



Original : French

No.: ICC-01/04-01/06  
Date: 4 September 2006

**PRE-TRIAL CHAMBER I**

**Before:** Judge Claude Jorda, President  
Judge Akua Kuenyehia  
Judge Sylvia Steiner

**Registrar:** Mr Bruno Cathala

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

**Public Document**

**Defence submissions regarding the applications for participation in the  
proceedings of applicants a/0004/06 to a/0052/06**

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

**Legal representatives for the Applicants**

Mr Luc Walley

Mr Franck Mulenda

**Counsel for the Defence**

Mr Jean Flamme

**Legal assistant**

Ms Véronique Pandanzyla

## 1. BACKGROUND

### 1.1 Facts

1. On 25 July, 31 July and 7 August 2006, applications for participation in the case of *The Prosecutor v. Thomas Lubanga Dyilo* were addressed to the Court by applicants whose identities and any information likely to identify them had been redacted;
2. The applications were registered under the reference numbers a/0004/06 to a/0052/06 respectively;
3. The applicants made no objections to their identities or the information contained in the application form for participation being disclosed to the Defence, except for applicants a/0004/06, a/0005/06, a/0019/06 and a/0044/06;
4. However, the Defence, unlike the Prosecution, was notified of all the applications where the identities and any identification information had been redacted.
5. In the light of the information which may be identified, the applications involve applicants who are acting on their own behalf or on behalf of a victim who is either deceased or has given his or her consent;
6. The acts which the applicants ascribe to the defendant are dated 2002 and 2003 and no further information is supplied to the Defence regarding the exact date or the location of the acts mentioned in the application;
7. The crimes alleged by the applicants for applications a/0004/06 to a/0052/06 involve homicide, attempted homicide and intentional injuries, torture and inhuman and degrading treatment, rape and sexual assault, pillaging, summary arrests and threats;

8. For applicants a/0047/06 to a/0052/06, the acts also include the forcible enlistment of a minor victim in militias and using that victim in fighting;
9. Regarding applications a/0034/06 to a/0043/06 and a/0045/06 to a/0052/06, the crimes alleged by the applicants were committed by “UPC militias” and, for the sexual assault allegation, “a UPC military leader”.
10. Applicants a/0022/06, a/0030/06, a/0033/06 and a/0044/06, however, accuse FNI militias or militia members who support them of these crimes.

## **1.2 Proceedings**

11. On 25 July, 31 July and 7 August 2006, applications for participation in the proceedings by applicants a/0004/06 to a/0052/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* were filed as confidential and *ex parte* and in them the applicants requested victim status and applied to take part in the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.
12. In a decision dated 4 August 2006, the Single Judge acknowledged the right of the Prosecution and the Defence to respond to an application for participation under rule 89 (1) of the Rules.
13. In addition, the Pre-Trial Chamber ordered the Registrar, under articles 68 (1) and 57 (3) (c) of the Statute and rule 86 of the Rules, to provide the Defence with a redacted version of the application in which any information which could lead to the identification of the applicant is deleted.
14. On 16 August 2006, the Pre-Trial Chamber rejected the request for redacted versions of the applications for participation made by the Defence in its application of 14 August 2006 and authorised an extension of the timescale for the Defence and the Prosecution to submit their comments regarding applications for participation from applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06.

15. The Defence therefore asks that the Pre-Trial Chamber takes into account its various comments.

## 2. MERITS

### **2.1 Reservations about the anonymous nature of the applications**

16. Regulation 86 regarding victim participation in the proceedings states that applicants must supply their identity and provide any relevant information for their application to be considered.

#### **2.1.1. Identity of applicants**

17. There is no question that any such application for participation in the proceedings, which makes provision for the victim to be heard, to make comments and even to question witnesses and the accused and then request reparations is in fact a formal act.
18. It is not possible for such participation to be done anonymously. The rights of the Defence can only be exercised if it knows who is bringing legal proceedings against the accused.
19. In this regard the Defence refers to article 35 (2) (a) of the European Convention on Human Rights, which states that the Court shall not deal with any application submitted under article 34 that is anonymous<sup>1</sup>. Rule 33 of the Rules of the European Court of Human Rights states that all applications shall be accessible to the public with the identity of the applicant, although the applicant may request that confidentiality measures be applied in respect of the general public under exceptional circumstances.

