

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 6 June 2006

**PRE-TRIAL CHAMBER I**

**Before:** Judge Sylvia Steiner, Single Judge

**Registrar:** Mr Bruno Cathala

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

**Public Formatted and Redacted Document**

**Prosecution's Observations on the Applications for Participation of Applicants  
a/0001/06 to a/0003/06**

**The Office of the Prosecutor**

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Ms Fatou Bensouda, Deputy Prosecutor  
Mr Ekkehard Withopf, Senior Trial Lawyer

**Counsel for the Defence**

Mr Jean Flamme

**Counsel for the Applicants**

Mr Luc Walley  
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No. : ICC-01/04-01/06

6 June 2006

## Background

1. On 10 February 2006, the Pre-Trial Chamber issued a warrant of arrest against Thomas LUBANGA DYILO in which he is alleged to have committed the crimes of enlisting, conscripting and using children to participate actively in hostilities under Article 8(2) of the Rome Statute ("Statute") at several locations between July 2002 and December 2003.<sup>1</sup>
2. On 5 May 2006, Applicants a/0001/06 to a/0003/06 applied for participation, as victims, at all stages of the proceedings in (1) the situation in the Democratic Republic of the Congo (DRC) and (2) in the case of *The Prosecutor vs Thomas LUBANGA DYILO* (Applications).<sup>2</sup>
3. By Decisions of 18 May 2006 (18 May 2006 Decisions),<sup>3</sup> the Single Judge of the Pre-Trial Chamber (Single Judge) set a time limit of 15 days from the notification of the Applications<sup>4</sup> for the Prosecution, Counsel for the Defence, and Counsel *ad hoc* for the Defence to file their observations. The Prosecution was notified of the Applications on 22 May 2006.<sup>5</sup>

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<sup>1</sup> Arrest Warrant, 10 February 2006, at page 4.

<sup>2</sup> Demande de participation à la procédure: a/0001/06, filed by the Registry on 9 May 2006 (ICC-01/04-01/06-98-Conf-Exp); Demande de participation à la procédure: a/0002/06, filed by the Registry on 9 May 2006 (ICC-01/04-01/06-99-Conf-Exp); Demande de participation à la procédure: a/0003/06, filed by the Registry on 9 May 2006 (ICC-01/04-01/06-100-Conf-Exp).

<sup>3</sup> Decision Establishing a Deadline for the Prosecution and the Defence to submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, 18 May 2006; 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.

<sup>4</sup> For reasons of protection and privacy of victims and witnesses, and in line with the 18 May 2006 Decisions of the Single Judge, Counsel for the Defence and Counsel *ad hoc* for the Defence were provided redacted versions of the Applications. The Prosecution, in compliance with the 18 May 2006 Decisions, was provided with the un-redacted Applications.

<sup>5</sup> The Prosecution notes that - to its knowledge - Counsel for the Defence and Counsel *ad hoc* for the Defence were notified of the (redacted) copies of the Applications on or after 2 June 2006. This results in a

## Scope of the present submission

4. The present submission covers the Applications to the extent that the Applicants request participation in the case of *The Prosecutor vs Thomas LUBANGA DYILO*.<sup>6</sup>

## Legal Qualification of “Victim”

5. According to Rule 89(2) of the Rules of Procedure and Evidence (Rules), the Chamber must first decide if the applicants qualify as “victims” in accordance with the definition contained in Rule 85. Any decision taken by the Chamber under Rule 89 “shall apply throughout the proceedings in the same case”, subject to Rule 91(1).<sup>7</sup>
6. Rule 85 provides the following definition of “victim”:

*“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;”*

7. Article 68(3) of the Rome Statute (Statute) provides that the Chamber shall permit participation of an individual (as defined by Rule 85) where the personal interests of the individual are affected. The Prosecution submits that Article 68(3) of the

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situation that the deadlines for the filing of the respective replies for the Prosecution, Counsel for the Defence and Counsel *ad hoc* for the Defence differ significantly. Whilst in the present case the Prosecution does not believe it necessary to discuss this matter further, it reserves its right to make additional submissions and to request adjustment of its deadline in future similar situations.

<sup>6</sup> To the extent that the Applicants request participation in the proceedings in the situation of the Democratic Republic of the Congo, the Prosecution will submit a separate filing.

<sup>7</sup> Regulation 86(8).

