

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
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

**PROTECTION OF VICTIMS AND MANDATE OF
THE VICTIMS AND WITNESSES UNIT**

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The Registrar of the International Criminal Court (“the Court”)

NOTING the order scheduling a hearing of 14 November 2007;

NOTING the hearing of 4 December 2007;

NOTING articles 43(6), 68(1) et (4) of the Rome Statute, Rules 16 (4), 17, 18, 19, 85, 87 and 88 of the Rules and of Procedure and Evidence, Regulations 41 and 42 of the Regulations of the Court and Regulations 79 to 90 of the Regulations of the Registry;

CONSIDERING that in the above mentioned order, the Chamber stressed that it had emerged that “ there is a lack of agreement as to whether the Victims and Witnesses Unit has responsibility for the safety and well being of victims who have applied to participate in the trial during the period whilst their applications are pending”;

CONSIDERING that the representative of the Registrar made a reference to the indirect responsibility of the Victims and Witnesses Unit (the “VWU”) to protect victim applicants;

SUBMITS the following report on the protection of victims including victim applicants and the specific mandate of the VWU.

I. *Preliminary observations*

1. The exact definition of “victims who appear before the Court” has been the subject of discussion between the Chamber and the Parties and Participants in the trial, and the Registrar would not want to prejudge on definitions upon

which it is the purview of the Chamber to pronounce. However, the Registrar does wish in this report to clarify what the mandate and responsibilities of the VWU and other sections of the Registry are and to whom these obligations extend.

2. The scope of this report to the Chamber is three fold. First, an interpretation of the term "victims who appear before the Court" as used, *inter alia*, in article 43(6) and 68(4) of the Rome Statute will be provided as it is the key element in determining the mandate of the VWU. Second, the question of the responsibility of the Court under Article 68(1) of the Rome Statute with regard to victims including victims applying to participate in the proceedings will be addressed. Finally, in Annex 1 to this filing a document exposes the mechanisms of protection which could be implemented for victims as envisaged by the Registry.
3. This annex will be filed confidential in order to protect current participants of the ICCPP. This is consistent with the need to maintain the confidentiality of the protection mechanisms implemented by the VWU, in that they should not be made known to the public.

II. Interpretation of "victims who appear before the Court"

4. Article 43(6) of the Rome Statute establishes a Victims and Witnesses Unit within the Registry and sets out its responsibilities. The provision reads:

Article 43
The Registry
 [...]

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims how appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

5. The Rules of Procedure and Evidence define “victims” as follows:

Rule 85

Definition of victims:

- (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 organization or institution 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.

6. As the term “victim” is already legally defined within the legal framework of the Court, only the phrase “who appear before the Court” needs to be interpreted. This interpretation will ultimately determine the mandate of the Victims and Witnesses Unit under Article 43(6).

Interpretation according to the wording

7. The word “appear” is defined in the Oxford Dictionary as follows:

Appear *verb* 1 become or be visible. 2 present oneself, especially formally or publicly; *the Minstrels are appearing at the Victoria Theatre.* 3 act as counsel in a lawcourt; *I appear for the defendant.* 4 be published; *the story appeared in the newspaper.* 5 give a certain impression; *you appear to have forgotten.*¹

In the context of victims’ protection, the verb “appear” can therefore be interpreted in four different ways. It may simply refer to the exposure of a victim during the proceedings. It may imply physical presence of the victim in the Courtroom. It may also imply that a victim is represented by a legal representative who physically appears in the Courtroom. Finally, it may also refer to the identity of a victim being revealed in a document or in a statement during the proceedings. In the four cases, the victim must have been recognized a certain role in the proceedings. For example, a victim who would be present in the public gallery although physically present clearly would not be considered as appearing before the Court. This necessity to have victims who have been recognized a certain role in the proceedings is

¹The Oxford Paperback Dictionary, Oxford University Press, 2000.

interpreted as indicating that only victims recognized by a Chamber to participate in the proceedings or ask for reparations fall within the direct mandate of the VWU under article 43(6) of the Statute.