Similarly, article 33 of the Rules of Procedure of the Inter-American Court of Human Rights states that the requests “shall include the name and

---

<sup>1</sup> <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>  
<http://www.echr.coe.int/NR/rdonlyres/086519A8-B57A-40F4-9E22-3E27564DBE86/0/FrenchFrançais.pdf>

address of the original petitioner, and also the name and address of the alleged victims, their next of kin or their duly accredited representatives.”<sup>2</sup>

20. The rights of the accused, the principles of participation of both parties and the equality of arms essentially include the right to be informed of all the information in the case file and the trial, including the identity of the opposing party<sup>3</sup>.

This is indeed the case because the security measures are always subordinated to the rights of the Defence.

The non-disclosure of the identity of the applicants to the Defence makes the Defence a party outside the trial in the same way as the general public, even though the Prosecution is aware of their identity.

21. Given that the decision of the Single Judge recognised that the non-disclosure of the identity of victims which the Prosecution was intending to use at the confirmation of charges hearing might affect the Defence’s ability to contest the evidence and credibility of certain witnesses and would have consequences for the rights of the Defence in respect of articles 61 (3) and (6) (b) and 67 (1) (b) of the Statute<sup>4</sup>, is all the more applicable to anonymous victims<sup>5</sup>.

<sup>2</sup> <http://hei.unige.ch/humanrts/iachr/rule12-03.html>  
<http://www.cidh.oas.org/Basicos/frbas12.htm>

<sup>3</sup> Eur. Ct. H Rts, “Bönisch v. Austria (1985), series A, Number 92:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695320&portal=hbkm&source=externalbydocnumber&table=1132746FF1FE2A468ACCBCD1763D4D8149>

Eur. Ct. H Rts Kotostovski v. Netherlands (1989), Series A, Number 166:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=50&portal=hbkm&action=html&highlight=Kotostovski|v.|Netherlands&sessionId=8263382&skin=hudoc-en>

and Eur. Ct. H Rts Unterpertinger v. Austria (1986), Series A, Number 110:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=unterpertinger/austria&sessionId=9263443&skin=hudoc-en>

Case number ICTY-IT-95-14-T, the Prosecutor v. Tihomir BLASKIC, Protection of witnesses, 5 November 1996, §41

<sup>4</sup> Decision establishing general principles governing applications to restrict disclosure pursuant to rule 81 (2) and (4) of the Statute of 19 May 2006, ICC-01/04-01/06-108 at para. 30, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-166\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-166_English.pdf)

<sup>5</sup> Second report on the situation of Human Rights in Peru, Inter-American Court of Human Rights, OEA/Ser.L/V/II.106, doc. 59 rev. (2000). (Chapter II);  
<http://www1.umn.edu/humanrts/iachr/country-reports/peru2000-chap2.html>

22. In the case in point, the applicants accuse the accused by name and directly of crimes and as a result become accusers and party to the proceedings. A party implicated cannot be asked to defend himself or herself against anonymous accusers.

David Donat-Cattin<sup>6</sup> emphasises that the protection of victims and witnesses justifies the exception to the general rule of public debates in article 68, paragraph 2, “However, non-disclosure of identity to the public or to the media is one thing, anonymity of witnesses/victims to the defence is another. The latter is unacceptable [...] (in fact it is not possible to respond to arguments presented by someone without identity)”.

The victims have chosen to take part in the debates and must therefore agree to reveal their identity as **a party to the proceedings**, this is all the more the case given that under procedural law, once victims have been granted that status they will not be allowed to testify<sup>7 8</sup>

**2.1.2 Regarding the consideration of the requests of applicants a/0006/06 to a/0018/06, a/0020/06 to a/0043/06, a/0045/06 to a/0052/06**

23. Section H of the participation questionnaire allows the victim to ask the Court not to disclose his or her identity and/or any other information provided in the form to the Prosecution and/or the general public and/or States or other participants and/or the Defence. The following paragraph

<sup>6</sup> Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*.