Statute and Rule 85, viewed together, establish a two-stage process for the Chamber to determine if an individual qualifies as a victim with standing to participate in a proceeding: first, the applicant must fulfil the criteria set out in Rule 85, then the Chamber must satisfy itself that the personal interests of the victim are directly affected by the proceedings in which he or she is applying to participate.<sup>8</sup>

8. This interpretation is supported by the practical application of Rule 89(2), which provides that “[a] victim whose application has been rejected may file a new application later in the proceedings”. A person’s status as a victim (or not) is unlikely to change during the course of the proceedings.<sup>9</sup> Rather, it is the issue of whether a victim’s personal interests are directly affected by the proceedings that is likely to change, depending on the scope of the crimes with which a person is charged.
9. This reasoning reinforces the conclusion that there must be a “judicially recognisable personal interest”<sup>10</sup> in order for an application for participation under Article 68(3) to succeed. That personal interest must relate to the *specific matters* at issue within the framework of the Court’s proceedings.
10. The Prosecution submits that the question whether “*the personal interests of the victim are affected*” within the meaning of Article 68(3) must be causally connected to the specific crimes being prosecuted. Otherwise, the participation of a victim serves no useful purpose and could, in fact, result in significant prejudice to the accused.

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<sup>8</sup> See also para. 62 of the Pre-Trial Chamber’s 17 January 2006 “Décision sur les Demandes de Participation à la Procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6.”

<sup>9</sup> “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”, 15 August 2005, at page 9.

<sup>10</sup> See E. Haslam, “Victim Participation at the ICC”, in McGoldrick, Rowe and Donnelly (eds.): *The Permanent International Criminal Court* (2004), at page 326.

## Factual analysis

11. As presently constituted,<sup>11</sup> the charges against Thomas LUBANGA DYILO include (1) enlisting children under the age of fifteen years, (2) conscripting children under the age of fifteen years, and (3) using children under the age of fifteen years to participate actively in hostilities.

12. In the instance case, REDACTED individuals (Applicants) have applied to qualify as victims in order to be permitted to participate in the case of *The Prosecutor vs. Thomas LUBANGA DYILO*:

- (i) REDACTED has applied in REDACTED own right, and REDACTED is in addition representing, as REDACTED respectively, REDACTED;
- (ii) REDACTED has applied in REDACTED own right, and REDACTED is in addition representing, as REDACTED;
- (iii) REDACTED are applying in their own right.

### *Application a/0001/06*

13. The following individuals have applied for participation as victims: REDACTED.<sup>12</sup>

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<sup>11</sup> The Prosecution will in near future inform the Pre-Trial Chamber of its decision in respect of the amendment of the charges.

<sup>12</sup> In REDACTED own right.

14. In the Prosecution's view, all REDACTED Applicants, for most aspects of the Application,<sup>13</sup> meet the criteria to be qualified as "victims" in terms of Rule 85:<sup>14</sup>

- (i) REDACTED voluntarily joined the UPC<sup>15</sup> in REDACTED. REDACTED was enlisted by a UPC commander named REDACTED who was working with the UPC commander REDACTED. REDACTED was made his escort. In August 2003, after the arrival of ARTEMIS, REDACTED voluntarily demobilised. Later on, the UPC made an effort to re-recruit REDACTED. REDACTED has named the "UPC DE THOMAS LUBANGA" being responsible for these events.<sup>16</sup> By this account, REDACTED has set out a relevant and close link between the harm REDACTED suffered and the charges against Thomas LUBANGA DYILO.
- (ii) REDACTED voluntarily joined the UPC in REDACTED. REDACTED was made the bodyguard of the UPC commander REDACTED and was used, *inter alia*, as a spy. After the arrival of ARTEMIS, REDACTED voluntarily demobilised. REDACTED has named the "UPC DE THOMAS LUBANGA" being responsible for these events.<sup>17</sup> By this account, REDACTED has set out a relevant and close link

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<sup>13</sup> The portions of the Application, for which in the Prosecution's view the Applicants do not meet the criteria, are detailed in para. 15.

<sup>14</sup> The Prosecution submits that the details of the factual statements of the Applicants, whilst sometimes difficult to follow, provide sufficient basis to reach a determination on the Applications.

<sup>15</sup> The Prosecution emphasizes that in the context of the present filing, whenever naming the respective militia groups, it quotes from the Applications. The Prosecution is of the view that "UPC" makes reference to "FPLC". The Prosecution specifically refers to para. 57 of the Prosecutor's Application for Warrant of Arrest, Article 58.

<sup>16</sup> Application, at page 10.

<sup>17</sup> Application, at page 10.

between the harm REDACTED suffered and the charges against Thomas LUBANGA DYILO.

