

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/06  
Date: 15 December 2008

**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  
Annex 1  
Decision on the applications by 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  
Mr Ekkehard Withopf

**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  
Mr Joseph Keta Orwinyo  
Mr Jean Louis Gilissen  
Mr Jean Chrysostome Mulamba  
Nsokoloni  
Mr Paul Kabongo Tshibangu  
Mr Hervé Diakiese

**Unrepresented Victims**

**Legal Representatives of the Applicants**

**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**

Mr Simo Vaatainen

**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 victims to participate in the proceedings, in accordance with Article 68 of the Rome Statute (“Statute”).

## **I. Background**

### **A. Procedural history before the Trial Chamber**

1. On 18 January 2008, the Trial Chamber issued its “Decision on victims’ participation”, with a Separate and Dissenting Opinion of Judge René Blattmann, in which the Chamber set out general guidelines on matters relating to the participation of victims throughout the proceedings.<sup>1</sup>
2. On 28 January 2008, the defence<sup>2</sup> and the Office of the Prosecutor (“prosecution”)<sup>3</sup> requested leave to appeal.
3. On 26 February 2008, the Trial Chamber issued its “Decision on the defence and prosecution requests for leave to appeal the Decision on victims’ participation of 18 January 2008”, with a Separate and Dissenting Opinion of Judge René Blattmann. The Trial Chamber granted leave to appeal on three issues.<sup>4</sup>
4. On 11 July 2008, the Appeals Chamber issued its Judgment on the appeals.<sup>5</sup> The Appeals Chamber upheld the Decision of the Trial Chamber on two of the issues: (i) the conclusion of the Trial Chamber that for the purposes of Rule 85 (a) of the Rules of Procedure and Evidence (“Rules”), the harm suffered by victims does not necessarily have to be direct (although it established that the harm must necessarily be “personal harm”); and (ii) the decision allowing

<sup>1</sup> Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119.

<sup>2</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la “Decision on Victims’ Participation” rendue le 18 janvier 2008, 28 January 2008, ICC-01/04-01/06-1135.

<sup>3</sup> Application for Leave to Appeal Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, 28 January 2008, ICC-01/04-01/06-1136.

<sup>4</sup> Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191.

<sup>5</sup> Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

victims participating in the proceedings to present evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence in the trial proceedings. The Appeals Chamber reversed the decision of the majority of the Trial Chamber that under the Rome Statute (“Statute”) framework generally, and Rule 85 of the Rules in particular, the participation of victims is not limited to the Trial Chamber’s investigation of the crimes contained in the charges confirmed by the Pre-Trial Chamber. The Appeals Chamber found that for the purposes of participation in trial proceedings, the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Statute must be linked to the charges confirmed against the accused.

5. As regards the applications currently under consideration, on 11 April 2008, the Registry filed confidentially, *ex parte*, Registry-only, its “First Report to Trial Chamber I on Victims’ Applications under Regulation 86(5) of the Regulations of the Court” (“Registry’s First Report”), in which it submitted to the Chamber 105 applications to participate in the proceedings.<sup>6</sup>
6. On 22 April 2008, the Office of Public Counsel for Victims (“OPCV”) submitted the “Filing of two memoranda concerning the application for participation of victim a/0078/06 with two annexes *ex parte*, only available to the OPCV and the Applicant”.<sup>7</sup>
7. On 6 May 2008, the Trial Chamber rendered its “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

<sup>6</sup> First report to Trial Chamber I on Victims’ Applications under Regulation 86(5) of the Regulations of the Court, 11 April 2008, ICC-01/04-01/06-1275-Conf-Exp.

<sup>7</sup> Filing of two memoranda concerning the application for participation of victim a/0078/06 with two annexes *ex parte* only available to the OPCV and the Applicant, 22 April 2008, ICC-01/04-01/06-1288-Conf-Exp. Annex 2, 14 April 2008, ICC-01/04-01/06-1275-Conf-Exp-Anx2.

to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08”;<sup>8</sup> and ordered the Registry to transmit the applications for participation to the parties in a confidential and redacted form by 12 May 2008.

8. On 9 May 2008, the OPCV filed a "Request of the OPCV in relation to redactions to the applications of victims following the Trial Chamber's decision of 6 May 2008" ("OPCV's request").<sup>9</sup>
9. As a result, on 12 May 2008, the Chamber issued its "Order suspending deadline in "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" issued on 6 May 2008", in which it suspended the existing deadline until further notice, in order to enable the parties to file their responses to the OPCV's request by Tuesday 13 May 2008.<sup>10</sup>
10. On 12 and 13 May 2008, the defence<sup>11</sup> and the prosecution<sup>12</sup> filed confidentially their responses to the OPCV's request.

<sup>8</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.

<sup>9</sup> A confidential *ex parte* OPCV only version was filed (ICC-01/04-01/06-1314-Conf-Exp) together with a public version (ICC-01/04-01/06-1315)

<sup>10</sup> Order suspending deadline in "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" issued on 6 May 2008, 12 May 2008, ICC-01/04-01/06-1319.

<sup>11</sup> Réponse de la Défense à la "Request of the OPCV in relation to redactions to the applications of victims following the Trial Chamber's decision of 6 May 2008" déposée le 9 mai 2008, 12 May 2008, ICC-01/04-01/06-1318-Conf.

<sup>12</sup> Prosecution's information to the Trial Chamber regarding the prior notification of un-redacted applications for victim participation, 13 May 2008, ICC-01/04-01/06-1322-Conf.

11. On 16 May 2008, the Chamber rendered its "Decision on the request of the OPCV and on the prosecution's filing which concern the Trial Chamber's decision inviting the parties' observations on applications for participation of victims issued on 6 May 2008", ordering the Registry to transmit the applications for participation to both parties in a confidential and redacted form, no later than 19 May 2008.<sup>13</sup>
12. On 6 June 2008, the Registry filed its "Report on supplementary information received and missing information concerning the applications for participation dealt with in the "First Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court" dated 11 April 2008 (ICC-01/04-01/06-1275-Conf-Exp)" ("Registry's First Supplementary Report").<sup>14</sup>
13. On 9 June 2008, the prosecution submitted the "Prosecution's Observations on 105 Redacted Applications for Victim Participation to the Case", with a confidential annex,<sup>15</sup> followed by the defence on 10 June 2008,<sup>16</sup> and the observations of the legal representatives of victims a/0001/06 to a/0003/06 on 12 June 2008.<sup>17</sup>
14. On 13 June 2008, the Trial Chamber imposed a stay in the proceedings, which was lifted on 18 November 2008.<sup>18</sup>

<sup>13</sup> Decision on the request of the OPCV and on the prosecution's filing which concern the Trial Chamber's decision inviting the parties' observations on applications for participation of victims issued on 6 May 2008, 16 May 2008, ICC-01/04-01/06-1333.

<sup>14</sup> Report on supplementary information received and missing information concerning the applications for participation dealt with in the "First Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court" dated 11 April 2008 (ICC-01/04-01/06-1275-Conf-Exp), 6 June 2008, ICC-01/04-01/06-1380-Conf-Exp.

<sup>15</sup> Prosecution's Observations on 105 Redacted Applications for Victim Participation to the Case, 9 June 2008, ICC-01/04-01/06-1386.