<sup>7</sup> Judgement of 6 November 1956 of the French Court of Assizes, Bull. Cass, number 709, appeal number 3160, “The Statute and Role of the Victim”, page 1409 in “The Rome Statute of the International Criminal Court: A commentary”, Volume II, edited by Cassese, Gaeta and Jones 2002

<sup>8</sup> “The type of crimes judged by international courts does not mean that the rights of the accused can be overly limited. On the contrary, the international courts must be exemplary also in respect of the rights of the defence”. As a result the author believes that: “In each situation the respective interests [rights of the victims and witnesses to protective measures and rights of the accused] must be weighed against each other and when there is any doubt the scales must tip towards the accused, in spite of the gravity of the crimes of which he is accused”. International Review of the Red Cross March 2002, vol 84, number 845, Victims and witnesses of International Crimes

deals with the reasons put forward in support of the request for non-disclosure.<sup>9</sup>

24. On the one hand it would appear that applicants a/0006/06 to a/0018/06, a/0020/06 to a/0043/06 and a/0045/06 to a/0052/06 have left **blank** the section of the document regarding the non-disclosure of their identity or information contained in the form.

These applicants have opted to conceal neither their identity nor the information contained in the form from the Defence and all the more so from the proceedings in general.

25. Clearly applicants a/0006/06 to a/0018/06; a/0022/06 to a/0043/06 and a/0045/06 to a/0046/06 have expressed freely and in an informed manner their desire to appear in the proceedings before the Defence without the cover of anonymity and thus allow the Defence to know not only their identity but also all the information contained in the form.
26. On the other hand, the Defence expresses reservations regarding the request for non-disclosure by applicant a/0044/06 to the Prosecution, Defence, Public, States or other Participants given that the reason provided on the form is illegible, which does not allow the Defence to assess the merits of his or her application.
27. Finally, pursuant to Rule 87: "The Chamber shall seek to obtain, wherever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure".

However, in this case the Pre-Trial Chamber has not submitted any consent from the applicants regarding this measure, or at least the supporting documents regarding consent have not been successful.

---

<sup>9</sup> Section H, P 13 of the annexes of the application for participation in the proceedings as victim by the applicants.

28. The Pre-Trial Chamber cannot disregard the individual right of any person to be heard during a free and fair trial in a public and non-anonymous fashion.

### 2.1.3 Unnecessary nature of the measure

29. Under article 57 (3) of the Statute, the Pre-Trial Chamber may “where necessary provide for the protection and privacy of victims and witnesses [...]”.

30. The general principle of rule 86 is that in making any direction or order a Chamber shall take into account the needs of all victims and witnesses in accordance with article 68.

31. In the present case, on the one hand applicants a/0006/06 to a/0018/06; a/0022/06 to a/0043/06 and a/0045/06 to a/0046/06 do not report any fear of reprisals or any pressure which may arise as a result of the disclosure of their identity to the Defence which might result in them requesting particular protection from the Court<sup>10</sup>.

Accordingly the above-mentioned applicants have not expressed the need to conceal their identity or even the information contained in their form from the Defence.

32. On the other hand, according to article 68 of the Statute and the decision of Pre-Trial Chamber I of 19 May 2006, these measures which may infringe the rights of the accused can only be taken if, and only if, the Chamber notes that there are exceptional circumstances.

In this case the Chamber notes neither particular circumstances nor objective information making possible measures which are exceptions to the principles of public hearings and the participation of both parties.

33. **In the alternative**, and on the rare occasion where the Chamber might take into consideration the request for anonymity by the applicants, it would

---

<sup>10</sup> Section H, P 13 of the annexes to the application for participation in the proceedings as a victim by applicants.



seem to be crucial to stipulate strict conditions under which this measure can be granted.

34. Referring to the practice of the international courts as far as the admissibility of anonymous witness accounts is concerned<sup>11</sup>, the facts alleged by the applicants who wish to be granted the status of victim whilst at the same time requesting protective measures, should meet at least the following conditions:
- They must prove that fears for the safety of the victim or of his or her family are well-founded;
  - They must prove that the victim's credibility is not in question in any way;
  - They must demonstrate that there is no effective victim protection programme;
  - They must request measures which are limited to what is strictly necessary.

35. However, in this particular case:

- 1) The existence of a well-founded fear for the safety of the victim or his or her family is not raised by the applicants.
- 2) Regarding the credibility of the victim, the Defence cannot verify the authenticity, accuracy and sincerity of the statements made by the applicants which have been disclosed to the Defence in a redacted version.

