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Date: **23 March 2012**

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

Request for reconsideration of Trial Chamber I's decision to withdraw the status of participating victims in the proceedings to a/0047/06, a/0048/06, a/0050/06 and a/0052/06

Source: Office of Public Counsel for Victims

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I. BACKGROUND

1. On 15 December 2008, Trial Chamber I granted to applicants a/0047/06, a/0048/06, a/0050/06 and a/0052/06 the status of victims participating in the trial proceedings related to the present case¹, after having found that the information submitted was sufficient to establish, on a *prima facie* basis, that the criteria pursuant to rule 85 of the Rules of Procedure and Evidence were met² (the “Decision of 15 December 2008”).

2. Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 were called to testify during the trial proceedings respectively as Prosecution witnesses OTP-7, OTP-8, OTP-10 and OTP-11. Their testimonies took place between February and March 2009³.

3. On 14 March 2012, the Chamber delivered its “Judgment pursuant to Article 74 of the Statute” (the “Judgment”)⁴ by which it found Mr. Thomas Lubanga Dyilo guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the Force Patriotique pour la libération du Congo and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003⁵. Furthermore, the Majority of the Chamber – Judge Odio Benito dissenting – decided to withdraw the status of participating victims to all individuals enjoying the dual status of victims and witnesses in the current case, including OTP-7, OTP-8, OTP-10 and OTP-

¹ See the “Corrigendum to Decision on the applications by victims to participate in the proceedings” (Trial Chamber I), No. ICC-01/04-01/06-1556-Corr-Anx1, 13 January 2009 (dated 15 December 2008) (the “Decision of 15 December 2008”), par. 137-a.

² *Idem.*, paras. 61, 62 and 73.

³ Witness OTP-8 gave testimony on 25-27 February 2009. Witness OTP-11 gave testimony on 27 February and 3-4 March 2009. Witness OTP-10 gave testimony on 5-6 March 2009. Witness OTP-7 gave testimony on 13 and 17-18 March 2009.

⁴ See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012 (the “Judgment”).

⁵ *Idem.*, par. 1358.

11,⁶ “given the Chamber’s present conclusions as to the reliability and accuracy of these witnesses”⁷, while holding that “[i]t would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria”⁸.

4. On the same day, the Chamber issued a “Scheduling order concerning timetable for sentencing and reparations”⁹.

5. The Principal Counsel of the Office of Public Counsel for Victims as Legal Representative of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 (the “Legal Representative”) respectfully requests the Chamber to reconsider its decision to withdraw the status of participating victims in the trial proceedings to the said individuals for the following reasons.

II. LEGAL BASIS FOR THE REQUEST FOR RECONSIDERATION

6. In the “Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010” dated 30 March 2011 (the “Decision of 30 March 2011”)¹⁰ the Chamber endorsed “the interpretation that in certain circumstances a Chamber is entitled to depart from its decisions on matters of substance as regards the law or the facts of the case”¹¹. The Chamber held in particular that “it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information”¹². It concluded in this regard that

⁶ *Ibid.*, par. 1362.

⁷ *Ibid.*, par. 484.

⁸ *Ibid.*

⁹ See the “Scheduling order concerning timetable for sentencing and reparations” (Trial Chamber I), No. ICC-01/04-01/06-2844, 14 March 2012.

¹⁰ See the “Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011.

¹¹ *Idem.*, par. 15.

¹² *Ibid.*, par. 18.

“irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”¹³.

7. The Legal Representative submits that, while revising the status of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to further participate in the trial proceedings related to the present case, the Chamber imposed on them an unfair and discriminatory treatment as compared with other victims admitted to participate in the present case and being in an analogous situation. This causes manifestly unsatisfactory consequences as regards both the victims and the fair trial safeguards within the meaning of the Decision of 30 March 2011.

8. The Legal Representative provides legal grounds for her request below and contends that they constitute sufficient basis for the Chamber to reconsider its decision in respect of the victims she represents.

9. The Legal Representative takes note of the approach adopted by Judge Blattmann in his Separate Opinion to the Decision of 30 March 2011¹⁴. In particular, Judge Blattmann stated that “[g]iven that there is no express provision generally allowing a Chamber to reconsider its own decisions, in principle, once a decision is released it cannot be corrected but by the Appeals Chamber”¹⁵. He specified that “[a] scenario to be avoided is one in which the parties, once the deadline for applications requesting leave to appeal has elapsed, could enable a review mechanism by simply arguing that they did not properly read or understand the contents of a decision”¹⁶. The Legal Representative understands that Judge Blattmann’s major concern was to avoid enabling the parties to request a review of a Chamber’s decisions in addition and/or in alternative to appeal mechanisms open to them under the Court’s legal framework.

