

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/04-01/06**

Date: **28 September 2007**

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public Document

**Joint submissions of the Legal Representatives of Victims a/0001/06 to a/0003/06
and a/0105/06 on the modalities of victims' participation in the proceedings
leading up to and during the trial**

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a/0001/06 to a/0003/06 and a/0105/06**

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I. Background

1. After the status conference of 4 September 2007, Trial Chamber I ordered the legal representatives of victims a/0001/06 to a/0003/06 and a/0105/06 (the “Legal Representatives”) to file their submissions on the role of victims in the proceedings leading up to and during the trial by 28 September 2007.¹

2. Accordingly, the Legal Representatives respectfully file the following submissions. In view of the significance of this matter for all victims, the teams of Legal Representatives participating in the proceedings have worked jointly to present a common position.

II. General remarks on the participation of victims in the present case

3. A characteristic of this case is that it deals with children being recruited into an armed group and taking part in hostilities. As far as victim participation is concerned, this means that the Court and the parties must have regard to the following:

- o Some of the victims participating in the proceedings are still minors at this time and thus constitute a particularly vulnerable group.
- o In the recent past, these minors were under the authority of the Accused. By participating in legal proceedings against their former leader, they have come to be seen as traitors.
- o The victims’ families belong to the same community as the Accused, in which the Accused still has a certain influence. Taking part in the proceedings puts these families at risk, not only of reprisals from the organisation commanded by the Accused, which is still active in the field, but also from the people around them.

¹ See “Order setting out schedule for submissions and hearings regarding the subjects that require early determination”, ICC-01/04-01/06-947, 5 September 2007, para. 3, pp. 2-3.

- o The majority of victims are still in the field, where a lack of safety and security is widespread and opportunities for protection are limited. All of these people are living in very precarious circumstances.

4. The victims' foremost concern is for their own safety and that of their families. Article 68 of the Statute, which guarantees the participation of victims in the proceedings, begins as follows:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

5. The issue of victim (and witness) safety informs every aspect of the proceedings, from making arrangements for their representation and deciding whether to implement protective measures, to the issue of holding hearings in public, the form in which evidence is to be submitted and whether or not to grant interim release. The issue must also be taken into account in arguments as to the modalities of victims' participation in the proceedings.

6. Victim a/105/06 has already submitted a request for reparations. Others intend to do so. However, the objective of victim participation is not only to obtain reparations for the harm suffered; it is also to enable victims to present their views and concerns. By presenting their views and concerns, victims contribute to fair justice and thus become not only beneficiaries of but also partners in international justice. These two facets of victim participation are inextricably linked. Indeed, the very notion of reparations for victims extends to more than just compensation and other forms of restitution. According to the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" – adopted by the General Assembly of the United Nations² and forming part of the law

² United Nations General Assembly resolution 60/147 of 16 December 2005.

applicable to these proceedings pursuant to article 21(1)(b) of the Statute – victims should be provided with “full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”

7. Principle 22 stipulates that satisfaction should include:

(b) Verification of the facts [...];

[...]

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

[...]

(f) Judicial and administrative sanctions against persons liable for the violations[.]³

Reparation also comprises the cessation of violations that are continuing and the provision of guarantees of non-repetition to victims.

8. Some of these forms of reparation must necessarily be addressed in the proceedings before any decision is rendered as to whether the Accused is guilty. By participating in those proceedings, the victims will be able to:

- o participate in the verification of the facts, insofar as those facts pertain to them (*How was victim X recruited into the UPC?*);
- o guard against any infringement of their dignity, reputation and rights during the proceedings, and respond to any such infringement (*Such-and-such a victim is not credible and is only seeking financial gain or acting under pressure from an enemy group; so-and-so offered his own son up for recruitment*); and
- o guard against their being put in danger by the conduct of the proceedings (e.g. if certain documents or items of testimony concern them directly or indirectly).

