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**International
Criminal
Court**

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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

**Decision on the legal representative's request for clarification of the Trial
Chamber's 18 January 2008 "Decision on victims' participation"**

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 on the legal representative's request for clarification of the Trial Chamber's 18 January "Decision on victims' participation" ("request for clarification"):

I. BACKGROUND

1. The legal representative of victims' a/0001-0003/06 filed a request for clarification of the Decision on victims' participation¹ on 23 April 2008.² He sought an order that the Office of the Prosecutor ("prosecution") transmits to the legal representative certain material in its possession, which includes the public evidence listed in Annexes 1 and 2 to the prosecution's "summary of presentation of evidence".³
2. During the Status Conference of 6 May 2008 oral submissions were heard on this request.⁴

II. SUBMISSIONS

Legal representative of victims a/0001-0003/06

3. In his request, the legal representative of victims a/0001-0003/06 argued that the decision of 18 January 2008 was "executory", because the Appeals Chamber had not at that stage rendered a decision on the suspensive effect of the interlocutory appeal pending before it.⁵

¹ Decision on victims' participation, 18 January 2008, , ICC-01/04-01/06-1119.

² Demande de clarification de la décision du 18 janvier 2008, 22 April 2008, ICC-01/04-01/06-1292.

³ ICC-01/04-01/06-1292, page 6.

⁴ Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG

⁵ ICC-01/04-01/06-1292, paragraph 2.

4. The legal representative of victims a/0001-0003/06 informed the Court that as a result of the Trial Chamber's 18 January decision, the legal representative sent an e-mail to the prosecution on 3 March 2008 requesting the communication of the index of evidence as well as a series of documents that, in the opinion of both legal representatives, relate to the personal interests of their clients. A further meeting was held between the prosecution and the legal representative on 13 March 2008.⁶
5. The legal representative of victims a/0001-0003/06 argued that in order to identify the personal interests of victims, in light of paragraph 111 of the majority's decision of 18 January, it is necessary to demonstrate precisely which documents relate to the victims' personal interests. Furthermore, in accordance with paragraph 112 of the majority's decision, he contended that since his clients had been granted the right to participate at this stage of the proceedings, the prosecution has the obligation to provide material in its possession to participating victims, upon a specific request and subject to a demonstration of relevance to their personal interests, along with the public evidence listed in Annexes 1 and 2 to the prosecution's summary of presentation of evidence.⁷
6. The legal representative of victims a/0001-0003/06 requested the Trial Chamber to clarify whether paragraph 111 of the majority's decision orders the communication of all material which the Chamber has permitted the prosecution to produce as evidence, or whether the communication of these documents will only take place once the Chamber has established the particular interests of individual victims.⁸

⁶ *Ibid*, paragraphs 4-6.

⁷ *Ibid*, paragraphs 10-12.

⁸ *Ibid*, paragraph 14.

7. The legal representative of victims a/0001-0003/06 requested an explanation from the prosecution about their approach to disclosure because it is his understanding that the prosecution is seemingly requiring a specific authorization from the Chamber for each document. As a consequence, the legal representatives would need authorisation from the Chamber in order to obtain a document. The legal representative argued that this created a paradox because he would only know if a document exists once he has seen the record.⁹
8. In the submission of the legal representative of victims a/0001-0003/06 the appropriate interpretation of the 18 January decision is that disclosure is the same for victims and the defence. He highlighted that the defence does not have to identify in advance the specific documents for which it seeks disclosure. It was argued that it is for the prosecution to identify those documents which are material to the preparation of a victim's participation during a given phase of the proceedings.¹⁰
9. The legal representative of victims a/0001-0003/06 requested the intervention of the Chamber given the imminence of the trial, and particularly the victims' legal representatives need to access documents in order to prepare for the trial.¹¹

Legal representative of victim a/0105/06

10. During the Status Conference on 6 May 2008, the Office of Public Counsel for Victims, acting on behalf of the legal representative of victim a/0105/06 agreed with the submissions of the legal representative of victims a/0001-0003/06. In the submission of the Office of Public Counsel for Victims, paragraphs 103 and 104 and paragraph 111 of the Decision on victims' participation refer to two

⁹ ICC-01/04-01/06-T-86-ENG, page 38, lines 19-25

¹⁰ *Ibid*, page 38, lines 1-6.

