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No.: ICC-01/04-01/06  
Date: **24 September 2007**

**TRIAL CHAMBER I**

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

**Registrar:** Mr Bruno Cathala

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

**Public Document**

**Submissions of the Legal Representative of Victim a/0105/06 in Response to the  
Order Setting out Schedule for Submissions and Hearings Regarding the Subjects  
that Require Early Determination**

**The Office of the Prosecutor**

Mr Louis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor  
Mr Ekkehard Withopf, Senior Trial Lawyer

**Counsel for the Defence**

Ms Catherine Mabilie

**Legal Representatives of the Victims**

Ms Carine Bapita Buyangandu  
Mr Luc Walley and Mr Franck Mulenda

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

Noting the *Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, rendered by Pre-Trial Chamber I on 20 October 2006, in which the Chamber decided that victim status is granted to Applicant a/0105/06 at the stage of the case of *The Prosecutor v. Thomas Lubanga Dyilo*;<sup>1</sup>

Noting the *Decision on the confirmation of charges*, issued by Pre-Trial Chamber I on 29 January 2007, which committed Thomas Lubanga Dyilo to a trial chamber for trial on the charges as confirmed;<sup>2</sup>

Noting the *Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Thomas Lubanga Dyilo*, rendered by the Presidency on 6 March 2007, by which the Presidency constituted Trial Chamber I and invested it with responsibility for the conduct of the trial in the case of *The Prosecutor v. Thomas Lubanga Dyilo*;<sup>3</sup>

Noting the *Request for submissions on the subjects that require early determination*, issued by Trial Chamber I on 18 July 2007,<sup>4</sup> by which the Chamber invited “*submissions – in the first instance in writing – on the list of issues, the dates for filing submissions and the timetable for hearings*” stating in particular that written submissions on the issues listed in paragraph 6 of the Request had to be filed by 17 August 2007;

Noting the *Order setting out schedule for submissions and hearings regarding the subjects that require early determination*<sup>5</sup> (the “Order”), issued by Trial Chamber I on 5

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<sup>1</sup> See *Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601-tEN, 20 October 2006.

<sup>2</sup> See *Decision on the confirmation of charges*, ICC-01/04-01/06-803-tEN, 29 January 2007.

<sup>3</sup> See *Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-842, 6 March 2007.

<sup>4</sup> See *Request for submissions on the subjects that require early determination*, ICC-01/04-01/06-936, 18 July 2007.

<sup>5</sup> See *Order setting out schedule for submissions and hearings regarding the subjects that require early determination*, ICC-01/04-01/06-947, 5 September 2007, para. 2, p. 2.

September 2007, setting 24 September as the deadline for filing written submissions on issues relating to the date of the trial, the languages to be used in the proceedings, the timing of disclosure of the evidence, and the e-Court Protocol;

Noting articles 50(2), 50(3), 64(3), 68(3) and 75 of the *Rome Statute*, and rule 131(2) of the *Rules of Procedure and Evidence*.

1. The Legal Representative of Victim a/0105/06 (the “Legal Representative”) hereby files her submissions in response to the issues listed in paragraph 2 of the Order.

**A. On the date of the trial**

2. Firstly, the Legal Representative respectfully informs the Chamber that she wishes to see the trial commence within the briefest delay possible. She submits, however, that the date of commencement of the trial should be set on the basis of proposals made by all participants and should take account of the said participants’ legitimate rights and interests. Under no circumstances should this date contravene the requirements of a fair and impartial trial.

3. The right to a fair and impartial trial is one of the inherent essential cornerstones of all the norms of the *Rome Statute* and enshrines, *inter alia*, the principle of equality of arms for all participants in the trial. Fair and impartial trial guarantees also apply to the participation of victims in proceedings before the Court, the principles of which are set out in article 68(3) of the *Rome Statute*. Fair and impartial trial requirements entail that victims participating in proceedings enjoy procedural rights that would likely afford them effective participation and ensure that they are on an equal footing with other participants in the proceedings. These procedural rights include the right to adequate opportunity and time to be able to

properly prepare for the proceedings as well as the right to inspect evidence in the record of the case and to be informed of the positions of the other participants.