9. While the Statute and the Rules of Procedure and Evidence allow for a post-conviction ruling on reparations for victims – including restitution, compensation and rehabilitation pursuant to article 75 of the Statute – this in no way precludes victims from deriving some satisfaction, and therefore a form of

³ Emphasis added.

reparation, purely from the establishment of the truth about the facts, from a Court decision identifying the perpetrators, and even from the sentences handed down. Victims may also have an interest in not seeing an innocent person convicted while the guilty party walks free. These are the principles that supply the basis of the Legal Representatives' proposed modalities for the participation of the victims they represent in the proceedings.

III. Organisation of proceedings on the charges against the accused and the harm suffered by the victims (regulation 56 of the Regulations of the Court)

10. The modalities of victim participation depend in part on how the Trial Chamber decides to organise the proceedings and on whether it wishes to hold separate or joint hearings on the charges and reparations.

11. The hearing of reparation requests is an integral part of the trial phase and falls within the mandate of the Trial Chamber. There is nothing in the Court's founding texts that would require the Chamber to hear the issue of victim reparations during a specific phase of the proceedings or outside the trial phase governed by Part 6 of the Statute and Chapter 6 of the Rules of Procedure and Evidence.

12. Article 76 of the Statute provides for proceedings (representations) on reparations to take place after conviction and before sentencing, or at any later hearing. Under rule 143 of the Rules of Procedure and Evidence, the hearing on sentencing – and, where applicable, on reparations – may be postponed in exceptional circumstances.⁴

13. Regulation 56 of the Regulations of the Court reads as follows: "The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a

⁴ The French version of the rule refers to "*audiences se rapportant aux réparations*" in the plural, while the English uses "proceedings". Rules 91(4) and 97(2) of the Rules of Procedure and Evidence suggest that specific reparation hearings may be held after the accused is convicted.

decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.”

14. This leaves it up to the Chamber to decide whether the witnesses called by the parties may also be asked questions about the harm suffered by the victims, and whether the victims can call witnesses and submit documents for these purposes. The Chamber may decide on a case-by-case basis to apply regulation 56 of the Regulations of the Court, either at the request of a participant in the proceedings or on its own motion.

15. The Legal Representatives hereby explicitly ask the Chamber to rule, pursuant to regulation 56 of the Regulations of the Court, that – with exceptions to be decided on a case-by-case basis – witnesses and experts may also be questioned on the harm suffered by victims as a result of the Accused’s alleged acts, and that the Legal Representatives may file documents for these purposes. In the view of the Legal Representatives, this may contribute to a fairer trial and more efficient proceedings. Many questions of fact concern potential mitigating or aggravating circumstances with respect to the Accused, or even exonerating or incriminating evidence, and are germane to the harm suffered by the victims, for example:

- Was child X, Y, or Z enlisted in an armed group before the age of 15?
- Was this enlistment voluntary or forced? Did the parents approve it?
- Were certain children subjected to inhumane or degrading treatment, enslaved, wounded or killed?
- Were they coerced into committing acts that may be characterised as war crimes?
- Have they suffered physical or psychological repercussions?

16. It stands to reason that if information of this sort emerges from the record, or if questions such as these are raised during the proceedings – or, simply, if witnesses

who may be able to provide such information are called – the Legal Representatives will want to be involved in the proceedings.

17. If such issues cannot be raised at trial, certain witnesses may actually have to be re-examined if and after the Accused is convicted.

18. Regardless, the application of regulation 56 of the Regulations of the Court is not without impact on the modalities of victim participation. In particular, the victims' Legal Representatives will have to be given more opportunities to intervene in the proceedings and more time to prepare if they do not have the opportunity to recall previously heard witnesses for the reparation hearings.

