

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 25 July 2011

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

**Redacted version of the Decision on the applications by 7 victims to participate in
the proceedings**

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 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

Ms Maria Luisa Martinod Jacome

Detention Section :

Victims Participation and Reparations Section

Ms Fiona McKay

Other

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 applications by 7 victims to participate in the proceedings, in accordance with Article 68 of the Rome Statute ("Statute").¹

I. Background

1. The relevant procedural history on participation by victims before the Chamber is set out comprehensively in the "Decision on the applications by victims to participate in the proceedings" issued on 15 December 2008 in which the applications from 117 individuals to participate in the proceedings were resolved (92 were granted).²
2. As regards the present applications, on 3 March 2011 the Registry filed a confidential, *ex parte*, Registry-only "Sixth Report to Trial Chamber I on Victims' Applications under Regulation 86.5 of the Regulations of the Court" ("Registry's Sixth Report") which dealt with the applications of seven victims to participate in the proceedings.³
3. On 8 March 2011, the Chamber ordered the transmission of the seven applications to the parties by 14 March 2011 and it invited the parties and participants to file their written submissions by 5 April 2011.⁴
4. On 14 March 2011, the Registry provided the redacted application forms to the parties and participants.⁵
5. On 5 April 2011, the parties submitted their observations on the applications.⁶

¹ Sixth Report to Trial Chamber I on Victims' Applications under Regulation 86.5 of the Regulations of the Court, 3 March 2011, ICC-01/04-01/06-2695-Conf-Exp.

² Corrigendum to the Decision on the applications by victims to participate in the proceedings, 13 January 2009, ICC-01/04-01/06-1556-Corr-Anx1, paragraphs 1-27.

³ ICC-01/04-01/06-2695-Conf-Exp. The Chamber notes that the applicants are 1 male and 6 females.

⁴ Order on the transmission of 7 new victims' applications and the submission of observations, 8 March 2011, ICC-01/04-01/06-2698.

⁵ Transmission to the parties of seven new victims' applications for participation in accordance with Trial Chamber I's Order of 8 March 2011, 14 March 2011, ICC-01/04-01/06-2701 with confidential annexes.

6. On 21 April 2011, the Victims Participation and Reparations Sections ("VPRS") informed the Chamber that two of the applicants, a/1610/10 and a/1619/10, had recently provided supplementary information.⁷
7. On 11 May 2011, the Chamber instructed the Registry to forward this material to the Chamber and the parties.⁸
8. On 12 May 2011, the Registry sent the Trial Chamber the consolidated applications of a/1610/10 and a/1619/10,⁹ and the Registry provided redacted versions to the parties and Mr Keta.¹⁰
9. The defence and the Office of the Prosecutor ("prosecution") respectively filed their observations on the supplementary information on 18 and 19 May 2011.¹¹

II. Relevant Provisions

10. The relevant provisions, particularly of the Rome Statute framework, are set out comprehensively in the decisions of the Chamber on victim participation, issued variously on 18 January 2008, 15 December 2008 and 10 July 2009.¹²

⁶ Prosecution's Observations on Seven Redacted Applications for Victim Participation to the Case, concerning applicants a/0335/10, a/1610/10, a/1615/10, a/1616/10, a/1619/10, a/1621/10 and a/1622/10, 5 April 2011, ICC-01/04-01/06-2718 with confidential annexes; Observations de la Défense sur les 7 demandes de participation à la procédure communiquées le 14 mars 2011, 5 April 2011, ICC-01/04-01/06-2719-Conf.

⁷ Email communication from the VPRS to the Chamber through a Legal Officer of the Trial Division on 21 April 2011.

⁸ Transcript of the hearing on 11 May 2011, ICC-01/04-01/06-T-354-CONF-ENG ET, page 4, lines 2 – 8.

⁹ Transmission to Trial Chamber I of consolidated applications a/1610/10 and a/1619/10 including supplementary information, 12 May 2011, ICC-01/04-01/06-2736 with Conf-Exp annexes.

