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

Date: 22 September 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

**Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and
a/0003/06 at the Confirmation Hearing**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Mr Jean Flamme

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda

PRE-TRIAL CHAMBER I (“the Chamber”) of the International Criminal Court (“the Court”);

NOTING the “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of *the Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo” issued by the Chamber on 28 July 2006¹ and which invited Mr Luc Walley and Mr Franck Mulenda, the legal representatives of victims a/0001/06, a/0002/06 and a/0003/06 (“the Victims’ Representatives”) to file observations on the arrangements for their participation at the confirmation hearing in the case pertaining to Thomas Lubanga Dyilo;

NOTING the “*Observations concernant les modalités de la participation des victimes*” filed by the Victims’ Representatives on 8 August 2006² (“the Observations of the Victims’ Representatives”);

NOTING the “*Décision autorisant le Procureur et la Défense à déposer une réponse aux observations des représentants légaux des victimes concernant les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l’audience de confirmation des charges*” issued by the single judge on 10 August 2006;³

NOTING the Prosecutor’s response to the Observations of the Victims’ Representatives filed on 11 August 2006⁴ by which the Prosecutor requests that the single judge reject the application presented by the Victims’ Representatives with a view to participating in the status conferences of 17 August 2006, 4 September 2006 and 19 September 2006;

¹ ICC-01/04-01/06-205-Conf-Exp.

² ICC-01/04-01/06-316-Conf

³ ICC-01/04-01/06-319

⁴ ICC-01/04-01/06-322

NOTING the decisions issued on 17 August 2006⁵ and 4 September 2006,⁶ rejecting the applications presented by the Victims' Representatives with a view to participating in the status conferences of 24 August 2006 and 5 September 2006, respectively;

NOTING the "*Requête urgente des victimes en rapport avec l'audience ex parte du 23 août et en obtention de mesures de protection*" filed on 22 August 2006⁷ ("the Urgent Application of the Victims' Representatives") by which the Victims' Representatives request that the names and all other information identifying victims a/0001/06, a/0002/06 and a/0003/06 not be disclosed to the Defence and to the public, and that they be deleted from the record of the Chamber, and that the victims be assigned a pseudonym for the entire proceedings, particularly at the confirmation hearing;

NOTING the decision issued on 22 August 2006⁸ by the single judge rejecting the Urgent Application of the Victims' Representatives;

NOTING the application filed on 22 August 2006 by Counsel for the Defence,⁹ in particular for the purpose of an extension to the time-limit for filing his response;

NOTING the decision issued during the status conference of 24 August 2006 in the case *The Prosecutor vs. Thomas Lubanga Dyilo*,¹⁰ by which the single judge granted Counsel for the Defence leave to submit his response by no later than 16.00 on Tuesday 5 September;

⁵ ICC-01/04-01/06-335

⁶ ICC-01/04-01/06-380

⁷ ICC-01/04-01/06-344-Conf, ICC-01/04-01/06-380

⁸ ICC-01/04-01/06-346

⁹ ICC-01/04-01/06-343-Conf, para. 18 ii)

¹⁰ ICC-01/04-01/06-T-13-EN

NOTING the second response of the Prosecutor to the Observations of the Victims' Representatives filed on 25 August 2006;¹¹

NOTING the "*Demande d'autorisation de formuler une réplique et demande d'audience ex parte*" filed by the Victims' Representatives on 30 August 2006;¹²

NOTING the "Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06" filed on 4 September 2006¹³ in which Counsel for the Defence reiterates that he had received notification of only victim a/0001/06's application for participation;

NOTING the "*Demande à pouvoir répliquer aux observations de la défense quant aux modalités de participation des victimes a/0001/06 à a/0003/06*" filed on 13 September 2006 by the victims' legal representatives;¹⁴

PURSUANT to articles 57 (3) (c), 61 (5), 61 (7), 67 and 68 (3) of the Rome Statute ("the Statute") and rules 87, 88, 89 (1), 91, 121 and 122 of the Rules of Procedure and Evidence ("the Rules");

CONSIDERING that it appears that Counsel for the Defence has signed the notification form pertaining to the applications for participation; that even assuming that he had not received all the applications for participation, it was, however, incumbent on him to verify the contents of what the Registry had sent before signing the form; that nevertheless, as the Chamber is mindful of the effective exercise of the rights of the Defence, it considers that the latter must receive a copy of the applications for participation of all the relevant victims;

¹¹ ICC-01/04-01/06-353

¹² ICC-01/04-01/06-364-Conf-Exp

¹³ ICC-01/04-01/06-379

¹⁴ ICC-01/04-01/06-432

CONSIDERING that under regulation 24 (5) of the Regulations of the Court, the participants may only reply to a response with the leave of the Chamber; that in this case, the Chamber considers that it is unnecessary for the victims' legal representatives to file a reply, in so far as the Chamber has sufficient information in view of the initial observations of the victims, Defence and Prosecutor;