¹¹ *Ibid*, page 38, lines 14-19.

different issues. Paragraphs 103 and 104 address the modalities of participation of victims in relation to any identified stage of the proceeding, and they establish that if a victim wishes to participate during a particular stage of the proceedings, he or she shall set out in writing the way in which his or her personal interests are affected.¹² In contrast, the Office of Public Counsel for Victims submitted that paragraph 111 deals with inspection – in particular with the material in possession of the prosecution – and pre-eminently that the prosecution shall provide to the legal representatives any material in its possession which may have an impact on the personal interests of the victim concerned, provided that the victim can demonstrate his or her interest in the material.¹³

11. Finally, as regards the Trial Chamber's order in paragraph 138(f) of the Decision on victims' participation, the Office of Public Counsel for Victims informed the Chamber that they have not yet received any material in the possession of the prosecution or any public version of Annexes 1 and 2 to the prosecution's summary of presentation of evidence. To date, they have only received the summary of presentation of evidence in a redacted form.¹⁴

Prosecution

12. The prosecution submitted that paragraph 111 of the 18 January decision establishes that materials in the possession of the prosecution are to be provided through the legal representatives if they are relevant to the personal interests of victims "which the Chamber has permitted to be investigated during the proceedings [...]".¹⁵

¹² *Ibid*, page 39, lines 1-9.

¹³ *Ibid*, page 39, lines 11-15

¹⁴ *Ibid*, page 41, lines 5-9.

¹⁵ ICC-01/04-01/06-1292-Conf-Anx, Annex 1, page 5.

13. The prosecution suggested that the difficulty in complying with the request of the legal representative of victims a/0001-0003/06 is that the Trial Chamber has yet to make a specific determination permitting the investigation, during a particular stage of the proceedings, of the personal interests of the victims that are represented by the legal representative of victims a/0001-0003/06. The prosecution referred to paragraphs 103-104, where the procedure for the determination of personal interests is described.¹⁶
14. The prosecution contended that following the Decision on victims' participation, particularly paragraph 111, access to individual documents cannot be provided to the victims until the Trial Chamber makes item-specific orders.¹⁷
15. The prosecution further highlighted that the procedure for determining participation by victims during the trial is currently the subject-matter of the pending appeal on victims' participation.¹⁸ Accordingly, in the prosecution's submission, prior to a determination by the Appeals Chamber, the issues raised in this request for clarification cannot be fully addressed.¹⁹

Defence

16. During the 6 May Status Conference, the defence agreed with the prosecution's submission that the matter is the subject of an appeal and thus cannot be resolved pending a decision from the Appeals Chamber.²⁰

¹⁶ ICC-01/04-01/06-1292-Conf-Anx, Annex 1, page 5.

¹⁷ ICC-01/04-01/06-T-86-ENG, page 41, lines 6-18.

¹⁸ ICC-01/04-01/06-1292-Conf-Anx, Annex 1, page 5.

¹⁹ ICC-01/04-01/06-1292-Conf-Anx, Annex 1, page 4; ICC-01/04-01/06-T-86-ENG, page 40, lines 1-2.

²⁰ ICC-01/04-01/06-T-86-ENG, page 43, lines 11-15.

III. ANALYSIS AND CONCLUSIONS

17. The relevant paragraphs of the Decision on victims' participation that require clarification are the following:

111. Turning to inspection, the Trial Chamber agrees with the prosecution that inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence. However, as a matter of general principle, and in order to give effect to the rights accorded to victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing. The participating victims should also be provided with the public evidence listed in the prosecution's annexes 1 and 2 to its "summary of presentation of evidence" subject to a demonstration of relevance to their personal interests as stated above. If part of a document in this context is confidential, the document should be made available in a suitably redacted form.