¹⁰ Transmission to the parties and Me Keta of redacted consolidated applications a/1610/10 and a/1619/10 including supplementary information, 12 May 2011, ICC-01/04-01/06-2737 with Conf annexes.

¹¹ Observations de la Défense sur les "Informations supplémentaires recues sur un demande de participation conformément à la norme 86.4 du Règlement de la Court", transmises le 12 mai 2011, 18 May 2011, ICC-01/04-01/06-2738; Prosecution's Observations on supplementary information related to applications a/1610/10 and a/1619/10, 19 May 2010 (notified on 20 May 2011), ICC-01/04-01/06-2740-Conf.

¹² Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraphs 20 – 37; ICC-01/04-01/06-1556-Corr-Anx1, paragraphs 34-50; Decision on the applications by 7 victims to participate in the proceedings, 10 July 2009, ICC-01/04-01/06-2035, paragraphs 10-26.

III. Submissions

11. The submissions focussing on the particular position of each applicant are dealt with in Annex A to this Decision. However, the Chamber has addressed below the submissions that are of general relevance to some or all of the applicants.

General submissions of the prosecution

12. Overall, the prosecution does not oppose the applications to participate. It notes that one of the applications contains redactions that make it impossible for the prosecution to assess whether it meets the relevant criteria (a/1619/10)¹³ and for applicant a/1621/10 the prosecution suggests that further information or clarification ought to be obtained before the application is determined.¹⁴

General submissions of the defence

13. The defence submits that a victim's right to participate should be dependent on the Chamber's ability to assess sufficiently whether the criteria for participation have been fulfilled, if only on a *prima facie* basis, and, applying that suggested principle to these applications, the defence contends that they are, for the most part, exclusively based on the unsupported allegations of the applicants. The defence additionally notes that many of the redactions affect essential information which limits the opportunity for the defence to make submissions on the admissibility of these applications.¹⁵
14. As regards a/1610/10, a/1615/10, a/1616/10, a/1619/10 and a/1621/10, the defence contends that they have not referred to any specific crimes committed against them, but instead the applicants generally allege that crimes were committed against "girl child soldiers". Furthermore, the defence submits that a/0335/10, a/1610/10, a/1615/10, a/1619/10 and a/1621/10 have referred to crimes that are

¹³ ICC-01/04-01/06-2718, paragraph 3; Confidential Annex A, 5 April 2011, ICC-01/04-01/06-2718-Conf-AnxA, paragraph 5.

¹⁴ ICC-01/04-01/06-2718, paragraph 3 and ICC-01/04-01/06-2718-Conf-AnxA, paragraph 7.

¹⁵ ICC-01/04-01/06-2719-Conf, paragraphs 3-7.

not included in the charges confirmed against the accused (*i.e.* torture, pillage and sexual violence).¹⁶

15. In relation to a/0335/10, a/1615/10 and a/1616/10, the defence observes that the "*attestation de carence*" (a/0335/10) and the "*attestation de perte de pièce d'identité*" (a/1615/10 and a/1616/10) (indicating that the applicants have lost their identity cards) are the only documents referred to as proof of the applicants' respective dates of birth. It is argued that they have no probative value because documents of this kind are issued solely on the basis of information provided by the applicants themselves. The defence points out that a/1615/10 and a/1616/10 have not attached the relevant document in this regard to their applications.¹⁷

16. The defence further argues that the applications are imprecise and thus they do not fulfil the requirements of Rule 85 of the Rules.¹⁸ It is suggested the demobilisation certificates provided by four of the applicants (a/1610/10, a/1615/10, a/1616/10, and a/1619/10) fail to establish either that they were under the age of fifteen at the time of the alleged events or the date of their alleged recruitment.¹⁹

17. The defence contends that of the seven applicants, only a/0335/10 and a/1622/10 suggest Mr Lubanga was responsible for the relevant events (albeit without providing any details in support). The defence observes that a/1610/10, a/1615/10 and a/1621/10 refer to the UPC and a commander whose name has been redacted, but they have not set out any supporting details. It is noted that a/1616/10 and a/1619/10 refer to the APC as being responsible for what occurred (as opposed to the accused or the UPC).²⁰

¹⁶ ICC-01/04-01/06-2719-Conf, paragraph 9.

