

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 21 January 2009

**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 defence application for disclosure of victims applications**

**Decision 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

**Legal Representatives of the Victims**

Mr Luc Walley  
 Mr Franck Mulenda  
 Ms Carine Bapita Buyangandu  
 Mr Joseph Keta Orwinyo  
 Mr Jean Louis Gilissen  
 Mr Jean-Chrysostome Mulamba  
 Nsokoloni  
 Mr Paul Kabongo Tshibangu  
 Mr Hervé Diakiese

**Unrepresented Victims****The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**States Representatives****Counsel for the Defence**

Ms Catherine Mabilie  
 Mr Jean-Marie Biju Duval

**Legal Representatives of the Applicants**

[1 name per team maximum]

**Unrepresented Applicants for  
Participation/Reparation****The Office of Public Counsel for the  
Defence****Amicus Curiae****REGISTRY****Registrar**

Ms Sylvana Arbia

**Victims and Witnesses Unit****Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Defence Support Section****Detention Section****Other**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision (“Decision”):

### **Background and Submissions**

1. On 11 June 2008, the defence requested the Chamber to order the Office of the Prosecutor (“prosecution”) and the Registry’s Victims Participation and Reparations Section (“VPRS”) to disclose, without redactions, the victims’ applications for participation and reparations filed by the victims who will be called as prosecution witnesses at trial. Furthermore, the defence requested the Chamber to order disclosure to the defence of all the non-redacted statements relevant to these individuals, regardless of the circumstances or form in which they were taken.<sup>1</sup> It follows that this application relates solely to the particular group of individuals who have the dual status of victims and witnesses. It is to be noted that copies of the victims’ applications for participation have been provided by the Registrar to the defence, in accordance with Rule 89(1) of the Rules of Procedure and Evidence (“Rules”). However, any information which may have led to the identification of the applicants and their whereabouts was redacted because of the risk that their security may be endangered if this information were to be disclosed to the defence.<sup>2</sup>
  
2. On 13 June 2008, the Office of Public Counsel for Victims (“OPCV”) observed that in respect of the victims/witnesses DRC-OTP-WWWW-0007, DRC-OTP-

<sup>1</sup> Requête de la Défense aux fins de divulgation des demandes de participation ou de réparation présentées en qualité de victimes, par les témoins du Procureur et de toutes autres déclarations faites par lesdits témoins et non divulguées à ce jour, 11 June 2008 (notified on 12 June), ICC-01/04-01/06-1393.

<sup>2</sup> Decision inviting the parties’ observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, 6 May 2008, ICC-01/04-01/06-1308, paragraph 28; Decision on the request of the OPCV and on the prosecution’s filing which concern the Trial Chamber’s decision inviting the parties’ observations on applications for participation of victims issued on 6 May 2008, 16 May 2008, ICC-01/04-01/06-1333, paragraph 16.

WWWW-0008, DRC-OTP-WWWW-0010, and DRC-OTP-WWWW-0011 a Registrar's decision appointed the Principal Counsel of the OPCV as their legal representative. The OPCV submitted that the personal interests of these four victims are potentially affected by this application, particularly as regards their security and privacy. Therefore, the Principal Counsel sought leave to file written observations on the request of the defence.<sup>3</sup>

3. On 13 June 2008 the Chamber indefinitely stayed the proceedings against Thomas Lubanga Dyilo.<sup>4</sup> On 18 November 2008, during the status conference in which the Chamber lifted the stay of proceedings,<sup>5</sup> the OPCV was granted permission to submit observations, and the prosecution, the participants and the OPCV were given until 28 November 2008 to file submissions.<sup>6</sup>
4. On 25 November 2008, the Chamber indicated that this issue would be the subject of a written decision after responses to the application are received.<sup>7</sup>
5. On 28 November 2008 the OPCV filed its observations.<sup>8</sup> The Chamber was requested to reject the application on the basis of two grounds, (i) the suggested lack of a legal basis, and (ii) Rule 76 of the Rules, which imposes a burden on the prosecution alone as regards the disclosure of witness statements in its possession, once a decision is made to call the relevant witness.<sup>9</sup>

<sup>3</sup> OPCV's request to submit observations on the Defence's Request dated 11 June 2008, 13 June 2008, ICC-01/04-01/06-1396.