Interpretation according to the systematic context of the regulation

8. The phrase “victims who appear before the Court” is only used once in the Statute, namely in Article 43(6) of the Statute. Article 68(1), when referring to the overall responsibilities of the Court, does not restrict the term but instead refers to “victims” in general. At the same time, Article 68(4) specifically makes reference to Article 43(6) of the Statute, thus linking the mandate of the Victims and Witnesses Unit not to the general obligation of the Court but to the more specific regulation of Article 43(6) of the Statute.
9. The way “appear/appearance” is used throughout the Statute and the Rules of Procedure and Evidence (the “RPE”) in other contexts may be interpreted as implying a physical presence. For example:

Rule 65 of the RPE: Compellability

1. A witness who appears before the Court is compellable by the Court to provide testimony, unless otherwise provided for in the Statute and the Rules, in particular rules 73, 74 and 75.
2. Rule 171 applies to a witness appearing before the Court who is compellable to provide testimony under sub-rule 1.²

10. However, other provisions suggest otherwise. For example, Article 61 (1) of the Statute, when referring to the physical presence of the person charged at the confirmation of charges hearing states that “the hearing shall be held *in the presence of* the Prosecutor, and the person charged, as well as his or her counsel”. This wording leaves no doubt as to the fact that the person charged must appear physically before the Chamber. Also, Rule 68(a) of the RPE, in its French version, in order to refer to witnesses who gave a recorded testimony and will appear physically before the Chamber, reads “Si le témoin dont le

² Further examples are Articles 19 and 58, Rules 17(2)(a), 18(c), 20(1)(b), 58(3), 65(1) and (2), 75(1), 112(1), 114(1), 118(1) and (3), 119(3), 120, 121(1) and (2), 123(1), 125(4), 147(2) of the Rules of Procedure and Evidence.

témoignage *ne comparait pas en personne* devant la Chambre de première instance (...). The addition of the words “en personne” indicates that a person can appear before the Court without necessarily appearing in person.

11. The phrase “victims who appear before the Court” is used twice in the Rules of Procedure and Evidence, namely in Rules 17 and 18. Both of these Rules refer directly to the mandate of the Victims and Witnesses Unit. Contrary hereto, when referring to the competence of the Chamber to order protective measures no such restriction can be found. Instead Rules 87 and 88 refer to “victims” without any restrictions. Also, in Rule 16 of the RPE which refers to the Role of the Registrar when concluding relocation agreements rather than to the role of the VWU, the term “victims” is used. From this it is clear that the phrase “victims who appear before the Court” is used to define the specific mandate of the Victims and Witnesses Unit. The phrase is used in a consistent and deliberate manner and a clear distinction can be drawn between the different groups of individuals referred to.

Interpretation according to the purpose of this regulation

12. Article 43(6) of the Statute gives a specific mandate to a specific unit of the Court relating to specific categories of individuals. The phrase “victims who appear before the Court” describes a specific category of individuals who may benefit from the services of the Unit. It is distinct from a larger group of victims.
13. The term witness does not include such a limitation in Article 43(6) of the Statute. Consequently, also witnesses who will not appear physically before the Court fall into the mandate of the Victims and Witnesses Unit. However, the number of potential witnesses will always be considerably lower than the number of potential victims as encompassed in the wide definition of Rule 85 of the RPE. A restriction of the potential beneficiaries of the services of the Victims and Witnesses Unit was thus necessary. However, victims recognized

in a situation or in case are not as numerous as victims who apply for participation or reparations. This category of victims participating is more limited than the category of victims envisaged in Rule 85 of the RPE including its paragraph b. It could therefore be concluded that the services of the VWU, under article 43(6) of the Statute, are limited to victims participating in the case that is to say whose status has been recognized by a Chamber

Interpretation according to the drafting history of the regulation

14. Although different, it is difficult to separate the question of the protection of victims with that of their participation to the proceedings. When drafting the Rome Statute, the States Representatives decided to give a role to victims which had never been granted before other International Criminal Tribunals. By no means, the discussions held during the *travaux préparatoires* regarding the issue of protection of victims should be interpreted in a way which would refrain victims from exercising their rights as guaranteed under the Rome Statute.

15. It is clear that earlier drafts of Article 43(6) of the Statute referred to "victims and witnesses" and did not include the restriction "victims who appear before the Court"³.

16. However, the Committee of the Whole / Coordinator's Text on Articles 43 and 44 of 30 June 1998 includes the restriction as it is also reflected in the adopted Rome Statute. The relevant passage of the draft reads:

Article 44(4): The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate

³ For example, the Report of the Working Group on procedural matters as taken note of by the Preparatory Committee on the Establishment of an International Criminal Court on 14 August 1997 3), 120, 121(1) and (2), 123(1), 125(4), 147(2) of the Rules of Procedure and Evidence. The Addendum of the Report of the Preparatory Committee on the Establishment of an International Criminal Court of 14 April 1998.

assistance for witnesses, victims who appear before the Court, and for others who are at risk on account of testimony given by such witnesses.⁴

Finally, the recommendations of the Coordinator of 4 July 1998 included the following provision:

Article 44(3): The Registry shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and for others who are at risk on account of testimony given by such witnesses. [...]

