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

Date: **31 January 2008**

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

**Corrigendum to the Response of the Legal Representatives of Victims a/0001/06 to
a/0003/06 to the Applications of the Defence and the Prosecutor for Leave to
Appeal the Decision of 18 January 2008**

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Ms Carine Bapita Buyangandu

Noting the *Decision on Victims' Participation* of 18.1.2008,¹ ("the Decision");

Noting the Prosecutor's "Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' Participation" of 28.1.2008;²

Noting the Defence application of 28.1.2008 for leave to appeal the *Decision on Victims' Participation* rendered on 18.1.2008;³

The Legal Representatives of Victims a/0001/06 to a/0003/06 hereby have the honour to submit a response to the applications of the Defence and the Prosecutor in accordance with regulations 24(2) and 65(3) of the *Regulations of the Court*.

I. GENERAL OBSERVATIONS

1. The Decision relates to the following problems:
 - A. The criteria to be applied to applications by victims to participate
 - B. Modalities of participation of victims
 - C. Common legal representation for victims
 - D. Protective and special measures for victims
 - E. The dual status of victim-witness
2. A final decision has not yet been taken on a series of issues, even though the Chamber has already indicated the direction in which it considers it may rule. Points C and E are not being challenged by any party.
3. The problems relate first and foremost to the victims. The Legal Representatives wish to avoid an appeal, not because they have no criticism of the Decision, but because they consider that an appeal lodged just before the start of the trial is not likely to advance the proceedings.

¹ ICC-01/04-01/06-1119.

² ICC-01/04-01/06-1136.

³ ICC-01/04-01/06-1135.

1. *The conditions under which an appeal may be authorised*

4. Article 82(1) of the *Rome Statute* provides that:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. *Appealable decision*

5. A trial chamber cannot grant leave to a party to appeal against a decision it endorses under the pretext that the reasoning is not appropriate. In its decision of 13 July 2006,⁴ the Appeals Chamber recalled that:

Only an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject.

6. The Legal Representatives consider that the role of the Appeals Chamber is not to give legal advice or instructions to the trial chambers, but to uphold or set aside decisions. For example, it would not be for the Appeals Chamber to issue in the abstract an opinion on the legal force of United Nations General Assembly resolution 60/47 on the principles relating to the rights of victims, or to decide on the extent to which that instrument should be taken into account in a future decision.⁵

7. Both the Prosecutor’s and the Defence applications are therefore inadmissible, because they do not concern the decisions of the Chamber (orders of the Court), but the grounds set forth by the Chamber to support decisions which the future appellants are not challenging, and because they concern the grounds which may support future decisions.

⁴ ICC-01/04-168.

⁵ It should, however, be noted that the General Assembly resolution of 16 December did not exist at the time the Statute and the *Rules of Procedure and Evidence* were drafted (there was only a draft which was subsequently modified but which evidently did not have the legal weight of a General Assembly resolution).

8. The Defence and the Prosecutor both attach great importance to the separate and partially dissenting opinion of Judge Blattmann. However, the victims' representatives understand that Judge Blattmann supports the decisions contained in the judgment of 18 January, while disagreeing on the principles to be taken into account to decide which victims other than the current participants may be granted leave to participate.

9. Although the Majority and the Minority thus expressed opinions about how this issue will have to be resolved in the future, this cannot be considered to be a "decision" at this point. Decisions on applications for participation are effectively individual decisions. At this point in time, we do not know what those decisions will be, and in any case, the parties may seek leave to appeal them.

10. The only "decision" to which the applications relate is the one concerning the disclosure of certain documents (f). If an appeal were to be granted, it should be restricted to the only decision f).

3. Potential impact of the decision on the fair and expeditious conduct of the proceedings or the outcome of the trial

11. Furthermore, it should be considered whether the Decision involves "an issue that would significantly affect the fair and expeditious conduct of the proceedings⁶ or the outcome of the trial". In its decision of 13 July 2006, the Appeals Chamber wrote:

Hence, the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.

⁶ The two conditions are cumulative. See *Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58*, ICC-02/04-01/05-20-US-Exp, 19 August 2005 and *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, 13 July 2006.

