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No.: **ICC-01/04-01/06**
Date: **12 October 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

Observations of the Legal Representatives of Victims a/0001/06 to a/0003/06

The Office of the Prosecutor

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**Legal Representative of Victim
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**Legal Representatives of Victims
a/0001/06 to a/0001/06**

Mr Luc Walley and Mr Franck Mulenda

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Noting Trial Chamber I's invitation at the hearing of 2 October 2007 requesting that the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 (the "Legal Representatives") submit observations on the e-Court Protocol (the "Protocol") by 4 p.m. on Friday 5 October 2007¹ and on other issues within an unspecified time;²

Noting the "*Demande d'extension du délai*" filed by the Legal Representatives;³

Noting the "Decision on the request of the legal representatives of victims for an extension of time to file submissions on the e-court protocol"⁴ issued by Trial Chamber I, authorising the Legal Representatives to submit their observations on the Protocol by 12 October 2007 at the latest;

A. Parties and participants

1. The Chamber invited the participants to give an opinion on the meaning of the terms "parties" and "participants" in the documents of the Court. The Legal Representatives hereby present their observations on this issue, which is linked to a number of issues which arise in relation to the e-Court Protocol.

2. The term "participant" in the documents of the Court (for example in the Regulations of the Court), but also in the e-Court Protocol, refers to both the parties and the other persons authorised to participate in the proceedings (victims, States, *amici curiae*...). However, neither the Statute, nor the Rules of Procedure, nor even the

¹ See transcript of hearing of 2 October 2007, no. ICC-01/04-01/06-T-54-EN (Real Time), 2 October 2007, pp. 2-3, lines 22-11.

² Ibidem, 51, line 24 et seq.

³ See "*Demande d'extension de délai*", no. ICC-01/04-01/06-969, 4 October 2007.

⁴ See "Decision on the request of the legal representatives of victims for an extension of time to file submissions on the e-court protocol", no. ICC-01/04-01/06-973, 5 October 2007.

Regulations of the Court, explicitly specify which participants are also to be considered as “parties”. In certain documents, such as in article 57 of the Statute or in rule 34 of the RPE, the meaning of the term “party” seems to be fairly broad.⁵ In other provisions generally pertaining to a specific phase in the proceedings, the term seems to refer to the Prosecution and the Defence only.

3. The common meaning of the term is no more revelatory. The dictionary defines the term “*partie*”, in the context of criminal proceedings, as follows: “*Dr. Pén. Personne engagée dans un procès*”⁶ [translation: Cr. Law. Person involved in a trial]. One generally considers that parties in a criminal trial are those seeking a conviction (that is, the Prosecutor and/or *parties civiles*, in some legal systems), and those defending themselves against such claims (defendant or accused, civilly liable).

4. Although in some national courts, the victim can be a *partie civile*, and make a claim against the person charged, or even institute criminal proceedings, this is not the case for the victim participating in proceedings before the Court under article 68 of the Statute. Such victim participation does not transform the victim into an accuser. Only the Prosecutor must prove the guilt of the accused, whereas the victims participate in this stage of the proceedings to express their views and concerns.

5. On the other hand, when a victim requests that reparations be made by a person convicted under article 75 of the Statute, he or she files a complaint against this person, thus becoming, undeniably, a party to the case (plaintiff). Logically, and pursuant to rule 91(4), the legal representatives of the victims therefore have the same procedural rights as the other parties.

⁵ Article 57(3)(e) seems even to explicitly refer to the victims in speaking of the “benefit of the parties concerned”.

⁶ P. Robert. *Dictionnaire de la langue française*, Ed. 1983, p. 1367.

6. The requirements of the e-Court Protocol should not necessarily be the same for all the participants; a balance should be respected between the rights and obligations of the parties.

B. Observations on the e-Court Protocol

7. Firstly, the Legal Representatives observe that they were not consulted in the discussions on the Protocol used at the confirmation hearing, and accordingly were unable to put forward the specific requests of the victims. Moreover, the Protocol as approved by Pre-Trial Chamber I⁷ does not even contain mention of the legal representatives of the victims.

8. The Legal Representatives consider however that they must be included in any discussion on the Protocol, as the Trial Chamber could ask them to respect this Protocol when they file evidence or other documents, in particular during the reparations phase.

