

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 December 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

**Redacted Decision on the Defence Application for the Chamber to call an Associate
Legal Officer from the Registry to give evidence**

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

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Ms Fiona McKay

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* hereby delivers the following Decision on the Defence Application for the Chamber to call an Associate Legal Officer from the Registry to give evidence.¹

Submissions

1. On 5 October 2009 the defence filed an application for [REDACTED] attendance as a court-witness.² [REDACTED] is an Associate Legal Officer in the Victims Participation and Reparations Section of the Registry (“VPRS”).³
2. The defence referred in its submissions to the live evidence of Witness 298 before Trial Chamber I on 28 January 2009 and 10 and 11 February 2009, having been called by the Office of the Prosecutor (“prosecution”).⁴ During his testimony, Witness 298 was questioned by the defence about [REDACTED].⁵ When asked whether he recognised the signature on the relevant document, the witness replied:

I see a document on which something is written, something of which I know nothing. As regards the signature, I don’t know if it is my signature because I would have to first read the content of the document. My name is [REDACTED].⁶

A little later the witness said:

Then there’s the signature of [REDACTED]. A signature which I do not recognise. I never signed such a document.⁷

And:

[REDACTED] is a white woman who came to [REDACTED]. I was living in a village, and I had refused to go to [REDACTED]. When they came to take me to

¹ Requête de la Défense afin de citer [REDACTED] à comparaître en tant que témoin de la Cour, 5 October 2009, ICC-01/04-01/06-2148-Conf.

² ICC-01/04-01/06-2148-Conf.

³ Submission by the Registrar on the Defence request of 5 October 2009, 14 October 2009, ICC-01/04-01/06-2162-Conf, paragraph 16.

⁴ ICC-01/04-01/06-2148-Conf, paragraph 2.

⁵ ICC-01/04-01/06-2148-Conf, paragraph 3; see also confidential Annex 1 (a copy of [REDACTED] (MFI-D-00013)).

⁶ Transcript of hearing on 10 February 2009, ICC-01/04-01/06-T-123-CONF-ENG-ET, page 55, lines 12 – 16.

⁷ ICC-01/04-01/06-T-123-CONF-ENG-ET, page 56, lines 3 – 4.

[REDACTED], I was living in [REDACTED]. Someone came to get me because I had given my address in [REDACTED]. That person came to see me and said, "Come. There's a woman looking to see you and members of your family are [REDACTED]. [REDACTED] knows where this place is. Come so that you can talk to her." So that's the reason I went to see this lady. That person came to get me because I had given my address. I went to talk to this woman and she said, "Well, your father is at such a place." And I said, "I can't go there. If you want me to go there, you'll have to give me the money for the transport." And I stayed in [REDACTED] and other people came to get me -- or to see me. Those people came to see me and I said, I can't go [REDACTED]. Why go [REDACTED]? If my father wanted to go to [REDACTED], I'll stay here. A document was brought to me and questions were put to me. I answered them, and a document was shown to me. It's not this document, and I signed that document, and I could strike out the passages with which I did not agree. And there were witnesses who also signed the document. There was also a person who introduced themselves as being an employee of [REDACTED], and that person also signed the reverse side of that document. [...] I don't know this document. I didn't sign this document.⁸

3. On 19 May 2009 the Chamber admitted this document into evidence, although it does not presently have an EVD number.⁹ At the end of the document there is a handwritten heading "Témoins", with the name and signature of [REDACTED] beneath it.
4. On 15 September 2009 the defence asked [REDACTED] if she is prepared to give evidence, called by the accused.¹⁰ On the same day [REDACTED] responded as follows: "[...] the Registry does not consider it appropriate for a member of its staff to appear before the Court at the request of one or other of the parties but it would do so if the Chamber ordered it".¹¹
5. The defence submits that in due course the Chamber will need to assess the evidential significance of the [REDACTED] – particularly the authenticity of the signature – when it considers the evidence of Witness 298. In essence, as set out in his submissions, the accused seeks clarification as to the circumstances surrounding the signing of the [REDACTED] and confirmation

⁸ ICC-01/04-01/06-T-123-CONF-ENG-ET, page 56, line 10 to page 57, line 9.

⁹ Transcript of hearing on 19 May 2009, ICC-01/04-01/06-T-176-CONF-ENG-ET, page 4, line 22 to page 5, line 2.

¹⁰ ICC-01/04-01/06-2148-Conf, paragraph 7.