¹³ *Ibid.*

¹⁴ See the “Separate Opinion of Judge René Blattmann to the Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010”, No. ICC-01/04-01/06-2707, 30 March 2011.

¹⁵ *Idem.*, par. 11.

¹⁶ *Ibid.*, par. 32.

10. In the present instance, the parties – and the parties only – are entitled to appeal the Judgment. According to the legal framework of the Court, victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 whose status to participate has been withdrawn are not provided with any possibility to challenge either the Chamber’s judgment on the guilt or innocence of the accused or the Chamber’s findings contained in the Judgment which has a direct negative impact on their status. Indeed, as opposed to the parties, the only possibility for the victims concerned is to request the Chamber to reconsider the decision which directly relates to them, in order to prevent unfairness within the meaning of the Decision of 30 March 2011. Denying the victims to make use of the said possibility would cause additional unfairness in their respect.

III. LEGAL GROUNDS FOR THE REQUEST FOR RECONSIDERATION

11. In her Separate and Dissenting Opinion to the Judgment¹⁷, Judge Odio Benito dissented with the manner in which the Majority of the Chamber dealt with individuals enjoying the dual status of victims and witnesses, when evaluating their status as victims participating in the case¹⁸. In particular, she opined that the contradictions and weaknesses of OTP-7, OTP-8, OTP-10 and OTP-11 as witnesses in the present trial should not affect their status as victims with right to participate in the trial proceedings¹⁹. She concludes as follows:

“it is unfair and discriminatory to impose upon individuals with dual status a higher evidentiary threshold (beyond reasonable doubt) as regards their victims’ status, while all other victims participating in the proceedings have not been subject to thorough examination by the parties and the Chamber, as these young persons have been. When reparations are

¹⁷ See the “Separate and Dissenting Opinion of Judge Odio Benito”, No. ICC-01/04-01/06-2842, 14 March 2012, pp. 608 to 624.

¹⁸ *Idem.*, paras. 21 to 35.

¹⁹ *Ibid.*, paras. 25, 27 and 28.

*evaluated, it will be up to the Trial Chamber to determine the criteria utilised in determining their final status”.*²⁰

12. The Legal Representative acknowledges and endorses said views and conclusions of Judge Odio Benito. In this regard, the Legal Representative submits additional elements as follows.

13. For the purpose of revising the status of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to participate in the trial proceedings related to the present case, the Majority of the Chamber has adopted a standard of proof identical to the one used for conviction purposes, *i.e.* “beyond reasonable doubt”²¹. Indeed in its Decision, the majority of the Chamber justifies the withdrawal of the status of participating victims to the individuals concerned by applying this standard to the evidence they provided at trial; therefore, *de facto* applying said standard to their request for participation. However, this standard is solely applicable when assessing evidence for the purpose of determining the guilt or innocence of the accused persons²². In accordance with the jurisprudence established by Trial Chambers I, II and III, the standard of proof to be applied for victims to participate at trial stage requires the Chamber’s assessment of information contained in victims’ application forms on a *prima facie* basis only²³. Even assuming that in an advanced stage of the trial proceedings a higher threshold might apply to victims, neither the current regime regarding victims’ participation in the proceedings before the Court nor the current jurisprudence even envisage the possibility to apply to applications for participation the highest burden of proof so to oblige victims to substantiate their request “beyond reasonable doubt”. This hardening of the standard of proof was never foreseen during the negotiations of

²⁰ *Ibid.*, par. 35.

²¹ See the Judgment, *supra* note 4, paras. 247, 268, 288, 480 and 484.

²² See article 66-3 of the Statute.

²³ See the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 99; the “Decision on the treatment of applications for participation” (Trial Chamber II), No. ICC-01/04-01/07-933-tENG, 9 July 2009 (dated 26 February 2009), par. 10; the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants” (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, par. 19.

either the Statute or the Rules of Procedure and Evidence. Moreover, no other standards of proof to be applied to victims in trial proceedings, except the *prima facie* standard applied to all the other participating victims – with the exception of the dual status ones and the victims who appeared in person before the Chamber at trial, was ever discussed within the jurisprudence of the Court.

14. Consequently, by placing on victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 the standard of proof “beyond reasonable doubt” while assessing their status to participate at the end of the trial proceedings, the Majority of the Chamber applied as regards these victims a new threshold which has no legal basis in the legal framework of the Court. This resulted in denying to the said victims their right to participate in trial proceedings, right which was granted to them on the basis of clearly defined criteria established by the legal texts of the Court as interpreted by the current jurisprudence.

