

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01-04/01-06
Date: 19 December 2008

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***

Confidential

Ex parte only available to the OPCV and the Registry

Issues concerning the legal representation of victims a/0047/06 to a/0052/06,
a/0078/06 and a/0149/08

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Ms Paolina Massidda

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 Vaätainen

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

I. Procedural Background

1. On 18 January 2008, Trial Chamber I delivered its "Decision on victims' participation" establishing general guidelines on all matters related to the participation of victims in the proceedings¹.

2. On 6 March 2008, Trial Chamber I issued the "Decision on the role of the Office of Public Counsel for Victims and its request for access to documents" pursuant to which "[t]he Office of Public Counsel for Victims shall continue to represent the victim applicants it currently represents until the Chamber issues a decision on their application to participate"².

3. On 15 December 2008, Trial Chamber I issued the "Decision on the applications by victims to participate in the proceedings" granting "*status to participate in the proceedings to applicants a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06, a/0052/06, [...] a/0078/06 [and] a/0149/08*"³.

4. This document is filed *ex parte* only available to the OPCV and the Registry in conformity with the Decision dated 6 March 2008 in which the Trial Chamber established that "[...] the Registrar shall arrange for a legal representative to act for [victims formerly represented by the Office of Public Counsel for Victims], unless there are specific reasons, which are to be set out in a filing addressed to the Chamber and Registry only within 7 days of the decision, as to why this course may be detrimental to

¹ See the "Decision on victim's participation" (Trial Chamber I), 18 January 2008, No. ICC-01/04-01/06-1119.

² See the "Decision on the role of the Office of Public Counsel for Victims and its request for access to documents" (Trial Chamber I), 6 March 2008, No. ICC-01/04-01/06-1211, par. 41.

³ See the "Decision on the applications by victims to participate in the proceedings" (Trial Chamber I), 15 December 2008, No. ICC-01/04-01/06-1556, par. 137.

individual participating victims"⁴. The Office of Public Counsel for Victims (the "Office" or the "OPCV") contends that some issues touched upon in the present submission might not be covered by this level of confidentiality since some of them could be of some interests for other parties and participants in the proceedings. Therefore the Office is ready to file a public redacted version of this document should it is deemed necessary by the Chamber.

5. The Principal Counsel respectfully submits the following observations.

II. Observations on the legal representation of victims a/0047/06 to a/0052/06, a/0078/06 and a/149/08

11. In the Decision of the Chamber dated 6 March 2008, the Chamber established that "[t]he Office of Public Counsel for Victims shall continue to represent the victim applicants it currently represents until the Chamber issues a decision on their application to participate"⁵. In the said decision, the Trial Chamber recalled the previous ruling by Pre-Trial Chamber I concerning the same issue⁶ in which it requested the Registrar to appoint the OPCV as legal representative of unrepresented applicants. However, it did not retained the part of the Pre-Trial Chamber's decision according to which such appointment shall ceased once the victims recognised to participate have chosen a legal representative or the Court has appointed one. Therefore, by virtue of the decision issued on 15 December 2008 by Trial Chamber I⁷, it seems that the Office is not bound anymore by the Decision dated 6 March 2008.

⁴ See the "Decision on the role of the Office of Public Counsel for Victims and its request for access to documents", *supra* note 2, par. 41.

⁵ *Idem*.

⁶ *Ibid.* par. 34. See also the "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation" (Pre-Trial Chamber I), No. ICC-01/04-374, 17 August 2007, par. 44 and p. 24.

⁷ See *supra* note 3.

12. However, the Office contends that consequences entailed by the Decision dated 6 March 2008, read in conjunction with the Decision issued 15 December 2005, might be detrimental to the victims who, as a matter of fact, are at this moment in time not represented.

13. Indeed, in accordance with regulation 24(2) of the Regulations of the Court, victims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68(3) of the Rome Statute and rule 89(1) of the Rules of Procedure and Evidence.

14. The Office submits that pending the designation of a legal representative, should a document be filed by a party or participant, such as a leave to appeal the decision of 15 December 2008, the victims will not be able to put forward their views and concerns and they will be *de facto* deprived of their rights to file a response in accordance with regulation 24 (2) of the Regulations of the Court.

15. This gap concerning the legal representation is all the more detrimental at this point in time since, by virtue of orders by the Trial Chamber, actions are to be taken by legal representatives before a decision on common legal representation is issued by the Chamber.