4. However, at this stage of the proceedings, the Legal Representative does not regard herself as being in a position to provide details about the date by which she would be ready for the trial to commence, due to the fact that, to date, she has not had the opportunity to adequately familiarise herself with the record of the case nor has she been duly informed of all aspects of the legal positions of both the Prosecution and the Defence. In this regard, the Legal Representative directs the Chamber's attention to the following circumstances.

5. Firstly, the Legal Representative observes that during the pre-trial phase she did not have the opportunity to familiarise herself with the full record of the case, having had access only to public documents which afford but a very general and incomplete view of the proceedings. Accordingly, the information available to the Legal Representative to date does not enable her to properly form her own legal opinion in order to effectively participate in the trial.

6. Moreover, to date, the Legal Representative knows nothing of the intentions of both the Prosecution and the Defence with regard to the volume of evidence upon which either of them intends to rely, the number of witnesses, areas of agreement and the matters on which a consensus can be reached.

7. The Legal Representative also wishes to inform the Chamber about another matter which may have an impact on the commencement of the trial.

8. The Legal Representative applied to the Registry for additional means pursuant to regulation 83(3) of the *Regulations of the Court*, with a view to preparing documents and possibly conducting research prior to the trial such as to gather

material that would enable her to properly defend the interests of Victim a/0105/06 at the trial and especially for the purpose of reparation proceedings.

9. The said application was filed on 2 August 2007 and will be considered within 30 days. If the application is successful, a further 30 days must elapse before the funds can be released by the Court's financial services and made available to the Legal Representative.

10. Subsequent to this, the Legal Representative considers that a period of at least two months will be needed in order to put all the material together. In fact, the Legal Representative will need to apply to the national court for a "suppletory judgment" with regard to the date of birth of Victim a/0105/06; she will also need to travel to the north of the country to obtain certification about the victim's handling by an international organisation that supervised the family reunification and the international organisation which demobilised the child from the armed group.

11. The Legal Representative notes that the issue raised at paragraph 10 will also apply to other victims who may be allowed to participate.

12. Lastly, to date, the Legal Representative does not know whether the Chamber will examine the evidence presented under article 75 of the *Rome Statute* within the same context as the trial or in separate proceedings. Only after receiving an answer to this question will the Legal Representative be in a position to provide an estimate of the time she might need to adequately prepare for the trial.

13. In light of the foregoing, the Legal Representative notes that she is not in a position to provide details with regard to the commencement date for the trial. The Legal Representative respectfully submits that before considering this issue, the Chamber should first rule on the following issues at the hearing of 11 September 2007:

- Disclosure to the Legal Representative of materials in the record of the case that would enable her to adequately prepare for the trial;
- Disclosure to the Legal Representative of information regarding the volume of evidence upon which the Prosecution and the Defence intend to rely, their respective number of witnesses, as well as areas of agreement and matters on which a consensus can be reached;
- Whether the Chamber will examine the evidence presented under article 75 of the *Rome Statute* within the same context as the trial or in separate proceedings.

14. Once the above questions have been dealt with and the Registry has ruled on the application for additional means, the Legal Representative will be in a position to provide details to the Chamber with regard to the earliest date by which she would be ready for the trial to commence.

#### **B. On the languages to be used in the trial**

15. The Legal Representative respectfully informs the Chamber that she wishes to use French during the trial proceedings as a working language pursuant to article 50(2) of the *Rome Statute*.

16. Equally, the Legal Representative directs the Chamber's attention to the fact that her client is not capable of using either French or English in the trial proceedings as a working language pursuant to article 50(2) of the *Rome Statute*.

17. Although there is no provision in the founding documents of the Court for victims receiving representation to participate in person in the proceedings, it is likely that these victims may nevertheless be invited to provide information to the Chamber or to present their views and concerns. The question that then arises in this

regard concerns the languages which may or should be used by such victims for the purpose of the proceedings.