<sup>16</sup> Observations de la Défense sur les 105 demandes de participation à la procédure communiquées le 20 mai 2008, 10 June 2008, ICC-01/04-01/06-1388.

<sup>17</sup> Réponses aux observations du Procureur et de la Défense sur des demandes de participation à la procédure, 12 June 2008, ICC-01/04-01/06-1394.

<sup>18</sup> Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, Transcript of hearing of 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, line 25 to page 4, line 1.

15. On 21 November 2008, the Registry filed a confidential, *ex parte*, Registry-only "Second Report on Supplementary Information Concerning Applications for Participation filed with the "First Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court" dated 11 April 2008 (ICC-01/04-01/06-1275-Conf-Exp)" ("Registry's Second Supplementary Report").<sup>19</sup>
16. On the same date the Registry filed a confidential, *ex parte*, Registry-only "Second Report to Trial Chamber I on Victim's Applications under Regulation 86.5 of the Regulations of the Court" (Registry's Second Report").<sup>20</sup>
17. On 21 November 2008, the OPCV submitted confidentially and *ex parte* its "Observations by the OPCV and communication of additional information regarding applicant victims represented by the Office" ("OPCV's filing of 21 November 2008").<sup>21</sup>
18. At the status conference of 25 November 2008, the Chamber decided to disregard this latter filing, *inter alia*, because certain issues of principle that were raised by the OPCV should not have been addressed in an *ex parte* manner, and, furthermore, some of the submissions of the Office were contrary to the express terms and directions set out in the Chamber's Decision of 6 March 2008.<sup>22</sup>
19. At the status conference on 25 November 2008, the Trial Chamber instructed the Registry to provide the parties with the 15 new applications included in the Registry's Second Report, in a redacted form, by 26 November 2008.<sup>23</sup> The Trial Chamber invited the parties to file their responses by 5 December 2008.<sup>24</sup> The

<sup>19</sup> Second report on supplementary information concerning applications for participation filed with the "First Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court" dated 11 April 2008 (ICC-01/04-01/06-1275-Conf-Exp), 21 November 2008, ICC-01/04-01/06-1503-Conf-Exp.

<sup>20</sup> Second Report to Trial Chamber I on Victim's Applications under Regulation 86.5 of the Regulations of the Court, 21 November 2008, ICC-01/04-01/06-1501-Conf-Exp.

<sup>21</sup> Observations by the OPCV and communication of additional information regarding applicant victims represented by the Office, 21 November 2008, ICC-01/04-01/06-1500-Conf-Exp.

<sup>22</sup> See transcript of status conference held on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 7, lines 7 - 9, 21-25, page 8, lines 1-2.

<sup>23</sup> Transcript of status conference held on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 9, lines 4 -9.

<sup>24</sup> Transcript of status conference held on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 9, lines 12 -19.

legal representatives of the applicants included in the Registry's First Report were instructed to submit their replies to the observations of the parties of 10 June 2008 by 28 November 2008.<sup>25</sup>

20. On 27 November 2008, the Registry filed the redacted version of the applications included in the Registry's Second Report.<sup>26</sup>
21. On 28 November 2008 the OPCV filed its "Observations du BCPV en tant que représentant legal des demandeurs a/0004/06, a/0047/06 à a/0052/06, a/077/06, a/0078/06 et a/0240/06, sur leurs demandes de participation dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo* ».<sup>27</sup>
22. On the same day the legal representatives of the victims a/0001/06 to a/0003/06 filed the "Observations sur les demandes de participation des victims".<sup>28</sup> The "Réponse des demandeurs a/0105/06, a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0243/06, a/0244/06, a/0245/06, a/0246/06, a/0247/06, a/0248/06, a/0249/06, a/0250/06, a/0001/07, a/0002/07, a/0003/07, a/0004/07, a/0005/07, a/0006/07, a/0251/07, a/0253/07 et a/0254/07 aux observations du Procureur et de la Défense quant à leur demande de participation à la procédure dans l'affaire *Le Procureur contre Thomas Lubanga*",<sup>29</sup> the "Réponse des demandeurs a/0155/07 et a/0156/07 aux observations du Procureur et de la Défense quant à leur demande de participation à la procédure dans l'affaire *Le Procureur contre Thomas Lubanga*",<sup>30</sup> and the "Réponse des demandeurs a/0149/07 et a/0162/07

<sup>25</sup> Transcript of status conference held on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 6, lines 20-25.

<sup>26</sup> Transmission to the parties of redacted versions of 15 new applications for participation in accordance with Trial Chamber I's oral decision of 25 November 2008, 27 November 2008, ICC-01/04-01/06-1506-Conf and ICC-01/04-01/06-1507-Conf.

<sup>27</sup> Observations du BCPV en tant que représentant légal des demandeurs a/0004/06, a/0047/06 à a/0052/06, a/077/06, a/0078/06 et a/0240/06, sur leurs demandes de participation dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo*, 28 November 2008, ICC-01/04-01/06-1510

<sup>28</sup> Observations sur les demandes de participation des victimes, 28 November 2008, ICC-01/04-01/06-1511.

<sup>29</sup> Réponse des demandeurs a/0105/06, a/0231/06, a/0232/06, a/0233/06, a/0242/06, a/0243/06, a/0244/06, a/0245/06, a/0246/06, a/0247/06, a/0248/06, a/0249/06, a/0250/06, a/0001/07, a/0002/07, a/0003/07, a/0004/07, a/0005/07, a/0006/07, a/0251/07, a/0253/07 et a/0254/07 aux observations du Procureur et de la Défense quant à leur demande de participation à la procédure dans l'affaire *Le Procureur contre Thomas Lubanga*, 28 November 2008, ICC-01/04-01/06-1514-Corr.

<sup>30</sup> Réponse des demandeurs a/0155/07 et a/0156/07 aux observations du Procureur et de la Défense quant à leur demande de participation à la procédure dans l'affaire *Le Procureur contre Thomas Lubanga*, 28 November 2008, ICC-01/04-01/06-1515.



aux observations du Procureur et de la Défense quant à leur demande de participation à la procédure dans l'affaire Le Procureur contre Thomas Lubanga"<sup>31</sup> were also submitted.

23. On 3 December 2008, the Registry submitted its "Report on supplementary information concerning applications for participation filed with the "Second Report to Trial Chamber I on Victims' Applications under Regulation 86.5 of the Regulations of the Court" dated 21 November 2008 (ICC-01/04-01/06-1501-Conf-Exp)" ("Supplementary Information to the Second Report"), which relates to three applicants included in the Second Registry's Report.<sup>32</sup>
24. On 4 December 2008, the Trial Chamber ordered the Registry to transmit the additional information on the applications for participation included in the Supplementary Information to the Second Report to both parties (prosecution and defence) in a confidential and redacted form, by 5 December 2008. In the same order the Trial Chamber set a new deadline for the parties to submit observations on the additional information relating to 3 applicants by 10 December 2008, and for the legal representatives to file any further submissions by 15 December 2008. As regards the other 12 applications included in the Second Registry's Report, the Chamber stated that the deadlines previously set out remained unchanged.<sup>33</sup>
25. On 5 December 2008, the defence submitted observations to the Registry's Second Report and Second Supplementary Report, and to the legal representatives' replies.<sup>34</sup>

<sup>31</sup> Réponse des demandeurs a/0149/07 et a/0162/07 aux observations du Procureur et de la Défense quant à leur demande de participation à la procédure dans l'affaire Le Procureur contre Thomas Lubanga, 28 November 2008, ICC-01/04-01/06-1516.

