

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

OPCV's analysis of the notions of "*victims*" and of "*victims who appear before the Court*" with Annexes

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I. Background

1. On 14 November 2007, Trial Chamber I issued an “Order scheduling a hearing”¹ for 29 November 2007 to discuss, *inter alia*, the request of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) to access documents in the case record² and protective measures for victims’ applicants.³

2. On 16 November 2007, in the “Order amending scheduling for hearing”, Trial Chamber I rescheduled the hearing on 5 December 2007;⁴ a subsequent order rescheduled the hearing on 4 December 2007.⁵

3. On 21 November 2007, the Office filed a request to appear before the Chamber during the hearing to be held on 5 December 2007 or to submit written observations in relation to point E. of the Order scheduling a hearing of 14 November 2007 dealing with protective measures for victims’ applicants, as well as on the dual status of witnesses/victims.⁶

4. On 27 November 2007, Trial Chamber I issued an Order, granting the Office to present oral observations on point E. of the Order of 14 November 2007 on protective measures for victims’ applicants at the hearing on 4 December 2007.⁷

¹ See the “Order Scheduling a hearing” (TC I), No. ICC-01/04-01/06-1027, 14 November 2007.

² *Ibid.*, pp. 3-4.

³ *Ibid.*, pp. 6-7.

⁴ See the “Order amending scheduling for hearing” (TC I), No. ICC-01/04-01/06-1031, 16 November 2007.

⁵ See the “Order amending scheduling for hearing and adding an item to the agenda” (TC I), No. ICC-01/04-01/06-1044, 27 November 2007.

⁶ See the “OPCV’s Request to submit observations or otherwise be heard on point E. of the Order of 14 November 2007 and on the issue of the dual status of witnesses/victims”, No. ICC-01/04-01/06-1038, 21 November 2007.

⁷ See the “Order on the Office of Public Counsel for Victims’ request filed on 21 November 2007”, (TC I), No. ICC-01/04-01/06-1046, 27 November 2007.

5. During the hearing held on 4 December 2007, Presiding Judge Fulford requested the Office to provide the Chamber with the documents related to *travaux préparatoires* for the draft of the Rome Statute and related to article 43(6) and article 68(1) of the Rome Statute, together with an analysis related to the use of the notions of “victims” and of “victims who appear before the Court”.⁸

6. The Office therefore submits the following analysis and the relevant documents related to the Preparatory Works⁹ for the drafting of articles 43(6) and 68(1) of the Rome Statute.

II. The notion of “Victims” *versus* the notion of “Victims who appear before the Court” in the context of the Court’s obligation to protect victims

7. The notion of “victims who appear before the Court” can be found throughout the founding texts of the International Criminal Court.¹⁰

8. It appeared first in article 43(6) of the Rome Statute dealing with the establishment of the Victims and Witnesses Unit (the “VWU”). However, it has to be noted that these terms are not defined and that the other provisions of the Statute merely mention the term “victim” without defining it either.

9. The *travaux préparatoires* leading to the adoption of article 43(6) of the Rome Statute do not provide a clear answer with regard to the meaning of the notion. Indeed, the drafts elaborated within the Preparatory Committee on the

⁸ See the Transcription of the hearing of 4 December 2007, No. ICC-01/04-01/06-T-62-ENG, p. 17, lines 21-25 and page 18, lines 1-2 (realtime).

⁹ The list of the relevant documents issued during the Preparatory Works is annexed to this document as Annex A.

¹⁰ See Annex B.

Establishment of an International Criminal Court solely mention “victims.”¹¹ No mention of the reason why the drafting changed to “victims who appear before the Court” when adopting the Statute¹² can be found since the discussions were held in a Working Group.¹³

10. When discussing the provisions pertaining to the protection of victims and witnesses, the term “victim” was replaced with the notion of “victims who appear before the Court” in article 43(6) of the Rome Statute. The term remained unchanged in article 68 of the Rome Statute. According to the Monitor dated November 1998, “[T]he Women’s and Children’s Caucuses expressed their disappointment over the fact that the protection would only apply to those witnesses and victims who appear before the Court.”¹⁴

11. As a result of the inclusion of the notion of “victims who appear before the Court” in article 43(6) of the Rome Statute and the mere use of the word “victims” in all the other articles of the Rome Statute, the Office argues that a distinction can be drawn when dealing with protection of victims.

