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TRIAL CHAMBER I

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

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

**Public - with confidential Annex
Prosecution's Observations on 105 Redacted Applications for Victim
Participation to the Case**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Background

1. On 18 January 2008, the Trial Chamber issued the "Decision on victims' participation" with a Separate and Dissenting Opinion of Judge René Blattmann¹, which the Defence² and the Prosecution³ sought leave to appeal on certain issues.
2. On 26 February 2008, the Trial Chamber issued the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008" and granted leave to appeal on three issues: (1.) Whether the notion of victim necessarily implies the existence of personal and direct harm; (2.) 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; (3.) whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.⁴
3. On 22 May 2008, the Appeals Chamber rendered the "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" in which the Appeals Chamber ordered suspension of the impugned decision, to the extent that it is affected by the issues on appeal.⁵
4. On 6 May 2008, the Trial Chamber rendered its "Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07

¹ ICC-01/04-01/06-1119.

² ICC-01/04-01/06-1135.

³ ICC-01/04-01/06-1136.

⁴ ICC-01/04-01/06-1191.

⁵ ICC-01/04-01/06-1347.

to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08" (the "Decision of 6 May 2008"), in which it ordered the Registry to notify both parties with confidential redacted versions of the applications for participation by 12 May 2008 and gave the parties 20 days upon notification of the redacted applications to present their observations thereto.⁶ Amongst other redactions, the Trial Chamber ordered the exact date of birth to be redacted, leaving only the year of birth.⁷

5. On 9 May 2008, the Office of Public Counsel for Victims (the "OPCV") filed a "Request of the OPCV in relation to redactions to the applications of victims following the Trial Chamber's decision of 6 May 2008", in which the OPCV requested to review the redactions to the applications of individuals it represents before the applications are notified to the parties.⁸
6. On 12 May 2008, the Trial Chamber suspended the deadline for notification of the redacted application forms to the parties, which it had set in its earlier Decision.⁹
7. On 13 May 2008, the Prosecution informed the Trial Chamber that it had received 39¹⁰ out of the 105 applications in un-redacted form through prior notifications at earlier stages of the proceedings and requested that the month of birth of applicants remain un-redacted.¹¹
8. On 14 May 2008, the Defence responded to the Prosecution's information and agreed with the request of the Prosecution that the applicants' month of birth

⁶ ICC-01/04-01/06-1308, para 30 and 33 (ii).

⁷ ICC-01/04-01/06-1308, para 28.

⁸ ICC-01/04-01/06-1315.

⁹ ICC-01/04-01/06-1319.

¹⁰ This concerns applications 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.

¹¹ ICC-01/04-01/06-1322. This filing was based on an E-mail sent by the OTP to the Legal Advisor of the Trial Chamber, copied to the Defence and the OPCV on Friday, 9 May 2008 at 7:11 pm.

remain un-redacted.¹² In addition, the Defence requested to receive the 39 applications in un-redacted form.¹³

9. On 16 May 2008, the Trial Chamber rendered its "Decision on the request of the OPCV and on the prosecution's filing which concern the Trial Chamber's decision inviting the parties' observations on applications for participation of victims issued on 6 May 2008",¹⁴ in which it ordered the Prosecution to "restrict its observations on the victims' applications to the information contained in the redacted applications"¹⁵ and modified its Decision of 6 May 2008 to the extent that the month of birth of the victims would not be redacted.¹⁶
10. On 20 Mai 2008, the 105 applications were notified in redacted form to the parties by the Registry.¹⁷

II. Pending Appeals

11. The Trial Chamber's 18 January 2008 decision on victim participation has been appealed on three issues, two of which are core to the legal definition of a victim.¹⁸ The Trial Chamber clarified in its Decision of 6 May 2008, that "it is not disputed by the parties and the participants that this group (viz. direct victims of the charges against the accused) should be granted the status of victims in this trial and, accordingly, this discrete element of the decision on victims' participation is not an issue currently pending before the Appeals Chamber. In these circumstances, the Chamber has decided that it is

¹² ICC-01/04-01/06-1329-Conf, para 6.

¹³ ICC-01/04-01/06-1329-Conf, para 9.

¹⁴ ICC-01/04-01/06-1333.

¹⁵ ICC-01/04-01/06-1333, Para 15.

¹⁶ ICC-01/04-01/06-1333, Para 16.