- (iii) REDACTED. In the Application, REDACTED states that the recruitment of REDACTED had a serious impact on REDACTED and has disorganised the life of REDACTED family. REDACTED names the "UPC DE THOMAS LUBANGA" being responsible for these events.<sup>18</sup> REDACTED has set out a relevant and close link between the harm REDACTED suffered and the charges against Thomas LUBANGA DYILO. The Prosecution submits that - in the specific circumstances of the present case - REDACTED meets the criteria: REDACTED has suffered harm by the recruitment of REDACTED by the UPC, and REDACTED has provided sufficient information to show that REDACTED personal interests, namely REDACTED family life, are directly linked to the proceedings against Thomas LUBANGA DYILO.

15. The Prosecution submits that in relation to the following alleged crimes the Applicants do not meet the criteria for participation:

- (i) Given the factual information provided by REDACTED concerning the death of REDACTED in REDACTED, the only possible conclusion is that REDACTED died of natural cause. The mere fact that REDACTED died following combats between the UPC and the FNI does not sufficiently indicate the commission of a crime.

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<sup>18</sup> Application, at page 10.

- (ii) The information provided in respect of the alleged killing of REDACTED does not allow to establish the necessary link between the alleged crime and the charges against Thomas LUBANGA DYILO. First, REDACTED appears to have been killed by a member of the APC, thus not by an individual under the command and control of Thomas LUBANGA DYILO. Second, the crime by its very nature is not linked to the current charges against Thomas LUBANGA DYILO.

*Application a/0002/06*

16. The following individuals have applied for participation as victims: REDACTED.<sup>19</sup>

17. In the Prosecution's view, the REDACTED Applicants, for most aspects of the Application,<sup>20</sup> meet the criteria for qualification as "victims" in terms of Rule 85:<sup>21</sup>

- (i) REDACTED was, together with other children, forcibly recruited by armed militia in REDACTED.<sup>22</sup> REDACTED, together with the other forcibly recruited children, was brought to the military training camp in REDACTED, where they received military training of three months under the command of the UPC<sup>23</sup> commanders

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<sup>19</sup> In REDACTED own right.

<sup>20</sup> The portions of the Application, for which in the view of the Prosecution the Applicants do not meet the criteria, are detailed in para. 18.

<sup>21</sup> The Prosecution submits that the details of the factual statements of the Applicants, whilst sometimes difficult to follow, provide sufficient basis to reach a determination on the Applications.

<sup>22</sup> In respect of the temporal jurisdiction, the Prosecution submits that the enlistment, conscription and use of REDACTED continued from July 2002 onwards.

<sup>23</sup> Specific reference is made to footnote 18.

named REDACTED. Later, REDACTED was transferred to the military training camp in REDACTED, commanded by a UPC commander called REDACTED. REDACTED was made - up until REDACTED demobilisation in 2004<sup>24</sup> - the escort of commander REDACTED and later on, at various locations, the escort of a number of additional UPC commanders. REDACTED was tasked, *inter alia*, with guarding their respective propriety. In 2004, REDACTED was demobilised. REDACTED has named "LES DIRIGEANTS DE L'UPC (M THOMAS LUBANGA) CAR C'EST LUI LE CHEF DES COMMANDANTS REDACTED ET AUTRES" being responsible for these events.<sup>25</sup> By this account, REDACTED has set out a relevant and close link between the harm REDACTED suffered and the charges against Thomas LUBANGA DYILO.

- (ii) REDACTED. In the Application, REDACTED states that the recruitment of REDACTED and of other children of REDACTED family has caused serious damage to REDACTED family. As an example, REDACTED is particularly referring to the fact that REDACTED children were deprived of their education. REDACTED states that "LES DIRIGEANTS DE L'UPC (M THOMAS LUBANGA) CAR C'EST LUI LE CHEF DES COMMANDANTS REDACTED ET AUTRES" are responsible for these events.<sup>26</sup> By this account, REDACTED has set out a relevant and close link between the harm REDACTED suffered and the

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<sup>24</sup> The Prosecution, due to the scarce information in respect of dates, is not in a position to detail the periods of time for which REDACTED was able to temporarily escape. The Prosecution notes, however, that REDACTED was re-recruited.

<sup>25</sup> Application, at page 10.

<sup>26</sup> Application, at page 10.

charges against Thomas LUBANGA DYILO. The Prosecution submits that - in the specific circumstances of the present case - REDACTED meets the criteria: REDACTED has suffered harm by the recruitment of REDACTED by the UPC, and REDACTED has provided sufficient information to show that REDACTED personal interests, namely REDACTED family life, are directly linked to the proceedings against Thomas LUBANGA DYILO.

