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Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 22 February 2010

**TRIAL CHAMBER III**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
THE PROSECUTOR  
*v. JEAN-PIERRE BEMBA GOMBO***

**Public**

**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**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Deputy Prosecutor  
Ms Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence**

Mr Nkwebe Liriss  
Mr Aimé Kilolo-Musamba

**Legal Representatives of the Victims**

Ms Marie-Edith Douzima-Lawson

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Other**

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby delivers the following Decision defining the status of 54 victims who participated at the pre-trial stage and inviting the parties’ observations on applications for participation by a/0293/08, a/0511/08 to a/0517/08, a/0541/08 to a/0543/08, a/0546/08 to a/0552/08, a/0555/08 to a/0557/08, a/0559/08, a/0560/08, a/0562/08 to a/0579/08, a/0582/08 to a/0606/08, a/0624/08, a/0625/08, a/0130/09 to a/0139/09, a/0141/09, a/0427/09 to a/0430/09, a/0432/09, a/0651/09 to a/0653/09.

## **I. Background and Submissions**

1. On 12 December 2008, the Single Judge of Pre-Trial Chamber III<sup>1</sup> (“Pre-Trial Chamber”) issued his “Fourth Decision on Victims’ Participation” in which the Single Judge recognised 54 individuals as victims of the case, rejected the application of 3 others and deferred his decision in respect of a single applicant.<sup>2</sup>
2. On 5 October 2009, the Registry filed *ex parte* (Registry-only) with Trial Chamber III, its “Report on the status of applications for victims’ participation in the proceedings or for reparations received by the Victims Participation and Reparations Section”, in which the Registry asked the Chamber for guidance on various matters.<sup>3</sup>

<sup>1</sup> On 19 March 2009 the Presidency merged Pre-Trial Chamber III with Pre-Trial Chamber II and assigned the situation in the Central African Republic to Pre-Trial Chamber II, see Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation, 19 March 2009, ICC-01/05-01/08-390.

<sup>2</sup> Fourth Decision on Victims’ Participation, 12 December 2008, ICC-01/05-01/08-320, pages 36 – 37.

<sup>3</sup> Report on the status of applications for victims’ participation in the proceedings or for reparations received by the Victims Participation and Reparations Section, 5 October 2009, ICC-01/05-01/08-541-Conf-Exp. An addendum to the Report was filed on 15 October 2009, ICC-01/05-01/08-562-Conf-Exp.

3. On 15 October 2009, the Office of Public Counsel for Victims ("OPCV") filed its submission on the continued application of a ruling on victims' participation throughout the pre-trial and trial stages of a case.<sup>4</sup>
4. On 4 November 2009 the Office of the Prosecutor ("prosecution") filed its submission on whether the Chamber should adopt or depart from the existing jurisprudence on victims' participation at trial.<sup>5</sup>
5. On 13 November 2009, the defence filed its response to the OPCV's submissions of 15 October 2009.<sup>6</sup>
6. On 9 December 2009, the Trial Chamber issued its "Decision on the Observations on legal representation of unrepresented applicants".<sup>7</sup>
7. On 10 December 2009 the Victims Participation and Reparations Section ("VPRS") filed *ex parte* (Registry-only) with Trial Chamber III, its "Report on applications to participate in the proceedings" along with the applications of 86 applicants.<sup>8</sup> The VPRS annexed to this report the Registry's recommendations on the establishment of a redaction regime for victims' applications.<sup>9</sup>

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<sup>4</sup> Submission on the continued application of a ruling on victims' participation throughout the proceedings in a case, 15 October 2009, ICC-01/05-01/08-563; French version: Soumissions concernant l'application à tous les stades de la procédure dans le cadre d'une même affaire d'une décision concernant la participation des victimes, 15 October 2009, ICC-01/05-01/08-561. See also transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET, page 26, lines 1 – 9.

<sup>5</sup> Prosecution's Submission on whether the Chamber should adopt or depart from the existing jurisprudence on victim's participation at trial, 4 November 2009, ICC-01/05-01/08-594. See also ICC-01/05-01/08-T-14-ENG-ET, page 28, lines 16 – 25.