18. It appears from the founding documents of the Court that victims do not have an absolute right to use in the proceedings a language other than those specified in article 50(2) of the *Rome Statute*, i.e. French and English. However, this right may be granted to victims by decision of the Chamber.

19. Indeed, under article 50(3) of the *Rome Statute*, “[a]t the request of any party to a proceeding [...], the Court shall authorize a language other than English or French to be used by such a party [...], provided that the Court considers such authorization to be adequately justified.” In this respect, it should be observed that this article does not explicitly restrict the scope within which such “other language” may be selected.

20. The Legal Representative informs the Chamber that, for the purpose of the trial proceedings, her client is not capable of using only Alur and/or Swahili. However, the proceedings conducted in Swahili during the confirmation hearing demonstrated that Swahili has a variety of dialects. Consequently, Alur appears to be the most appropriate language for Victim a/0105/06 to use in the proceedings.

21. In light of the above and pursuant to article 50(3) of the *Rome Statute*, the Legal Representative requests the Chamber to authorise Victim a/0105/06 participating in the proceedings to use Alur in the event that the Chamber decides to invite the said victim, in person, to provide information or to present views and/or concerns.

22. Lastly, in relation to the evidence to be presented during reparation proceedings, the Legal Representative observes that it is highly likely that some documents will be drafted in languages other than the working languages, i.e. French or English. Similarly, it is highly likely that witnesses that may be called by the Legal Representative will be unable to testify in either of the Court’s working languages

and/or that written statements provided by other witnesses will not be drafted in French or English.

23. At this stage of the proceedings, the Legal Representative does not regard herself to be in a position to identify any languages other than French and English that it may be necessary to use for the presentation of evidence during reparation proceedings. She will only be in a position to do so upon review of all the evidence pertaining to reparation proceedings.

24. The Legal Representative respectfully requests the Chamber to reserve her the right to request from the Chamber, pursuant to article 50(3) of the *Rome Statute*, leave to use languages other than French and English for the purpose of presenting evidence during reparation proceedings at a later stage in the proceedings, in particular, after this evidence has been reviewed.

### **C. On the disclosure of evidence and materials**

25. The Legal Representative recalls that the main objective of victim participation in proceedings before the Court is, on the one hand, for victims to be able to present their views and concerns and, on the other, to obtain reparations for harm suffered.

26. The first prong implies that victims have the right to prior knowledge of the evidence in the record in order to then provide their views to the Chamber. The second prong implies that victims have the right to present evidence in support of their requests for reparations, particularly in relation to harm suffered. This implies that victims require knowledge of the record of the case in order to identify evidence relating to the harm suffered, such evidence being already available to the participants and the Chamber, and thereafter to choose the most appropriate strategy for adducing evidence in support of their requests for reparations.

27. Under article 64(3)(c) of the *Rome Statute*, it is for the Trial Chamber to “*provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.*”

28. Furthermore, under rule 131(2) of the *Rules of Procedure and Evidence*, victims and their legal representatives participating in the proceedings are entitled to consult the record of the case, subject to any restrictions concerning confidentiality and the protection of national security information.

29. In this respect, the Legal Representative notes that the two foregoing provisions also apply to victims authorised to participate in the trial.

30. However, to date, the Legal Representative has not had the opportunity to adequately familiarise herself with the record of the case. The Legal Representative is of the opinion that the restriction imposed to date upon her access to the record of the case does not enable her to adequately prepare and affects the effective participation of Victim a/0105/06 in the proceedings.

31. In any event, in the absence of the full index of the record of the case at the very least, the Legal Representative is not in a position to provide comprehensive submissions concerning the scope of the disclosure of evidence and materials to be requested. The Legal Representative respectfully submits that, before considering this issue, at the hearing of 11 September 2007, the Chamber should first rule on the disclosure issues set out in paragraph 13 of these submissions.

32. At the same time, the Legal Representative is hereby requesting that the Chamber grant her access, at the very the least, to the full index of the record of the case and reserve her the right to submit her proposals regarding the disclosure of evidence and materials after she has had the opportunity to inspect the record of the case and reviewed other participants' positions.

