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

Date: **1 April 2011**

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**PUBLIC**

**Joint Observations of the Legal Representatives of Victims on the Procedure for  
Applying Article 70 of the Rome Statute**

Source: The Legal Representatives of Victims a/0001/06-a/0003/06, a/0047/06-a/0052/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06-a/0227/06, a/0229/06-a/0233/06, a/0236/06, a/0238/06-a/0240/06, a/0244/06, a/0245/06, a/0248/06-a/0250/06, a/0001/07-a/0003/07, a/0005/07, a/0054/07-a/0060/07, a/0063/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07-a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0188/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07-a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0007/08, a/0122/08-a/0126/08, a/0130/08, a/0149/08, a/0404/08-a/0407/08, a/0409/08, a/0612/08, and a/0613/08

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

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**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. PROCEDURAL HISTORY

1. On 29 March 2011, the Chamber instructed the parties and participants to file, by 1 April 2011 at 16.00, observations on the procedure for applying article 70 of the Rome Statute, and in particular, on whether responsibility for the conduct of investigations under that article lies solely with the Office of the Prosecutor.<sup>1</sup>
2. Accordingly, the Legal Representatives of Victims submit to the Chamber their joint observations on the procedure for applying article 70 of the Rome Statute.

## II. OBSERVATIONS OF THE LEGAL REPRESENTATIVES

*a. The Court's jurisdiction over offences against its administration of justice*

3. Article 70(1) of the Rome Statute clearly and explicitly sets out the Court's power to exercise jurisdiction over offences against its administration of justice when committed intentionally. It follows that the Court's power in this regard is statutory, unlike the similar power held by the two *ad hoc* international criminal tribunals, namely, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"),<sup>2</sup> which is considered to be "inherent power"<sup>3</sup> and cannot, therefore, be limited through regulation.<sup>4</sup>

4. Under article 70(2) of the Rome Statute, the principles and procedures governing the Court's exercise of jurisdiction over offences against the administration of justice shall be those provided for in the Rules of Procedure and Evidence. Those principles and procedures are governed by rules 162 to 169 of the Rules of Procedure and Evidence. Therefore, the Legal Representatives will not

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<sup>1</sup> Email from the Chamber to the parties and participants, 29 March 2011, entitled "Article 70 proceedings".

<sup>2</sup> Rule 77 of the Rules of Procedure and Evidence of the ICTY and the Rules of Procedure and Evidence of the ICTR. These documents are available at: [www.icty.org](http://www.icty.org) and [www.unictl.org](http://www.unictl.org).

<sup>3</sup> *Idem.*, Rule 77(A) of the Rules of Procedure and Evidence of the ICTY and the Rules of Procedure and Evidence of the ICTR.

<sup>4</sup> ICTY, *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-R77, [Decision on Motion for Acquittal Pursuant to Rule 98 bis](#), 19 March 2004, para. 14.

merely read article 70 in conjunction with rule 165, but with all the aforementioned rules so as to be able to respond to the question posed by the Chamber.<sup>5</sup>

5. Regarding the Court's exercise of jurisdiction in this matter, rule 163(2) of the Rules of Procedure and Evidence states that the provisions of Part 2 of the Rome Statute and any rules thereunder shall not apply to the procedures under article 70 of the Rome Statute, with the exception of article 21. It follows that the scope of the principle of complementarity set out in the Rome Statute does not affect the Court's exercise of jurisdiction over offences against the administration of justice<sup>6</sup> and that, consequently, the Court has discretion to exercise its jurisdiction in this matter.

