

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 10 July 2009

**TRIAL CHAMBER I**

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

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

**Public**

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

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju Duval

**Legal Representatives of the Victims**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu  
Mr Joseph Keta Orwinyo  
Mr Jean Louis Gilissen  
Mr Jean Chrysostome Mulamba Nsokoloni  
Mr Paul Kabongo Tshibangu  
Mr Hervé Diakiese

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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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 I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, delivers the following decision on the applications by seven victims to participate in the proceedings, in accordance with Article 68 of the Rome Statute ("Statute").

## **I. Background**

1. The relevant procedural history on participation by victims before the Chamber is set out comprehensively in the "Decision on the applications by victims to participate in the proceedings" issued on 15 December 2008 in which the applications of 117 individuals to participate in the proceedings were resolved (91 of which were granted).<sup>1</sup>
2. As regards the present applications, on 22 April 2009 the Registry filed a confidential, *ex parte*, Registry only, "Third Report to Trial Chamber I on Victims' Applications under Regulation 86.5 of the Regulations of the Court" ("Registry's Third Report") which dealt with the applications of 7 victims to participate in the proceedings.<sup>2</sup>
3. At the hearing on 8 May 2009, the Trial Chamber instructed the Registry to provide the parties and participants with the 7 new applications included in the Registry's Third Report, suitably redacted, by 11 May 2009 and any responses were to be filed by 18 May 2009.<sup>3</sup>
4. On 12 May 2009, the Victims Participation and Reparation Section ("VPRS") transmitted to the defence and the prosecution the relevant documents.<sup>4</sup>
5. During a hearing on 13 May 2009, the Principal Counsel of the Office of Public Counsel for Victims ("OPCV") informed the Chamber that the redacted

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<sup>1</sup> Decision on the applications by victims to participate in the proceedings, 15 December 2008, ICC-01/04-01/06-1556, paragraphs 1-27.

<sup>2</sup> Third Report to Trial Chamber I on Victims' Applications under Regulation 86.5 of the Regulations of the Court, 22 April 2009, ICC-01/04-01/06-1823-Conf-Exp.

<sup>3</sup> Transcript of hearing on 8 May 2009, ICC-01/04-01/06-T-171 ENG, page 44, line 19 to page 45, line 4.

<sup>4</sup> Transmission to the parties of seven new victims' applications for participation in accordance with Trial Chamber I's oral decision of 8 May 2009, 12 May 2009, ICC-01/04-01/06-1869 with 7 confidential annexes.

versions of these 7 applications had not been transmitted to the legal representatives of victims. The OPCV requested disclosure of the redacted standard application forms to the legal representatives of the victims concerned.<sup>5</sup> Mr Mulamba and the OPCV raised this issue once more on 14 May 2009.<sup>6</sup>

6. Thereafter, the Principal Counsel of the OPCV contacted the Head of the VPRS, who responded on 15 May 2009;<sup>7</sup> on the same day, the Chamber instructed the OPCV to liaise with the VPRS in order to ensure the relevant email communications are served on the parties and the participants.<sup>8</sup> Additionally, the Chamber suspended the deadline for filing observations on the seven new applications, whilst directing service of submissions on the issue of notification of the redacted application forms to the victims' legal representatives by 16.00 on Monday 18 May 2009.<sup>9</sup>
7. On 18 May 2009, the victims' legal representatives jointly submitted observations on the issue of notification,<sup>10</sup> and whilst the defence does not oppose notification of the redacted versions of the forms for each victim to his or her legal representative, it resists general transmission of the standard application form to all the legal representatives.<sup>11</sup>
8. On 12 June 2009, the Trial Chamber instructed the Registry to notify all the relevant documents to the legal representatives of victims whose interests and concerns are engaged by filings 1817 and 1823, including any confidential or *ex parte* documents that have been transmitted to the parties in accordance with the Chamber's oral rulings of 8 May 2009, to the extent that this step does not

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<sup>5</sup> Transcript of hearing on 13 May 2009, ICC-01/04-01/06-T-173 ENG, page 54, line 16 to page 56, line 15.

<sup>6</sup> Transcript of hearing on 14 May 2009, ICC-01/04-01/06-T-174 ENG, page 13, line 1 to page 14, line 21.

<sup>7</sup> E-mail communication from the Head of VPRS to the Principal Counsel of the OPCV, 15 May 2009.

<sup>8</sup> Transcript of hearing on 14 May 2009, ICC-01/04-01/06-T-175 ENG, page 50, lines 14-19.

<sup>9</sup> *Ibid.*, page 50, lines 7-13 and page 86, lines 14-16.

<sup>10</sup> Observations of the legal representatives of victims on the access to standard applications form for victims' participation and related documents, 18 May 2009, ICC-01/04-01/06-1882.

<sup>11</sup> E-mail communication from the defence to the Legal Adviser to the Trial Division of 18 May 2009.

breach protective measures that need to remain in place.<sup>12</sup> The Chamber also instructed the defence to file its submissions on the 7 new applications by 15 June 2009.<sup>13</sup>

9. The prosecution submitted its observations on the seven new applications on 18 May 2009,<sup>14</sup> and the defence on 16 June 2009.<sup>15</sup>

## **II. Relevant Provisions**

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

11. Article 68 of the Statute on "Protection of the victims and their participation in the proceedings" provides:

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.

12. Article 69(3) of the Statute under the heading "Evidence" sets out that:

3. [...] The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

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<sup>12</sup> Transcript of hearing on 12 June 2009, ICC-01/04-01/06-T-191-CONF-ENG, page 59, line 3 et seq.

<sup>13</sup> *Ibid.*, page 60, line 13 et seq.