<sup>32</sup> Report on supplementary information concerning applications for participation filed with the "Second Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court", dated 21 November 2008 (ICC-01-/04-01/06-1501-Conf-Exp), 3 December 2008, ICC-0-/04-01/06-1532-Conf-Exp.

<sup>33</sup> Order for transmission of additional documents on applications for participation a/0403/08, a/0407/08 and a/0408/08, 4 December 2008, ICC-01-/04-01/06-1533, paragraph 3.

<sup>34</sup> Observations de la Défense sur les 15 demandes de participation à la procédure et les 30 demandes de participation complémentaires communiquées le 27 novembre 2008 ; Réponse de la Défense aux observations

26. On the same date the prosecution submitted observations on the aforesaid reports from the Registry.<sup>35</sup>
27. On 10 December 2008, the legal representatives filed their replies to the observations of the defence and the prosecution.<sup>36</sup>

### **B. Previous pre-trial decisions concerning the applicants**

28. Several of the applications submitted to the Chamber in the Registry's First Report had been previously submitted to Pre-Trial Chamber I in the context of the DRC situation or the pre-trial phase of the case of the Prosecutor v. Thomas Lubanga Dyilo, or both.<sup>37</sup>
29. In its decisions of 28 July 2006 and 20 October 2006, Pre-Trial Chamber I granted applicants a/0001/06, a/0002/06, a/0003/06, and a/0105/06, status to participate as victims in the present case.<sup>38</sup>
30. In its decision of 20 October 2006, Pre-Trial Chamber I rejected the requests to participate by applicants a/0078/06, a/0077/06, and a/0004/06.<sup>39</sup> In the same

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des représentants légaux relatives aux 105 demandes de participation communiquées le 20 mai 2008 ; et Observations de la Défense relatives aux victimes indirectes, 5 December 2008, ICC-01/04-01/06-1536.

<sup>35</sup> Prosecution's Observations on supplementary information for victim applications a/0002/06, a/0047/06, a/0048/06, a/0051/06, a/0052/06, a/0077/06, a/0221/06, a/0224/06, a/0225/06, a/0227/06, a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06, a/0243/06, a/0055/07, a/0056/07, a/0057/07, a/0058/07, a/0060/07, a/0155/07, a/0156/07, a/0172/07, a/0187/07, a/0007/08, 5 December 2008, ICC-01/04-01/06-1540-Conf and ICC-01/04-01/06-1543 (Public redacted version); Prosecution's Observations on 12 Redacted Applications for Victim Participation to the Case, concerning applicants a/0063/07, a/0122/08, a/0123/08, a/0124/08, a/0125/08, a/0126/08, a/0130/08, a/0149/08, a/0404/08, a/0405/08, a/0406/08 and a/0409/08, 5 December 2008, ICC-01/04-01/06-1541.

<sup>36</sup> Réponse aux « Prosecution's Observations on supplementary information for victim applications a/0002/06, a/0047/06, a/0048/06, a/0051/06, a/0052/06, a/0077/06, a/0221/06, a/0224/06, a/0225/06, /0227/06 a/0229/06, a/0230/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06, a/0243/06, a/0055/07, a/0056/07, a/0057/07, a/0058/07, a/0060/07, a/0155/07, a/0156/07, a/0172/07, a/0187/07, a/0007/08 », et aux « Prosecution's Observations on 12 Redacted Applications for Victim Participation to the Case, concerning applicants a/0063/07, a/0122/08, a/0123/08, a/0124/08, a/0125/08, a/0126/08, a/0130/08, /0149/08, a/0404/08, a/0405/08, a/0406/08 and a/0409/08 », et aux « Observations de la Défense sur les 15 demandes de participation à la procédure et les 30 demandes de participation complémentaires communiquées le 27 novembre 2008 ; Réponse de la Défense aux observations des représentants légaux relatives aux 105 demandes de participation communiquées le 20 mai 2008 », et à du 5 décembre 2008 (sic), 10 December 2008, ICC-01/04-01/06-1551

<sup>37</sup> The Registry informed the Chamber that none of the new 15 applications submitted with the Registry's Second Report had been filed previously before Pre-Trial Chamber I, either in the record of the situation or in the record of the case ICC-01/04-01/06-1501, paragraph 12.

<sup>38</sup> Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire Le Procureur c. Thomas Lubanga Dyilo et de l'enquête en République Démocratique du Congo, 28 July 2006, ICC-01/04-01/06-228, pages 12, 16, Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601, page 12.

decision, Pre-Trial Chamber I accepted that applicants a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0052/06, a/0051/06 were victims of the case but concluded that their participation was not appropriate at the confirmation hearing.<sup>40</sup>

31. In the context of the DRC Situation, and in relation to applicants a/0237/06, a/0238/06, a/0244/06, a/0249/06, a/0250/06, a/0225/06, a/0232/06, a/0239/06, a/0231/06, a/0245/06, a/0247/06, a/0248/06, a/0221/06, a/0226/06, a/0233/06, a/0241/06, a/0246/06, a/0242/06, a/0243/06, a/0051/06, the Pre-Trial Chamber determined it would not resolve their status as victims, since their applications were pending before Trial Chamber I in the context of the case of the Prosecutor v. Thomas Lubanga Dyilo.<sup>41</sup>

32. In the same decision, Pre-Trial determined that applicants a/0229/06, a/0230/06, a/0224/06, a/0227/06, a/0240/06, a/0077/06, a/0236/06 had submitted incomplete applications which were, in consequence, rejected.<sup>42</sup> The Pre-Trial Chamber also concluded that applicant a/0228/06 was not a victim of recruitment within the jurisdiction of the Court, as he was over 15 at the time of the events. However, the Pre-Trial Chamber accepted that the applicant had suffered moral and physical harm as a result of inhumane treatment and torture, which he

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<sup>39</sup> Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601, pages 9-10 and 13.

<sup>40</sup> Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601, pages 10-11.

<sup>41</sup> Corrigendum à la "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06", 31 January 2008, ICC-01/04-423-Corr, paragraph 144.

<sup>42</sup> Corrigendum à la "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06", 31 January 2008, ICC-01/04-423-Corr, paragraphs 17, 22.

experienced during his training. The Pre-Trial Chamber thus granted applicant a/0228/06 status to participate in the DRC Situation.<sup>43</sup>

33. In a subsequent decision on 3 July 2008, Pre-Trial Chamber I reviewed the applications of applicants a/0239/06, a/0245/06, a/0221/06, a/0226/06, a/0241/06, a/0246/06, a/0243/06, and a/0051/06, and since they had not submitted any identification documents, their applications were considered incomplete.<sup>44</sup> In the same decision, applicants a/0231/06, a/0247/06, a/0248/06, a/0233/06, and a/0242/06 were granted status to participate in the context of the DRC Situation.<sup>45</sup>

## **II. Relevant Provisions**

34. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions under the Rome Statute framework.
35. 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.