6. When deciding whether to exercise jurisdiction under article 70 of the Rome Statute, the Court *may* consult with States Parties that may have jurisdiction over the offence<sup>7</sup> although it is expected *to give favourable consideration* to a request from the host State for a waiver of the power of the Court to exercise jurisdiction in cases where the host State considers such a waiver to be of particular importance.<sup>8</sup> However, if the Court decides not to exercise its jurisdiction, it *may* request a State Party to exercise jurisdiction pursuant to article 70(4) of the Rome Statute.<sup>9</sup> In that case, when agreeing to exercise jurisdiction, the State Party is expected to extend the provisions of its national laws penalizing offences against the integrity of its investigative or judicial process to offences against the administration of justice under article 70 of the Rome Statute, where the offences have been committed on its territory or by one of its nationals.<sup>10</sup>

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<sup>5</sup> See above, para. 1.

<sup>6</sup> The idea of subjecting the procedures under article 70 of the Statute to the complementarity regime was rejected during the preparatory work for the adoption of that article. See H. Friman, *Offences and Misconduct against the Court*, in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. 2001, at p. 609.

<sup>7</sup> Rules of Procedure and Evidence, rule 162(1).

<sup>8</sup> *Ibid.* rule 162(3).

<sup>9</sup> *Ibid.* rule 162(4).

<sup>10</sup> Rome Statute, article 70(4)(a).

7. Furthermore, when deciding whether to exercise jurisdiction, the Court is expected to take into account a number of factors on the non-exhaustive list under rule 162(2) of the Rules of Procedure and Evidence.<sup>11</sup>

8. Lastly, upon request by the Court, whenever it deems it proper, the State Party in question is supposed to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.<sup>12</sup>

*b. Law applicable to the procedure under article 70 of the Rome Statute*

9. Article 70 of the Rome Statute concerns “offences”, while articles 5 to 8 of the Rome Statute concern “crimes”. This in itself shows that the drafters of the Rome Statute wanted to draw a distinction between two types of offence within the jurisdiction of the Court.<sup>13</sup> Under rule 163(1) of the Rules of Procedure and Evidence, the Rome Statute and the Rules of Procedure and Evidence shall apply *mutatis mutandis* to the Court’s investigation, prosecution, and punishment of offences defined in article 70, with the exception of the provisions of rules 163(2) and 163(3) of the Rules of Procedure and Evidence.

10. It follows that all the norms and principles as set out in the texts of the Court concerning, *inter alia*, questions relating to gathering evidence, conducting investigations, preparing and conducting the trial, appeal, and any review procedure, must apply by analogy to the investigations and procedures under article 70, with the exception of the provisions of Part 2 of the Rome Statute and the rules thereunder, governing, *inter alia*, questions relating to challenges to the jurisdiction of the Court or the admissibility of the case. Moreover, the general principles of

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<sup>11</sup> The use of the term “*notamment*” in the French version and the term “in particular” in the English version of rule 162(2) of the Rules of Procedure and Evidence suggests that it is indeed a non-exhaustive list.

<sup>12</sup> Rome Statute, article 70(4)(b).

<sup>13</sup> W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Inc., New York, 2010, p. 856.

criminal law set out in Part 3 of the Rome Statute must also apply to the procedures under article 70, apart from the principle of *ne bis in idem*, which is specifically defined in respect of offences against the administration of justice in rule 168 of the Rules of Procedure and Evidence.<sup>14</sup>

*c. Categories of offence against the administration of justice over which the Court has jurisdiction*

11. Article 70(1) of the Rome Statute provides an exhaustive list of offences against the administration of justice over which the Court has jurisdiction, while emphasizing that any such offence must be committed intentionally. The scope of the article extends to the relevant offences, regardless of the stage of the proceedings at which they are committed<sup>15</sup> and it is not limited to offences committed in the presence of the Chamber.<sup>16</sup>

12. By contrast, rule 77 of the Rules of Procedure and Evidence of both the ICTY and the ICTR provides a non-exhaustive<sup>17</sup> list of acts or omissions that could constitute “contempt” for which any person who knowingly and wilfully interferes with the administration of justice may be held responsible.<sup>18</sup>

*d. Conditions for proceedings under article 70 of the Rome Statute*

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<sup>14</sup> The drafters of the Rules of Procedure and Evidence considered that since the principle of *ne bis in idem* in article 20 of the Rome Statute is closely related to the principle of complementarity, *ne bis in idem* is not applicable to the procedures under article 70 of the Rome statute. H. Friman, “Offences and Misconduct against the Court”, above, footnote 6, at p. 615.