18. The Prosecution submits that in relation to the following alleged crimes the Applicants do not meet the criteria for participation: The factual information provided by REDACTED in respect of the alleged killing of REDACTED reveals that - pursuant to REDACTED own account - "FNI et FPPI"<sup>27</sup> militia and "l'UPDF (armée ougandaise)"<sup>28</sup> are allegedly responsible for these killings. This information does not allow establishing the necessary link between the alleged crime and the charges against Thomas LUBANGA DYILO. First, REDACTED appear to have been killed by members of militia groups and/or an army not under the command and control of Thomas LUBANGA DYILO. Second, the crimes by their very nature are not linked to the current charges against Thomas LUBANGA DYILO.

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<sup>27</sup> See Statement of the Applicant, at page 4.

<sup>28</sup> See Statement of the Applicant, at page 4.

*Application a/0003/06*

19. The following individuals have applied, of their own right, for participation as victims: REDACTED.<sup>29</sup>

20. In the Prosecution's view, the REDACTED applicants meet the criteria to be qualified as "victims" in terms of Rule 85<sup>30</sup> for the following alleged crime:<sup>31</sup> On REDACTED, their REDACTED was abducted by UPC<sup>32</sup> militia groups and thereafter, together with others, brought to an unknown location. To date, REDACTED has not returned, a fact that makes REDACTED conclude that REDACTED was afterwards killed.<sup>33</sup> They state that the abduction and the alleged killing of REDACTED have made them and their further children suffer, including in REDACTED suffering of psychological trauma, and that REDACTED needs to be rehabilitated.<sup>34</sup> They detail the "MILICES UPC DE THOMAS LUBANGA"<sup>35</sup> being responsible for these events. By this account, REDACTED have, in relation to the recruitment and the disappearance<sup>36</sup> of REDACTED by the UPC, set out a relevant and close link between the harm they suffered and the charges against Thomas LUBANGA DYILO.

21. The Prosecution submits that in relation to the following alleged crimes the Applicants do not meet the criteria for participation:

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<sup>29</sup> The Prosecution makes reference to footnote 12 above.

<sup>30</sup> The Prosecution submits that the details of the factual statements of the Applicants, whilst sometimes difficult to follow, provide sufficient basis to reach a determination on the Applications.

<sup>31</sup> The portions of the Application, for which in the Prosecution's view the Applicants do not meet the criteria, are detailed in para. 21.

<sup>32</sup> The Prosecution makes specific reference to footnote 18.

<sup>33</sup> See Statement, at page 1.

<sup>34</sup> See Statement, at page 3, and Application, at page 11.

<sup>35</sup> See Application, at page 10.

<sup>36</sup> In respect of the alleged killing, see at para. 21(ii).

- (i) Pursuant to the Declaration of the Applicants,<sup>37</sup> on REDACTED, due to threats of imminent attacks by the UPC, the Applicants left their house in REDACTED. REDACTED,<sup>38</sup> remained behind. The following day, on REDACTED returned to REDACTED and found REDACTED dead in front of the family's house, apparently killed by shots. This information does not provide sufficient details to establish a crime that can be linked to Thomas LUBANGA DYILO. In addition, the alleged crime by its very nature is not linked to the current charges against Thomas LUBANGA DYILO.
- (ii) In the Prosecution's view, the same consideration applies to the alleged killing of REDACTED.

### **Classification of the present filing**

22. Due to aspects in the present submission that address matters related to the security and safety of victims and witnesses, the Prosecution has filed the present submission as a "Confidential – *Ex Parte* – Prosecutor Only" document. The Prosecution will file a public redacted version as soon as practicable.

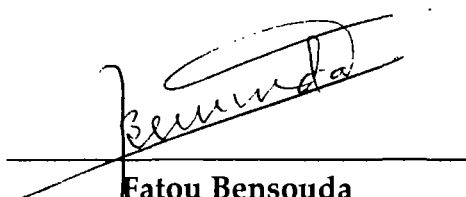
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<sup>37</sup> See Declaration, at page 2.

<sup>38</sup> The Prosecution is, due to the poor technical quality of the related portion of the Statement, not in a position to identify the respective month of REDACTED date of birth.

**Request**

23. For the foregoing reasons, the Prosecution requests the Pre-Trial Chamber to, with the exceptions as detailed in paragraphs 15, 18 and 21 above, grant the Applications to participate as victims in the case of *The Prosecutor vs. Thomas LUBANGA DYILO*.



**Fatou Bensouda**  
**Deputy Prosecutor (Prosecutions)**

Dated this 6<sup>th</sup> day of June 2006  
At The Hague, The Netherlands