<sup>43</sup> Corrigendum à la “Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06”, 31 January 2008, ICC-01/04-423-Corr, paragraph 134.

<sup>44</sup> Decision on the applications for participation file in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/163/06 to a/0187/06, a/0221/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241 to a/0250/06, 3 July 2008, ICC-01/04-505, paragraphs 31, 32 and 34.

<sup>45</sup> Corrigendum à la “Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06”, 31 January 2008, ICC-01/04-423-Corr, paragraphs 92, 98, 100, 102 and page 41.

[...]

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.

36. 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.

37. In order to assist the Court in determining who is a victim under the statutory framework, Rule 85 of the 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.

38. 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.

39. Rule 87 of the Rules in paragraph 3 on "Protective measures" sets out that:

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.

40. 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 [...]

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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>46</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>47</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.

49. 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>48</sup>

<sup>46</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>47</sup> Adopted by the United Nations General Assembly, resolution 60/147, 16 December 2005.

<sup>48</sup> Adopted by the United Nations General Assembly, resolution 44/25, 20 November 1989.



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.

50. 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.

### **III. Submissions**

51. The submissions of the parties and participants have been analysed on a case-by-case basis in Annex A to this decision. The annex will be issued separately in due course.

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

52. 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>49</sup> as confirmed or varied by the Appeals Chamber in its judgment of 11 July 2008.<sup>50</sup>
53. For the purposes of this Decision, the Chamber has divided the applicants into groups, reflecting particular features which individual victims share and which are of broad importance. These "common" issues of principle will be the subject of general analysis in this part of the Decision. Thereafter, the applicant-by-applicant analysis is set out in Annex A.

<sup>49</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

<sup>50</sup> Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

## A. Group 1: Applicants Granted Participating Status

### *Group 1(a): Applicants currently participating in the proceedings*

54. Applicants a/0001/06, a/0002/06, a/0003/06, and a/0105/06 are in this group of applications.
55. The Trial Chamber notes that Pre-Trial Chamber I granted these applicants status to participate as victims in the case,<sup>51</sup> and they have participated in the proceedings before the Trial Chamber thus far.<sup>52</sup> Furthermore, the Appeals Chamber has granted them the right to participate in interlocutory appeals in this case.<sup>53</sup>
56. The Chamber considers that the documents and the other material provided assist in demonstrating the identity of the applicants a/0001/06, a/0003/06 and a/0105/06 in accordance with the Trial Chamber's Decision on victims' participation. They indicate that these victims were under the age of 15 at the time of the material events.<sup>54</sup>
57. In the circumstances, the Trial Chamber determines that applicants a/0001/06, a/0003/06 and a/0105/06 have given sufficient evidence to establish, *prima facie*, that they are victims under Rules 85(a) of the Rules, as the Chamber has been provided with information that leads it to conclude that the applicants have suffered personal harm as a result of crimes confirmed against the accused, namely the alleged conscription and/or enlistment and/or use of children under

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<sup>51</sup> Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire Le Procureur c. Thomas Lubanga Dyilo et de l'enquête en République Démocratique du Congo, 28 July 2006, ICC-01/04-01/06-228, page 16 ; Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601, page 12.

<sup>52</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 112.

<sup>53</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", 12 February 2007, ICC-01/04-01/06-824 OA7, paragraph 43; Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation, 16 May 2008, ICC-01/04-01/06-1335 OA9 and OA 10, paragraph 1.

<sup>54</sup> For the purposes of the age of the applicant at the "time of the events", this should be understood as the initial moment of the child's alleged conscription, enlistment or use to participate actively in the hostilities

the age of 15 to participate actively in the hostilities, between September 2002 and 13 August 2003.<sup>55</sup>

58. In relation to applicant a/0002/06, the Trial Chamber notes that although it has been provided with an identification document for the person acting on behalf of the applicant, it has not been provided with an identification document for the applicant. However, the Trial Chamber has considered his special and unique circumstances, which are analysed in Annex A. In addition, the defence and the prosecution have not opposed this application to participate in the proceedings. The Trial Chamber notes that the legal representative of the applicant stated that his client agreed to disclose his identity in full to the defence.<sup>56</sup> The full unredacted version of the application was transmitted to the parties on 28 November 2008.<sup>57</sup>
59. In light of the above, the Trial Chamber considers that applicant a/0002/06 has given sufficient evidence to establish, *prima facie*, that he is a victim under Rules 85(a) of the Rules, as the Chamber has been provided with enough information to conclude that the applicant has suffered personal harm as a result of the commission of crimes included in the charges against the accused, namely his alleged enlistment and/or conscription and/or use to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>58</sup>

***Group 1(b): Applications appearing to meet the criteria for participation in the proceedings which do not involve the issues set out in the following categories***

60. Applicants a/0050/06, a/0172/07, a/0078/06, a/0237/06, a/0238/06, a/0002/07, a/0054/07, a/0056/07, a/0060/07, a/0156/07, a/0007/08, a/0244/06, a/0249/06,

<sup>55</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

<sup>56</sup> E-mail addressed to the Legal Adviser of the Trial Division on 1 June 2008.

<sup>57</sup> Transmission of the unredacted version of application a/0002/06 for participation in the proceedings in implementation of the Oral Decision of 25 November 2008, 28 November 2008, ICC-01/04-01/06-1518.

<sup>58</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

a/0250/06, a/0229/06, a/0230/06, a/0003/07, a/0224/06, a/0123/08 and a/0409/08 are in this group.

61. The Trial Chamber considers that the overall material provided by these applicants provides a sufficiently reliable indication of their age and identity, in accordance with the Trial Chamber's Decision on victims' participation. In particular, the Chamber accepts that the documents and the other material prove, *prima facie*, that the applicants were under the age of 15 at the time of the relevant events, as well as the identity of those people acting on their behalf, and their relationship with the applicants, where applicable.
62. The Trial Chamber has determined that the applicants have given sufficient evidence to establish, *prima facie*, that they are victims under Rules 85(a) of the Rules, since the Chamber has been provided with enough information to prove that the applicants suffered personal harm as a result of the commission of crimes included in the charges against the accused, namely the alleged enlistment and/or conscription and/or use to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>59</sup>

***Group 1(c): Applicants where the person acting on the victim's behalf (with his or her consent) is not a relative or their legal guardians***

63. Applicants a/0047/06, a/0048/06, a/0049/06, a/0052/06, a/0057/07, a/0183/07, a/0184/07, a/0190/07, a/0191/07, a/0251/07, a/0063/07, a/0122/08, a/0124/08, a/0125/08, a/0126/08, a/0130/08, a/0405/08, a/0183/07, a/0184/07, a/0190/07, a/0191/07, and a/0251/07 are in this group
64. The applicants in this group have various individuals acting for them who are not their relative or legal guardian. However, in each instance, the applicant has given his or her consent for this person to act on their behalf.