In any case, the anonymous testimony of a person with a criminal past, or of an accomplice (whether or not that person has repented) must be excluded.

---

<sup>11</sup> Tadic, ICT-Y, decision of 10 August 1995, ICTY-94-1-PT; <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>  
Blaskic, ICT-Y, decision of 10 July 1999, ICTY-95-14-PT; <http://www.un.org/icty/blaskic/trialc1/decisions-e/70710PM113304.htm>

The Prosecution will then have to provide information about the personality of the victim, in particular whether he or she has been the subject of legal proceedings before national and/or international courts.

- 3) In this particular case, no mention is made regarding a lack of an effective witness protection programme.
- 4) With regard to the strictly necessary protective measures, not only the identity of the applicants but also the exact **dates of the alleged events** and their **location** have been redacted - that is information vital for the Defence to gauge the credibility of the facts related by the victim and which cannot be considered strictly necessary to withhold. In addition, rule 87(3) allows the Court to prohibit the Defence from disclosing the identity of the victim to a third party (87 (3) (b)) and to redact any information which could lead to the victim being identified from the public records of the Chamber (87 (3) (a)), which makes the protection measure taken in this particular case excessive.

36. In the Blaskic case<sup>12</sup>, the Tribunal specified its case law by ruling that the fear of reprisals was not sufficient to grant the measure of anonymity, but that objective information which supports the request for anonymity must also be supplied. In this case, the Tribunal accepted the anonymity of the witness vis-à-vis the public and the media, but not the Defence. In this particular case, the Chamber has provided no objective information to support its decision to redact the identities of the applicants.
37. As a result, and if extraordinarily the Chamber were to grant anonymity to the applicants vis-à-vis Thomas Lubanga Dyilo, this must only be a strictly

<sup>12</sup> Blaskic, ICT-Y, decision of 10 July 1999, ICTY-95-14-PT; <http://www.un.org/icty/blaskic/trialc1/decisions-e/70710PM113304.htm>

necessary and exceptional measure taken in respect of objective supported information about the risks to the life or freedom of the person concerned, or of his or her relatives. This has not been demonstrated here.

38. It is clear from these observations that because the Defence does not know the identity of the applicants and the content of their applications it considers that its rights have been violated.

It therefore expresses reservations regarding the anonymous nature of the procedure used by the applicants.

## **2.2. Inadmissibility of the applications in view of the inappropriate nature of participation at this stage in the proceedings**

39. Article 68 (3) allows the Court to assess the appropriate moment for participation, in particular with regard to respect for the rights of the Defence and the demands of a fair and impartial trial.
40. Under rule 89 regarding applications for participation of victims in the proceedings: “The Chamber, on its own initiative or on the application of the Prosecutor or the Defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3 are not fulfilled”.
41. The discretionary powers afforded to the Court under article 68 (3), to exclude *in limine litis* the applications for participation, requires that the Court take into account objective information regarding both the situation of the victims, that of the Defence, and also the obligations in conducting the procedures of the Court.

### **2.2.1 Participation impeding the Court’s obligation of expeditiousness and respect for a fair trial when conducting the proceedings**

42. The Defence refers to its conclusions of 4 September 2006 regarding the manner of participation of victims a/001/06 to a/003/06 (paragraphs 22 to 26).

43. In accordance with articles 64 (2) and 64 (3) of the Statute and rules 84, 91, 101 and 131 of the Rules of Procedure and Evidence, the trial must be fair and expeditious.
44. Article 67 (1) (c) recognises the right of the accused to “be tried without undue delay” as of the preliminary stage (rule 121 (1)).  
Article 67 (b) grants the accused the right to “have adequate time and facilities for the preparation of the defence...”.
45. Applications for participation at this stage of the trial place an impossible burden on the Defence. The Court must assess the volume and additional workload required to process, analyse and comment on these applications in the run-up to the confirmation of charges hearing.
46. Many fundamental issues the parties must discuss within the excessively short time before the confirmation of charges hearing have had to remain unresolved and in practice both the Prosecution and the Defence have been forced to request deadline extensions from the Court to respond to the applications and to compose observations.
47. This participation procedure, as implemented before the Chamber, disregards the above-mentioned articles.
48. Victim participation from the pre-trial stage not only significantly delays the proceedings, whose scope then becomes unmanageable for the Defence, but also risks paralysing its action and proceedings before the Court<sup>13</sup>.
49. If the Chamber, however, granted requests for participation, and in accordance with rule 101 (1) which states that: “In making any order

---

<sup>13</sup> See letter from the President of the Tribunal for Rwanda, Judge Navanethem Pillay, to the United Nations Secretary General telling him that procedure and determining requests for compensation for victims ought not to be the work of the international tribunals and that such a task “would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal” (Annex to a letter of the United Nations Secretary General to the Security Council dated 14 December 2000, UN doc. S/2000/1198).