¹⁷ ICC-01/04-01/06-1339-Conf

¹⁸ These issues are the following : (1.) Whether the notion of victim necessarily implies the existence of personal and direct harm. (2.) 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, see ICC-01/04-01/06-1119.

appropriate to consider the merits of these particular applications, in advance of the outcome of the interlocutory appeal.”¹⁹

12. The Trial Chamber has thus allowed “a limited category of applications” to “be considered (...), namely those that relate to individuals who allege they are the direct victims of the charges confirmed against the accused” ²⁰ (hereinafter referred to as the “Trial Chamber’s restrictive approach”).

III. Legal qualification of "Victim" and criteria for determining "Victim" status to participate in the Case

13. In its 18 January 2008 Decision, the Trial Chamber held that “[i]n order to determine which applicant victims will have the right to participate in this trial, the Trial Chamber must consider the following issues: first whether the applicant is a victim of a crime under the jurisdiction of the Court, as provided for in Rule 85 of the Rules, and second whether the interests of the victim are affected in the proceedings in accordance with Article 68(3) of the Statute.” The Trial Chamber held that it will analyze whether the personal interests of a victim are affected at a later stage in the proceedings after it has made an “initial determination that the victim shall be allowed to participate in the proceedings” and only after the victim has filed a “discrete written application” setting out “the reasons why his or her interests are affected” in a particular stage of the proceedings.²¹
14. The Prosecution will therefore limit its observations on the 105 applications to their compliance with the definition of a victim set out in Rule 85, as interpreted by the Pre-Trial Chamber, according to the Trial Chamber’s approach set out above.

¹⁹ ICC-01/04-01/06-1308, para 14.

²⁰ ICC-01/04-01/06-1308, para 13.

²¹ ICC-01/04-01/06-1119, para 96 and ICC-01/04-01/06-1368, para 29.

15. Pursuant to Rule 85 (a) of the Rules of Procedure and Evidence, "victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".
16. It has been the consistent jurisprudence that for an individual to be granted victim status four criteria must be satisfied: (a) the victim must be a natural person; (b) he or she must have suffered harm; (c) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (d) a causal link between the crime and the harm must exist.²²
17. Furthermore, it has been determined that applicants at the case stage must demonstrate that there is a sufficient causal link between the harm they suffered and the crimes with which the accused is charged.²³
18. The charges against Thomas LUBANGA were confirmed by the Pre-Trial Chamber on 29 January 2007 in its "Decision on the confirmation of charges".²⁴ The Decision set out that there were substantial grounds to believe that Thomas LUBANGA is responsible as a co-perpetrator, for the charges of enlisting, and conscripting children under the age of fifteen years into the UPC/FPLC, and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute from early September 2002 to 2 June 2003 and for the charges of enlisting, and conscripting children under the age of fifteen years into the UPC/FPLC and

²² See ICC-01/04-01/06-228-IEN, p. 7; ICC-01/04-101, para. 94; ICC-02/05-111, para. 2.

PTC II interpreted the criteria to be met under Rule 85 as: "(i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) most crucially, whether such harm appears to have arisen 'as a result' of the event constituting a crime within the jurisdiction of the Court.", ICC-02/04-01/05-252, para. 12. PTCII further determined that harm would be held to have occurred "as a result of" the alleged incident when "the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.", ICC-02/04-01/05-252, para. 14.

²³ See, for example, ICC-01/04-01/06-228-tEN, p. 9; ICC-01/04-01/06-172-tEN, pp. 6-8; ICC-01/04-01/06-601-tEN, pp. 8-9.

²⁴ ICC-01/04-01/06-803-tEN.

using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from 2 June to 13 August 2003.²⁵

IV. Factual analysis of the applications

19. In the 18 January 2008 Decision on victim participation, the Trial Chamber established that applicants must provide adequate proof of identity to prove their status as a natural person.²⁶ This requirement has been put in place by all Chambers as a minimum safeguard to guaranteeing the accuracy of the applications.²⁷
20. Although not all applications contain identifying documents,²⁸ the Trial Chamber in a preliminary assessment found that “these 105 applicants are all natural persons”.²⁹
21. The Prosecution submits that not all applicants are natural persons in the meaning of Article 85(a). Applicant a/0270/07, for instance, seeks victim participation status not only in his capacity as a natural person, but also for an institution dedicated to education under Article 85(b).
22. Finally, the Prosecution notes that in some cases where applicants are minors at the time of application, no additional information, such as consent of a parent or legal guardian has been provided.³⁰

²⁵ Pre-Trial Chamber I, Situation in the Democratic Republic of Congo: In the Case of The Prosecutor v. Thomas Lubanga, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, page 156 and 157.