<sup>59</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

65. It is to be noted that although many of these applicants were children at the time the application form was completed, they are now adults. The applicants who are still children are all over the age of 15. Indeed, those applicants who are not yet 18 years old are relatively close to that age because the children who Mr Lubanga is alleged to have conscripted were 15 years old, or close thereto, between the end 2002 and August 2003.
66. The question that arises for this group of applicants is whether they individually need to establish that the person acting on their behalf is either their relative or legal guardian, in order to participate in the proceedings. Alternatively, is the Chamber entitled to act on the application that has been submitted "by a person" on their behalf, which indicates clearly in each instance that the victim wishes to participate in these proceedings.
67. The Rome Statute framework is clear on this issue. There are no provisions establishing categories of people who alone are allowed to act for victims, whether the latter are adults or children. Rule 89(3) of the Rules simply states that "[a]n 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 [...]". It follows that the person acting on behalf of a victim does not have to be a relative or a legal guardian because, within the Rules, the "person acting" is undefined and unrestricted.
68. In support of this approach, the inevitable experience of most, if not all, children who were recruited in the circumstances alleged in this trial, is that they will have been separated from their parents and other adult relatives at a relatively young age. Many of them have been living, to put it at its lowest, disjointed and very unsettled lives for a number of years. Some children have still not been reunited with their families and they do not have legal guardians. To the extent that they have managed to find representation at all, they are

often assisted by people such as schoolteachers and other similar community figures.

69. In this regard, the Chamber notes the General Comment No. 6 (2005) of the Committee on the Rights of the Child in which it was recognised that separated or unaccompanied children (defined as children who have been separated from both parents, other relatives or from any previous legal or customary primary caregiver), in some situations “have no access to proper and appropriate identification, registration, age assessment, documentation family tracing, guardianship systems or legal advice”.<sup>60</sup> The Committee further noted that “in large-scale crises, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of separated children should be safeguarded and promoted by States and organizations working on behalf of these children”.<sup>61</sup>
70. The Chamber has paid careful attention to the experience of the Registry in the field in the DRC, and particularly its opinion that “legal guardianship is very rare in Eastern Congo and many children who do not live with their parents, for instance because they have not yet been reunited with their families after being demobilised from an armed group or because they experience difficulties in reintegration, are looked after by persons such as school principals, transition centres for demobilised children, who do not have a formal status in relation to the child”.<sup>62</sup>
71. The real possibility exists, therefore, that a number of applicants who seek to participate in these proceedings will be living in circumstances where they

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<sup>60</sup> Committee on the Rights of the Child, General Comment No. 6 (2005), 1 September 2005, CRC/GC/2005/6, paragraphs 3, 7 and 8. Although this General Comment applies to children who have crossed an international border, the Committee has acknowledged that there are many similar challenges related to internally displaced unaccompanied and separated children and encourages States Parties to adopt the relevant aspects of the General Comment in relation to internally displaced unaccompanied and separated children (paragraph 5).

<sup>61</sup> Committee on the Rights of the Child, General Comment No. 6 (2005), 1 September 2005, CRC/GC/2005/6, paragraph 38.

<sup>62</sup> Second Report on supplementary information, ICC-01/04-01/06-1503-Conf-Exp, 21 November 2008, paragraph 20.

cannot be represented by their parents, other family relatives or a legal guardian. In relation to these victims, who are over 18 years of age or are close thereto, they have individually applied through a person acting on their behalf (who is not their next-of-kin or their legal guardian or there's no documental proof thereof) to participate in this trial as a victim. In each instance, the application accords with the express requirements of Rule 89(3) of the Rules.

72. All of the matters set out above provide strong support for the approach that the Rules have not restricted the types of people who are able to act on behalf of all victims and including child victims. If particular individuals are unsuitable, the Chamber will be able to make an appropriate decision on a case-by-case basis.
73. The Trial Chamber determines that the applicants have given sufficient evidence to establish, *prima facie*, that they are victims under Rule 85(a) of the Rules, as the Chamber has been provided with enough information to establish that the applicants have suffered personal harm as a result of the commission of crimes included in the charges against the accused, namely the alleged enlistment and/or conscription and/or use of children under age 15 to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>63</sup>

***Group 1(d): Applicants who were children when the application was originally filed, but who are now adults (or are close thereto)***

74. Applicants a/0225/06, a/0232/06, a/0239/06, a/0246/06, a/0001/07, a/0005/07, a/0059/07, a/0149/07, a/0155/07, a/0231/06, a/0245/06, a/0612/08, a/0248/06, a/0613/08, a/0055/07 a/0047/06, a/0048/06, a/0049/06, a/0052/06, a/0057/07 are in this group”.

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<sup>63</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

75. The Chamber considers that the documents and the other materials provided prove, *prima facie*, the identity of the applicants and of the person acting on their behalf, if applicable, in accordance with the Trial Chamber's Decision on victims' participation. They also prove, *prima facie*, that the applicants were under the age of 15 at the time of the events.
76. The Trial Chamber notes that the applicants were children when the applications were filed but are now adults or will soon be adults (18 years old). In each instance someone is acting on their behalf.
77. The Trial Chamber observes that in its decision of 3 July 2008, Pre-Trial Chamber I concluded in the context of the DRC Situation that some of the applications included in this group were incomplete, since the applicants were children when the applications were submitted but at the time of the decision they were adults. The Pre-Trial Chamber, as a consequence, sought additional information as to whether the applicants still consented to another person acting on their behalf.<sup>64</sup>
78. As set out above, Rule 89(3) of the Rules provides that "[a]n 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 [...]". The Trial Chamber considers that it would be onerous and against the interests of justice to require applicants, when they turn 18, to furnish the Court with a fresh document formally authorising the person who has represented them hitherto to remain in that role. Given that each applicant (now an adult or close thereto) has indicated his or her wish to participate in the proceedings, the Chamber infers that when they become adults they consent to the person continuing to act for them. If that is not the case, the obligation rests on the applicant to inform the Court.

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<sup>64</sup> Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/163/06 to a/0187/06, a/0221/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-505, paragraph 35.



79. The Trial Chamber concludes that the applicants have given sufficient evidence to establish, *prima facie*, that they are victims under Rules 85(a) of the Rules, as the Chamber has been provided with enough information to conclude that the applicants have suffered personal harm as a result of the commission of crimes included in the charges against the accused, namely the alleged enlistment and/or conscription and/or use of children under the age of 15 to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>65</sup>

***Group 1(e): Applications where the date of birth is uncertain or the demobilisation date is in issue***

80. Applicants a/0187/07, a/0168/07, a/0169/07, a/0170/07, a/0173/07, a/0179/07, a/0181/07, a/0188/07, a/0253/07, a/0257/07, a/0271/07, a/0272/07, a/0273/07, a/0274/07, a/0275/07, a/0276/07, a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0171/07, a/0183/07, a/0184/07, a/0190/07, a/0191/07, a/0251/07, and a/0406/08 are in this group.

81. The Chamber considers that the documents and the other material provided prove, *prima facie*, the identity of the applicants in accordance with the Trial Chamber's Decision on victims' participation.

82. For most of the applicants within this group, the Chamber has been provided with the demobilisation certificate of the applicants, which prove, *prima facie*, that they were under 18 years of age at the time of their demobilisation.

83. Furthermore, the Chamber has taken into consideration that the applicants have set out their date of birth precisely and unequivocally in the application, and in each case this has not been contradicted by other evidence.