¹¹ Annex 2 to Requête de la Défense afin de citer [REDACTED] à comparaître en tant que témoin de la Cour, 5 October 2009, ICC-01/04-01/06-2148-Conf-Anx2 (an email dated 15 September 2009).

from [REDACTED] that Witness 298 signed it.¹² Against that background, the defence argues her presence is essential, and since she has indicated her unwillingness to give evidence for the accused, it invites the Chamber to call her as a court witness.¹³

6. The prosecution filed the “Prosecution’s Response to the ‘Requête de la Défense afin de citer [REDACTED] à comparaître en tant que témoin de la Cour’” on 14 October 2009,¹⁴ in which it raised the apparent lack of any legal basis provided by the defence for its application. However, the prosecution accepted that the Chamber is entitled to call a representative of the VPRS to give evidence if it is satisfied the evidence is “relevant and necessary” and is “related to the staff member’s official employment duties”.¹⁵ The prosecution particularly cited the Chamber’s authority under Article 64(6)(b) of the Rome Statute (“Statute”) to require the attendance and testimony of witnesses, in order to perform its functions during the course of the trial.¹⁶ Since the witness is employed by the Registry, it is argued that any request should be addressed to the Registrar, so that any suggested objections or limitations can be raised.¹⁷ The prosecution recognised, however, that the ultimate decisions on calling this staff member, and the limits of her testimony, are for the Chamber.¹⁸

7. Also on 14 October 2009 the Registry filed the “Submission by the Registrar on the Defence request of 5 October 2009”.¹⁹ The Registrar suggests that it is neither appropriate nor desirable for the representative of “an impartial and

¹² ICC-01/04-01/06-2148-Conf, paragraphs 11 and 12.

¹³ ICC-01/04-01/06-2148-Conf, paragraphs 12 and 13.

¹⁴ Prosecution’s Response to the “Requête de la Défense afin de citer [REDACTED] à comparaître en tant que témoin de la Cour”, 14 October 2009, ICC-01/04-01/06-2161-Conf.

¹⁵ ICC-01/04-01/06-2161-Conf, preamble.

¹⁶ ICC-01/04-01/06-2161-Conf, paragraph 3.

¹⁷ ICC-01/04-01/06-2161-Conf, paragraph 4.

¹⁸ ICC-01/04-01/06-2161-Conf, paragraph 5.

¹⁹ ICC-01/04-01/06-2162-Conf.

neutral organ” of the Court to be called to give evidence, and that her staff should be safeguarded from substantive case-related controversies.²⁰

8. The Registrar cites in support of her arguments the approach taken by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) as follows:

3. The Registrar notes that in the case *Prosecutor v. Delalić, Mucić, Delić and Landžo*, the Appeals Chamber held, *inter alia*, that “...the Registrar, in view of her official role at the International Tribunal which includes assisting Chambers and certain functions of a judicial nature, should not be drawn into proceedings before the International Tribunal to give evidence for either of the parties unless such evidence is not available from another source and is otherwise necessary.”²¹ Within the scope of the above ICTY Appeals Chamber decision and in respect of the present case related to document ICC-01/04-01/06-912-Conf-Exp-Anx 2 and without prejudice to the Chamber's determination on this matter, the Registrar respectfully submits that in the specific circumstances, testimony by a Registry staff member on this matter is not necessary.²²

9. The Chamber interpolates to note that the Pre-Trial Division has addressed a similar issue, in the context of an application to call a staff member from within the Office of the Prosecutor. The Pre-Trial Chamber's decision included the observation that “from a procedural viewpoint, nothing in the statutory instruments prohibits a member of the OTP from being called as a witness, in particular if the party calling such a witness has presented reasonable grounds to justify the need for the witness' testimony to be presented *viva voce* during a hearing”.²³ The Trial Chamber notes additionally that there is no statutory prohibition on calling individuals from any particular categories of witnesses.²⁴

²⁰ ICC-01/04-01/06-2162-Conf, paragraphs 1, 2, 9 and 10.

²¹ ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Appeals Chamber, Order on motion of the appellant, Esad Landžo, for permission to obtain and adduce further evidence on appeal, 7 December 1999, page 5.

²² ICC-01/04-01/06-2162-Conf, paragraph 3.

²³ Decision on witness to be called by the Defence at the confirmation hearing, 19 October 2009, ICC-02/05-02/09-186, page 4; see also *Décision sur la requête de la Défense de Mathieu Ngudjolo en vue de reporter la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve)*, 5 November 2009, ICC-01/04-01/07-1603, paragraph 17.