IV. Modalities of participation leading up to and during the trial

Consultation and disclosure of documents and materials entered into the case record and introduced before the Court

19. On this point, the Legal Representatives refer to their respective submissions dated 24 September 2007.⁵

Participation in all hearings

20. Victims a/0001/06 to a/0003/06 and a/0105/06 were granted victim status by the Pre-Trial Chamber. They were also admitted to participate in the proceedings against the Accused. In the Pre-Trial Chamber's view, therefore, their personal interests were affected by the case.⁶ Their interests are still – if not more – affected at the current

⁵ See "Submissions of the Legal Representative of Victim a/0105/06 in Response to the Order Setting out Schedule for Submissions and Hearings Regarding the Subjects that Require Early Determination", ICC-01/04-01/06-961-tENG, 24 September 2007. See also "Submissions on Preliminary Issues", ICC-01/04-01/06-957-tENG, 24 September 2007.

⁶ See "Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo" (Pre-Trial Chamber I), ICC-01/04-01/06-228-tEN, 28 July 2006. See also "Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*" (Pre-Trial Chamber I), ICC-01/04-01/06-601-tEN, 20 October 2006. On the criteria used by the Chamber,

stage of the proceedings, now that the charges of enlisting children under the age of 15 years and using them to participate in the hostilities have been confirmed; that the relevant victims or their children say they were enlisted by the UPC; and that the Accused's responsibility for those acts will now be debated.

21. In the case of child soldiers, the victims also have a moral interest – regardless of any request for reparations – in being recognised as such where some might regard them wrongly as perpetrators of or accessories to war crimes.

22. The Legal Representatives are keen to participate throughout the proceedings, including in all phases leading up to the trial. They intend to submit their considerations and file oral or written submissions, during all status conferences, on issues relating to the preparation and conduct of the trial.

23. Moreover, they would like to exercise their right to present views and concerns on any and all procedural issues, where such issues may be raised by the parties or by the Chamber on its own motion, as well as on issues of law decided by the Trial Chamber.

24. The Legal Representatives cite rule 91(2) of the Rules of Procedure and Evidence, according to which “[a] legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90.” This includes the right to “participat[e] in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions.”

25. The above provision means that participation is the principle and any restriction of it is an exception which must be supported by the circumstances of the

see “DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, paras. 63-64.

case.⁷ Nothing would justify a blanket exception for closed hearings, although it is conceivable that some closed hearings may be held entirely or partly *ex parte*, without certain participants attending, if the circumstances require it, but this has to be decided on a case-by-case basis. The Chamber may also decide to hold certain hearings *ex parte* without the Defence but with the Legal Representatives of one or more victims attending so as to discuss the organisation of protective measures, for example.

26. Inasmuch as the Legal Representatives are entitled, in accordance with rule 91(2) of the Rules of Procedure and Evidence, to participate in *all hearings* before the Court, they are therefore also entitled to participate in *all status conferences* held pursuant to rule 132 of the Rules of Procedure and Evidence, “unless, in the circumstances of the case, the [Trial] Chamber is of the view that [their] intervention should be confined to written observations or submissions.”⁸ This is also implicitly confirmed by the Trial Chamber’s orders dated 18 July 2007 and 5 September 2007.

Presentation of considerations and oral/written submissions on any issues relating to the preparation or conduct of the trial, including on the applicable law

27. Rule 91 of the Rules of Procedure and Evidence makes a distinction between “attend[ing]” and “participat[ing] in” the proceedings. Participation implies the opportunity to make oral and written submissions on any issues of interest to the victims in accordance with the terms that the Chamber sets. The intent of the drafters of the Rules of Procedure and Evidence was to allow victims’ representatives “not only to respond and make comments but also to initiate questions in a case before the Court by making a submission”.⁹

⁷ See Bitti, G. and Friman, H. “Participation of victims in the procedures.” *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Ed. Lee, R.S. (p. 466): “This means that the participation of the legal representative in hearings is the principle and the restriction to written observations or submissions is the exception.”

⁸ See rule 91(2) of the Rules of Procedure and Evidence.

⁹ Bitti, G. and Friman, H. *ibid.* (p. 467).