[.]

138 . For these reasons, the Trial Chamber hereby orders the following:
[...] f) The prosecution shall provide to participating victims upon a specific request, subject to a demonstration of relevance to their personal interests, material in its possession and public evidence listed in Annexes 1 and 2 to the prosecution's "summary of presentation of evidence".

18. The following paragraphs of the Decision on victims' participation are also relevant:

101. It is clear from the analysis set out above that participation is not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time.

102. When considering victims' applications for participation, the Trial Chamber will assess whether the interests of the victims relate to the prosecution's "summary of presentation of evidence". The Chamber will be assisted by the report on the applications submitted to it by the Registry's Victims Participation and Reparation Section in accordance with Regulation of the Court 86.

103. Subsequently, a victim who wishes to participate in relation to any identified stage of the proceedings should set out in a discrete written application the nature and the detail of the proposed intervention (e.g. by providing the questions that he or she seeks to put). At this stage, the victim must describe the way in which his or her personal interest is affected, for example by identifying how the harm he or she suffered relates to the evidence or the issues the Chamber is considering in its determination of the charges.

104. Once the Trial Chamber has determined that the interests of a victim or group of victims are affected at a certain stage of the proceedings, the Trial Chamber will determine if participation in the manner requested is appropriate and consistent with the rights of the defence to a fair and expeditious trial.

[. .]

106. Due to the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution's investigations, the presumption will be that the legal representatives of victims shall have access only to public filings. However, if confidential filings are of material relevance to the personal interests of participating victims, consideration shall be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place.

107. In accordance with Rule 92(5) of the Rules, victims or their legal representatives shall be notified in a timely manner of all public proceedings and filings before the Court, and, if the Chamber determines that a victim's personal interests are materially affected, of any that are confidential to the extent that this does not breach other protective measures that need to remain in place. This will enable victims to identify the parts of the proceedings which may affect their interests. The Trial Chamber reiterates its general approach set out in the Order on notification of filings of 19 November 2007 that "the party or participant filing a document bears responsibility for determining the appropriate recipients". Accordingly, confidential filings which include the names of the legal representatives of the victims on their cover shall also be notified to the victims by the Registry.

A. Pending determinations

19. The majority of the Trial Chamber granted leave to appeal as regards the Decision on victims' participation on the following issues:²¹

- a) Whether the notion of victim necessarily implies the existence of personal and direct harm.
- b) 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.

²¹ 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 54.

- c) 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.

20. Although both parties requested leave to appeal on the issue of “whether the evidence of the prosecutor must be communicated to the victims before trial and whether victims participating at trial have a right to access material in the prosecution’s possession or control”, the majority decision refused leave to appeal on this issue. Furthermore, in the majority’s decision, it is noted that “access to materials by victims is a separate issue from the ability to lead evidence during trial”.²² Judge Blattmann did not dissent from the majority’s decision in this regard.
21. On 22 May 2008, the Appeals Chamber issued a decision partially granting the requests for suspensive effect made by the parties. The Appeals Chamber ordered “suspension of the impugned decision, to the extent that it is affected by the issues on appeal”.²³ Furthermore, the Appeals Chamber affirmed that the suspensive effect does not cover the orders set out paragraph 138 of the Decision on victims’ participation.²⁴ While the manner in which the personal interests of victims may be investigated in the trial (i.e. whether they may bring evidence) is yet to be resolved, participating victims’ access to the material which forms the subject of the present decision is not subject to a pending appeal.
22. As a result, the procedure decided by the Trial Chamber in the paragraphs where clarification is sought is not pending before the Appeals Chamber and

²² ICC-01/04-01/06-1191, paragraph 48.

²³ Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008, 22 May 2008, ICC-01/04-01/06-1347 OA9 & OA10, paragraph 24.