#### **D. On the e-Court Protocol**

33. First, the Legal Representative observes that she was not consulted during discussions on the e-Court Protocol used for the confirmation proceedings.

34. In addition, the Legal Representative never had the opportunity to make use of the said Protocol to present documents and/or materials and is therefore not in a position to identify all the potential problem areas which are likely to impact upon the participation of Victim a/0105/06 in the proceedings.

35. Nevertheless, the Legal Representative had the opportunity to read the e-Court Protocol and considers some aspects of the Protocol to be problematic; these aspects are summarised above and will be elaborated upon later at the hearing of 11 September 2007.

36. The first aspect relates to evidence “metadata”. Indeed, the Protocol does not allow participants to include the victim number of the victim to whom the evidence pertains. Yet, to be able to clearly identify the evidence relating to each victim, particularly in anticipation of evidence filed for reparation proceedings, it appears necessary for this information to be included in the “metadata”.

37. The second aspect concerns the need to ascertain whether certain data should be included in the “metadata”. The Legal Representative notes that the Protocol does not allow for the inclusion of information such as the victim number, the harm suffered, the description of the accident which caused the harm, the nature of the crime and certain information pertaining to the victim’s condition (age, gender, health), that may be material for the purpose of reparation proceedings in particular.

38. The Legal Representative wishes to discuss this matter with the relevant sections of the Registry, as well as with the other participants and wishes to have the opportunity to acquaint herself with the Protocol before stating her position.

39. Lastly, the third aspect concerns the fact that the Protocol does not provide for a “victim information” (analogous to the “witness information”). Such information could turn out to be useful when a victim appears before the Chamber to present his or her views and concerns and/or in the context of reparation proceedings.

40. In light of the foregoing, the Legal Representative does not regard herself to be in a position to make submissions on issues regarding the use of the e-Court Protocol because she has very limited knowledge of the Protocol and no experience of the Protocol as a user. The Legal Representative respectfully submits that before considering these issues, the Chamber should allow the participants to discuss them beforehand at the hearing of 11 September 2007, to consult one another on the matter and, subsequently, to grant them the opportunity to file their submissions at a later stage in the proceedings.

**FOR THESE REASONS, MAY IT PLEASE THE TRIAL CHAMBER TO**

1. First determine the following issues at the hearing of 1 October 2007, before considering the issues set out in paragraph 2 of the Order of 5 September 2007:

- a. the disclosure to the Legal Representative of materials in the record of the case in order to enable her to adequately prepare for the trial;
- b. the disclosure to the Legal Representative of information regarding the volume of evidence upon which the Prosecution and the Defence intend to rely, their respective number of witnesses, as well as areas of agreement and matters on which a consensus can be reached;

- c. whether the Chamber will examine the evidence presented under article 75 of the *Rome Statute* within the same context as the trial or in separate proceedings.

2. Authorise Victim a/0105/06 to use the Alur language in the event that the Chamber decides to invite the said victim to personally provide the Chamber with information or present views and/or concerns to the Chamber.

3. Reserve to the Legal Representative the right to request from the Chamber pursuant to article 50(3) of the *Rome Statute*, leave to use languages other than French and English for the purpose of presenting evidence in reparation proceedings, at a later stage in the proceedings, in particular, after this evidence has been reviewed.

4. Grant the Legal Representative access to the full index of the record of the case and reserve her the right to submit her proposals regarding the disclosure of evidence and materials after she has had the opportunity to inspect the record of the case and reviewed other participants' positions

5. Raise issues relating to the use of the e-Court Protocol at the hearing of 11 September 2007, and, subsequently, to grant the Legal Representative the opportunity to file her submissions at a later stage in the proceedings

6. Reserve to the Legal Representative the right to make her submissions and/or further observations on any issue that may be considered by the Chamber or discussed among all the participants at the hearing of 11 September 2007.

**Carine Bapita Buyangandu**

**Legal Representative of Victim a/0105/06**

[signed]

Dated this 24 September 2007

At The Hague, The Netherlands, and Kinshasa, Democratic Republic of the Congo