28. The Legal Representatives wish to be able to avail themselves of this opportunity.

Opportunity to respond to any motion, challenge or observation and requests from the Prosecution or Defence

29. Regulation 24(2) of the Regulations of the Court sets out as a general principle that “[v]ictims 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, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber.” In accordance with the Regulations of the Court, the Legal Representatives wish to be able to respond to any motions, challenges or observations and requests submitted by the Prosecution and/or the Defence on any issue of the conduct of the proceedings or any procedural matter raised by the Chamber on its own motion. Given the interest of victims in this issue, the victims also ask to be able to reply to observations submitted by the parties on the modalities of participation in the proceedings.

V. Trial-only participation modalities

Statements on victims’ views and concerns

30. According to regulation 54(a) of the Regulations of the Court, “[a]t a status conference, the Trial Chamber may [...] issue any order in the interests of justice for the purposes of proceedings on, *inter alia*, the [...] length and content of legal arguments and the opening and closing statements”.

31. The Legal Representatives hereby request leave to make opening and closing statements in accordance with rule 89(1) of the Rules of Procedure and Evidence; they will request the Chamber’s leave on a case-by-case basis to make statements on specific points of fact, law or procedure.

32. Certain victims also wish to appear before the Chamber in person, namely victims a/0002/06 and a/0105/06. Such hearings need not be held at the opening of the trial, but should take place when the Chamber sees fit. Any appearance of victims in person should take place with the assistance of an interpreter and in circumstances that do not endanger them.

Introduction of evidence

33. The Court's founding texts do not preclude the Legal Representatives from submitting evidence with the leave of the Chamber. On the contrary, article 68(3) of the Statute provides that witnesses' views and concerns may be presented as well as considered, which should mean that evidence of them can be adduced. Rule 91(3) of the Rules of Procedure and Evidence also mentions the submission of materials by the Legal Representatives in preparation for a witness examination.

34. Pre-Trial Chamber I ruled in its order dated 17 January 2006 that victims admitted to participate in the proceedings could file documents in connection with the investigation at the investigation stage.

35. As set out above, evidence of the facts directly concerning the victims and the resulting harm may be of interest to the Chamber and the parties before a verdict is reached. The Legal Representatives will request leave to submit certain evidence (such as medical and psychological reports and testimony from witnesses and experts) according to the terms that the Court sets.

36. Should the Chamber decide to apply regulation 56 of the Regulations of the Court, it would make sense to give the Legal Representatives the same opportunities to introduce evidence as the Prosecution and the Defence by analogy with the provisions of rule 91(4) on hearings limited to reparations. Even if the regulation is not applied, the Chamber may nonetheless grant the Legal Representatives leave to present witnesses or documents.

Motions to rule on the relevance and admissibility of evidence

37. Inasmuch as “[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to [the] Chamber”,¹⁰ the Legal Representatives may raise before the Court issues relating to the relevance or admissibility of evidence introduced by either the Prosecution or the Defence in their oral or written submissions during a hearing under rule 91(2) of the Rules of Procedure and Evidence where that evidence pertains to them.

38. Pursuant to article 68(3) of the Statute, the Legal Representatives request the opportunity under rule 91(2) of the Rules of Procedure and Evidence to raise issues relating to the relevance or admissibility of evidence introduced by either the Prosecution or the Defence, where their clients’ interests are affected or where that evidence concerns matters bearing on reparations.

Examination of witnesses, experts and the accused

39. Rule 91(3) of the Rules of Procedure and Evidence provides that the Legal Representatives may question witnesses, experts or the accused with the Chamber’s leave. The Legal Representatives do not at this time request a blanket authorisation for such purposes, but will submit applications on a case-by-case basis according to how the proceedings develop.

¹⁰ See rule 64(1) of the Rules of Procedure and Evidence.

Protective measures

40. Rules 87 and 88 of the Rules of Procedure and Evidence are not formally part of subsection 3 on the participation of victims in the proceedings. However, the modalities of such participation are affected by some of these protective measures, such as the opportunity to participate in proceedings anonymously.

41. Protective measures are awarded to victims, not as a matter of favour, but as a necessity over which they have no control. Accordingly, protective measures granted by the Court should never restrict the protected person's rights to participate in the proceedings or apply for reparations.