<sup>4</sup> Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

<sup>5</sup> Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 4, line 1.

<sup>6</sup> *Ibid*, page 7, lines 3-13.

<sup>7</sup> Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG, page 8, lines 3-12.

<sup>8</sup> Observations du BCPV en tant que représentant légal des demandeurs a/0047/06, a/0048/06, a/0050/06 et a/0052/06 sur la "Requête de la Défense aux fins de divulgation des demandes de participation ou de réparation présentées en qualité de victimes, par les témoins du Procureur et de toutes autres déclarations faites par lesdits témoins et non divulguées à ce jour", 28 November 2008, ICC-01/04-01/06-1509.

<sup>9</sup> *Ibid.*, pages 12 and 13.

6. The prosecution also filed its response on 28 November 2008. It submitted that it is in possession of non-redacted copies of the application forms of those individuals with dual status. It argued that the competent authority as regards applications by victims and for providing the defence with notification of any relevant documents is the Registrar rather than the prosecution. As to the request for disclosure of the previous statements of the individuals with dual status, the prosecution indicated that it does not treat these individuals differently to other trial witnesses as regards the application of Rule 76 of the Rules.<sup>10</sup>
7. On 5 December 2008, the defence replied to the OPCV's observations.<sup>11</sup> In its submissions, the defence submitted that the application forms in the possession of the prosecution should be disclosed to the defence.<sup>12</sup> The defence also argued that the Chamber has the clear mandate to order the Registry to disclose any document that would enable the defence to prepare adequately for trial and does not affect the Registry's neutrality.<sup>13</sup> Finally, the defence argued that the disclosure in full of these applications would not affect the security concerns of the persons concerned, since the defence already knows the identity of these individuals.<sup>14</sup>
8. On 12 January 2009, the prosecution requested the Chamber to "direct the Registry to re-classify applications of victims who are also prosecution

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<sup>10</sup> Prosecution's Response to the "Requête de la Défense aux fins de divulgation des demandes de participation ou de réparation présentées en qualité de victimes, par les témoins du Procureur et de toutes autres déclarations faites par lesdits témoins et non divulguées à ce jour", 28 November 2008, ICC-01/04-01/06-1517, with confidential *ex parte* prosecution and Registry only annex, paragraphs 5-9.

<sup>11</sup> Réponse de la Défense aux «Observations du BCPV en tant que Représentant légal des demandeurs a/0047/06, a/0048/06, a/0050/06 et a/0052/06 sur la «Requête de la Défense aux fins de divulgation des demandes de participation ou de réparation présentées en qualité de victimes, par les témoins du Procureur et de toutes autres déclarations faites par lesdits témoins et non divulguées à ce jour », 5 December 2008, ICC-01/04-01/06-1517

<sup>12</sup> *Ibid*, paragraphs 4-7.

<sup>13</sup> *Ibid*, paragraphs 14-16.

<sup>14</sup> *Ibid.*, paragraphs 11-13.

witnesses, to a level that affords the Defence sufficient access.”<sup>15</sup> The prosecution submitted that it views the applications of victims who are prospective prosecution witnesses as prior statements of the witnesses pursuant to Rule 76(1) of the Rules.<sup>16</sup> The defence in its response filed on 13 January 2009 agreed with the prosecution’s request and reiterated the submissions made in its application.<sup>17</sup>

## Analysis and Conclusions

9. Three particular issues of principle are engaged in the determination of this application. First, the accused has the right to a fair hearing (Article 67(1) of the Rome Statute (“Statute”). Second, the Court has the various duties of protecting “the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” (Article 68(1) of the Statute), providing “for the protection of the accused, victims and witnesses during the trial” (Article 64(6)(e) of the Statute), as well as taking “the necessary steps to ensure the confidentiality of information [...] to protect the safety of witnesses and victims and members of their families” (Rule 81(4) of the Rules). Third, the prosecution has the obligation to disclose to the defence copies of any statements made by those witnesses it intends to call, and to disclose to the defence evidence in its possession or control which the Prosecutor “believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence” (Article 67(2) of the Statute). Furthermore, the prosecution shall “permit the defence to inspect any books, documents photographs and other tangible objects in the possession or control of the prosecution, which are material to the preparation of the defence or are intended for use by the Prosecutor as

<sup>15</sup> Prosecution’s Consolidated Motion for Determination of Issues prior to the Commencement of Trial, 12 January 2009, ICC-01/04-01/06-1596, paragraph 6.