15. Moreover, the Trial Chamber shall ensure that a trial is fair²⁴. The “fair trial” guarantees shall apply throughout the proceedings and in respect of all the parties and participants, including victims²⁵. Pursuant to article 21(3) of the Statute, “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as [...] or other status”²⁶.

²⁴ See article 64-2 of the Statute.

²⁵ In this regard, the Office argues that the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to Justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. A/RES/40/34, 29 November 1985, Principles 4 to 7. The document is available on the following address: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

²⁶ See also in this regard the “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006” (Appeals Chamber), No. ICC-01/04-01/06-772, 14 December 2006, par 36. See also the “Corrigendum to Decision on the applications by victims to participate in the proceedings” (Trial Chamber I), No. ICC-01/04-01/06-1556-Corr-Anx1, *supra* note 1, par. 48.

16. According to internationally recognized human rights as developed by the European Court of Human Rights and the Inter-American Court of Human Rights, the right not to be discriminated against in the enjoyment of the rights guaranteed is violated when persons in analogous or “relevant similar” situations are treated differently without being provided with an objective and reasonable justification”²⁷. The fundamental principle of equality and non-discrimination constitutes an outstanding element of the human rights protection system and has entered the realm of *jus cogens*²⁸. A difference of treatment is discriminatory if it “*has no objective and reasonable justification*”, therefore if it does not pursue a “*legitimate aim*” or if there is “*no reasonable relationship of proportionality between the means employed and the aim sought to be realised*”²⁹.

17. In the present instance, the evidence presented by victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, including the one related to their victim status, was subject of thorough examination by the parties and the Chamber. None of other victims admitted to participate in the trial proceedings related to the present case but not cumulating the dual status of victim and witness was treated by the Chamber in the same manner. The same treatment was also imposed on the three victims who appeared in person before the Chamber at trial³⁰. Thus, except for the latter and the dual status victims who were called as witnesses by the Prosecution, all the participating victims continue to participate in the trial proceedings on the basis of a

²⁷ See ECHR, *Paulik v. Slovakia*, Application No. 10699/05, 10 October 2006, par. 51. See also in this regard ECHR, *Ponomaryovi v. Bulgaria*, Application No. 5335/05, 21 June 2011, par. 51; *D.H. and others v. the Czech Republic*, Application No. 57325/00, 13 November 2007, paras. 175 and 196; *Thlimmenos v. Greece*, Application No. 34369/97, 6 April 2000, par. 44; *Larkos v. Cyprus*, Application No. 29515/95, 18 February 1999, par. 30.

²⁸ See IACHR, *Yatama v. Nicaragua*, Judgment of 23 June 2005, par. 184.

²⁹ See ECHR, *Paulik v. Slovakia*, Application No. 10699/05, 10 October 2006, par. 55. See also in this regard ECHR, *J.M. v. the United Kingdom*, Application No. 37060/06, 28 September 2010, par. 54; *Genovese v. Malta*, Application No. 53124/09, 11 October 2011, par. 43; *Moldovan and others v. Romania*, Applications Nos. 41138/98 and 64320/01, 30 November 2005, par. 137; *Fretté v. France*, Application No. 36515/97, 26 February 2002, par. 34; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Applications Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, par. 72. See also IACHR, *Castaneda Gutman v. Mexico*, Judgment of 6 August 2008, par. 212; *Yatama v. Nicaragua*, Judgment of 23 June 2005, par. 185.

³⁰ See the Judgment, *supra* note 4, paras. 499 to 502.

prima facie assessment made by the Chamber regarding the information they provided in their applications for participation at the outset of the trial.

18. As far as the right to participate in the trial proceedings pursuant to article 68(3) of the Statute is concerned, the Legal Representative submits that victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 have clearly been treated by the Chamber differently when compared with other victims admitted to participate in the present case and being in an analogous situation. The fact that, in addition to their status of victim, said individuals enjoyed the status of witnesses “*does not preclude them from being in sufficiently comparable positions and from having sufficiently comparable interests*”³¹ than other victims not enjoying dual status. The difference in treatment said victims had received is clearly discriminatory in light of the criteria established by the international human rights jurisprudence³².

19. Indeed, the Chamber advanced no justification for the difference in treatment victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 had received which in principle deprives the said treatment of any “legitimate aim”³³. In addition, it appears that applying to said victims the standard of proof “beyond reasonable doubt” while assessing their status to further participate in the trial proceedings has no legal basis in the legal framework of the Court.³⁴ Even assuming that the Chamber could apply said standard of proof at the end of the trial to enable them to further participate in the proceedings may pursue a certain “legitimate interest”, the same standard was not applied to other victims in an analogous situation³⁵. Consequently, there is no reasonable relationship of proportionality between the aim sought to be realised and

³¹ See ECHR, *Paulik v. Slovakia*, Application No. 10699/05, 10 October 2006, par. 54. See also in this regard ECHR, *Cliff v. the United Kingdom*, Application No. 7205/07, 13 July 2010, par. 66; *D.H. and others v. the Czech Republic*, Application No. 57325/00, 13 November 2007, par. 175.