²⁶ ICC-01/04-01/06-1119, para 87; Applications a/0270/07 to a/0285/07 included a copy of the demobilization certificate (“Attestation de sortie d’un enfant d’un groupe armé”), which according to the Trial Chamber’s Decision of 18 January 2008 is sufficient proof of identity, see ICC-01/04-01/06-1119, para 87 lit (iii); application a/0007/08 contains a copy of a student card, see ICC-01/04-01/06-1119, para 87 lit (ii).

²⁷ PTC I, ICC-01/04-374; PTC II, ICC-02/04-01/05-252, paras 16 to 21 and TC I, ICC-01/04-01/06-1119, para 87.

²⁸ See for instance application a/0002/06 or application a/0077/06, which indicates that a copy of an election card should be attached to the application.

²⁹ ICC-01/04-01/06-1308, para 5.

³⁰ See for instance applicants a/0271/07, a/0273/07 and a/0274/07 who were all 17 years old at the time of application.

Applicants who prima facie meet the necessary requirements for victim participation

23. At the pre-trial stage of the proceedings applicants a/0001/06, a/0002/06 and a/0003/06 and a/0105/06 have been granted victim participation status by the Pre-Trial Chamber.³¹ At that stage of the proceedings, the Prosecution submitted detailed observations on the applications,³² to which reference is made. Furthermore, regarding the status of applicants a/0001/06, a/0002/06 and a/0003/06 and a/0105/06, the Trial Chamber recently held that “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.”³³ In light of the above said, the Prosecution refrains from submitting further observations on these applications and contends itself to concluding that these victims shall be granted participation status for the trial against Thomas LUBANGA as they fulfil all necessary criteria.

24. The applications for victim participation of applicants a/0047/06 to a/0052/06 have also been analyzed at the Pre-Trial stage of the case against Thomas LUBANGA. With respect to these applicants Pre-Trial Chamber I had concluded that although the applicants meet all necessary criteria for victim participation, particularly since they were enrolled by the UPC as under 15 year-olds, their participation at the confirmation hearing was not appropriate, because of potential security risks which these protected individuals might have faced.³⁴ The Prosecution submits that participation should be allowed as applicants a/0047/06 to a/0052/06 fulfil all necessary requirements for victim

³¹ ICC-01/04-01/06-601 and ICC-01/04-01/06-228-tEN.

³² ICC-01/04-01/06-140.

³³ ICC-01/04-01/06-1368, para 24, referring to ICC-01/04-01/06-1335 OA9 and O A 10, paragraph 38.

³⁴ ICC-01/04-01/06-601.

participation. The Prosecution submits, however, that the status as a victim should not infringe the applicant's pre-existing status as OTP witness.³⁵ The Prosecution makes reference to its earlier submissions on this issue.³⁶

25. Applicant a/0078/06 has previously been denied participation status by Pre-Trial Chamber I.³⁷ This was based on the information contained in the original application form, stating that the applicant was born in March 1988 and recruited in August 2003, which would have made him/her older than 15. However, supplementing information has been received by the Registry after the decision was rendered, clarifying that the applicant was indeed born in March 1989 and conscripted in August 2002. In light of the additional information received, the applicant would have been under the age of 15 at the time of conscription and thus would fall within the ambit of the crimes for which Thomas LUBANGA is charged.

26. The following applicants were allegedly forcefully recruited into the UPC and forcefully "married" to UPC soldiers during the years 2002 and 2003 while they were still under the age of 15 years: a/0231/06, a/0232/06, a/0246/06, and a/0007/08.

27. For the remaining applicants, the application forms and the further information received by the Registry under Regulation 84 (2) attached there to, suggest that the following applicants were under the age of 15 at the time of their enlistment, conscription or use by the armed forces of the UPC during the time-frame relevant to the charges against Thomas LUBANGA set out above: a/0221/06, a/0225/06, a/0226/06, a/0229/06, a/0230/06, a/0233/06, a/0237/06, a/0238/06, a/0239/06, a/0241/06, a/0244/06, a/0245/06, a/0247/06, a/0248/06, a/0249/06, a/0250/06, a/0001/07, a/0002/07, a/0003/07, a/0004/07,

³⁵ Dual status only applies to applicants a/0047/06, a/0048/06, a/0050/06 and a/0052/06, the other two applicants, namely a/0049/06 and a/0051/06 are no longer OTP witnesses.