<http://daccessdds.un.org/doc/UNDOC/GEN/N00/801/56/PDF/N008056.pdf?OpenElement>

setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims”, it would seem necessary for the Court to set an extinctive time-limit for filing applications for participation as do rules 121 (3), (4) and (5) which set strict time-limits for the Prosecution and Defence prior to the confirmation of charges hearing.

### **2.2.2. Participation hindering respect for the rights of the Defence**

50. Victim participation cannot prejudice the rights of the accused (art. 68.3). In practice victim participation obviously seems premature at this stage in the proceedings and runs contrary to respect for the principle of a fair trial, rights which include timely proceedings and a judgement rendered without undue delay.
51. Furthermore, the Pre-Trial Chamber held that in order to participate in this stage of the proceedings, applicants must prove a sufficient causal link between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears responsibility and which are set out in the arrest warrant issued by the Chamber<sup>14</sup>.
52. The Defence challenges this causal approach (“the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears responsibility”), which is a serious violation of the presumption of innocence (article 66 of the Statute). The victim participation applications force the Chamber to consider the factual and substantive allegations relative to the case and the alleged harm. The Chamber will then have to examine and assess the facts even before the confirmation of charges

---

<sup>14</sup> Decision of 22 June 2006, ICC-01/04-01/06-172  
<http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172-tEnglish.pdf>  
[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172_French.pdf)

hearing and even though those facts could affect the outcome of the hearing.

It is, however, not the Chamber's role to seek the truth regarding the guilt or innocence of the accused.

A decision based on this assessment of the causal link which is made public can, in the eyes of the public and the accused, not only give rise to objectively justified fears of pre-judgement<sup>15</sup> regarding the confirmation or not of the charges, but also presumes, before the trial has even taken place, that the accused committed the crime whereas the accused must have a trial based on the presumption of innocence<sup>16</sup>.

The Defence has no choice but to reject the wording of this assessment criteria as defined by the Chamber in its decision of 22 June 2006.

53. Thus the Defence holds that the assessment of the causal link by the Pre-Trial Chamber runs counter to the principle of the presumption of innocence and requires the Chamber to revise its interpretation. Moreover, the Defence invites the Chamber to allow the granting of victim status to fall within the authority of a specific Chamber other than the Pre-Trial Chamber whose purpose is to confirm or not to confirm the charges.

---

<sup>15</sup> ECHR, "Hauschildt v. Denmark", 24 May 1989, Series A, number 154, p. 21, §48. In this particular case, the judges of the Strasbourg Court held that the judge, who in a specific criminal proceedings system like the Danish system, had taken pre-trial decisions, in particular with regard to the extension of detention on remand, on the well-foundedness of article 762 of the criminal law which obliges him to ensure that the existence of "particularly confirmed suspicion" could not sit during the trial. According to the Court, "the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous". The impartiality of the court might call for caution and that the applicant's fears in this respect could be considered objectively justified.  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hauschild%20%7C%20danemark&sessionid=8248394&skin=hudoc-fr>

<sup>16</sup> Jorda and de Hemptinne, "Commentary of Statutes of Rome" at 1403 ("[Rule 85]; (...) it should be pointed out that the ICC Rules define the concept of a "victim" as follows: "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". This formula may pose problems for the presumption of innocence, as it appears to presuppose that a crime has been committed whereas that remains to be proved by a trial".

Statement by ICC Prosecutor Luis Moreno-Ocampo, 28/08/06; ICC-OTP-20060828-157-Fr: "As Prosecutors we have the responsibility to prove the case [...]. However, until his guilt is established, Thomas Lubanga Dyilo is presumed innocent."  
<http://www.icc-cpi.int/press/pressreleases/174.html>

54. Furthermore, rule 85 of the Rules of Procedure and Evidence defines the victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. Article 68 (3) of the Statute makes victim participation conditional on the requirement that “the personal interests of the victims are affected”. The Pre-Trial Chamber has made the provisions for victim participation fit its own criteria.