<sup>6</sup> Réponse de la Défense aux soumissions des représentants légaux des victimes du 15 Octobre 2009 référenciées ICC-01/05-01/08-561, 13 November 2009, ICC-01/05-01/08-608.

<sup>7</sup> Decision on the Observations on legal representation of unrepresented applicants, 9 December 2009, ICC-01/05-01/08-651.

<sup>8</sup> Report on applications to participate in the proceedings, 10 December 2009, ICC-01/05-01/08-653-Conf-Exp and Annexes 3 to 88.

<sup>9</sup> Annex 2 to Report on applications to participate in the proceedings, 10 December 2009, ICC-01/05-01/08-653-Conf-Exp-Anx2.

8. On 19 February 2010 the Chamber received 15 of the 86 applications already transmitted to the Chamber, containing additional information provided to the VPRS.<sup>10</sup>
9. Out of these 86 applicants, 85 are natural persons and one is an organisation or institution, and they all request to be allowed to participate in the proceedings in the trial of Mr Jean-Pierre Bemba Gombo.<sup>11</sup>

## II. Relevant Provisions

10. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

### **Article 68 of the Statute**

#### **Protection of the victims and witnesses and their participation in the proceedings**

1. 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. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

[...]

### **Rule 85 of the Rules of Procedure and Evidence ("Rules")**

#### **Definition of Victims**

<sup>10</sup> Filing of supplementary information relating to applications to participate in the proceedings, 19 February 2010, ICC-01/05-01/08-697-Conf-Exp with 16 confidential *ex parte* annexes.

<sup>11</sup> ICC-01/05-01/08-653-Conf-Exp, paragraph 3.

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

#### **Rule 87 of the Rules**

##### **Protective measures**

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

[...]

#### **Rule 89 of the Rules**

##### **Application for participation of victims in the proceedings**

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

[...]

#### **Rule 91 of the Rules**

##### **Participation of legal representatives in the proceedings**

1. A Chamber may modify a previous ruling under rule 89.

[...]

#### **Regulation 80 of the Regulations of the Court ("Regulations")**

##### **Appointment of legal representatives of victims by a Chamber**

1. A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require.

2. The Chamber may appoint counsel from the Office of Public Counsel for victims.

#### **Regulation 86 of the Regulations**

##### **Participation of victims in the proceedings under rule 89**

1. For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, subregulation 2 [...].

[...]

3. Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate.

[...]

5. The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.

6. Subject to any order of the Chamber, the Registrar may also submit one report on a number of applications received in accordance with sub-regulation 1 to the Chamber seized of the case or situation in order to assist that Chamber in issuing only one decision on a number of applications in accordance with rule 89, sub-rule 4. Reports covering all applications received in a certain time period may be presented on a periodic basis.

7. Before deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from *inter alia*, States, the Prosecutor, the victims or those acting on their behalf or with their consent. If information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.

8. A decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.

### III. Status of those applications already determined by the Pre-Trial Chamber

#### The Pre-Trial Stage

11. The Single Judge granted victim status to 54 applicants, rejected three applications and deferred one application during the pre-trial stage.<sup>12</sup> The Registry seeks guidance on whether the Chamber intends to reconsider the applications for participation of these individuals (whether accepted, rejected or pending) and, if so, whether it should re-submit the applications in accordance with Regulation 86(5) of the Regulations of the Court.<sup>13</sup>

#### The Submissions

12. The OPCV argued that the Decision on victims' participation made for the pre-trial phase should be applied during the trial proceedings because, *inter alia*, this would afford legal certainty to the participating victims, and it would guarantee that the proceedings are conducted timeously and in a manner which respects judicial economy, in the interests of all participants.<sup>14</sup> Indeed, it advocated the procedure adopted by Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ("Katanga and Ngudjolo case")*,<sup>15</sup> by which the VPRS was ordered to consider whether the applications rejected by the Pre-Trial Chamber merited re-examination in the light of the new criteria as regards admissibility and registration established by the Trial Chamber. The applications were re-submitted to the Chamber, together with an explanatory report, as to why the applications were

<sup>12</sup> ICC-01/05-01/08-320, pages 36 – 37.

