the accused is fair.

41. Victim a/0270/07 has applied to preserve his anonymity vis-à-vis the public whilst he has agreed to lift his anonymity as regards the parties and the other participants, subject to any contrary evaluation by the VWU.⁴⁶ The position as regards the other two victims on this issue is not entirely clear, although it also appears to be dependent on the VWU's proposals.⁴⁷
42. In any event, the three victims, with the assistance of the VWU, shall file their final proposals in this regard confidentially by 10 August 2009, notifying the Chamber, the Registry, the parties and the participants.
43. A witness statement or other comprehensive summary of the evidence that is to be given by each victim, together with their application forms (in full or with necessary redactions), shall be filed confidentially by 10 August 2009, notifying the Chamber, the Registry, the parties and the participants.
44. The evidence from these three participating victims will be given after the judicial recess, but in any event prior to the accused's presentation of his case. The precise date will be determined at a status conference in due course, once the Chamber has been able to assess the length of time the prosecution and defence reasonably require for preparation.

⁴⁶ ICC-01/04-01/06-1977-Conf, paragraph 4.

⁴⁷ ICC-01/04-01/06-1977-Conf; ICC-01/04-01/06-1883-Conf, paragraphs 14-17.

IV. Orders of the Chamber

45. For these reasons, the Trial Chamber hereby:

- a. Adjourns the applications on behalf of victims a/0225/06, a/0229/06 and a/0270/07 to present their views and concerns in person.
- b. Grants the application of victims a/0225/06, a/0229/06 and a/0270/07 to give evidence.
- c. Requires the three victims, with the assistance of the VWU, to file their final proposals as regards lifting anonymity vis-à-vis the parties and the participants confidentially by 10 August 2009.
- d. Requires witness statement or other comprehensive summary of the evidence that is to be given by each victim, together with their application forms (in full or with necessary redactions), to be filed confidentially by 10 August 2009.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 26 June 2009

At The Hague, The Netherlands