²⁴ *Ibid*, paragraph 13.

therefore it should be clarified to the extent necessary and thereafter implemented.

23. The legal representative's request for clarification is consequently not premature or inappropriate, and should be resolved immediately given the date of commencement of trial on 23 June 2008.
24. The Trial Chamber notes that an evaluation of the status of victims a/0001-0003/06 and a/0105/06 is currently pending before the Trial Chamber.²⁵ However, in accordance with Regulation of the Court 86(8), their status as victims shall apply throughout the proceedings, subject to modification by a Chamber. Furthermore, as indicated by the Appeals Chamber, there is a presumption that they have victim-status, given the decision of the Pre-Trial Chamber I, together with their participation in the proceedings before the Trial Chamber thus far.²⁶

B. Interpretation of the Decision on victims' participation

25. The clarification of the Chamber is sought as regards two main issues:
 - a) Victims a/0001-0003/06 and a/0105/06 right to access annexes 1 and 2 of the prosecution's summary of presentation of evidence; and
 - b) Victims a/0001-0003/06 and a/0105/06 right to inspect material in the possession of the prosecution.

²⁵ 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/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, 07 May 2008, ICC-01/04-01/06-1308.

²⁶ Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation, 16 May 2008, ICC-01/04-01/06-1335 OA9 and OA 10", paragraph 38.

26. Although the requests have been made specifically by the legal representative of victims a/0001-0003/06, the Chamber considers that any clarification of the Decision on victims' participation applies identically to victim a/0105/06, and any other victims who hereafter are granted participating status.

a) Victims a/0001-0003/06 and a/0105/06 right to access Annexes 1 and 2 of the prosecution's summary of presentation of evidence

27. In accordance with paragraph 102 of the Decision on victims' participation, once a victim has been granted participating status, the Chamber will assess how his or her interests are engaged at a particular stage of the proceedings in order to decide on their modalities of participation. As part of this process, the Chamber will consider the prosecution's summary of presentation of evidence.
28. In accordance with paragraph 103 of the Decision on victims' participation, the legal representatives of victims that have been allowed to participate are instructed to "set out in a discrete written application the nature and the detail of the proposed intervention", and "the victim must describe the way in which his or her personal interest is affected" in order to participate at a particular stage of the proceedings.
29. As regards the present application, victims a/0001-0003/06 and a/0105/06 have been granted the right to participate in the current phase of the proceedings (post-confirmation of charges and pre-trial), in accordance with paragraph 112 of the Decision on victims' participation. Although, they have earlier been given the right of access to the public version of Annexes 1 and 2 of the prosecution's summary of presentation of evidence, considering the nature and format of these annexes (which are essentially lists of documents), the Chamber, following detailed consideration of the annexes, has concluded that filing a redacted public versions of the annexes will not serve any practical

purpose.²⁷ Nonetheless, the victims will only be in a position to make discrete applications before the Chamber, in accordance with paragraphs 103-104 of the Decision on victims' participation, specifying how their personal interests are affected, if they have sufficient knowledge of the prosecution's evidence. The prosecution filed a confidential updated version of its summary of presentation of evidence on 23 May 2008,²⁸ and a public redacted version of the updated summary on 30 May 2008.²⁹ The footnotes to the public redacted version of this document refer in detail to the evidence which the prosecution intends to rely on, including witnesses who are referred to by their reference number and the relevant material listed in Annexes 1 and 2. In addition, during the Status Conference on 28 May 2008, the prosecution provided the Chamber and the defence with a document listing the witnesses it intends to call in their order of appearance. The Chamber is satisfied that the victims participating in the proceedings should be afforded access to a redacted version of this document referring to the witnesses by their number,³⁰ which in combination with the public redacted version of the prosecution's summary of presentation of evidence will be sufficient to enable them to prepare discrete applications for participation.

b) Victims a/0001-0003/06 and a/0105/06 right to inspect material in the possession of the prosecution

30. As regards inspection, the Chamber reiterates its decision that inspection, as provided for in Rules 77 and 78 of the Rules of Procedure and Evidence, relates

²⁷ Transcript of hearing on 28 May 2008, ICC-01/-04-01/06-T-88-ENG, page 14.