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<sup>65</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

84. In all the circumstances, the Chamber has been provided with enough information to determine, *prima facie*, that the applicants were under the age of 15 at the time of the relevant events.
85. The Trial Chamber has reviewed the applications on a case-by-case basis as well as the reports submitted by the VPRS and rejects the submission advanced by the defence in relation to some of these applicants, namely that the alleged recruitment cannot be established, *prima facie*, to have occurred between September 2002 and August 2003. Weighing all the evidence, the Trial Chamber considers that the information provided in the applications and in the VPRS reports is sufficient to establish, *prima facie*, that the applicants were recruited within that time period, particularly taking into consideration that the date of demobilization can reasonably be inferred as being the date when the applicant received his or her demobilisation certificate.
86. The Trial Chamber thus determines that the applicants have given sufficient evidence to establish, *prima facie*, that they are victims under Rules 85(a) of the Rules, as the Chamber has been provided with enough information to conclude that the applicants have suffered personal harm as a result of crimes included in the charges against the accused, namely the alleged enlistment and/or conscription and/or use of children under the age of 15 to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>66</sup>

***Group 1(f): Applications where there are some inconsistencies within documents***

87. Applicants a/0058/07, a/0240/06, a/0236/06, a/0227/06, a/0051/06, a/0221/06, a/0226/06, and a/0233/06 are included in this group.

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<sup>66</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

88. The Trial Chamber notes that for these applicants there are discrepancies between their year of birth as set out in the application form and in the document(s) provided to the Chamber.
89. The Chamber has carefully weighed the inconsistencies in each case, but in all the circumstances the differences do not, *ipso facto*, undermine the credibility of the applicants' assertion as to his or her age in the application form, supported by documents that have been provided such as student identity card, election cards and birth certificates. In the view of the Chamber, the material, when considered overall, proves, *prima facie*, the identity and age of the applicants in accordance with the Trial Chamber's Decision on victims' participation. Thus, the Chamber considers that it has been provided with enough information to determine, *prima facie*, that the applicants were under the age of 15 at the time of the events.
90. The Trial Chamber determines that the applicants have given sufficient evidence to establish, *prima facie*, that he or she is a victim under Rules 85(a) of the Rules, as the Chamber has been provided with enough information to establish that the applicants suffered personal harm as a result of the commission of crimes included in the charges against the accused, namely his/her alleged enlistment and/or conscription and/or use to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>67</sup>

***Group 1(g): Applicants who are still under 18 where the application has not been made by a person acting on their behalf***

91. Applicants a/0149/08 and a/0404/08 are in this group.
92. It is to be noted that although the applicants are still children, they are all over the age of 15. Indeed, they are relatively close to adulthood (18 years of age)

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<sup>67</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

because the children who Mr Lubanga is alleged to have conscripted were 15 years old, or close thereto, between the end 2002 and August 2003.

93. The question that arises for this group of applicants is whether it is a precondition of their participation that their application is made by a person acting on their behalf.
94. It is to be observed that Rule 89(3) of the Rules is a permissive rather than a mandatory provision: an application in the case of a victim who is an adult may be made by person on his or her behalf with their consent, and for a child an application may also be made by a person acting on his or her behalf. In the judgment of the Chamber, the wording of Rule 89(3) of the Rules, coupled with the absence of any provision denying children the opportunity of applying to participate without an intermediary, creates, at the very least, the opportunity for a child to apply on his or her own behalf to participate in the proceedings, depending always on their individual circumstances (viz. the age and the apparent maturity of the child) and the interests of justice overall.
95. The idea that the views of a child shall be given due weight in accordance with his or her maturity is consistent with internationally recognized human rights (Article 21(3) of the Statute), as reflected in Article 12(1) of the Convention on the Rights of the Child and the observations of the Committee on the Rights of the Child.<sup>68</sup>
96. There is no evidence to suggest the applicants in this group are particularly immature or that they do not understand the application they are individually making. Although the Chamber would normally expect a person to act on behalf of a minor, the fact that the applicants are very close to the age of legal maturity at the moment when the trial is to commence, creates a strong case for

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<sup>68</sup> Committee on the Rights of the Child, Final Recommendations, Day of General Discussion on the Right of the Child to be Heard, 43<sup>rd</sup> Session, 29 September 2006, paragraphs 51 and 52.

the Chamber to admit these applications. Any other decision at this point in time would effectively remove their opportunity to participate.

97. In all the circumstances, the absence of a person acting on their behalf does not act as a bar to their participation in these proceedings.
98. In the cases of each of the applicants considered in this group, the Trial Chamber determines that the applicants have given sufficient evidence to establish, *prima facie*, that they are victims under Rule 85(a) of the Rules, as the Chamber has been provided with enough information to establish that the applicants have suffered personal harm as a result of the commission of crimes included in the charges against the accused, namely the alleged enlistment and/or conscription and/or use of children under age 15 to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>69</sup>

***Group 1(h): Other***

99. Applicants a/0162/07 and a/0270/07 are in this group.
100. In relation to applicant a/0162/07, the Chamber has carefully reviewed the application form as well as the additional documents provided by the applicant and considers that the apparent contradiction as regards the age of the applicant is clarified by the certificate of identification of the applicant's father, which includes the dates of birth of his three children. Therefore, the applicant's year of birth is sufficiently established as being 1994 in accordance with the identification documents provided to the Chamber.
101. The Chamber therefore considers that the documents and the overall information provided prove, *prima facie*, the identity of the applicant and the person acting on her behalf in accordance with the Trial Chamber's Decision on victims' participation. They prove, *prima facie*, that the applicant was 8 years old

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<sup>69</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

at the time of the events and they establish the kinship between the applicant and the person acting on her behalf.

102. The Chamber has reviewed the application submitted by the alleged victim, which reveals that she was allegedly abducted and held by the UPC for a period (albeit of uncertain length) within the timeframe of these charges, in the context of a broad campaign conducted by the UPC of child abduction and forced recruitment. Given the alleged systematic recruitment, enlistment or use of child soldiers at this time by that group, on a *prima facie* basis, the Chamber considers that it is fair to infer that she was held, *inter alia*, for one of these purposes. Accordingly, the Chamber rejects the prosecution's submission that the fact that soldiers of the UPC allegedly forcibly took and raped her, and made threats to her life, results in an insufficient causal link between her abduction and the charges against the accused. To the contrary, it is reasonable to conclude, on a *prima facie* basis, that she suffered other crimes (*viz.* rape and threats to her life), as well as being a victim of the charges brought against the accused which the Chamber is considering.
103. It is not necessary, in those circumstances, for the Chamber to engage in the critical question that otherwise arises in this application as to whether the "use" of children for sexual purposes alone, and including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, *prima facie*, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC.
104. Consequently, the Trial Chamber determines that the applicant has given sufficient evidence to establish, *prima facie*, that she is a victim under Rule 85(a) of the Rules, as the Chamber has been provided with enough information to

conclude that the applicant suffered personal harm as a result of crimes included in the charges against the accused, namely her alleged enlistment and/or conscription and/or use to actively participate in the hostilities by the UPC between September 2002 and 13 August 2003.