However, nothing in rule 85 or article 68(3) or anywhere else in the Statute or the Rules binds or restricts the definition of victims or participation of victims to the crimes ascribed to a specific person by the Prosecution.

55. The Defence considers that as article 68(3) emphasises the situation where “the personal interests of the victims are affected”, it refers to the personal interests of the victims in relation to the proceedings and not to the person concerned/the accused.

56. Linking participation to the personal interest of victims as to the outcome of the proceedings is consistent with the right of victims to compensation stipulated in human rights instruments. For the Defence, the right to compensation means that the victims have the right to see the right person held criminally responsible and an innocent person acquitted.

57. Reparation does not necessarily imply sentencing. For example, a person may hope to participate in the proceedings in order to highlight certain atrocities or crimes that have been committed with impunity in a particular region and which can be directly used to assess grounds of defence such as necessity or legitimate defence.

58. Alternatively, the applicants may consider that the crimes chosen by the Prosecution should be attributed to another person or that these crimes did not take place in the way in which the Prosecutor established them.

59. Therefore there are several scenarios regarding victim participation which are excluded as a result of the definition of victim used by the Pre-Trial Chamber. The Defence maintains that the effect of excluding these various methods of participation is to fit victim participation to the Prosecution's mould, their participation thus being limited to a role of secondary prosecutors rather than a role in establishing the truth. This clearly causes a serious imbalance in the proceedings.

Furthermore the interpretation used by the Pre-Trial Chamber essentially constitutes conclusions regarding the alleged guilt of Thomas Lubanga Dyilo for crimes which come under the jurisdiction of the Court. One of the criteria for victim participation is that they have "grounds to believe" that applicants have suffered harm as a result of crimes committed by Thomas Lubanga Dyilo which fall within the jurisdiction of the Court. The subtle distinction between this method of assessment and that used for the confirmation of charges hearing ("if there are substantial grounds to believe") gives rise to confusion and appears to be a pre-judgement.

In addition, this analysis has the effect of lightening the burden of proof for the Prosecutor.

### **2.3 Inadmissibility of applications for participation a/0004/06 to a/0052/06 because the applicants do not have victim status**

60. According to rule 89 on applications for participation of victims in the proceedings: "The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3 are not otherwise fulfilled [...]".

61. Rule 85 (1) describes a victim as: "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".



62. In a decision dated 28 July 2006<sup>17</sup>, with regard to rule 85 of the Rules of Procedure and Evidence, the Pre-Trial Chamber sets out the four criteria which must be met for an applicant for participation in the proceedings to be granted the status of victim:
- the applicant must be a natural person
  - the applicant has suffered harm
  - the crime from which the harm resulted must fall within the jurisdiction of the Court
  - there must be a causal link between the crime and the harm.
63. As far as the criteria of natural person is concerned, this condition is not challenged.

### 2.3.1. Harm

64. The terms “harm” and “victim” are not defined in the Statute. Traditionally harm must be personal (whether the victim is direct or indirect), real (in other words result in psychic or psychological trauma and/or proven physical harm) and direct.
65. The Court must study whether or not the victim meets the criteria for harm on a case-by-case basis<sup>18</sup>.
66. Some restrictions to this have been applied by French case law when the Criminal Chamber of the Court of Cassation confirmed a decree issued by the Assize Court which rejected an application by a mother to be a *partie civile* with regard to reparation for the mental harm as a result of sexual offences against her three minor children by her partner, on the grounds

---

<sup>17</sup> Pre-Trial Chamber I decision of 28 July 2006 ; ICC-01/04-01/06-228  
<http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-228-tEnglish.pdf>  
[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-228\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-228_French.pdf)

<sup>18</sup> Decision of 17 January 2006 ; ICC-01/04-101  
[http://www.icc-cpi.int/library/cases/ICC-01-04-101\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-101_French.pdf)  
[http://www.icc-cpi.int/library/cases/ICC-01-04-101\\_tEnglish-Corr.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf)

that she had not personally suffered as a result of the harm caused by the crimes and that the absence of mental harm resulted from the fact that the applicant “was not at all concerned about the morality, education or protection of her children (...)”<sup>19</sup>