³² See par. 16 *supra*.

³³ See ECHR, *Moldovan and others v. Romania*, Applications Nos. 41138/98 and 64320/01, 30 November 2005, par. 140.

³⁴ See paras. 13 and 14 *supra*.

³⁵ See ECHR, *Paulik v. Slovakia*, Application No. 10699/05, 10 October 2006, par. 58.

the absolute means employed in the pursuit of it³⁶. The Legal Representative observes in this regard that Judge Odio Benito stressed that *“it is unfair and discriminatory to impose upon individuals with dual status a higher evidentiary threshold (beyond reasonable doubt) as regards their victims’ status, while all other victims participating in the proceedings have not been subject to thorough examination by the parties and the Chamber, as these young persons have been”*³⁷.

20. In addition, the Legal Representative contends that the decision of the Chamber is not final since it may still be appealed by either party. As a consequence, should an appeal be lodged and should the Appeals Chamber revert the ruling dealing with the credibility and reliability of the evidence presented by the former child soldiers concerned and/or the resulting withdrawal of their status as participating victims, these individuals would be unduly deprived of their right to present their views and concerns in the further proceedings and no remedy will be available to them.

21. The Legal Representative further submits that while criticizing the consistency and the reliability of the evidence provided by witnesses OTP-7, OTP-8, OTP-10 and OTP-11, the Chamber never ruled with certainty that relevant criteria determining their status of victims were not met, *i.e.* the fact that they were abducted into an armed group when they were under fifteen years of age, but merely stated that it was not satisfied beyond reasonable doubt that those criteria were met³⁸. Consequently, should a proper standard of proof, *i.e.* the *prima facie* standard, be applied to victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, the relevant factors determining their status to participate in the trial proceedings would still be deemed to be met in accordance with the Decision of 15 December 2008. In this regard, Judge Odio Benito

³⁶ *Idem.*, par. 59.

³⁷ See the “Separate and Dissenting Opinion of Judge Odio Benito”, *supra* note 17, par. 35.

³⁸ See the Judgment, *supra* note 4, paras. 247, 268, 288, 480 and 484.

also stressed that witnesses OTP-7, OTP-8, OTP-10 and OTP-11 could have well been recruited and their victims' status should remain unaffected.³⁹

22. Finally, the Legal Representative argues that the Trial Chamber's approach, *i.e.* the difference in treatment of participating victims within the same case, on the one hand, and the application of the standard of proof "beyond reasonable doubt" to victims enjoying the dual status of victim and witness, on the other hand, gives rise to a precedent which is likely to significantly jeopardise the current regime of the participation of victims before the Court. Furthermore, applying to victims enjoying the dual status a higher and different standard of proof in relation to their status of participating victims in the proceedings is very likely to discourage victims to appear in the proceedings as witnesses; this would have detrimental impact on the administration of Justice.

IV. REQUEST FOR URGENT EVALUATION BY THE CHAMBER

23. In the Scheduling Order of 14 March 2012, the Chamber, *inter alia*, requested the legal representatives of victims to file written submissions on the procedure to be adopted for sentencing under article 76 of the Statute and the principles to be applied by the Chamber when it is considering the appropriate sentence to be imposed, by 16:00 on 18 April 2012⁴⁰. Furthermore, the legal representatives of victims were requested to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed by the Chamber, by 16:00 on 18 April 2012⁴¹.

24. The Legal Representative respectfully requests the Chamber to consider the present request for reconsideration on an urgent basis and given the deadlines set out in the Scheduling Order of 14 March 2012, to consider shortening the deadline set

³⁹ *Idem.*, par. 34.

⁴⁰ See the Scheduling Order of 14 March 2012, *supra* note 9, par. 3.

⁴¹ *Idem.*, par. 8.

out in regulation 24(1) of the Regulations of the Court for the parties' observations on the present request for reconsideration.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Trial Chamber to reconsider its decision to withdraw the status of participating victims in the proceedings to a/0047/06, a/0048/06, a/0050/06 and a/0052/06, in order to prevent unfairness within the meaning of the Decision of 30 March 2011.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

**Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims**

Dated this 23rd day of March 2012

At The Hague, The Netherlands