105. In relation to applicant a/0270/07, the Trial Chamber notes that the applicant wishes to participate as a “natural” person and also as the representative of a “legal” person, namely the school he supervises.
106. As regards the applicant’s participation as a natural person, the Chamber considers that the documents provided prove, *prima facie*, the identity of the applicant in accordance with the Trial Chamber’s Decision on victims’ participation.
107. The applicant alleges he is a victim who has suffered harm when intervening to help direct victims in the case, in the sense that he sought to prevent children from becoming the victims of crimes confirmed against the accused.
108. The Trial Chamber notes that Pre-Trial Chamber I has stated that persons who have suffered harm whilst intervening to help direct victims of the case, or to prevent the latter from becoming victims following the commission of relevant crimes, are victims of the case in accordance with Rule 85 of the Rules.<sup>70</sup> The Trial Chamber has also followed the decision of the Appeals Chamber, that the harm suffered does not necessarily have to be direct but it must be personal.<sup>71</sup>
109. In those circumstances, and taking into consideration the abovementioned case law, the Trial Chamber concludes that the applicant is an indirect victim of the crimes of enlistment and/or conscription and/or use to participate actively in hostilities of children under the age of 15 (viz. the students of his school) between September 2002 and 13 August 2003. The applicant has provided the

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<sup>70</sup> Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172-tEN, pages 8-9.

<sup>71</sup> Appeals Chamber’s Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraph 1.

Chamber with enough information (including the results of medical examinations) to determine, *prima facie*, that he suffered personal harm as a result of these crimes.<sup>72</sup> Although the Trial Chamber cannot determine whether all, or only some, of the students who were recruited were under the age of 15 at the time, the Trial Chamber infers that since the recruitment occurred in a school, it is highly likely that at least some of them were below that age.

110. As regards the applicant's wish to participate as the representative of a "legal" person, the Trial Chamber infers that as the principal of the school, the applicant has sufficient authority to act on behalf of his institution.

111. The Trial Chamber thus considers that the applicant has given sufficient evidence to establish, *prima facie*, that he is a victim under Rules 85(a) of the Rules, as the Chamber has been provided with enough information to conclude that the applicant suffered personal harm as a result of crimes included in the charges against the accused, namely the alleged enlistment and/or conscription of students in the school that the applicant supervises and/or their use to participate actively in the hostilities by the UPC between September 2002 and 13 August 2003.<sup>73</sup> Moreover, for the reasons set out above, the applicant may participate in the trial on his own behalf, and on behalf of the school, under Rule 85(b) of the Rules of Procedure and Evidence.

## **B. Group 2: Applicants Refused Participating Status**

### *Group 2(a): Applications where the forms are incomplete*

112. Applicants a/0241/06, a/0061/07, a/0062/07, a/0065/07, a/0182/07, a/0174/07, a/0176/07, a/0185/07, a/0189/07, a/0064/07, a/0175/07, a/0177/07, a/0178/07, a/0180/07 are in this group.

<sup>72</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

<sup>73</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, as confirmed, amended and reversed by the Appeals Chamber's Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.



113. In relation to these applicants, the Trial Chamber has not been provided with any identification documents in accordance with its Decision on victims' participation.<sup>74</sup> Although a lack of documentation may be justified for applicants who are or have been confronted with particular difficulties, no explanation has been provided for the absence of any identifying documents to support these applications. Consequently, the application forms are materially incomplete. The Chamber instructs the VPRS to contact the applicants and their legal representatives in order to seek appropriate documentation.

***Group 2(b): Incidents falling outside of the time frame of the charges or when the applicants were older than 15 at the time of their alleged recruitment***

114. Applicants a/0228/06, a/0252/07, a/0278/07, a/0281/07, a/0284/07, a/0242/06, a/0243/06, a/0004/06, a/0077/06, a/0256/07, a/0255/07 are in this group.

115. In relation to these applicants the Chamber has been provided with documents and information that either establish, *prima facie*, that the applicant was 15 years or older at the time of the events or that the alleged recruitment took place at a time which is outside the scope of the charges, namely September 2002 to 13 August 2003.

116. For self-evident reasons, the Trial Chamber rejects these applications.

**C. Applications where a person who is acting on behalf of a victim also suffered harm**

117. Applicants a/0105/06, a/0149/06, a/0155/07, and a/0004/07 are in this group.

118. Some parents acting on behalf of their children allege they suffered harm as a result of their children's alleged conscription, enlistment or use to participate actively in the hostilities. The Trial Chamber refers to the Registry the issue of

<sup>74</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

whether these parents wish to participate on their own behalf for the personal harm they have allegedly suffered.

**D. Applications where the applicant alleges harm unrelated to the crimes included in the charges**

119. Applicants a/0173/07, a/0253/07, a/0181/07, and a/0171/07 are in this group.

120. Some applicants refer in their application forms to harm or injury caused by crimes unrelated to the present charges. Although the Trial Chamber has considered the particularity of each case, it has concluded, *prima facie*, that the conscription, enlistment or use of children under the age of 15 to participate actively in the hostilities, *ipso facto*, will have resulted in some form of physical or psychological injury or harm to the child, or his or her parents (or both), regardless of whether specific harm or injury has been set out in the application form. It needs to be stressed that this is a *prima facie* conclusion, rather than one that is reached on the basis of a higher test, such as beyond reasonable doubt.

**E. Legal Representation**

121. Thus far 91 applicants have been granted status to participate in the trial. Active participation by this number of victims must not affect the right of the accused to a fair trial without undue delay. Given that the views and concerns of many victims will coincide or overlap, the opportunity in this case for joint representation must be carefully explored. The Trial Chamber instructs the VPRS to consult with the legal representatives of the victims and to return to the Chamber with a proposal on common legal representation in accordance with Rule 90(2) of the Rules, no later than 7 January 2009.

122. If a victim wishes to participate in person at any stage of the trial proceedings, he or she shall apply in writing to the Chamber no later than 9 January 2009. Later applications will be considered only if the delay is justified.

## F. Protective Measures

123. As established by the Trial Chamber in its Decision on victims' participation of 18 January 2008, "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".<sup>75</sup> However, the Trial Chamber also recognised that although it cannot exclude the possibility of participation by anonymous victims, "it is preferable that the identities of victims are disclosed in full to the parties" and that "extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused".<sup>76</sup>
124. The Chamber reiterates that "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".<sup>77</sup>
125. As set out in the Trial Chamber's decision of 6 May 2008, the Chamber is mindful that most victims have requested 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 constituting the main reasons for requesting these protective measures. 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.<sup>78</sup>

<sup>75</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 77.

<sup>76</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraphs 130-131.

<sup>77</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 131.