12. Indeed, article 43(6) of the Rome Statute is setting up a Victims and Witnesses Unit and defines its responsibilities. As a result, the mandate of the Unit is limited, when acting *proprio motu* to “victims who appear before the Court.”

13. Article 68(1) of the Rome Statute, in contrast, establishes the principle according to which “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,” thus

¹¹ See *inter alia* the Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Addendum*, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, Article 44 (The Registry), pp. 69-70 and Article 68, pp. 108-109.

¹² As from the Recommendations of the Coordinator of the Committee of the Whole, UN Doc. A/CONF.183/C.1/L.45, 4 July 1998, article 44(4), p. 9.

¹³ In this sense, see the Proposal submitted by Canada, UN Doc. A/CONF./C/WGPM/L.58, 6 July 1998, footnote 2, p. 2.

¹⁴ See the International Criminal Court Monitor, Issue 10, November 1998, p. 14.

not limiting the protection to “victims who appear before the Court,” but covering all victims. Rules 87 and 88 of the Rules of Procedure and Evidence (“the Rules”) echo article 68(1) of the Rome Statute, referring to “victims” *tout court*.

14. Moreover, article 68(4) of the Rome Statute reinforces the fact that the Victims and Witnesses Unit only provides measures of protection to victims who appear before the Court and to witnesses. But according to this very same paragraph, the limited mandate of the Unit is only to be understood within the confine of its actions when advising “*the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.*”

15. Therefore, there is no derogation to the general obligation provided for in article 68(1) of the Rome Statute when implementing Chamber’s decisions with regard to the protection of victims, since this provision goes beyond the limited scope of the mandate of VWU.¹⁵

16. It is important to note that this interpretation is reinforced by the fact that references to “victims who appear before the Court” intervene only when express reference is made to article 43(6) of the Rome Statute. This is the case concerning rules 17 and 18 of the Rules and Chapter 3 of the Regulations of the Registry entitled “Responsibilities of the Registrar relating to Victims and Witnesses.” Accordingly, these provisions are limiting the mandate of the VWU to “victims who appear before the Court.” Express reference to article 43(6) of the Rome Statute is made in rule 17(1), followed by rule 18, of the Rules and in regulation 79 and the Regulations of the Registry, making it crystal clear that the provisions concerned are solely dealing with the *proprio motu* role of the VWU.¹⁶

¹⁵ In this sense, see DONAT-CATTIN (D.), “Article 68”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 883, margin 32.

¹⁶ See Annex B.

17. The Registrar, however, is still bound by any order issued by a relevant Chamber to protect victims, including victims who do not appear before the Court, as provided for in article 68(1) of the Rome Statute and rules 87 and 88 of the Rules.

18. There remains a problem as far as the Regulations of the Registry are concerned. Indeed, although the entire Chapter 3 refers to the *proprio motu* role of the VWU, regulation 94 clearly derogates to this general rule since it concerns “[m]easures taken pursuant to an order of a Chamber under rule 87.” And despite the fact that reference to rule 87 of the Rules is made, the Chapeau of regulation 94 still refers to “victims who appear before the Court.” However, out of respect of the hierarchy of legal texts, the said regulation should refer to “victims” *tout court*, in accordance with article 68(1) of the Rome Statute and in rule 87 of the Rules.

19. The clear distinction between the powers *proprio motu* of the VWU, limited to “victims who appear before the Court” on the one hand, and the general principle according to which the Court, and hence a relevant Chamber, can order protective measures or special measures in order to protect victims *tout court* on the other hand,¹⁷ does not give any additional information on the meaning of the notion of “victims who appear before the Court.”

20. Indeed, neither the Rome Statute, nor the Rules of Procedure and Evidence and the Regulations of the Registry define this notion.

21. In the absence of any definition provided for in the founding texts of the Court, a systematic study of the relevant provisions of the said texts is necessary in order to be able to apprehend the notion at stake. Indeed, pursuant to article 31(1) of the Vienna Convention on the Law of Treaties, “[a] *treaty shall be interpreted in good*

¹⁷ See also rule 87 and 88 of the Rules of Procedure and Evidence which refer to “victims” and not “victims who appear before the Court.”

faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁸

22. Throughout the founding texts of the Court, numerous terms are used to refer to victims. In each case, the term refers to a specific situation of the victims or the person concerned.