<sup>15</sup> K. Harris Article 70. *Offences against the administration of justice*, in O. Triffterer (ed.). *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden, 1999, at p. 919.

<sup>16</sup> The proposal to introduce such a restriction to the scope of article 70 of the Rome Statute was rejected. See *Working Paper on Article 70, Offences against the Integrity of the Court*, UN Doc. A/CONF.183/C.1/WGPM/L.68/Rev.1, 11 July 1998.

<sup>17</sup> The use of the word “*notamment*” in the French version and the term “including” in the English version of rule 77(a) suggests that it is indeed a non-exhaustive list. See rule 77(A) of the Rules of Procedure and Evidence of the ICTY and the Rules of Procedure and Evidence of the ICTR, above, footnote 2.

<sup>18</sup> *Idem.*, Rule 77 of the Rules of Procedure and Evidence of the ICTY and the Rules of Procedure and Evidence of the ICTR.

13. Although the Court's exercise of its jurisdiction under article 70 of the Rome Statute is discretionary,<sup>19</sup> the competent Chamber is expected to take into account a number of factors listed under rule 162(2) of the Rules of Procedure and Evidence, including the availability and effectiveness of prosecution in the State Party.<sup>20</sup> That formulation, when combined with the express exclusion of the applicability of the provisions of article 53 of the Rome Statute governing the initiation of an investigation to the procedures under article 70 of the Rome Statute,<sup>21</sup> lends all the more weight to the idea of the drafters of the Court's texts that it would be desirable for offences against the administration of justice before the Court to be investigated and prosecuted in the first instance by the States Parties in accordance with their national laws.<sup>22</sup> That idea is based on, but only minimally reflects, the endeavours of the authors of the Statute of an international criminal court drafted by the International Law Commission in 1994, whose purpose was to impose on the States Parties the obligation to prosecute perjury before the competent domestic court.<sup>23</sup>

14. In addition, pursuant to article 68(1) of the Rome Statute, it is the duty of the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Accordingly, in making a decision whether or not to delegate jurisdiction to a State Party under article 70, the competent Chamber must take into account, in addition to the factors listed in rule 162(2) of the Rules of Procedure and Evidence, the overall security situation in the State Party concerned, as well as specific issues relating to the safety of the person alleged to have committed offences against the administration of justice.

15. Under rule 164(2) of the Rules of Procedure and Evidence, the offences defined in article 70 of the Rome Statute shall be subject to a period of limitation of

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<sup>19</sup> See II(a) above.

<sup>20</sup> Rules of Procedure and Evidence, rule 162(2)(a).

<sup>21</sup> Rules of Procedure and Evidence, rule 165(2).

<sup>22</sup> In that respect, see W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, above, footnote 13, p. 857.

<sup>23</sup> *Report of the International Law Commission on the work of its forty-sixth session*, UN Doc. A/49/10, 2 May-22 July 1994, article 44(2), pp. 130-131.

five years from the date on which the offence was committed, provided that during this period no investigation or prosecution has been initiated. The period of limitation is applicable only where the Court decides to exercise jurisdiction under article 70 of the Rome Statute.<sup>24</sup> That period of limitation was set intentionally and its purpose was to distinguish between an “offence” under article 70 of the Rome Statute and “crimes” within the jurisdiction of the Court under articles 5 to 8 of the Rome Statute.<sup>25</sup> This period of limitation is interrupted if an investigation or prosecution is conducted during that period, either before the Court or by a State Party with jurisdiction over the case.<sup>26</sup>

