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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

Public Document

**Prosecution's Response to the "Observations conjointes des représentants légaux
des victimes sur la communication des documents et pièces produits au cours du
procès"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

On 26 February 2009, the Legal Representatives of Victims filed a joint application seeking: (i) advance access to documents the parties intend to use during trial, or (ii) in the alternative, permission to make a request to examine a witness following the Defence's examination, in the case where a document that had not been previously disclosed to the Legal Representatives had been shown to that witness. In response to this request, the Prosecution submits that both the Trial Chamber and the Appeals Chamber have determined that victims' participation at a given stage in the trial proceeding can only occur once the victim has identified a relevant personal interest with precision and has demonstrated that their personal interest is affected by the particular step in the proceeding. The request and ultimate determination are necessarily conducted on a case-by-case basis, and are not granted generally with respect to the entire proceeding.

Background

1. On 23 February 2009, the Trial Chamber invited the Legal Representatives of victims to submit written observations on their request for the disclosure of documents that the parties intend to introduce through witnesses by Thursday, 26 February 2009. The Trial Chamber ordered the parties to file their responses by Monday, 2 March 2009.¹
2. On 26 February 2009, the Legal Representatives of victims filed the "Observations conjointes des représentants légaux des victimes sur la communication des documents et pièces produits au cours du procès" (the "Legal Representatives' Common Observations"), requesting (i) advance access to documents that the parties intend to introduce at trial, and (ii) alternatively, where the Defence examines a witness on a document not yet disclosed to the

¹ ICC-01/04-01/06-T-0133-CONF-ENG ET, page 78, line 6 to page 79, line 9.

Legal Representatives, that the Legal Representatives be granted the right to make a request to examine the witness following the Defence's examination.²

3. The Prosecution hereby responds to the Legal Representatives' Common Observations.

Prosecution's Observations

(i) Request to advance access to material to be used at trial

4. The Prosecution submits that the Trial Chamber has established a procedure for documentary disclosure by the Prosecution to the participating victims by which victims may make a written request to the Prosecution to disclose materials within its possession that are relevant to a defined personal interest of the victim.³ Only those materials that have been determined to be relevant to the personal interest outlined by the victim in writing are subsequently disclosed to the victim. As a consequence, participating victims have a right to receive material which the Prosecution may use at trial only when it is relevant to his or her defined personal interest.
5. The victims' legal representatives argue that access to the materials that the parties intend to use during trial is necessary in order for them to exercise their participatory rights as confirmed by the Appeals Chamber.⁴ The Prosecution submits that in its judgment of 11 July 2008, the Appeals Chamber allowed victims, on a case by case basis and subject to demonstrating that their personal interests are affected, to lead evidence pertaining to the guilt or innocence of

² Observations conjointes des représentants légaux des victimes sur la communication des documents et pièces produits au cours du process, 26 February 2009, ICC-01/04-01/06-1740.

³ See Trial Chamber I "Decision on victims' participation" of 18 January 2008, ICC-01/04-01/06-1119, para 111 and "Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation"", ICC-01/04-01/06-1368.

⁴ See the Legal Representatives' Common Observations, at para 7 and 33.

the accused and to challenge the admissibility or relevance of evidence during the trial. The Appeals Chamber maintained, nonetheless, that the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defence.

6. The Appeals Chamber emphasised that the system set out by the Trial Chamber “did not create an unfettered right for victims to lead or challenge evidence”, and only permitted victims to lead and examine evidence under the following conditions:⁵ (i) a discrete application by victims to that effect; (ii) notice to the parties; (iii) demonstration that the victims’ personal interests are affected by the specific proceedings; (iv) compliance with disclosure obligations⁶ and protection orders; (v) a determination of appropriateness; and (vi) consistency with the rights of the Accused⁷ and a fair trial.⁸

7. In terms of access to the case record, Rule 131 (2) of the Rules of Procedure and Evidence (“Rules”) grants victims participating in the proceedings or their legal representative the right to access “the record of the proceedings” subject to confidentiality restrictions.⁹ According to Regulation 21 (2) of the Regulations of the Registry, the record of the proceedings contains amongst others, materials submitted by the parties, such as filings¹⁰ and evidence registered by

⁵ “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/06-1432 OA 9 OA 10, 11 July 2008, at para 99.