³⁶ ICC-01/04-01/06-390.

³⁷ ICC-01/04-01/06-601, page 15; see also the Prosecution's Submissions ICC-01/04-01/06-589.

a/0005/07, a/0054/07, a/0055/07, a/0056/07, a/0057/07, a/0058/07, a/0059/07, a/0060/07, a/0149/07, a/0155/07, a/0156/07, a/0168/07, a/0169/07, a/0170/07, a/0171/07, a/0172/07, a/0173/07, a/0174/07, a/0176/07, a/0179/07, a/0181/07, a/0182/07, a/0183/07, a/0184/07, a/0185/07, a/0187/07, a/0188/07, a/0189/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0271/07, a/0272/07, a/273/07, a/0274/07, a/0275/07, a/0276/07, a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07 and a/0285/07.

28. The Prosecution submits that applicant a/0270/07, who seeks victim participation for himself and the loss of property of an institution dedicated to education, meets the criteria as victim under Rule 85 (a) and (b).

Applicants whose applications require further clarification

29. The dates of birth indicated in the demobilization cards of applicants a/0175/07, a/0177/07, a/0178/07 and a/0180/07 differ from that stated in their application. Whereas their application indicates they were born in 1988, 1989 or 1990 respectively,³⁸ the attached demobilization card states that they were born in 1986 or 1987,³⁹ which renders these applicants above the age of 15 at the time of enlistment. In addition to the differing birth dates, applicant a/0180/07 has not indicated the time of enlistment in his application and demobilization certificate.⁴⁰

30. Application a/0064/07 provides insufficient information on the time the crimes allegedly were committed. Although the applicant (born in 1990) is sufficiently young to have been recruited by the UPC while under the age of

³⁸ The application forms contain the following information : applicant a/0175/07 was born in November 1989, applicant a/0177/07 was born in October 1988, applicant a/0178/07 was born in October 1988, applicant a/0180/07 was born in March 1990.

³⁹ The demobilization cards, however, indicate the following : applicant a/0175/07 was born in May 1986, applicant a/0177/07 was born in October 1986, applicant a/0178/07 was born in October 1986, applicant a/0180/07 was born in May 1987.

⁴⁰ The 17 August 2007 Decision of Pre-Trial Chamber I (ICC-01/04-374) established a completeness test in paragraph 12, outlining that without indication of the (approximate) date of the crime an application cannot be considered complete.

15, his application provides insufficient information to conclude that this happened during the time-frame relevant to the charges.

31. Application a/0162/07 contains at this stage insufficient causal link to the charges. The applicant, a young girl, was raped by UPC soldiers in the field while picking fruit. The application, however, contains no information indicating that the girl was either enlisted, conscripted or used to participate actively in hostilities. Further information is required.

32. Similarly, applicants a/0255/07 and a/0256/07 merely refer to their conscription as having taken place in 2003. Given that the time-frame relevant to the charges ends on 13 August 2003, further precision vis-à-vis the alleged date of conscription is warranted.

33. The Prosecution submits that these applicants should thus be requested to provide the Chamber with additional information before their status of a victim be granted.

Applicants who do not meet the necessary requirements for victim participation

34. Applicant a/0004/06 has previously been denied status for participation as a victim in the case against Thomas LUBANGA by Pre-Trial Chamber I.⁴¹ The Prosecution had also concluded in its observations that the harm suffered by applicant a/0004/06 was not related to the charges against Thomas LUBANGA.⁴² The Prosecution notes, however, that although the applicant filed the application in her own name only, her application mentions the fact that her daughter had also been imprisoned and sexually abused. The Prosecution therefore contends that the daughter could meet the criteria for victim participation, had she been under the age of 15 at the time of the alleged crimes. Nevertheless, the applicant explicitly only filed the

⁴¹ ICC-01/04-01/06-601.

⁴² ICC-01/04-01/06-345.

application on behalf of herself and did not include any identifying information regarding her daughter's name or date of birth.