¹⁷ ICC-01/04-01/06-2719-Conf, pages 6-7.

¹⁸ ICC-01/04-01/06-2719-Conf, paragraphs 12 and 15.

¹⁹ ICC-01/04-01/06-2719-Conf, paragraph 14.

²⁰ ICC-01/04-01/06-2719-Conf, paragraph 13.

18. The defence finally argues that all the applications submitted by one of the legal representatives, Mr Keta, are formulated in an identical or very similar manner and the Chamber is reminded that this criticism was advanced at an earlier stage in these proceedings as regards other applicants represented by him.²¹ The defence suggests that the repetitive nature of the applications raises serious doubts as to whether the requests are genuine and it questions the nature of the assistance provided to the applicants.²²

IV. Analysis and Conclusions

19. The Trial Chamber has assessed the seven applications in accordance with the general principles and criteria established in the Trial Chamber's Decision on victims' participation of 18 January 2008,²³ as confirmed or varied by the Appeals Chamber in its judgment of 11 July 2008,²⁴ along with the approach set out in the Trial Chamber's "Decision on the applications by victims to participate in the proceedings" of 15 December 2008.²⁵

20. The applicant-by-applicant analysis is to be found in Annex A. However, as already indicated, the Chamber has addressed hereafter the general submissions that are of relevance to some or all of the applicants.

21. Taking first the argument of the defence that the redactions affect essential information which limits its opportunity to advance submissions on the admissibility of these applications, the Chamber refers to its previous decision of 6 May 2008, in which it set out the reasons for providing redacted versions of the victims' application forms to the parties:

²¹ ICC-01/04-01/06-2719-Conf, paragraphs 17- 21. The applicants are a/1610/10, a/1616/10, a/1619/10 and a/1621/10.

²² ICC-01/04-01/06-2719-Conf, paragraph 21.

²³ ICC-01/04-01/06-1119.

²⁴ 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.

²⁵ ICC-01/04-01/06-1556-Corr-Anx1.

24. At this stage the Chamber is essentially conducting a preliminary assessment on the merits of the applications that may lead to some of them being rejected and this could result in applicants not being granted the status of participants in the proceedings. For this limited purpose, the Chamber adopts the observations of Single Judge Politi when addressing a similar issue, namely that "[g]iven the practical and financial obstacles necessarily associated with measures other than redactions (in particular, measures in the field or relocation) [...] the adoption of any measures other than redactions would exceed the scope of the present proceedings and would therefore be unjustified".

25. The Trial Chamber has carefully applied the principle of proportionality approved by the Appeals Chamber, that protective measures should:

- i) restrict the rights of the suspect or accused only as far as necessary;
- ii) be put in place where they are the only sufficient and feasible measure.²⁶

22. This approach applies, *mutatis mutandis*, to these seven applications although it is important to bear in mind that the defence objects to the overall extent and effect of the redactions rather than the anonymity of the applicants. In each instance the redactions are necessary to protect the safety and well-being of the applicants and to the extent that any of them may seek in due course to participate substantively in the closing stages of these proceedings, the Chamber will reconsider the individual redactions, along with their current position of anonymity vis-à-vis the parties.²⁷

23. As set out above, otherwise the defence generally contends, first, that the applications are entirely based on the assertions of the applicants, unsupported by any document or testimony that establish, *prima facie*, the existence of the alleged events; second, they are imprecise; and, third, the applicants have failed to indicate that they were the victims of a relevant crime. It is to be noted that in accordance with the Court's jurisprudence, the obligation on each applicant, at this stage, is limited to providing the Chamber with sufficient material to establish, *prima facie*, his or her identity and a link between the alleged harm and the charges against the accused. Previously the Chamber has indicated that

²⁶ 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 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, 6 May 2008 (notified on 7 May 2008), ICC-01/04-01/06-1308, paragraphs 24-25.