<sup>13</sup> ICC-01/05-01/08-541-Conf-Exp, page 19.

<sup>14</sup> ICC-01/05-01/08-563, paragraphs 7 – 16 and page 9.

<sup>15</sup> Decision on the treatment of applications for participation, 26 February 2009, ICC-01/04-01/07-933-tENG.



rejected.<sup>16</sup>

13. The prosecution also submitted that Trial Chamber III should follow the Decision in the *Katanga and Ngudjolo* case, granting those victims who had participated at the pre-trial stage the right to participate in the trial, without re-registering their applications.<sup>17</sup>

14. The defence, on the other hand, argued that under the Rome Statute framework and the jurisprudence of the Appeals Chamber, each applicant must resubmit his or her request to participate in the trial, setting out how their interests are affected by the proceedings.<sup>18</sup>

15. The defence referred to a Decision of the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"),<sup>19</sup> in which it was decided that a decision taken by a Chamber as to whether the personal interest of an applicant is affected, does not bind another Chamber considering the same case.<sup>20</sup> Therefore, the defence averred that the pre-trial Decision granting victims the opportunity to participate in this case was limited to that stage of the proceedings.<sup>21</sup>

16. Finally, the defence argued that it is necessary for the applications to be re-submitted in order to give the defence the opportunity to consider and advance submissions on the information that was unavailable during the pre-trial stage and to enable the Chamber to evaluate whether the victims have suffered harm resulting from the charges confirmed by the Pre-Trial Chamber since, in the Confirmation Decision, it declined to confirm counts 3 to 5 (*viz.*

<sup>16</sup> ICC-01/05-01/08-563, paragraph 17 and page 10.

<sup>17</sup> ICC-01/05-01/08-594, paragraph 14.

<sup>18</sup> ICC-01/05-01/08-608, paragraphs 6 – 7.

<sup>19</sup> Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, paragraph 43.

<sup>20</sup> ICC-01/05-01/08-608, paragraph 8.

<sup>21</sup> ICC-01/05-01/08-608, paragraph 10.

torture constituting a crime against humanity and a war crime and outrage to human dignity constituting a war crime).<sup>22</sup>

### Analysis

17. Regulation 86(8) of the Regulations is clear in its terms: a decision on an application to participate is to apply throughout **the proceedings in the same case**, subject to the opportunities and limitations provided by Rule 91 of the Rules. Applying the natural meaning of the words emphasised above, together with a purposive approach, it is clear that a decision on victims' participation taken during the pre-trial stage shall continue to apply at the trial stage, subject to revision under Rule 91(1) of the Rules. It is open to the parties to object to the continued participation of any victim, for good cause based on new material that has emerged since the original decision. This approach is broadly consistent with the approach of Trial Chamber I in the *Lubanga* case, in that in its Decision of 18 January 2008 on victims' participation, the Chamber observed:<sup>23</sup>

112. The victims who have the opportunity to participate prior to trial by way of written and oral submissions with the leave of the Chamber are those who currently have been allowed to participate by Pre-Trial Chamber I (i.e. victims a/0001/06 to a/0003/06 and a/0105/06), subject to a review by the Chamber of their applications to participate in light of the criteria set out above, and any other victim granted that status hereafter.

18. Thereafter, Trial Chamber I carried out a review of their applications in its Decision of 15 December 2008.<sup>24</sup> However, under the approach which the Chamber now approves, it will not undertake a review of those applications granted by the Pre-Trial Chamber unless an application is made by one of the parties, which is based on new material that has emerged since the original decision, or issues are otherwise validly raised for the Chamber's

<sup>22</sup> ICC-01/05-01/08-608, paragraphs 16 – 17.

<sup>23</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 112.

<sup>24</sup> Decision on the applications by victims to participate in the proceedings, 15 December 2008, ICC-01/04-01/06-1556-Corr-Anx1; Corrigendum issued 13 January 2009, ICC-01/04-01/06-1556-Corr.

consideration.