16. Indeed, pursuant to the Decision dated 15 December 2008, "*if a victim wishes to participate in person at any stage of trial proceedings, he or she shall apply in writing to the Chamber no later than 9 January 2009*"⁸. But this possibility will be rendered void unless the said victims have the possibility to confer with a legal representative who is able to explain to them the implications and the consequences of their choice.

⁸ See the "Decision on the applications by victims to participate in the proceedings", *supra* note 3, par. 122.

17. Moreover, regarding the other issues to be dealt with by the Registry, *inter alia*, “to consult with the legal representatives of the victims and to return to the Chamber with a proposal on common legal representation in accordance with Rule 90(2) of the Rules, no later than 7 January 2009”⁹, it seems that in the absence of a legal representative defending their interests, victims a/0047/06 to a/0052/06, a/0078/06 and a/0149/08 will not be able to put forward their wishes to the Court. This aspect is crucial for them since pursuant to rule 90(1) of the Rules of Procedure and Evidence, they are free to choose their legal representative and the Office contends that the particularities of some of the victims at stake demands for a close scrutiny on this issue¹⁰. Moreover, rule 90(2) of the Rules of Procedure and Evidence is crystal clear on the fact that it should not be for the legal representatives alone to decide on this important issue, but for the victims themselves¹¹. The Office therefore argues that it is desirable that the matter is explained to the victims concerned by their own legal representative.

18. The same reasoning applies to the obligation imposed on the Registry “to consult with the victims and their legal representatives generally as regards the level of protection that is necessary during the trial”¹².

19. Last but not least, in its Decision dated 18 January 2008, Trial Chamber I established that “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

⁹ *Idem*, par. 121.

¹⁰ See *infra* par. 18.

¹¹ Rules 90(2) of the Rules of Procedure and Evidence reads as follows: “Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives” (we underline).

¹² See the “Decision on the applications by victims to participate in the proceedings”, *supra* note 3, par. 132.

to participate with any materials within the possession of the prosecution and relevant to the personal interests of victims"¹³. Given the fact that the trial is due to start on 26 January 2009 and that no decision will be issued on common legal representation before the submission, by the Registry, of its report due on 7 January 2009, the Office believes that in order not to delay the proceedings on the eve of the beginning of the trial, it is in a better position to proceed with the request addressed to the Prosecution as the lists of requested material are ready to be submitted to the Office of the Prosecutor.

20. Moreover, the Office is of the opinion that it is in the interests of victims to maintain the appointment of the Principal Counsel. In particular, in relation to victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 – who will be called, by the Prosecution, to testify during trial and who have been admitted in the Protection Programme of the International Criminal Court. Indeed, they have been represented by the Principal Counsel since August 2007. In the course of this legal representation, she, *inter alia*, assisted them during the gathering of further information for the purposes of their testimony at trial undertaken by the Prosecution during the last year. The legal representation of victim a/0047/06, a/0048/06, a/0050/06 and a/0052/06 also included participation in meetings with the Office of the Prosecutor and assisting the applicants during the performance of medical examinations upon request of the Prosecution. As a consequence, a trust relationship has been established between these victims and the Principal Counsel and the disruption of such an appointment could be detrimental for their well-being in the delicate period which precedes their testimony at trial.

21. In the course of the legal representation of the said victims, the Principal Counsel informed them, on several occasions, that her appointment was due to cease once a decision on their status as participants in the trial would have been taken by

¹³ See the "Decision on victim's participation", *supra* note 1, par. 111.

the Trial Chamber. The said victims always spontaneously expressed their wish that the Principal Counsel continue to represent their interests during the trial.

22. Finally, the Office respectfully draw the attention of the Chamber that victims a/0047/06 to a/0052/06 and a/0078/06 signed informed powers of attorney designating the Principal Counsel of the Office as their legal representative.

FOR THE FOREGOING REASONS, the Principal Counsel respectfully asks the Trial Chamber to appoint her as legal representative for victims a/0047/06 to a/0052/06, a/0078/06 and a/0149/08 authorised to participate in the case *The Prosecutor v. Thomas Lubanga Dyilo* at least until a common legal representative is chosen by the victims or appointed by the Chamber and to consider these observations when deciding on the issue of the legal representation of victims a/0047/06 to a/0052/06, a/0078/06 and a/0149/08.



Paolina Massidda

Principal Counsel

Office of Public Counsel for Victims

Dated this 19th day of December 2008

At The Hague, The Netherlands