<sup>14</sup> Prosecution's Observations on Seven Redacted Applications for Victim Participation to the Case, concerning applicants a/0523/08, a/0609/08, a/0610/08, a/0611/08, a/0053/09, a/0060/09 and a/0249/09, 18 May 2009, ICC-01/04-01/06-1880.

<sup>15</sup> Observations de la Défense sur les 7 demandes de participation à la procédure transmises le 12 mai 2009, 16 June 2009, ICC-01/04-01/06-1969.

13. In order to assist the Court in determining who is a victim under the statutory framework, Rule 85 of the Rules of Procedure and Evidence ("Rules") on the "Definition of victims" states:

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.

14. Rule 86 of the Rules provides certain "General principle" on matters relating to victims, setting out that:

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

15. Rule 87 of the Rules in paragraph 3 on "Protective measures" stipulates:

A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

- (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
- (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

[...]

- (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
- (e) That a Chamber conduct part of its proceedings in camera.

16. Rule 88(1) of the Rules provides for "Special measures", defined as:

[...] measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 [...]

17. Rule 89(1) of the Rules under the heading "Application for participation of victims in the proceedings" stipulates that once victims have applied to participate, the Chamber:

[...] shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

18. As regards common legal representation, Rule 90 of the Rules on the "Legal representation of victims" provides that the Chamber:

2. [...] may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives [...]

[...]

4. [...] shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

19. In relation to the "Participation of legal representatives in the proceedings", Rule 91 of the Rules provides:

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

2. 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 shall include participation 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...

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

20. Regulation 79(2) of the Regulations of the Court ("Regulations") on the

"Decision of the Chamber concerning legal representatives of victims" states:

When choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.

21. Rule 92 of the Rules under the heading "Notification to victims and their legal representatives" sets out as follows:

[...]

5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:

(a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;

(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.

22. Rule 131(2) of the Rules, on "Record of the proceedings transmitted by the Pre-Trial Chamber", provides the following:

2. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

23. In addition, Article 21(3) of the Statute, dealing with the "Applicable Law", states that:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.



24. In light of the provisions of Article 21(3) of the Statute, and taking into account the decision of the Appeals Chamber that "Article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights",<sup>16</sup> the Trial Chamber has considered 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 ("Basic Principles") for guidance, and particularly principles 8 and 9, which provide as follows:<sup>17</sup>

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

25. As regards victims who are children, the Trial Chamber has considered the Convention on the Rights of the Child, particularly article 3(1) that indicates the following:<sup>18</sup>

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

26. Article 12(2) of the same convention provides:

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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<sup>16</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paragraph 36.

<sup>17</sup> Adopted by the United Nations General Assembly, resolution 60/147, 16 December 2005.

<sup>18</sup> Adopted by the United Nations General Assembly, resolution 44/25, 20 November 1989.

### **III. Submissions**

27. The submissions of the parties and participants have been analysed on a case-by-case basis in Annex A to this filing.

### **IV. Analysis and Conclusions**

28. The Trial Chamber has carefully evaluated each application in accordance with the general criteria established in the Trial Chamber's decision on victims' participation of 18 January 2008,<sup>19</sup> as confirmed or varied by the Appeals Chamber in its judgment of 11 July 2008.<sup>20</sup>

29. The Chamber has applied the criteria and principles to these seven applications as set out in its "Decision on the applications by victims to participate in the proceedings" of 15 December 2008. The applicant-by-applicant analysis is set out in Annex A.

30. In the result, applicants a/0523/08, a/0611/08, a/0610/08, a/0249/09, a/0060/09 and a/0053/09 are granted status to participate.

31. The application of a/0609/08 is refused, although this decision will be reviewed if the applicant provides further clarification and information on his application, as addressed in Annex A.

32. Given applicants a/0611/08, a/0610/08, a/0249/09, and a/0060/09, who have been granted participating status, are already represented by one of the teams of legal representatives currently acting in the proceedings, the Chamber directs that all the participating victims are allocated to the current teams.

33. Applicants a/0523/08 and a/0053/09, currently represented by the OPCV, shall be assigned to one of the existing teams of legal representatives participating before the Chamber, taking into consideration any preference the victim may

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<sup>19</sup> ICC-01/04-01/06-1119.

<sup>20</sup> ICC-01/04-01/06-1432.

have and any possible conflict of interests. There is liberty to apply to the Chamber in the event of difficulties in the implementation of this order.

#### **V. Orders of the Chamber**

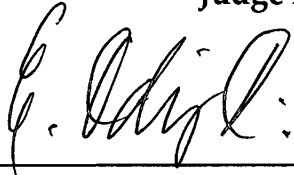
34. For these reasons, the Trial Chamber hereby:

- a. Grants the applications to participate of victims a/0523/08, a/0611/08, a/0610/08, a/0249/09, a/0060/09 and a/0053/09.
- b. Rejects the application to participate of victim a/0609/08 and instructs the Registry to contact the applicant and his legal representative, to seek clarification or further information on the application.
- c. Refers to the Registry the issue of whether the person acting on behalf of victim a/0053/09, who alleges harm, wishes to participate on his own behalf for any personal harm he has suffered.
- d. Instructs the Registry to allocate applicants a/0523/08, a/0611/08, a/0610/08, a/0249/09, a/0060/09 and a/0053/09 to the existing teams of legal representatives currently participating in the trial proceedings.
- e. Orders the Registry to submit to the Chamber a report on the requests for protective and special measures for the victims who have been granted status to participate, no later than 10 August 2009.
- f. Instructs victims who wish to participate during the trial proceedings, to set out in a discrete written application the nature and the detail of their proposed intervention at the earliest possible opportunity.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 10 July 2009

At The Hague, The Netherlands