19. By way of an exception to this general approach, the Chamber respectfully agrees with the practice of Trial Chamber II,<sup>25</sup> by which participation is not to be continued at trial if the harm allegedly suffered was not, *prima facie*, the result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber.<sup>26</sup> However, in the view of the Chamber, each of the 54 victims currently participating has allegedly suffered harm as a result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber.<sup>27</sup>
20. Additionally, the VPRS is to review each of the applications to participate rejected by the Pre-Trial Chamber, to establish whether, in light of events or information received subsequent to the original rejection, the application should be reconsidered by the Trial Chamber, following a report from the VPRS to the Chamber.
21. If new documents or information are received by the VPRS which may have a material impact on the decision permitting a victim to participate, the Chamber is to be advised immediately. The Chamber understands, however, that for the 54 current participants, no new documents have been submitted.
22. Otherwise, as set out above, the victims authorised to participate in the proceedings at the pre-trial stage shall automatically participate at trial, without the need to re-file their applications for assessment by the Trial Chamber.

<sup>25</sup> ICC-01/04-01/07-933-tENG, paragraphs 7 – 14.

<sup>26</sup> ICC-01/04-01/07-933-tENG, paragraph 13.

<sup>27</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424.

#### IV. Legal Representation

23. On 9 December 2009, the Trial Chamber issued its “Decision on the Observations on legal representation of unrepresented applicants”.<sup>28</sup> In light of this Decision the Chamber ordered the OPCV to represent those victim applicants who have not chosen a legal representative to act for them. The OPCV shall continue to represent the victim applicants it currently represents until the Chamber issues a Decision on their application to participate;<sup>29</sup> likewise, a Decision on common legal representation will be issued in due course.

#### V. Protective Measures

24. In accordance with Rule 89(1) of the Rules, the prosecution and the defence are to be provided with a copy of the applications for the 86 victims whose applications are yet to be determined. An issue that arises is the extent to which it is necessary at this stage to disclose the identity of any victims, whether applicants or current participants, for whom, *prima facie*, there are security concerns. In its “Decision on victims’ participation”,<sup>30</sup> Trial Chamber I in the *Lubanga* case set out the following:

##### D. Protective and Special Measures for Victims

127. As regards protective and special measures, applying the general principle contained in Rule 86 of the Rules, the Trial Chamber recognises there are particular (*sic*) special needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings. Generally, the Chamber will take into account to the fullest extent possible the needs and interests of victims or groups of victims, and it recognises that these may sometimes be different or in opposition. Under Rule 88 of the Rules the Chamber may order special measures to assist victims and witnesses, including

<sup>28</sup> ICC-01/05-01/08-651.

<sup>29</sup> ICC-01/05-01/08-651, paragraph 18.

<sup>30</sup> ICC-01/04-01/06-1119.

measures to facilitate the testimony of a traumatized victim or witness, children, the elderly and victims of sexual and gender violence.

128. Similarly, the Trial Chamber accepts the submission of the Office of Public Counsel for Victims that protective and special measures for victims are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with Article 68(1) of the Statute.

129. The Chamber also accepts the suggestion of the legal representatives of victims that protective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute. The participation of victims and their protection are included in the same statutory provision, namely Article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.

130. Both the prosecution and the defence resisted any suggestion that victims should remain anonymous as regards the defence during the proceedings leading up to and during the trial. However, the Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.

131. However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.

25. Although this approach has not been the subject of any contrary jurisprudence on appeal, the Appeals Chamber has ruled (in a different context) that the principle of proportionality should apply when a Chamber decides on the non-disclosure of the identity of a witness.<sup>31</sup> In this situation

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<sup>31</sup> Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paragraph 37; Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, paragraphs 33 – 34.

protective measures should:

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

26. In the Chamber's view these principles are applicable, *mutatis mutandis*, to the non-disclosure of the identity of victims, and the Chamber notes that, in a similar vein, Pre-Trial Chamber I decided that "the scope of [...] redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation".<sup>32</sup>

27. Trial Chamber I, in its Decision inviting the parties' observations on applications for participation by various applicants in the *Lubanga* trial, decided as follows:<sup>33</sup>

#### **V. Protective Measures**

19. In accordance with Rule 89(1) of the Rules, the Office of the Prosecutor ("prosecution") and the defence are to be provided with a copy of the applications, and they have the right to reply to them within the time-limit set by the Chamber.