It has been a deliberate decision by the drafters of the Rome Statue to include the phrase “who appear before the Court”, thus restricting in a way the mandate of the Victims and Witnesses Unit.

Conclusion

17. An interpretation of the Statute and the Rules supports a distinction between the general obligation of the Court towards victims and the specified mandate of the Victims and Witnesses Unit referring to “victims who appear before the Court”.
18. “Victims who appear before the Court” only refers to those victims participating in the proceedings and whose status has therefore been recognized by a Chamber.
19. However, the scope and modalities of protection the VWU provides to a particular individual will depend upon the scope and modalities of participation of the individual in question (and, typically, the resulting correlation in risk to which this individual is exposed). For example, due to the number of victims recognized in a situation, preventive measures should address most of the threats to this category of victims in order to have a viable system.

⁴ A/CONF.183/C.1/L.36, 30 June 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June-17 July 1998, Committee of the Whole, Coordinator’s Text on Articles 43 and 44.

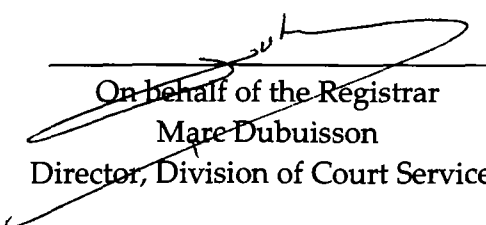
III. *The General obligation of the Court to protect victims*

20. Pursuant to Article 68 (1) of the Rome Statute, "The Court shall take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of victims and witnesses". The language used in this Article is much broader than that of Article 43(6) and can encompass victims who appear before the Court, victims participating in the situation or in the case and victim applicants. The Rome Statute as the Rules of Procedure and Evidence indeed make reference to the term victim to refer to a victim whose application has been accepted by a Chamber or to a victim applicant. Rule 89 (1) thus states that a "In order to present their views and concerns, victims shall make written application to the Registrar (...)".
21. The VWU, as a section of the Registry, that is an Organ of the Court therefore has a responsibility with regard to all victims including victim applicants. However, it shares this responsibility with other sections of the Registry, other Organs, the participants to the proceedings and the Chambers. In this context, the Registry submits that the defence and the legal representatives should also be bound by the same obligation to protect victims and witnesses as the Court as mentioned in Article 68.
22. As a section with an expertise in the area of protection, the VWU shall play a key role. However, it will not be able to succeed without the active involvement of all the Organs of the Court as well as the defence and the legal representatives.
23. The responsibility undertaken by the VWU first involves an advisory role to the Court in light of its expertise and its responsibilities under 43(6) of the Statute as envisaged in Article 68(4). It also involves the training of the actors who will be in contact with victims. The VWU will also implement measures which will be decided by a Chamber, *proprio motu* or upon request, in order to protect victims.

24. In the Registry's perspective, the protection of victims in the context of Article 68 (1) is based on three key principles. First, throughout the proceedings, the Court should ensure that victims take as few risks as possible; prevention remains the best mechanism of protection. The VWU could at this stage play an important role in advising the legal representatives and the Chambers. The VWU, to the extent possible, shall endeavor to give them a full picture of what the situation in the field is in terms of risk and in terms of possibilities to control these risks. Should the situation in the field be uncontrolled, the right to participation of victims will have to be carefully balanced with their right to safety.

25. Second, the Registrar considers that one possible approach to protection of victims would be to develop a system of "representative victim" whereby a group of victims would elect one or two victims who would accept to appear physically in Court and/or reveal his or her name to the parties and possibly to the public. The Chamber could play an important role in identifying these groups of victims as early as practicable. This would trigger the competence of the VWU under Article 43(6) as interpreted above. This person could benefit from more drastic measures of protection including, in last resort, relocation.

26. Third, the Registrar believes that should a staff Member of the Court, a Party or Participant to the proceedings have endangered the life of a victim by way of an interaction with him or her, the Court has a responsibility towards this victim. Although the VWU may arrange for protection of such a victim, the Organ, the Party or Participant should be responsible for such behaviour.


On behalf of the Registrar
Mare Dubuisson
Director, Division of Court Services

Dated this 12 December 2007

At The Hague, The Netherlands