16. Rule 165(1) of the Rules of Procedure and Evidence vests in the Office of the Prosecutor the power to initiate and conduct investigations with respect to offences defined in article 70 of the Rome Statute on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source. The restrictions contained in article 53 of the Rome Statute on the initiation of an investigation do not apply to the procedures under article 70 of the Rome Statute.<sup>27</sup>

17. Unlike the system established by the legal instruments of the two *ad hoc* international criminal tribunals,<sup>28</sup> no statutory or regulatory provision in the texts of the Court makes explicit provision for a procedure under article 70 to be initiated by the Chamber itself. However, the Chamber, just like “*any reliable source*,” may communicate the information at its disposal to the Prosecutor, who shall decide whether to initiate an investigation for the purpose of applying article 70 of the Rome Statute.<sup>29</sup>

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<sup>24</sup> *Outcome of the inter-sessional meeting held at Mont Tremblant, Canada, from 30 April to 5 May 2000, circulated at the request of Canada*, UN Doc. PCNICC/2000/WGRPE/INF/1, 24 May 2000, p. 85, footnote 75.

<sup>25</sup> H. Friman, *Offences and Misconduct against the Court*, footnote 6 above, p. 612.

<sup>26</sup> Rules of Procedure and Evidence, rule 164(2).

<sup>27</sup> Rules of Procedure and Evidence, rule 165(2).

<sup>28</sup> Rules 77(C) and 77(D) of the Rules of Procedure and Evidence of the ICTY and the Rules of Procedure and Evidence of the ICTR, footnote 2 above.

<sup>29</sup> Rules of Procedure and Evidence, rule 165(1).



18. According to rule 163 of the Rules of Procedure and Evidence, issues relating to the conduct of investigations and proceedings on the merits under article 70 of the Rome Statute must be regulated by the same statutory and regulatory standards which govern the procedures for investigating and prosecuting crimes over which the Court has jurisdiction under articles 5 to 8 of the Rome Statute, except for the provisions of article 59 of the Rome Statute on arrest proceedings in the custodial State.<sup>30</sup> It follows that the same standards for the administration of justice must similarly apply both to proceedings in respect of crimes over which the Court has jurisdiction under articles 5 to 8 of the Rome Statute and proceedings under article 70 of the Rome Statute,<sup>31</sup> barring the exceptions specified in rule 163 and rule 165 of the Rules of Procedure and Evidence. In addition, with respect to the powers of a Trial Chamber relating to proceedings under article 70 of the Rome Statute, according to rule 165(4) of the Rules of Procedure and Evidence, the Chamber may, if necessary and having regard to the rights of the Defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8 of the Rome Statute.

19. The texts of the Court therefore make no provision for a specific and/or simplified procedure for considering proceedings under article 70 of the Rome Statute as against the procedures for investigating and prosecuting crimes falling under the jurisdiction of the Court pursuant to articles 5 to 8 of the Rome Statute. In particular, the drafters of the Rules of Procedure and Evidence rejected the proposal that a provision be included in the Rules specifying that proceedings under article 70 of the Rome Statute could be heard by a Chamber with fewer judges than the number expressly provided for in the Rome Statute, whether that be a Pre-Trial

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<sup>30</sup> Rules of Procedure and Evidence, rule 165(2).

<sup>31</sup> Regarding the importance of upholding the same standards, see the report by Amnesty International: *International Criminal Court: Drafting effective Rules of Procedure and Evidence concerning the trial, appeal and review—Memorandum for participants at the Siracusa intersessional meeting, 22 to 26 June 1999*, June 1999. This document is available at: <https://www.amnesty.org/download/Documents/148000/ior400091999en.pdf>.

Chamber, a Trial Chamber or the Appeals Chamber.<sup>32</sup> Moreover, the texts of the Court make no provision for investigations for the purposes of proceedings under article 70 of the Rome Statute to be conducted by a body other than the Office of the Prosecutor of the Court.