CONSIDERING that as regards the application made by the Victims' Representatives for access to the entire record of the situation, it should be recalled that all the documents in the record of the situation which are relevant to the case pertaining to Thomas Lubanga Dyilo have already been transferred to the record of the case;

CONSIDERING that under rule 91 (2) of the Rules, the Victims' Representatives are entitled to attend and participate in the proceedings in accordance with the terms of the Chamber;

CONSIDERING that the confirmation hearing is an essential stage of the proceedings and that its objective is to determine whether there is sufficient evidence providing substantial grounds for believing that Thomas Lubanga Dyilo committed each of the crimes presented by the Prosecutor in his document of 28 August 2006;¹⁵

CONSIDERING as a consequence, that subject to their intervention being restricted to the scope determined by the charges brought against Thomas Lubanga Dyilo, the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered;

¹⁵ ICC-01/04-01/06-356.

CONSIDERING that in this case, victims a/0001/06 to a/0003/06 have insistently requested that their identities remain confidential during the proceedings leading to and at the confirmation hearing;

CONSIDERING that the recent deterioration in the security situation in certain regions of the Democratic Republic of the Congo (DRC) has had repercussions on the range of protective measures currently available and which might be implemented to protect victims a/0001/06 to a/0003/06 who are particularly vulnerable and live in risk areas of DRC; and that, in this context and following a meticulous examination of each case, non-disclosure of these victims' identities to the Defence for the purpose of the confirmation hearing, remains at present the only protective measure available and which might be implemented to duly protect them;

CONSIDERING that the Rome Statute is distinctive in the importance it affords to the participation of victims in proceedings;

CONSIDERING that in the circumstances of the case, the victims concerned can participate in proceedings effectively only if their anonymity is preserved;

CONSIDERING therefore that, the Chamber must determine which arrangements for participation are compatible with the anonymity of victims a/0001/06 to a/0003/06;

CONSIDERING that, in principle, the anonymous participation of the said victims at this stage in proceedings should be limited to: i) access to the public documents only; and ii) presence at the public hearings only; but that the Chamber retains the option to make an exception to this principle in the event of exceptional circumstances;

CONSIDERING that under rule 89 (1) of the Rules, it is possible for victims to make opening and closing statements at hearings to which they are invited;

CONSIDERING that it is possible for the victims' legal representatives to request leave to intervene during the public sessions of the confirmation hearing and that the Chamber will rule case-by-case and on the basis of the principles established in this decision;

CONSIDERING , however, that the fundamental principle prohibiting anonymous accusations would be violated, if victims a/0001/06 to a/0003/06 were permitted to add any point of fact or any evidence at all to the Prosecution's case-file presented against Thomas Lubanga Dyilo in the notification of charges document and the list of evidence; and that, in the opinion of the Chamber, victims a/0001/06 to a/0003/06 would therefore not be able to question the witnesses according to the procedure set out in rule 91 (3) of the Rules;

FOR THESE REASONS

ORDERS the Registrar to provide the Counsel for the Defence with a redacted copy of the notification form and of all the applications for participation which must be attached thereto;

REJECTS the application for leave to reply and the application for an *ex parte* hearing, filed by the Victims' Representatives;

REJECTS the application by the Victims' Representatives for access to the whole record of the situation;

DECIDES that the Victims' Representatives will participate in the confirmation hearing according to the arrangements set out below:

- i) Unless the Chamber decides otherwise in light of exceptional circumstances, the representatives of victims a/0001/06 to a/0003/06:

- a. will receive notification only of the public documents contained in the record of the case *The Prosecutor vs. Thomas Lubanga Dyilo*;
 - b. will attend only the status conferences or the parts of these conferences which are to be held in public, starting with the status conference scheduled for 14.00 on 26 September 2006;
 - c. will attend only those parts of the confirmation hearing held in public;
- ii) The Victims' Representatives may:
- a. make opening and closing statements at the confirmation hearing;
 - b. request during the public sessions of the confirmation hearing, leave to intervene, in which case the Chamber will rule case-by-case and on the basis of principles of the principles established in this decision;
- iii) The Victims' Representatives will not be able to add any point of fact or any evidence;
- iv) The Victims' Representatives will not be able to question the witnesses according to the procedure set out in rule 91 (3) of the Rules;

STATES that only if the victims agree to the disclosure of their identities to the Defence, will the Chamber examine the issue of determining whether they could be granted leave to participate in another manner in the proceedings taking place before the Pre-Trial Chamber in the case *The Prosecutor vs. Thomas Lubanga Dyilo*.

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

[signed]

Judge Claude Jorda

Presiding Judge

[signed]

Judge Akua Kuenyehia

[signed]

Judge Sylvia Steiner

Dated this Friday 22 September 2006

At The Hague

The Netherlands