⁶ The Trial Chamber can also rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence.

⁷ The Appeal’s Chamber found that the Trial Chamber should be vigilant in safeguarding the rights of the Accused: it can take into account, *inter alia*, whether the hearing of such evidence would be appropriate, timely or for other reasons should not be ordered.

⁸ “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/06-1432 OA 9 OA 10, 11 July 2008, at para 104.

⁹ See also Trial Chamber I “Decision on victims’ participation” of 18 January 2008, ICC-01/04-01/06-1119, at paras 105 to 107.

¹⁰ “Documents and material as originally filed with the Registry by a participant”, see Regulation 21(2) (b) of the Regulations of the Registry.

the Registry¹¹. This provision grants participating victims access to materials only once they have been registered in the case file and subject to confidentiality restrictions. Consequently Rule 131 (2) of the Rules does not grant victims access to materials that the parties intend to use at trial before they have actually been tendered into evidence, unless upon an application such materials had been determined by the Trial Chamber to be relevant to their personal interests.

8. It is correct that the Trial Chamber ordered the Prosecution to provide the Chamber, the Defence and the participants with “a list of any documents that, as far as the Prosecution is concerned, are going to arise during the course of evidence of those witnesses, together with any documents that the Prosecution is going to seek to introduce from the bar table”¹² at least seven days before a witness is expected to testify.¹³ Although the *list* of such documents was to be distributed in advance, the order of the Trial Chamber did not expressly include the *disclosure* of these documents to the victims’ legal representatives.¹⁴ Furthermore, disclosure of the documents themselves is not required for the victims to exercise their legal interests, given that they have access to the Prosecution’s list of witnesses, summary of presentation of evidence and lists of evidence upon which the Prosecution intends to rely at trial. The Trial

¹¹ “The evidence as registered by the Registry in accordance with Regulation 28”, see Regulation 21(2) (g) of the Regulations of the Registry.

¹² ICC-01/04-01/06-T-0104-ENG ET, 16 January 2009, page 38, line 24 to page 39 line 23.

¹³ See also ICC-01/04-01/06-T-119-CONF-ENG ET, 5 February 2009, at page 1 line 24 to page 3 line 8.

¹⁴ The Prosecution notes as well that the initial deadline for legal representatives to submit their applications to question a witness was set eight days prior to the scheduled appearance of a witness, (ICC-01/04-01/06-T-110-CONF-ENG ET, 28 January 2009, at page 15 line 3 to page 18 line 25) and thus prior to receiving the Prosecution’s list of documents. Following an application by victims’ legal representatives (ICC-01/04-01/06-1659, 2 February 2009) this delay was subsequently changed to seven days, to allow victims’ legal representatives to consult the Prosecution’s weekly list of documents, before submitting their applications to question witnesses. The Chamber’s order, however, did not include granting victims’ legal representatives’ access to all documents contained in the Prosecution’s list.

Chamber has deemed that access to these materials is sufficient to allow the victims to make discrete applications for participation.¹⁵

9. The Prosecution notes that during the trial proceeding, the Trial Chamber denied a request by a Legal Representative to access a document used by the Defence during the examination of a Prosecution witness. In that case, the Trial Chamber did not grant the request based on the fact that (i) the witness was not a victim represented by the Legal Representative and (ii) the Legal Representative had not filed an application to question the witness and had thus not invoked his client's personal interest in intervening.¹⁶ The Trial Chamber's view was that access to the document in these circumstances went beyond the scope of what the Legal Representative is entitled to receive.