12. The Defence and the Prosecutor are wrong to claim that the outcome of the trial (the decision on the guilt of the accused and the sentence) may be affected by the number of participants and/or the conditions in which the victims participate in the proceedings. It is in fact difficult to imagine the accused's being found guilty only on the basis of evidence tendered by the victims. By claiming that the Chamber might convict the accused on the basis of unlawful or questionable evidence tendered by the victims, the Prosecutor shows little faith in the legal proceedings.

13. The fair conduct of the trial is not affected either. Neither the Prosecutor nor the Defence demonstrates how the application of the Chamber's decision would result in an unfair trial. Nor do they demonstrate how the decision may slow down the proceedings. In any event, a concern for expeditiousness alone would not warrant an appeal, if the fairness of the trial is not at issue.

II. THE PROSECUTOR'S APPLICATION

1. Criterion for determining which victims may participate in the proceedings

14. The Legal Representatives are sensitive to the arguments set out by the Prosecutor, who considers that the Decision places too great a burden on the victims by allowing some uncertainty as to the criteria to be taken into account in order to participate in the proceedings, by requiring them to submit at least two different applications, and by allowing the participation of victims who experienced different events and have different problems from those currently participating. However, they consider that the Chamber itself may still clarify certain matters, and that those factors are not such as to affect the fairness and expeditiousness of the proceedings – whether in general or in respect of a particular participant – and that they will not influence the outcome of the trial.

2. Modalities of participation

15. The modalities of victims' participation in the proceedings are not governed by the Statute or the *Rules of Procedure and Evidence*, but are left to the discretion of each chamber. Rule 89(1) states that it is the Chamber which shall "specify the proceedings and manner in which participation is considered appropriate...".

16. The legislative intent was to grant the Chambers great discretion to organise the modalities of victim participation in accordance with the specific nature of the case and the stage of the proceedings, with respect for the fundamental rights of the victims under article 68(3) of the Statute and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

17. The modalities of participation therefore necessarily differ from one chamber to another – or from one case to another – according to the nature of the case, the number of victims, accused persons and witness, the relationship between the victims participating in the proceedings and the accused, and so on. By way of example, in respect of the questioning of witnesses by the legal representatives of victims, rule 91(3)(b) states that the Chamber shall take into account "the stage of the proceedings, the rights of the accused, the interests of the witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3".

18. The limited experience of the Court shows that the pre-trial chambers and the appeals chambers do not adopt a uniform approach towards the modalities of victim participation, which is consistent with the Statute and the Rules of Procedure.

19. In principle, it is difficult to imagine that a chamber – even an appeals chamber – would rule on the manner in which another chamber intends to organise its hearings, including the modalities of how victims may participate in the proceedings before that chamber.

Possibility for victims to tender evidence

20. The Prosecutor maintains that victims are not entitled to tender evidence pertaining to the guilt or innocence of the accused. In actual fact, the Chamber did not decide that victims may tender evidence with a view to proving the guilt or innocence of the accused, but to “establishing the truth”. This comes at the request of the Chamber, which is vested with this authority under article 69(3) of the Statute and rule 91(3) of the *Rules of Procedure and Evidence*.

21. Although it is not the role of the victims to bring or assess charges or to prove the guilt of the accused, they must nevertheless not be deprived of the opportunity to tender evidence which supports their views and concerns or helps to provide the Court with full and complete information about the issues which concern them.

22. The Prosecutor is in no way obliged to use against the accused evidence tendered by the legal representatives of the victims. Admittedly, they cannot prevent documents they submit or witnesses they request leave to question from being used by one of the parties as evidence of the guilt or innocence of the accused, even though that is not their objective. However, the legal representatives fail to see how that would infringe the right of the parties or of the Chamber.

23. Although, as the Prosecutor states, the victims may tender evidence which is unconvincing or even of questionable origin, there is nothing to prevent the Prosecutor or the Defence from requesting that the Court disregard it or exclude it from the discussions.

24. Far from forbidding victims from submitting documents, rule 91(3)(b) explicitly states that the Chamber may provide directions on the manner and order of the questions to be put to witnesses (by legal representatives) and the production of documents.

25. In this respect, the Decision therefore represents a strict application of the Statute and the *Rules of Procedure and Evidence*, such that it does not appear necessary to seek clarification from the Appeals Chamber. Furthermore, this issue concerns the rights of victims, not the rights of the Prosecutor or the Defence, which cannot be jeopardized by another participant's being authorised to tender evidence which may yet be challenged.