<sup>16</sup> *Ibid.*, referring to ICC-01/04-01/06-1517-Conf-Exp-Anx.

<sup>17</sup> Réponse de la Défense à la « Prosecution’s Consolidated Motion for Determination of Issues prior to the Commencement of Trial », 13 January 2009, ICC-01/04-01/06-1601, paragraph 3, referring to ICC-01/04-01/06-1393

evidence [...] or were obtained from or belonged to the person” (Rule 77 of the Rules). This latter principle has been referred to generally by the Chamber and the Appeals Chamber as the disclosure of exculpatory material.

10. The resolution of this application is mainly dependent on the interrelationship between those three principles, against the background of the facts of this case. By way of general observation, the accused has a right to a fair hearing and, by clear implication, to a fair trial, which the Chamber has a duty to protect. The entitlement of victims and witnesses to appropriate protection by the Court (including as regards their safety and privacy) is also a matter of substantial importance, although determining the right course in each instance is an essentially fact-sensitive decision. As regards the third principle, the disclosure regime established by the Rome Statute framework is imposed on the prosecution alone: in other words, no positive obligation is imposed on the other organs of the Court, the defence or the participants to disclose exculpatory material to the defence under Article 67(2) of the Statute, Rule 77 or Rule 76 of the Rules.
  
11. The critical tension revealed by this application is between the right of victims to appropriate protective measures and the right of the accused to a fair trial, and, in the particular context of this application, to the exculpatory material in the possession of the prosecution and the VPRS. Whilst the Chamber will ensure that Thomas Lubanga Dyilo’s fair-trial rights are fully protected, establishing the most appropriate means of implementing those rights must take into account the position and rights of the participating victims who are also witnesses.
  
12. In all the circumstances, balancing and applying these three principles, the regime established by this Chamber and the Appeals Chamber to effect disclosure and resolve related issues must be followed for those individuals

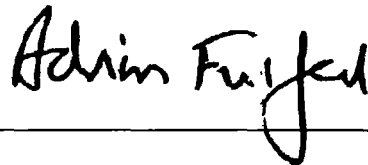
who have dual status. The prosecution has indicated that it treats this group of witnesses in the same way as all other witnesses in the case, particularly as it has in its possession the non-redacted versions of the application forms, together with – it is to be inferred – any supporting documents. It has further indicated that these applications, in its view, should be considered in the same way as statements of the witnesses, and that they are covered by Rule 76(1) of the Rules. Therefore, the prosecution is in a position to disclose all exculpatory material relevant to this application, and it is the body which is subject to positive disclosure obligations.

13. Accordingly, in the view of the Chamber, the prosecution must apply the same approach to this material as it does to any other exculpatory material in its possession. The only caveat is that prior to disclosure of information relevant to these particular witnesses who hold dual status, the views of their individual representatives must be sought, and if objections to disclosure are raised, the matter should be brought immediately to the attention of the Chamber by way of a filing, for determination. It is inappropriate to order the Registry to re-classify the applications of the victims as described in paragraph 8 above. For the reasons set out hitherto this issue is properly resolved by applying the approach to disclosure which has been outlined in this Decision.
14. Finally, the defence requested an order directed at the VPRS to “disclose” requests for reparations. The Chamber notes that, under Rule 94 of the Rules, at the commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request for reparations to the person or persons named in the request or identified in the charges. On Friday 16 January 2009, the Chamber orally reminded the



Registrar of her obligation to ensure that the requirements of Rule 94(2) are complied with in advance of the commencement of the trial.<sup>18</sup>

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 21 January 2009

At The Hague, The Netherlands

<sup>18</sup> Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG, page 54, lines 12-24.