20. However, when making these applications available to the parties the Chamber must apply Article 68(1) of the Statute, which mandates the Court to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims.

<sup>32</sup> Decision Appointing *Ad Hoc* Counsel and Establishing a Deadline for the Prosecution and the *Ad Hoc* Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, 18 May 2006, ICC-01/04-147, page 3.

<sup>33</sup> Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, 6 May 2008, ICC-01/04-01/06-1308.

21. Most of the applicants request that their identity, along with other information included in their application forms, is not disclosed to the prosecution, the defence, the State Parties or the general public. Most applicants refer to their fears of retaliation and the safety of their own lives and those of their families as the main reasons for requesting these protective measures.

22. The Trial Chamber has not received specific detailed information as to the individual security risks of the applicants, although it is aware of the potential high levels of insecurity in relevant parts of the Democratic Republic of Congo.

23. In order to make an informed decision on individual protective measures for each applicant the Trial Chamber would need the assistance of the Victims and Witnesses Unit so as to assess the individual levels of risk that each applicant faces. Nonetheless, the Chamber is aware of the cost and time involved in the Victims and Witnesses Unit carrying out this procedure as regards all 105 applicants.

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

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

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

26. The Trial Chamber deems that the above two requirements are met given that:

i) In light of the current and significant insecurity situation in relevant parts of the Democratic Republic of Congo, non-disclosure of the applicants’ identities is necessary. This will not restrict the rights of the accused at this moment, or create an irreversible situation that cannot be corrected in due course, given that the Trial Chamber will make any necessary judgements as to these redactions at the time any of the applicants are granted status as victims, in order to guarantee the fairness of proceedings.

ii) Consistent with the Chamber’s 18 January Decision on victims’ participation, if victims are granted status to participate in the proceedings, their active role in the trial will depend on additional discrete applications in which they must set out specifically how their interests are affected at a given phase of the proceedings. At that stage the Chamber will take into account whether the victim is requesting continued anonymity for the purposes of determining the appropriate form of participation. At this preliminary juncture, however, redactions to applications are necessary and appropriate and are the only feasible and appropriate measures at this stage of the proceedings, namely the initial application process.

27. Therefore, all applications for participation must be provided to the prosecution and defence in a confidential redacted form, whereby all information which may lead to the identification of the applicants and their individual whereabouts has been expunged. The Trial Chamber concurs with the reasoning of Pre-Trial Chamber I in a decision on a similar issue, in that "the scope of the redactions cannot exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation".

28. Hence, the following redactions are authorised:

- i) name of applicant;
- ii) name of parents;
- iii) place of birth;
- iv) exact date of birth (year of birth shall not be redacted);
- v) tribe or ethnic group;
- vi) occupation;
- vii) current address;
- viii) phone number and email address;
- ix) name of other victims of, or of witnesses to, the same incident;
- x) identifying features of the injury, loss or harm allegedly suffered;
- xi) name and contact details of the intermediary assisting the victim in filing the application.

29. As set out above, these redactions shall be further considered by the Trial Chamber for those applicants granted victim status. At that moment in time the Chamber will then re-evaluate the appropriateness of the protective measures in light of the participation of victims in the proceedings on a fact-specific basis.

30. Redacted applications are to be transmitted to both parties alike in light of "fundamental considerations of fairness (namely, the need to preserve the equality of arms), which require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them both by the statutory texts".

[...]

35. So as not to expose victims to further risks, applicants should not be contacted directly by any organ of the Court, but only through their legal representatives, the Victims Participation and Reparations Section or the Victims and Witnesses Unit.