20. Conversely, the legal instruments of two *ad hoc* international criminal tribunals allow for the designation of an *ad hoc* investigator where it is inappropriate for the Prosecutor to conduct the investigations insofar as the allegations are made against a member of the Prosecutor's staff. Indeed, where, in the view of the Chamber, the Prosecutor has a conflict of interest with respect to the conduct in question, it may direct the Registrar to appoint an *amicus curiae* to investigate the matter and inform the Chamber whether there are sufficient grounds to instigate contempt proceedings.<sup>33</sup>

21. Such a mechanism could apply by analogy in the Court's legal framework where staff members of the Office of the Prosecutor are the target of or affected by allegations of offences against the administration of justice under article 70 of the Rome Statute which would give rise to a manifest conflict of interest that could prevent the Prosecutor's impartial discharge of his or her duty to investigate allegations made under that article. In such case, it would be appropriate to request the Registry to appoint an *ad hoc* investigator who has no, and has never had any connection with the Office of the Prosecutor, and who has the requisite qualifications in accordance with the criteria applicable under regulation 137 of the Regulations of the Registry, to investigate and prosecute alleged Article 70 offences.

22. Since article 59 of the Rome Statute does not apply to proceedings under article 70 of the Rome Statute,<sup>34</sup> it would appear that the States Parties are not, in

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<sup>32</sup> H. Friman, *Offences and Misconduct against the Court*, footnote 6 above, pp. 614-615.

<sup>33</sup> Rules 77(C) and 77(D) of the Rules of Procedure and Evidence of the ICTY and the Rules of Procedure and Evidence of the ICTR, footnote 2 above. See also ICTY, *Prosecutor v. Radoslav Brđjanin*, Case No. IT-99-36/R77, "Order instigating proceedings against Milka Maglov", 8 May 2003.

<sup>34</sup> Rules of Procedure and Evidence, rule 165(2).

principle, bound to execute any order by the Court to arrest a person who is on their territory and who is alleged to have committed an Article 70 offence. Nonetheless, the Court may, in this connection, seek international cooperation and judicial assistance from the State in question under article 70(2) and (4) of the Rome Statute and rule 167 of the Rules of Procedure and Evidence. When making a request for cooperation, the Court must specify that the request concerns Article 70 offences<sup>35</sup> having due regard to the fact that the conditions for providing international cooperation to the Court with respect to proceedings under that article are governed by the domestic laws of the requested State.<sup>36</sup>

23. However, in case of an alleged Article 70 offence committed in the presence of the Chamber, the Prosecutor may orally request the Chamber to order the immediate arrest of the person concerned.<sup>37</sup>

*e. Sanctions imposed under article 70 of the Rome Statute*

24. According to the provisions of article 70(3) of the Rome Statute, in the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both. The modalities for determining a sentence under article 70(3) of the Rome Statute are set out in detail in rule 166 of the Rules of Procedure and Evidence. Rule 166(2) of the Rules of Procedure and Evidence states that article 77 of the Rome Statute on applicable penalties shall not apply to proceedings under article 70 of the Rome Statute with the exception of an order of forfeiture under article 77(2)(b) of the Rome Statute which may be ordered in addition to imprisonment or a fine, or both. Pursuant to the provisions of rule 164(3) of the Rules of Procedure and Evidence, enforcement of sanctions imposed with respect to offences defined in article 70 of the Statute shall be subject to a period of limitation of 10 years from the date on which the sanction has become final. The period of limitation shall be interrupted with the

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<sup>35</sup> Rules of Procedure and Evidence, rule 167(1).

<sup>36</sup> Rome Statute, article 70(2).

<sup>37</sup> Rules of Procedure and Evidence, rule 169.

detention of the convicted person or while the person concerned is outside the territory of the States Parties.

**Consequently, the Legal Representatives of Victims respectfully request the Trial Chamber to:**

- take account of the above observations.

[signed]

Mr H. Diakiese

[signed]

Ms P. Massidda

[signed]

Mr Joseph Keta

Dated this 1 April 2011

At The Hague, Netherlands