In this particular case the Court should note that:

67. *Applicant a/0034/06 makes no allegation of harm.* The applicant has willingly left blank and crossed out the section of the application form with regard to the harm suffered<sup>20</sup>. He makes no allegation of direct or even indirect harm and only makes a brief and vague mention in section E (5) of “high blood pressure problems” in response to the question “Do you still suffer from your physical or psychological condition?” without linking it in any way to the accusations.
68. *Applicant a/0037/06 does not demonstrate the existence of direct and personal harm.* In this case the applicant tells of the death of the wife of the victim, which according to him is caused by the “trauma” caused by the death of her husband and her father, which he claims was caused by a “psychological crisis aggravated by diabetes”<sup>21</sup>. In no way does the harm of the applicant seem to be personal (distinct from the harm of the direct victims), real and directly caused by the offence. In addition, the applicant does not provide any supporting material for his application to prove that there is a link between the direct victim and himself, nor any proof of the victim’s identity, or even any proof of his capacity to act on behalf of the direct deceased victim (death certificate or court decision)<sup>22</sup>.

<sup>19</sup> Cour de Cassation, Chambre criminelle [Criminal Chamber of the Court of Cassation], 4 November 1999, Appeal number: 98-86869,

<http://www.legifrance.gouv.fr/WAspad/Visu?cid=202070&indice=1&table=INCA&ligneDeb=1>

<sup>20</sup> Annexes to the applications for participation, Section E, ICC-01-04-01-026-297-Conf.pdf

<sup>21</sup> Annexes to the applications for participation, Section E, ICC-01-04-01-026-300-Conf.pdf

<sup>22</sup> Annexes to the applications for participation ICC-01-04-01-026-300-Conf.pdf, p.17

Thus the harm alleged by the applicant involves the death of an unidentified person whose link to the applicant has not even been demonstrated.

69. *Applicants a/0034/06, a/0037/06, a/0041/06, a/0042/06, a/0043/06 do not demonstrate that they have suffered harm.* The applicants do not provide any supporting material to prove that there is a link between the direct victim and themselves, nor any proof of the victim's identity, or even any proof of their capacity to act on behalf of the direct deceased victim (death certificate or court decision)<sup>23</sup>.

Thus the harm alleged by the applicants involves the death of an unidentified person whose link to the applicant has not been shown.

70. Based on these observations the applicants do not fulfil the conditions to be granted the status of victims under rule 85 and that as a result the Chamber must acknowledge that applications for participation a/0034/06, a/0037/06, a/0041/06, a/0042/06 and a/0043/06 are not admissible.

### **2.3.2 Jurisdiction of the Court**

71. It appears that the Court does not have jurisdiction under article 5 of the Statute over the offences of attempted homicide and intentional injury, arbitrary arrest and threats alleged by applicants a/0039/06, a/0040/06 and a/0045/06<sup>24</sup>.

### **2.3.3. Existence of a causal link between the harm and the crime**

72. The Pre-Trial Chamber found that to be able to participate in this stage of the proceedings, the applicants must demonstrate the existence of a sufficient causal link between the harm they suffered and the crimes for which there is

<sup>23</sup> Annexes to requests for participation ICC-01-04-01-026-297-Conf.pdf, ICC-01-04-01-026-300-Conf.pdf, ICC-01-04-01-026-304 à -306, p.17

<sup>24</sup> Annexes to the applications for participation Section D, ICC-01-04-06-302-conf ; ICC-01-04-01-06-303-cond; ICC-01-04-01-06-308-conf.pdf

reasonable cause to believe that Thomas Lubanga Dyilo is responsible and which are set out in the arrest warrant issued by the Pre-Trial Chamber<sup>25</sup>.

73. While the Defence strongly contests this causal approach, which represents a serious infringement of the presumption of innocence, it appears in any event, that in the present case, the link between the acts alleged by the applicants and the charges contained in the arrest warrant in the case of *The Prosecutor v. Thomas Lubanga Dyilo* does not exist.

74. In fact, the arrest warrant refers to the offence of war crimes for which Mr Thomas Lubanga Dyilo is alleged to be criminally responsible<sup>26</sup>:

- i. Enlisting children under the age of fifteen;
- ii. Conscripting children under the age of fifteen;
- iii. Using children under the age of fifteen to participate actively in hostilities

Regulation 23 (1) (d) stipulates that all documents filed shall state all relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon.

