

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06  
Date: 9 December 2008

**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**

**Decision on the prosecution's oral request regarding applications for protective  
measures**

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo, Prosecutor  
 Ms Fatou Bensouda, Deputy Prosecutor  
 Mr Ekkerhard Withopf, Senior Trial  
 Lawyer

**Counsel for the Defence**

Ms Catherine Mabilie  
 Mr Jean-Marie Biju Duval

**Legal Representatives of the Victims**

Mr Luc Walley  
 Mr Franck Mulenda  
 Ms Carine Bapita Buyangandu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

**The Office of Public Counsel for the  
 Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Vaatainen

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

## Background and submissions

1. The agenda for the Status Conference on 28 May 2008 contained the “time-line for the filing of applications for protective measures at trial”.<sup>1</sup> The Chamber requested the Office of the Prosecutor (“prosecution”) to file the protective measures applications for witnesses during the trial expeditiously in order to allow sufficient time to the defence to respond to the application and for the Chamber to consider the submissions.<sup>2</sup>
2. The prosecution informed the Chamber that following the advice of the Registry’s Victims and Witnesses Unit, it will file “in the near future” applications for protective measures that are similar for all witnesses who are in the Court’s protection programme, seeking the distortion of their image and voice and the assignment of a pseudonym.<sup>3</sup>
3. The prosecution made an oral application to be allowed to speak to those witnesses who are not included in the Court’s protection programme about their security situation, upon their arrival in The Hague and a few days prior to their appearance in court, in order to establish whether an application for protective measures, or amendments to an existing application, need to be filed. Reference was made to the Chamber’s “Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial” (“Decision on witness’ familiarisation”):<sup>4</sup> the prosecution submitted that the sole matter to be raised with the witnesses was that of their security, and it offered to tape-record the conversations.<sup>5</sup> The prosecution submitted that Rule 87 of the Rules of Procedure and Evidence (“Rules”) envisages that applications for protective

<sup>1</sup> Agenda for Status Conference on 28 May 2008 and scheduling order, 21 May 2008, ICC-01/04-01/06-1343, paragraph 2

<sup>2</sup> Transcript of hearing on 28 May 2008, ICC-01/04-01/06-T-88-ENG, page 57, lines 15-23

<sup>3</sup> ICC-01/04-01/06-T-88-ENG, page 58, lines 2-16.

<sup>4</sup> ICC-01/04-01/06-1049, 30 November 2007.

<sup>5</sup> ICC-01/04-01/06-T-88-ENG, page 58, line 17 to page 59, line 20

measures are to be filed by the parties, although it expressed an interest in any practical solution.<sup>6</sup>

4. The defence responded orally by stating that the Victims and Witnesses Unit was the body responsible for the protection of victims and witnesses.<sup>7</sup>

### **Analysis and conclusions**

5. The Chamber's Decision on witness' familiarisation held that the practice known as the "proofing" of witnesses by a party calling a witness will not be allowed, and the Victims and Witnesses Unit is responsible for dealing with witnesses in advance of their testimony before the Court.<sup>8</sup> In addition, Rule 87(1) of the Rules provides that the Victims and Witnesses Unit, as appropriate, may be consulted by the Chamber before protective measures are ordered. The Chamber remains of the view that the Victims and Witnesses Unit is the only organ of the Court which should deal with witnesses upon their arrival in The Hague, including reviewing their security. However, there should be close cooperation between the Unit and the prosecution, particularly in light of Article 68(4) of the Statute which provides that the "Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6."
6. Nonetheless, the Trial Chamber considers that, pursuant to Rule 87 of the Rules, the responsibility for filing applications for protective measures lies primarily with the party calling a witness. The prosecution is therefore directed to file applications for protective measures for witnesses it is to call, based on the information already in its possession and supplemented, as appropriate, by

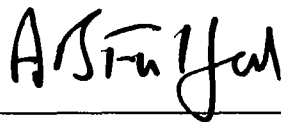
<sup>6</sup> ICC-01/04-01/06-T-88-ENG, page 60, line 20 to page 61, line 5.

<sup>7</sup> ICC-01/04-01/06-T-88-ENG, page 60, lines 3-12

<sup>8</sup> ICC-01/04-01/06-1049, paragraphs 35-52

any relevant information provided by the Victims and Witnesses Unit at the time of the filing of the applications. Thereafter, the prosecution may raise orally, or by way of a filing, any new information, provided by the Victims and Witnesses Unit concerning the witnesses prior to, or following, their evidence at trial, which is relevant to their security.

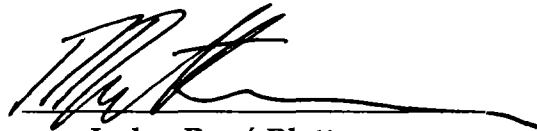
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 December 2008

At The Hague, The Netherlands