28. On 16 May 2008, Trial Chamber I modified its Decision inviting the parties' observations on applications for participation by various applicants, to the extent that it allowed the disclosure of the month of birth of the victims unless this could lead to the identification of a particular victim, as the age of the



victims was an issue in the *Lubanga* case.<sup>34</sup> Seemingly this issue does not arise in the present case. The Chamber has otherwise followed the approach adopted in Trial Chamber I's Decision inviting the parties' observations on applications for participation by various applicants,<sup>35</sup> given the markedly similar circumstances that apply to the present situation. The Chamber observes that there is a single – but unimportant – distinction that 54 victims have been granted an automatic opportunity to continue participating, unless there is a valid objection. In this instance also, a substantial majority of the participating victims and applicants have requested non-disclosure of their identities (together with certain other linked information included in their application forms) to the prosecution, the defence, the States Parties or the general public. Generally, they refer to fears of retaliation, and the possible risks to the lives of their families and themselves.

29. At this stage, the Trial Chamber has not received specific, detailed information as to the individual security risks of the victims, although it is aware of the potential high level of insecurity in the relevant parts of the Central African Republic.

30. In order to make a fact-based decision on individual protective measures for each victim who is, or has been, granted the opportunity to participate, the Trial Chamber will need the assistance of the Victims and Witnesses Unit ("VWU") to assess the individual level of risk that each applicant faces, although the Chamber is aware that this is a labour-intensive exercise.

31. At this early stage of the proceedings, on the basis of a preliminary assessment, the suggested non-disclosure of the victims' identities and the

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<sup>34</sup> Decision on the request of the OPCV and on the prosecution's filing which concern the Trial Chamber's decision inviting parties' observations on applications for participation of victims issued on 6 May 2008, 16 May 2008, ICC-01/04-01/06-1333, paragraph 16.

<sup>35</sup> ICC-01/04-01/06-1308.

linked material to the prosecution, the defence, the States Parties or the general public is proportionate and necessary, and it will not materially undermine the fair-trial rights of the accused. At later stages of the proceedings, for those granted leave to participate, and depending on the level of suggested participation by individual victims and the report of the VWU, this approach will be revisited on a case-by-case basis.

32. Therefore, appropriately redacted application forms (for the undetermined applications) should be provided to the accused and the prosecution, protecting the identity of each victim.

33. Bearing in mind the recommendations of the Registry on the establishment of a redaction regime for victims applications,<sup>36</sup> the following redactions are authorised, namely the:

- i) name of the applicant;
- ii) name of his or her parents and family members;
- iii) place of birth;
- iv) day and month of birth (the year of birth is not to be redacted);
- v) tribe or ethnic group (only if this could be an identifying feature, leading to the applicant, bearing in mind the overall circumstances);
- vi) occupation of the victim (only if this could be an identifying feature, leading to the applicant, bearing in mind the overall circumstances);
- vii) relevant address;
- viii) phone number and email address;
- ix) name of other victims of, or of witnesses to, the same incident;
- x) description of the injury, loss or harm allegedly suffered (only if

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<sup>36</sup> ICC-01/05-01/08-653-Conf-Exp-Anx2.

this could be an identifying feature leading to the applicant, bearing in mind the overall circumstances);

- xi) name and contact details of the intermediary who assisted the victim with the application.

34. Supplementary documents for some victims have been received.<sup>37</sup> These should be filed in a way that links them with the existing applications, and they should be communicated, following any necessary redactions, to the parties.

## VI. Filing of future applications

35. For those victims not granted automatic participation rights, the Trial Chamber should receive only those completed application forms that appear, *prima facie*, to be linked with the charges confirmed against the accused. In this respect the Chamber endorses the criteria used by the Pre-Trial Chamber as to the standard to be used to determine the sufficiency of an application,<sup>38</sup> specifically:

81. [...] An application is considered complete if it contains the following information, supported by documentation, if applicable:

- (i) the identity of the applicant;
- (ii) the date of the crime(s);
- (iii) the location of the crime(s);
- (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;
- (v) proof of identity;
- (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;
- (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;
- (viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.

<sup>37</sup> ICC-01/05-01/08-697-Conf-Exp.

<sup>38</sup> ICC-01/05-01/08-320, paragraphs 79 – 81.