The forms stipulate that the facts shall be set out in detail and require the date and place of the events to be stated.

This is merely the confirmation of the requirements set out in originating motions in general and in documents containing charges in criminal law.

The accused must know, in detail, of what he is accused.

Moreover, he must be able to know whether the applicant could be considered as a “victim” in relation to the charges against him.

<sup>25</sup>Decision of 22 June 2006, ICC-01/04-01/06-172,  
<http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172-tEnglish.pdf>  
[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172_French.pdf)

<sup>26</sup> 26 Mandat d’arrêt du 10 février 2006 ; ICC-01/04-01/06-2  
[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_French.pdf)  
[http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2\\_tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf)

*In the absence of the possibility for the Defence to know the dates and places where the events in question are alleged to have taken place, the Defence cannot know the acts that the applicants ascribe to the accused, contrary to article 67 of the Statute.*

In these circumstances, the applicants cannot be admitted as victims without violating the rights of the Defence.

75. The applications for participation of applicants a/0004/06 to a/0046/06 specify acts of homicide, torture, inhumane and degrading treatment, rapes, acts of violence, sexual assault, pillaging. The requests of a/0047/06 to a/0052/06 also specify, in part, these same crimes. These alleged crimes are not specified in the arrest warrant issued against Mr Thomas Lubanga Dyilo on 10 February 2006 and as a result do not come under the present case against Mr Thomas Lubanga Dyilo.

76. Moreover, the applications for participation of applicants a/0022/06, a/0030/06 and a/0033/06 specify as the presumed perpetrators of the rapes and homicide “the members of the FNI militia”.<sup>27</sup>

The application for participation of applicant a/0044/06 specifies as the presumed perpetrators of homicide, violation of private property and acts of pillaging the soldiers who came to support the Ugandans fighting against the UPC militias.<sup>28</sup>

Thus the alleged facts in no way specify Thomas Lubanga Dyilo or even indirectly the UPC militia and consequently have no link to Mr Thomas Lubanga Dyilo and can in no way be ascribed to him.

77. Moreover, it must be noted that the majority of the applications speak only of “UPC militias” and nothing more.

---

<sup>27</sup> Annexes to the applications for participation, Section D, ICC-01-04-01-06-285 ; -293 ; and -296-Conf.pdf

<sup>28</sup> Annexes to the applications for participation, Section D, ICC-01-04-01-06-307-Conf.pdf

It must be concluded that:

- At issue is not child soldiers as alleged **perpetrators** of crimes, such that any causal link is lacking.
- Actual membership of UPC militias cannot be verified properly in the absence of names or other details. The profusion of dozens of different militia in the region requires that the identity of the militia concerned be stated clearly, with the aid of verifiable material.

The causal link therefore is also lacking in this aspect.

78. As a result, the facts and the harm alleged by the applicants have no causal link with Mr Thomas Lubanga Dyilo and the charges brought against him can in no way be ascribed to him.

79. Consequently, the applicants do not meet the conditions stipulated in rule 85 of the Rules of Procedure and Evidence and its interpretation by the Pre-Trial Chamber in its decision of 28 July 2006.

80. Even more so, the applicants do not meet the criterion of “personal interests”, an additional condition for granting victim status<sup>29</sup>, as expressly set out in article 68 (3).

81. On the basis of these observations alone, the Pre-Trial Chamber must declare that the applications for participation a/0004/06 to a/0052/06 in the case *The Prosecutor v. Thomas Lubanga Dyilo* are inadmissible.

---

<sup>29</sup> Decision ICC-01-04-101

[http://www.icc-cpi.int/library/cases/ICC-01-04-101\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-101_French.pdf)

[http://www.icc-cpi.int/library/cases/ICC-01-04-101\\_tEnglish-Corr.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf)

**FOR THESE REASONS**

**MAY IT PLEASE PRE-TRIAL CHAMBER I**

To declare applications for participation a/0004/06 to a/0052/06 inadmissible, and in the alternative, without ground.

To refuse to grant victim status to the applicants.

*Defence Counsel*

*Jean Flamme*

Done on Monday 4 September 2006

At Ghent