²⁷ ICC-01/04-01/06-1119, paragraph 131.

it will take into account the “overall picture provided by the applicant to the Chamber”, bearing in mind the account advanced and any documents submitted to the Chamber, in order to reach a *prima facie* determination as to whether the applicant suffered harm as a result of a crime included in the charges against the accused.²⁸ It follows, therefore, that although there is no obligation on an applicant to produce documentary or other material in support of an application to participate, the Chamber has considered the suggestion that some of the individual applications are insufficiently precise and that they have failed to establish that the applicant was a victim of a relevant crime, as part of its detailed consideration of each application.

24. The defence also argues that the applicants do not claim to have suffered personal harm. However, each applicant answered question 1) in Part D) and question 1) in Part E of the application form:

1. Veuillez donner une description détaillée du ou des crimes allégués qui sont à l'origine de cette demande (veuillez expliquer en détail ce qui vous êtes [sic] arrivé(e)).

1. Veuillez décrire les dommages, pertes ou préjudices subis, et veuillez en donner une brève description (blessures physiques, souffrances psychologiques et angoisses, perte ou dommage d'un bien, etc.)

In these circumstances, the Chamber has considered as part of its detailed assessment of each application whether, on a *prima facie* basis, personal harm has been established.

25. Addressing the criticism that there are similarities between some of the application forms, the Chamber observes that they were filled in by individuals who were assisting the applicants, and, arguably, this is reflected in the way in which some of the forms have been completed. Although the answers in a number of the application forms are similar, they are not identical throughout,

²⁸ 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-AnxA2, pages, 9, 17-18, 23, 199, 202, 205, 207, 210, 213, 216, 229.

and the Chamber has previously observed, in broadly analogous circumstances, that the “similarities between the applications are unsurprising and do not in any way undermine their credibility”.²⁹ Indeed, the Chamber has pointed out that similarities in this context are perhaps unsurprising given the “broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC” during the timeframe of the charges in the province of Ituri, from whence all 15 applicants come.³⁰ However, these are only preliminary observations and the Chamber has reflected on the merits of these arguments as part of its detailed assessment of each application.

26. As to the contention that personal harm has not been alleged in every case, it is to be noted that all the applicants have submitted a demobilisation certificate, thereby suggesting that they had been recruited.³¹ Some of the applicants have set out in the supplementary information provided to the Chamber that they personally suffered as a result of their alleged recruitment.³² This material has been borne in mind when the Chamber has assessed, for each applicant, whether in all the circumstances *prima facie* evidence has been provided that the individual concerned was recruited.

27. The defence submits that the identity documents (“*attestation de carence*”) provided by the applicants are untrustworthy.³³ However, the Chamber has expressly recognised that an “*attestation de carence*” is admissible for these purposes and in that sense is to be treated as a “valid document” when an individual is seeking to establish proof of his or her identity.³⁴ Thus, the Chamber has considered these identity documents and assessed the weight to be accorded to them in the particular circumstances of each of these applications.

²⁹ ICC-01/04-01/06-1563-Conf-AnxA2, page 286.

³⁰ ICC-01/04-01/06-1556-Corr-Anx1, paragraph 103.

³¹ These are applicants a/1610/10, a/1615/10, a/1616/10/, and a/1619/10.

³² These are applicants a/1616/10 and a/1621/10.

³³ ICC-01/04-01/06-2719-Conf, page 6.

³⁴ ICC-01/04-01/06-1119, paragraph 87(iii); Redacted version of the Corrigendum of Decision on the applications by 15 victims to participate in the proceedings, 8 February 2011, ICC-01/04-01/06-2659-Corr-Red, paragraph 33.