23. The texts refer, *inter alia*, to:

Article 18(1) of the Rome Statute	“where the Prosecutor believes it is necessary to protect persons”
Article 43(6) of the Rome Statute	“other who are at risk on account of testimony given by [...] witnesses”
Article 54(3)(f) of the Rome Statute	“protection of any person”
Rule 16(3) of the Rules of Procedure and Evidence	“victims who have expressed their intention to participate in relation to a specific case”
Rule 59(1)(b) of the Rules of Procedure and Evidence	“victims who have already communicated with the Court”
Rule 92(2) of the Rules of Procedure and Evidence	“victims or their legal representatives who have already participated in the proceeding or, as far as possible, those ^[19] who have communicated with the Court in respect of the situation or case in question”
Rule 93 of the Rules of Procedure and Evidence	“the views of victims or their legal representatives participating [in the proceedings] [and] the views of other victims”
Regulation 93(1) of the Regulations of the Registry	“persons at risk of the territory of the State where an investigation is taking place”
Regulation 95 of the Regulations of the Registry	“persons at risk of harm or death”
Regulation 96 of the Regulations of the Registry	“others considered at risk of harm and/or death on account of a testimony given by [...] witnesses or as a result of their contact with the Court”

¹⁸ See the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331. The text of the Convention is also available on the Website of the United Nations at the following address:
http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁹ The French translation of this rule, referring to “celles” enables to construe the English version as reading “victims who have communicated with the Court.”

24. Therefore, it seems that the term “person” is used to cover people in very different situations, namely, applicants’ victims or persons who were granted the status of victims, members of their family or any person at risk because of his or her interaction with the Court. On the other hand, the term “victim,” is also used to cover people in very different situations. It applies to victims who are participating in the proceedings before the Court by virtue of a decision of a Chamber, but it also refers to applicants’ victims (rule 16(3) of the Rules), or simply to persons having communicated with the Court and who may not even be applicants (rules 59(1)(b), 92(2) and 93 of the Rule). Therefore, it is very uneasy to draw any conclusion from the systematic approach.

25. In the absence of a clear conclusion to be drawn from a systematic approach, the Office suggests an interpretation in line with the scope of victims’ participation, as well as with the general obligation of protection binding upon the Court in accordance with article 68(1) of the Rome Statute.

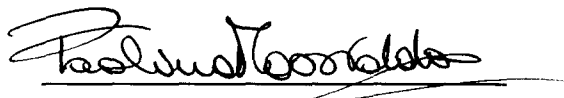
26. From the analysis of the *travaux préparatoires* it can be inferred that the drafters of the Rome Statute recognised that victims are extremely vulnerable and in need of protection, and that the basis for the drafting of article 68(1) was the United Nations Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power which includes that “*the responsiveness of judicial process [...] to the needs of the victims should be facilitated by: [...] d) taking measures to minimize inconvenience to victims, to protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.*”²⁰

27. Therefore, being the obligation upon the Court to protect victims formulated in general terms in article 68(1) of the Rome Statute, such obligation cannot be interpreted as limited to certain categories of individuals. This interpretation is

²⁰ See the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” adopted by the United Nations General Assembly, Resolution 40/34 of 29 November 1985.

supported by the analysis of the provisions of the founding texts of the Court which refers to the term “victims” *tout court*.²¹

28. On the other hand, the term “victims who appears before the Court” in article 43(6) of the Rome Statute should include a victim participating in the proceedings or a victim appearing before the Chamber for the purposes of rule 93 of the Rules. Moreover, since the representative of the Registry himself conceded it during the hearing held on 4 December 2007,²² the notion of “victims who appear before the Court” would benefit from the inclusion of applicants’ victims in the confines of article 43(6) of the Rome Statute.


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Dated this 7st day of December 2007

At The Hague

The Netherlands

²¹ The Office refers, in particular, to article 64 of the Rome Statute on the functions and powers of the Trial Chamber.

²² See the Transcription of the hearing of 4 December 2007, No. ICC-01/04-01/06-T-62-ENG, p. 6, lines 14-22 (realtime).