42. Given the current circumstances in Ituri, any participation in legal proceedings against Thomas Lubanga Dyilo is risky for victims, especially those from the same community as the Accused. There have already been reprisals against one victim after the confirmation of charges hearing. Protective measures within the meaning of rule 87 of the Rules of Procedure and Evidence are therefore vital and have already been taken by Pre-Trial Chamber I and by the Victims and Witnesses Unit. Pre-Trial Chamber I has allowed victims to participate in the proceedings anonymously, with their identity concealed from the public as well as the Defence.

43. The Legal Representatives ask for those measures to remain in force during the Trial Chamber proceedings. Should the Chamber deem it unacceptable to keep people's identities completely concealed from the Defence, the Legal Representatives reserve the right to submit alternatives to the Chamber subsequently. Whatever happens, any change to the current protective measures should entail an opportunity for the victims to request other measures to guarantee their safety, and time to think about possibly abandoning their participation in the proceedings.

44. Under no circumstances should the danger facing victims, or the resulting need to protect their identities, restrict or limit their rights of participation in the

proceedings. In the victims' view this would go against at least the spirit of article 68(1) of the Statute and rule 87 of the Rules of Procedure and Evidence.

45. Pre-Trial Chamber I's decision in this regard cannot be taken as a precedent. Firstly, the Trial Chamber organises its proceedings independently. Secondly, the decision of Pre-Trial Chamber I was taken urgently on the day before the confirmation of charges hearing, which made it impossible to organise alternative protective measures (such as victim relocation), at a time when the OPCD was already operational but was in effect incorporated into the defence team for the Accused.¹¹ The proximity of the confirmation of charges hearing also prevented the Legal Representatives from effectively exercising an appeal against that decision, which they nonetheless refused to accept.

46. Victim a/0105/06 consents to being identified to the Defence (but not to the public), on the condition of receiving the protection provided for by the mechanisms of the Court. Victim a/002/06 also consents to such identification, provided that the other protective measures set up by the Victims and Witnesses Unit remain in place for the duration of the proceedings and, if need be, for a time after them. The other victims are of the view that any disclosure of their identity could endanger them or their family members.

Special measures

47. The Legal Representatives would like to reserve the opportunity to request special measures under rule 88 of the Rules of Procedure and Evidence if, for example, any children were to appear before the Court.

¹¹ See Pre-Trial Chamber Decision ICC-01/04-01/06-374 dated 17 August 2007.

FOR THESE REASONS**MAY IT PLEASE THE TRIAL CHAMBER:**

Having ruled on the application of regulation 56 of the Regulations of the Court,

To issue an order stating that the victims and their Legal Representatives may, during the proceedings leading up to the trial:

- participate in all status conferences;
- submit observations on any issues that may affect the conduct of the trial; and
- respond, within a time limit to be set by the Court, to the Prosecution and Defence submissions on the modalities of victim participation.

During the trial:

- participate in all hearings;
- submit observations on any issues that may affect the conduct of the trial;
- submit their views and concerns through their Legal Representatives, including opening and closing statements of one hour each per group of victims;
- appear in person before the Chamber if they wish;
- introduce evidence;
- call witnesses and experts to substantiate their requests for reparations;
- have access, through their Legal Representatives, to the lists of witnesses and expert witnesses of the Prosecution and Defence, and to their statements, so as to allow prior verification of whether the victims' personal interests are affected by those statements; and
- avail themselves of the protective measures necessary for their safety, which may include keeping their identity a secret.

Place on record the reservations submitted by the Legal Representatives as to the issue of anonymity and the potential application of special measures, including at any hearing by the Chamber.

Luc Walley and Franck Mulenda
Legal Representatives of Victims
a/0001/06 to a/0003/06

Carine Bapita Buyangandu
Legal Representative of Victim
a/0105/06

[signed]

[signed]

Dated this 28 September 2007

At Brussels, Belgium, and at Kinshasa, Democratic Republic of the Congo