28. The defence argues that the demobilisation certificates provided by a/1610/10, a/1615/10, a/1616/10 and a/1619/10 have no probative value. However, the Chamber has previously decided that these certificates are admissible for the purposes of establishing an applicant's identity and age.³⁵ The certificates do not provide the applicants' ages or dates of birth but instead they certify that at the time they were issued, the individual concerned was a minor. It is to be noted that the applicants have each stated precisely and unequivocally in their application that they were born in [REDACTED] (a/1610/10), [REDACTED] (a/1615/10), [REDACTED] (a/1616/10) and [REDACTED] (a/1619/10) respectively, indicating that they were approximately between [REDACTED] and [REDACTED] years old when they were allegedly recruited. In the judgment of the Chamber the demobilisation certificates are admissible for these purposes and they have been considered (along with the assertions of the applicants) as part of the detailed consideration of the merits of each application.

29. The defence suggests that the applicants either failed to refer to the accused in their applications or they have merely indicated that the UPC was responsible for the alleged crimes, without providing any details. The Chamber has analysed the description given by each applicant as part of its detailed consideration of the merits of the individual applications and it has assessed in each case whether a sufficient connection has been established with the crimes alleged against the accused. On the general issue that some of the applicants referred to the names of other commanders and military groups (namely the APC and the FAPC), the Chamber – in line with its established approach – has borne in mind that the accused is charged with crimes allegedly committed between September 2002 and 13 August 2003, when the UPC/FPLC is said to have systematically recruited children³⁶ in Ituri (the location identified by the

³⁵ Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008, 8 May 2009, ICC-01/04-01/06-1861-AnxA1, pages 129-200.

³⁶ Decision on the confirmation of the charges, 14 May 2007, ICC-01/04-01/06-803-tEN, paragraph 250.

applicants) and it has considered in its assessment of the material provided to the Bench on each relevant application whether, notwithstanding the fact that the responsibility of others (such as the APC) cannot be discounted, there is *prima facie* evidence (as opposed to proof beyond a reasonable doubt or on a balance of probabilities) that the individual concerned was a victim under Rule 85(a) of the Rules, having suffered personal harm as a result of crimes confirmed against the accused, in the period of time between September 2002 and 13 August 2003.³⁷

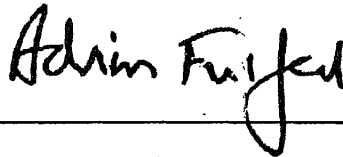
V. Orders of the Chamber

30. For these reasons, the Trial Chamber hereby:

- a. Grants the applications by a/0335/10, a/1615/10, a/1616/10, a/1619/10, and a/1622/10 to participate in the proceedings.
- b. Refuses the applications by a/1610/10 and a/1621/10 to participate in the proceedings.
- c. Orders the Registry to submit a report to the Chamber on the requests for protective and special measures for these 5 victims no later than 15 July 2011.
- d. Orders the Registry to propose a public redacted version of this cover decision and the confidential and public redacted versions of Annex A of this Decision to the Chamber by 15 July 2011.
- e. Directs that victim a/1622/10 is allocated to the team that includes Mr Diakiese and that all other victims are allocated to the team that includes Mr Keta, given these counsel represent the victims hereby admitted to participate.

³⁷ ICC-01/04-01/06-2659-Corr-Red, paragraph 40.

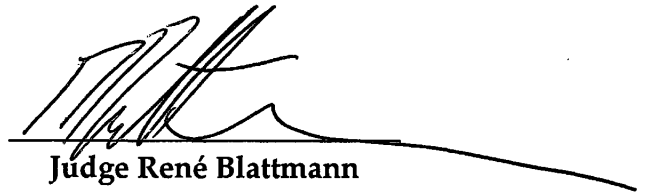
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 25 July 2011

At The Hague, The Netherlands