10. An additional factor to be considered is the anonymity of the participating victims and the challenges of providing unrestricted access to documents to victims whose identity is not known by the parties and whose interest in receiving the documents is uncertain. Of the 93 participating victims in the present case, both parties are aware of the identity of only the five dual status victims.¹⁷ The Prosecution submits that this is one element for consideration by the Trial Chamber in weighing any case-by-case requests for participation of victims against the rights of the Accused. It may not be appropriate for the parties to be providing anonymous victims with sensitive documents in advance of their admission into evidence.¹⁸ Frequently, the parties include documents on the advance notification lists that are not ultimately used during

¹⁵ "Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 'Decision on victims' participation'", ICC-01/04-01/-6-1368, 2 June 2008, paragraph 29.

¹⁶ ICC-01/04-01/06-T-114-CONF-ENG ET, 3 February 2009, at page 61, lines 9 to 22.

¹⁷ Victims a/0002/06, a/0047/06, a/0048/06, a/0050/06, a/0052/06.

¹⁸ Furthermore, in determining access rights of participating victims in *The Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui*, the Pre-Trial Chamber I distinguished between anonymous and non-anonymous victims and granted access to the entire case file only to victims whose identity is known to the parties. See "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", ICC-01/04-01/07-474, 13 May 2008, at para 127 to 132.

the trial for various reasons. In such a case, the subsequent dissemination of these materials is intended to be restricted.

11. Finally, the Prosecution submits that although the victims' Legal Representatives have to date been provided with materials listed on the Prosecution's weekly list of documents, this has been done as a courtesy. In the Prosecution's submission this courtesy is not intended to be interpreted as recognition of a legal right to access the documents, nor as establishing a practice that the Prosecution will necessarily follow in other cases.

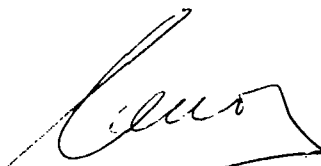
(ii) Request to examine witnesses following the Defence examination

12. In the alternative, the Legal Representatives are seeking an order that they be permitted to make a request to examine a witness following the Defence's examination in cases where they have not been provided with advance access to a document used during the Defence examination. In response to this request, the Prosecution submits that neither the Court's basic documents nor the pivotal Appeals Chamber decision grant a general right to the Legal Representatives of victims to examine or re-examine witnesses. Rather, under the clear terms of Rule 91 (3) (a) and (b) questioning of a witness by a legal representative may only take place after an application is made before the Trial Chamber, which shall determine whether the application ought to be granted after considering, inter alia, the stage of the proceedings and the rights of the accused. In turn, the Appeals Chamber reaffirmed the principle that a legal representative must file a request which will be considered on a case-by-case basis and must demonstrate that a particular victim's personal interests are affected by the specific proceedings.
13. Although the Trial Chamber has ordered that the participants may question a witness, if leave has been granted, following the questioning of the party

calling the witness,¹⁹ the Prosecution submits that nothing prevents them from making a discrete application for re-questioning the witness after cross-examination has taken place if they can establish that the personal interests of a victim are sufficiently affected to warrant the relief sought. In deciding on the application, the Trial Chamber will determine the appropriateness and consistency of the request balanced against the rights of the Accused.

Relief Requested

14. Based on the foregoing, the Prosecution requests that the application of the Legal Representatives to be given a general right in the abstract to receive in advance all documents that the parties intend to introduce at trial be denied and that only specific rights be granted on a case by case basis when personal interests are demonstrated.
15. With respect to the alternative request, the Prosecution submits that in appropriate circumstances the participants ought to be permitted to make discrete applications to examine witnesses where they can demonstrate that their personal interests are affected and their participation is not inconsistent with the rights of the Accused.



Luis Moreno-Ocampo
Prosecutor

Dated this 2nd day of March 2009
At The Hague, The Netherlands

¹⁹ ICC-01/04-01/06-T-104-ENG, page 37, lines 8-25, page 38, lines 1-3.