36. The Trial Chamber also endorses the approach employed by the Pre-Trial Chamber to determine the documents that provide proof of identity:<sup>39</sup>

36. After careful consideration, and having had due regard to the practice established by other chambers of the Court, the Single Judge accepts the following documentation as proof of identity, as indicated in the report of the VPRS: (i) «certificat de nationalité», (ii) «permis de conduire», (iii) «passeport», (iv) «livret de famille», (v) «extrait d'acte de mariage», (vi) «acte de mariage», (vii) «extrait d'acte de décès», (viii) «acte de décès», (ix) «jugement supplétif», (x) «extrait d'acte de naissance», (xi) «acte de naissance», (xii) «nouvelle carte d'identité», (xiii) «ancienne carte d'identité qui n'est plus en vigueur», (xiv) «carte professionnelle», (xv) «carte d'association», (xvi) «récépissé de dépôt de demande de carte nationale d'identité», (xvii) «carte de commission d'emploi», (xviii) «carte de député», (xix) «déclaration de naissance», (xx) «carte d'identité pastorale», (xxi) «testament», and (xxii) «livret de pension».

37. The Single Judge wishes to clarify that in those instances where it is not possible for a victim applicant to acquire or produce a document of the kind set out above, the Single Judge will consider a statement signed by two witnesses attesting to the identity of the victim applicant and including, where applicable, the relationship between the victim applicant and the person acting on his or her behalf. The statement should be accompanied by proof of identity of the two witnesses as set out above.

38. Pursuant to rule 89(3) of the Rules, an application may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, where necessary, a victim who is disabled. The Single Judge wishes to specify that in this case the identity of both the victim applicant and the person acting with his or her consent or on his or her behalf must be confirmed by one of the above listed documents. Finally, following the practice of Pre-Trial Chamber I and II, the Single Judge is of the view that the link existing between a child applying for participation and the person acting on his or her behalf (kinship, guardianship, or legal guardianship) as well as the link existing between a disabled applicant and the person acting on his or her behalf (legal guardianship) should be confirmed within the meaning of regulation 86(2)(e) of the Regulations.

37. For applications which do not meet these requirements, the VPRS shall not file the applications, but instead it shall furnish the Chamber with a report indicating the reasons why the application was not filed with the Chamber.

38. Finally, the Chamber considers that in order to ensure the expeditiousness and fairness of proceedings, the victims' applications should be filed at the

<sup>39</sup> ICC-01/05-01/08-320, paragraphs 36 – 38.

earliest possible opportunity.

## VII. Conclusion

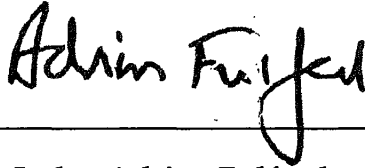
39. The Trial Chamber hereby orders:

- i) that the 54 individuals who were granted the status of victim in the present case by the Pre-Trial Chamber shall continue to participate in the proceedings, subject to objection for good cause based on new material that has emerged since the original decision;
- ii) the VPRS is to review the applications to participate rejected by the Pre-Trial Chamber, to establish whether, in light of events or information received subsequent to the original rejection, the application should be reconsidered by the Trial Chamber, and a report is to be filed with the Chamber;
- iii) the Registry is to transmit the applications for the 86 applicants to the parties in an appropriate redacted form, whereby any information which may lead to the identification of the victims and their whereabouts has been expunged in accordance with paragraph 33, no later than 16.00 Friday 26 February 2010;
- iv) the parties are to submit their observations, if any, no later than 16.00 on Wednesday 10 March 2010;
- v) only those completed applications that appear, *prima facie*, to be linked with the charges confirmed against the accused are to be

provided to the Chamber, in accordance with the criteria set out above, and a report is to be filed on those applications which are defective; and

- vi) applicants and participating victims shall not be contacted by anyone other than their legal representatives, the VPRS and the VWU.

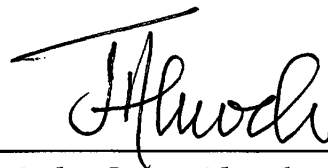
Done in both English and French, the English version being authoritative.



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge Joyce Aluoch**

Dated this 22 February 2010

At The Hague, The Netherlands