²⁸ Prosecution's Updated Summary of Presentation of Evidence and Annexes, 23 May 2008, ICC-01/-04-01/06-1354-Conf, and confidential Annexes A (prosecution's updated summary of presentation of evidence), 1 (list of evidence related to the witnesses the prosecution intends to call) and 2 (list of documents and other items of evidence it intends to rely upon).

²⁹ Submission of the Prosecution's Updated Summary of Presentation of Evidence, 30 May 2008, ICC-01/-04-01/06-1363. This document has been notified to the legal representatives of the victims currently participating in the proceedings.

³⁰ The prosecution indicated that it did not object to providing a redacted version of the list referring to the witnesses by their reference number to the legal representatives; it informed the Chamber on 29 May 2008 by way of email to the Legal Adviser to the Trial Division that it had provided a copy of the redacted list to the legal representatives.

only to the prosecution and the defence (see paragraph 111 of the Decision on victims' participation).

31. However, the Decision on victims' participation does provide a mechanism whereby the victims who have been given the right to participate may be provided with "any materials within the possession of the prosecution that are relevant to the personal interests of the victims".³¹ The mechanism for the provision of this information shall operate, in the first instance, between the relevant victim's legal representative and the prosecution. The relevant victim's legal representative shall identify, first, the victim's personal interest and, second, the nature of the information that may be within the evidence in the possession of the prosecution which is material to the preparation of the victim's participation during a particular phase of the proceedings. (e.g. material relating to involvement in particular events at a given time or location). This will enable the prosecution to identify whether material in its possession is relevant.
32. In accordance with the majority's decision the interests of victims that have been authorised for the current proceedings "must relate to the evidence and the issues the Chamber will be considering in its investigation of the charges brought against Mr Thomas Lubanga Dyilo: the extent of the evidence and the issues to be considered by the Chamber during this trial are defined by the alleged crimes the accused faces".³²
33. Additionally, in line with the decision of the Appeals Chamber of 22 May 2008, pending the decision on the substantive appeal on victims' participation, the personal interests of the victims are limited to those who have suffered

³¹ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 111.

³² *Ibid*, paragraph 97.

personal and direct harm as a result of the events covered by the charges brought against the accused.³³

34. The Chamber considers that this procedure for provision of material should be dealt with by the prosecution and victims' legal representatives *inter se* and that a filing before the Chamber should only be made in the event of disagreement. This approach is consistent with the wording of paragraphs 111 and 138(f) of the Decision on victims' participation in that the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate, with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing.

35. For the above reasons the Chamber makes the following orders:

- a) In accordance with the decision of the Appeals Chamber of 22 May 2008, pending the decision on the substantive appeal on victims' participation, the personal interests of the victims are limited to those who have suffered personal and direct harm as a result of the events covered by the charges brought against the accused.
- b) In order to exercise their right to receive relevant material, the legal representatives of victims are instructed to set out in a document provided to the prosecution how material in the latter's possession is relevant to an individual victim's personal interests (e.g. material relating to involvement in particular events at a given time or location).

³³ Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, 22 May 2008, ICC-01/04-01/06-1347 OA9 & OA10, paragraph 19.

- c) The prosecution shall thereafter identify and provide any material in its possession which satisfies the above criteria.
- d) The above procedure should be dealt with by the prosecution and legal representatives of victims *inter se* and a filing before the Chamber should only be made in case of disagreement.
- e) In order to participate at the trial, and once victims have received the above documents, they are instructed to file discrete applications before the Chamber, in accordance with paragraphs 103-104 of the majority's decision, specifying how their personal interests are affected at a given phase of the trial.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 2 June 2008

At The Hague, The Netherlands