<sup>78</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,

126. In order to make an informed decision on individual protective measures for each applicant, the Trial Chamber seeks the assistance of the Victims and Witnesses Unit in order to assess the individual risk that each participating victim faces. The Chamber is aware of the extensive nature of this undertaking, since it currently involves 91 applicants, and accordingly the VWU is to inform the Chamber if it will be unable to complete this task in advance of the trial.
127. In this Decision the Chamber is essentially conducting a preliminary assessment on the merits of the applications by victims to participate. It is impossible at this point in time to determine the extent to which, if at all, victims will be permitted to retain their anonymity, particularly vis-à-vis the accused, whilst continuing to participate actively in the proceedings. Although the goal is complete open justice, a critical dividing line in this context may be whether the accused has been informed as to the identity of the participating victim. Depending on the facts, it may be acceptable for the victim to remain anonymous as regards the public, whilst revealing his or her identity to the accused.
128. Other Divisions of the Court have addressed the acute difficulties that can exist as regards the protection of victims and witnesses. Judge Politi, when sitting as a single judge, addressed a similar issue and concluded 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”.<sup>79</sup>
129. The Appeals Chamber has endorsed the application of the principle of proportionality by setting out that protective measures should restrict the rights

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a/0237/06 to a/0250/06, a/0001/07 to 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, 7 May 2008, ICC-01/04-01/06-1308, paragraph 22.

<sup>79</sup> Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2008, ICC-02/04-01/05-134, paragraph 20.

of the suspect or accused only as far as necessary and they should be put in place where they are the only sufficient and feasible measure.<sup>80</sup>

130. In its Decision on Victims' Participation, this Chamber indicated that "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."<sup>81</sup> Additionally, the Chamber decided that "a victim who wishes to participate in relation to any identified stage of the proceedings should set out in a discrete written application the nature and the detail of the proposed intervention (e.g. by providing the questions that he or she seeks to put). At this stage, the victim must describe the way in which his or her personal interest is affected, for example by identifying how the harm he or she suffered relates to the evidence or the issues the Chamber is considering in its determination of the charges."<sup>82</sup> The Appeals Chamber, in reviewing this Decision of the Trial Chamber,<sup>83</sup> observed that:

The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.

131. It follows that a fact-sensitive decision, addressing what will often be a complex range of issues, needs to be made on all issues concerning a victim's participation, at each relevant stage in the trial, and including whether or not he or she is to be permitted to remain anonymous, and if so, the extent of the anonymity. Therefore, the Chamber will make a decision in due course on

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<sup>80</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. 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 to 34.

<sup>81</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 131.

<sup>82</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 103.

<sup>83</sup> Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber 1's Decision on Victims' Participation of 18 January 2008, ICC-04-01-06-1432, paragraph 104.

whether any victims are to be granted leave to participate “actively” whilst remaining anonymous, and if so, the extent of the anonymity.

132. The Trial Chamber instructs the Registry to consult with the victims and their legal representatives generally as regards the level of protection that is necessary during the trial. The Registry is to remind the victims and their legal representatives of the availability of protective and special measures other than complete anonymity, which may enable a greater degree of participation by them in the proceedings, consistent with the rights of the accused and a fair trial (e.g. confidentiality of the victims’ identity towards the public).
133. In any event, unless expressly provided by the victims or their legal representatives, all victims should be referred to by the parties, participants and any organ of the Court in all filings and hearings by their pseudonym.
134. The Registry is ordered to submit to the Chamber a report on the requests for protective and special measures of victims that have been granted status to participate no later than 9 January 2009.

#### **F. Participation in the proceedings**

135. The Trial Chamber previously established the presumption that victims will be permitted to make opening and closing statements during trial.<sup>84</sup> The Trial Chamber orders the legal representatives of victims to inform the Chamber no later than 9 January 2009 if they intend to make an opening statement, and to furnish to the Chamber, the parties and other participants, with an outline thereof 7 days in advance of the commencement of trial.<sup>85</sup>
136. In order to enable the legal representatives of victims to prepare for trial, the Registry shall notify to them the amended document listing the witnesses the prosecution intends to call in their order of appearance, referring to the

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<sup>84</sup> Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 117.

<sup>85</sup> Decision on opening and closing statements, 22 May 2008, ICC-01/04-01/06-1346.

witnesses by their reference number, which will be filed in the near future, which in combination with the public redacted version of the prosecution's summary of presentation of evidence will be sufficient to enable them to prepare discrete applications for participation.<sup>86</sup>

## V. Orders of the Chamber

137. For these reasons, the Trial Chamber hereby:

- a. Grants status to participate in the proceedings to applicants a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06, a/0052/06, a/0054/07, a/0055/07, a/0056/07, a/0057/07, a/0058/07, a/0059/07, a/0060/07, a/0063/07, a/0078/06, a/0105/06, a/0122/08, a/0123/08, a/0124/08, a/0125/08, a/0126/08, a/0130/08, a/0149/07, a/0149/08, a/0155/07, a/0156/07, a/0162/07, a/0168/07, a/0169/07, a/0170/07, a/0171/07, a/0172/07, a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0188/07, a/0190/07, a/0191/07, a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0227/06, a/0229/06, a/0230/06, a/0231/06, a/0232/06, a/0233/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06, a/0244/06, a/0245/06, a/0246/06, a/0248/06, a/0249/06, a/0250/06, a/0251/07, a/0253/07, a/0257/07, a/0270/07, a/0271/07, a/0272/07, a/0273/07, a/0274/07, a/0275/07, a/0276/07, a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0404/08, a/0405/08, a/0406/08, a/0409/08, a/0612/08, a/0613/08, a/0001/06, a/0002/06, a/0003/06, a/0001/07, a/0002/07, a/0003/07, a/0005/07, and a/0007/08.
- b. Rejects status to participate in the proceedings to applicants a/0241/06, a/0061/07, a/0062/07, a/0065/07, a/0182/07, a/0174/07, a/0176/07, a/0185/07, a/0189/07, a/0064/07, a/0175/07, a/0177/07, a/0178/07,

<sup>86</sup> Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation, 2 June 2008, ICC-01/04-01/06-1368, paragraph 29.

a/0180/07, a/0228/06, a/0252/07, a/0278/07, a/0281/07, a/0284/07, a/0242/06, a/0243/06, a/0004/06, a/0077/06, a/0256/07, and a/0255/07.

- c. Instructs the Registry to contact those applicants and their legal representatives that have provided incomplete applications in order to provide the Chamber with the necessary material.
- d. Refers to the Registry the issue of whether parents of victims who allege harm wish to participate on their own behalf for any personal harm they have suffered.
- e. Instructs the Registry to consult with the legal representatives of victims and to return to the Chamber with a proposal on common legal representation in accordance with Rule 90(2) of the Rules no later than 7 January 2009.
- f. Orders that any victim wishing to participate in person at any stage of the trial proceedings, to apply in writing to the Chamber no later than 9 January 2009.
- g. Orders the Registry to submit to the Chamber a report on the requests for protective and special measures of victims who have been granted status to participate no later than 9 January 2009.
- h. Orders the legal representatives of victims to inform the Chamber no later than 9 January 2009 if they intend to make an opening statement, and to furnish to the Chamber, the parties and other participants, with an outline thereof 7 days in advance of the commencement of trial.
- i. Orders the Registry to provide legal representatives of victims with the document listing the witnesses to be called in their order of appearance, referring to the witnesses by their reference number once it is filed.



- j. Instructs victims who wish to participate during the trial proceedings, in addition to Order (h), 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.

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**Judge Adrian Fulford**

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**Judge Elizabeth Odio Benito**

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**Judge René Blattmann**

Dated this 15 December 2008

At The Hague, The Netherlands