35. Applicant a/0077/06 has previously been denied participation status by Pre-Trial Chamber I.⁴³ The Prosecution submits that as the date of birth of the applicant is missing in the application form, along with proof of identity, the application is not complete. There is furthermore no indication that the applicant was a child soldier. Nevertheless, the application contains information regarding the time during which the crimes were allegedly committed against the applicant, namely August 2002, which lies outside the time-frame of the charges confirmed against Thomas LUBANGA. For these reasons, the Prosecution submits that the application does not prove a sufficient link to the charges against Thomas LUBANGA.⁴⁴

36. The following applications do not meet the criteria for victim applications to the case, because the applicants were either over the age of 15 at the time of their recruitment by the UPC or turned 15 by September 2002: a/0224/06, a/0227/06, a/0228/06, a/0236/06, a/0240/06, a/0061/07, a/0062/07, a/0065/07, a/0252/07, a/0278/07, a/0281/07 and a/0284/07.

37. Although applicants a/0242/06 and a/0243/06 were under the age of 15 when they suffered harm from the commission of crimes against them, the further information received by the Registrar under Regulation 86 (4) of the Regulations of the Court, confirms the crimes to have taken place in December 2003, which lies outside the time-frame of the charges.

V. General Considerations

38. Rule 90 (1) of the Rules of Procedure and Evidence allows the Chamber "for the purposes of ensuring the effectiveness of the proceedings" to "request the

⁴³ ICC-01/04-01/06-601, page 15.

⁴⁴ See also the Prosecution's Submissions in ICC-01/04-01/06-589.

victims or particular groups of victims... to chose a common legal representative or representatives", "where there are a large number of victims". A large number of applicants may be granted participation status shortly before the commencement of trial. In this respect the Prosecution submits that already now a limited number of legal representatives represent a large number of applicants. In order to avoid delay in the proceedings for new legal representatives having to familiarize themselves with the applicants, the Prosecution suggests following the procedure suggested in Rule 90.

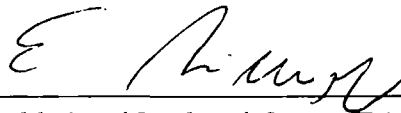
VI. Conclusion

39. For the reasons outlined above, the Prosecution requests the Chamber to grant participation status of victims in the case against Thomas LUBANGA to applicants a/0001/06, a/0002/06, a/0003/06, a/0105/06, a/0047/06 to a/0052/06, a/0078/06, a/0231/06, a/0232/06, a/0246/06, a/0007/08, a/0221/06, a/0225/06, a/0226/06, a/0229/06, a/0230/06, a/0233/06, a/0237/06, a/0238/06, a/0239/06, a/0241/06, a/0244/06, a/0245/06, a/0247/06, a/0248/06, a/0249/06, a/0250/06, a/0001/07, a/0002/07, a/0003/07, a/0004/07, a/0005/07, a/0054/07, a/0055/07, a/0056/07, a/0057/07, a/0058/07, a/0059/07, a/0060/07, a/0149/07, a/0155/07, a/0156/07, a/0168/07, a/0169/07, a/0170/07, a/0171/07, a/0172/07, a/0173/07, a/0174/07, a/0176/07, a/0179/07, a/0181/07, a/0182/07, a/0183/07, a/0184/07, a/0185/07, a/0187/07, a/0188/07, a/0189/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07, a/0271/07, a/0272/07, a/273/07, a/0274/07, a/0275/07, a/0276/07, a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07 and a/0285/07 and to request them to the extent possible to chose a common legal representative or representatives.

40. The Prosecution contends that applicants a/0064/07, a/0162/07, a/0175/07, a/0177/07, a/0178/07, a/0180/07, a/0255/07 and a/0256/07 should be requested to provide further information for their applications to be considered

complete in order to allow full evaluation of their applications before participation status as a victim is granted.

41. The Prosecution requests that the Trial Chamber dismiss the applications of applicants a/0004/06, a/0077/06, a/0224/06, a/0227/06, a/0228/06, a/0236/06, a/0240/06, a/0242/06, a/0243/06, a/0061/07, a/0062/07, a/0065/07, a/0252/07, a/0278/07, a/0281/07 and a/0284/07 to participate as victims within the proceedings in the case against Thomas LUBANGA, since the applications do not fulfil the criteria set out by Rule 85 as interpreted by the Pre-Trial Chamber.



Ekkehard Withopf, Senior Trial Lawyer
on behalf of Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of June 2008
At The Hague, The Netherlands