26. In many national legal systems, victims may submit as much evidence as the prosecutor or the defence, without that affecting the fairness of the trial or infringing the rights of the defence.

Access to the documents in the record

27. The Legal Representatives are not satisfied in respect of this point. The Legal Representatives consider that, pursuant to rule 131(2) of the *Rules of Procedure and Evidence*, the Chamber should have granted them access to all the documents submitted to the Chamber, subject to restrictions on disclosure of such information, where applicable, in the case of documents classified as confidential.

28. However, the Legal Representatives do not consider it necessary for the Appeals Chamber to rule on this matter.

29. Nevertheless, the victims might at the very least hope to at least be aware of the documents which concern them directly. The right to know is a fundamental right of victims recognised in international law.⁷

30. The victims are surprised that the Prosecutor objects to disclosing to the victims documents in his possession which concern them directly, and they fail to see why the Court could not order the Prosecutor to inform the victims of such documents,

⁷ United Nations GA resolution 60/147, principle X.

despite the fact that it is not an explicit requirement of the Statute or the Rules of Procedure.

31. None of the points raised by the Prosecutor is likely to prejudice the fairness and impartiality of the trial. In fact, the Defence also obtains disclosure of all the documents of concern to it, and much more also, since any incriminating and potentially exculpatory evidence must be disclosed to the Defence.

32. Certain victims' having knowledge of the documents which concern them directly could not make the trial unfair or impartial, if those same documents are disclosed to the Defence. In many legal systems – civil-law systems in particular – victims are automatically entitled to consult the entire case file and therefore all the evidence to which the Defence has access.

III. THE DEFENCE APPLICATION

33. The Defence applications partly concur with those of the Prosecutor. However, the Defence is not attempting to show how certain issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

34. The possibility for the victims to present certain evidentiary materials or to question witnesses can never infringe the principle of a fair trial or the rights of the Defence. Such possibilities which are open to victims at national level have never been censured by an international court such as the European Court of Human Rights.

35. Equality of arms is in no way correlated to the number of participants. Clearly, prosecuting a large number of accused persons does not result in equality of arms being tipped in favour of the Defence. Similarly, the fact that legal systems in civil-law countries have multiple "accusers" – the *parties civiles* and the prosecutor – does not mean there is no equality of arms. This is even less the case if the victims are merely granted leave to participate in the proceedings without having the status of

parties to the case at the first stage of the trial and without being able to bring charges against the accused.

36. The possibility for certain victims to participate in the proceedings anonymously is in no way excluded by any of the Court's basic documents. The Decision is very measured on this point and no final individual decision has yet been made by the Chamber on the matter.

IV. CONCLUSION

37. It must be noted that the Decision cannot affect the fair conduct of the proceedings and the judgment on the charges against the accused, and that any disagreements on the modalities of victims' participation do not constitute an issue for which an immediate resolution by the Appeals Chamber is necessary to materially advance the proceedings.

38. On the contrary, granting the appeals would risk delaying the handling of the case considerably. Indeed, it is hard to imagine the trial commencing without the parties', the participants' and even the Chamber's having agreed on the modalities governing victim participation. An appeal before the Appeals Chamber would necessarily involve an exchange of submissions and discussions, which would make it unlikely that the trial could start on 31.3.2008 as scheduled.

39. The victims' representatives wish for the trial to be able to commence on the scheduled date, but would also like to be able to prepare under satisfactory conditions. Although a decision by the Appeals Chambers may be issued prior to 31 March, an appeal would make it impossible for the victims' representatives to prepare their participation in the trial. They must have a final decision on which to base the modalities of their participation, the composition of their team, a possible rearrangement of the teams, consultation of the documents to which they have access and preparation of their interventions. Like the Defence, they are entitled to a reasonable amount of time to prepare for trial.

40. In any event, a possible appeal should not have suspensive effect.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER:

To dismiss the applications of the Prosecutor and the Defence seeking leave to appeal the decision of 18.1.2008;

In the alternative, to order that any appeal granted shall not have suspensive effect.

Dated this 31 January 2008

At Brussels, Belgium and Kinshasa, Democratic Republic of the Congo

Luc Walley [signed] and Franck Mulenda (absent at signing)
Legal Representatives of Victims a/0001/06 to a/0003/06