9. Recalling their submissions filed on 24 September 2007,⁸ the Legal Representatives would like the Chamber and the expert appointed by the Chamber to consider the following matters.

a) The obligations of the participants

⁷ See *inter alia* "Decision on the final system of disclosure and the establishment of a timetable", no. ICC-01/04-01/06-102, 15 May 2006; "Submission of a new version of the E-Court Protocol prepared jointly by the Office of the Prosecutor, the Defence and the Registry", no. ICC-01/04-01/06-201, 20 July 2006; "Decision on the new version of the draft protocol on the presentation of evidence prepared jointly by the Office of the Prosecutor, the Defence and the Registry", no. ICC-01/04-01/06-213, 27 July 2006; and "Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version for their Presentation During the Confirmation Hearing", no. ICC-01/04-01/06-360, 28 August 2006.

⁸ See "Submissions on Preliminary Issues", no. ICC-01/04-01/06-957-tENG, 24 September 2007.

10. Regulation 26 of the Regulations of the Court and regulation 24 of the Regulations of the Registry provide that documents and material may be filed by hand, by post or by email. Regulation 26 of the Regulations of the Registry makes it incumbent upon the Registrar to register such documents and material electronically.

11. The e-Court Protocol, drawn up by the Registry and the parties at the pre-trial phase of the proceedings, places the obligation on the participants to submit documents in a specific electronic format, and to provide a series of data for each document filed as evidence by either party.

12. The Legal Representatives consider that to place these obligations on all the participants, including the victims authorised to participate in the proceedings, before any request for reparations has even been made, would place a disproportionate burden on the victims. The victims may request to participate in person in the proceedings. While they may have one or more legal representatives, the representatives generally do not have the resources made available to the Prosecution and the Defence, even if legal aid had been granted by the Court, which is not necessarily the case (Victims a/0001/06 to a/0003/06 do not receive legal aid).

13. Accordingly, the Legal Representatives respectfully request that the use of this protocol remain optional for them, at least for the stage in the proceedings in which the victims intervene only under article 68 to express their views and concerns. If, in the event of reparations proceedings, the victims make representations as requesting parties under article 75, then clearly the documents and material they submit should be in keeping with the format prescribed in the Protocol.

14. The Legal Representatives also undertake to work in full compliance with the e-Court, but to the extent they are able to do so, and taking account of the specific modalities of participation that will be decided by the Court. In any event, they will observe any decisions taken in this respect.

(b) The contents of the metadata

15. The question of the contents of the metadata presents a number of problematic aspects of relevance to the victims, as was already raised by the Legal Representatives in their respective submissions of 24 September 2007.⁹

16. The Legal Representatives note that the Protocol renders the presentation of evidence cumbersome for all the participants. For the victims, it could impede the preparation of the requests for reparations.

17. The entire Protocol is designed for the phase of the proceedings for determining guilt. Moreover, even the Regulations of the Registry (regulation 27(4)) list six phases in the proceedings, but do not assign a specific code to the reparations phase, which is included in the trial phase. The Protocol does not provide for the inclusion of information such as, *inter alia*, the victim number, the harm suffered, a description of the incident at the origin of the harm, the nature of the crime and certain information relating to the victim's situation (age, gender, state of health).

18. However, in the interests of being able to identify the evidence relating to each victim, particularly in anticipation of the reparations process, it seems appropriate to be able to include such data in the metadata.

⁹ See *supra* footnote 8.

19. The Legal Representatives note that the disclosure to certain participants of all the data contained as electronic information could have an impact on the safety of the victims concerned. It is for this reason also that they would like the inclusion of certain information in the electronic file to remain optional. Moreover, the number by which a victim or victim witness is indexed in the metadata should never correspond to the code number assigned to the victims participating in the proceedings anonymously.

(c) The introduction of a “victim file”

20. The Legal Representatives observe that there is no provision in the Protocol for a “victim file” (similar to a “witness file”). Such a file could be useful in the event a victim makes a request for reparations before the Chamber under article 75 of the Statute, however it should be created by this victim’s representatives.

(d) On the Protocol fields currently disputed by the Parties

21. With regard to the Protocol fields currently disputed by the Parties, the Legal Representatives observe that the majority of the said information may also be useful to the Legal Representatives. If a participant were to enter such information in a data field it would always be on a subjective basis, and thus of relative value. Certain objective keywords essential to retrieving a document (author, recipient, date...), should be mandatory when the text of the document is not recognisable electronically. Others, (element of crime, mode of participation...) could be left optional.

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

Take into consideration the observations of the Legal Representatives as set forth in the present observations,

Instruct the expert appointed to examine and assess these observations.

[signed]

Luc Walley and Franck Mulenda (absent at signature); Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06

Done this 12 October 2007 at Brussels (Belgium) and Kinshasa (DRC)