²⁴ See in this regard, Articles 67(1)(e) and 69 of the Rome Statute.

10. The Registrar sets out a summary of the role of the VPRS staff member in these circumstances, and emphasises that his or her signature on the document in itself constitutes proof of its validity.²⁵ In those circumstances, it is suggested further evidence on the point is unnecessary.²⁶
11. The Registrar sets out other means by which the Chamber could be provided with assistance on the issue, for instance by an *ex parte* Registry report (as opposed to one from the individual staff-member).²⁷ The Registrar highlights that there may be general prejudice if a precedent is established that Registry staff can be called to give evidence on matters discussed in confidence, as this will tend to deter the full cooperation of others in the future, in a wide variety of different situations.²⁸ The Registrar emphasises that the confidentiality of communications needs to be protected in these circumstances, given the sensitive circumstances of [REDACTED] at the Court. In support of this argument, the Registrar cites Rule 73(2) of the Rules of Procedure and Evidence (“Rules”), as follows:

Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:

(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;

(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and

(c) Recognition of the privilege would further the objectives of the Statute and the Rules.

12. Finally, the Registrar seeks an order removing [REDACTED] name from the title of the defence Request, and for it to be replaced by her function (VPRS

²⁵ ICC-01/04-01/06-2162-Conf, paragraphs 4 and 5.

²⁶ ICC-01/04-01/06-2162-Conf, paragraph 6.

²⁷ ICC-01/04-01/06-2162-Conf, paragraph 7.

²⁸ ICC-01/04-01/06-2162, paragraphs 12 and 13.

Associate Legal Officer), in order to protect her privacy and her ongoing work, as well as out of courtesy.²⁹

Analysis and conclusions

13. The defence has a highly focussed objective in this application – it is limited to securing confirmation that Witness 298 signed the relevant form (see paragraph 5 above) and clarification as to the circumstances surrounding the signing of the document. It is suggested that if the signature on the document is established to be his, that evidence may impact significantly on his credibility as a witness.

14. The Chamber recognises that this is a forensic point that the defence is fully entitled to develop, but it considers that it can be achieved in a straightforward, uncontroversial and fair manner, that will alleviate the Registrar's concerns. It is important to remember that [REDACTED] is asked – at this stage – to assist solely as the person who acted as a witness when Witness 298 is said to have written his signature on the document, and it is arguable that if someone undertakes this role, he or she should be in a position to confirm, if necessary, the circumstances in which the signature came to be written. Therefore, [REDACTED] is to be asked to provide the Chamber with a signed statement (which contains the usual solemn declaration), setting out shortly the circumstances in which her signature and the signature of [REDACTED] were written, and specifically whether or not she was present when witness 298 signed the [REDACTED] (if that was the position). She should address this issue alone, and in the result any confidences exchanged between her and witness 298 will not be breached, because her statement will not include any of the conversations that occurred. In the Chamber's view, this approach addresses all of the substantive

²⁹ ICC-01/04-01/06-2162-Conf, paragraph 16.

concerns cited by the Registrar (“internal and external, on the relationship of trust and confidence”),³⁰ whilst ensuring that the defence is able to proceed on the firm evidential foundation that it seeks.

15. The Chamber interprets paragraph 5 of the Registrar’s submissions as indicating that this issue has been investigated and [REDACTED] was present when witness 298 wrote his signature:

Moreover, it is the respectful submission of the Registrar that the fact that the signature of the VPRS staff member in question appears in the document constitutes validation that the document is indeed authentic.³¹

16. If this interpretation is correct, once [REDACTED] statement is provided to the Chamber, the prosecution will be invited to make an appropriate admission of that fact, and, if provided, the trial will proceed on the basis that witness 298 signed the [REDACTED].

17. The Registrar is, therefore, instructed to obtain a short statement from [REDACTED], addressing this limited issue. Once it is available, depending on its contents, the Chamber will invite the prosecution to make the admission described above. Thereafter, the defence has liberty to raise the issue again (in writing), if it considers that the concerns it has advanced in this application have not been satisfactorily met.

18. In these circumstances, pending the outcome of this process, it is unnecessary for the Chamber to resolve whether or not it should follow the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, namely that

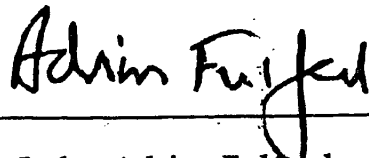
³⁰ ICC-01/04-01/06-2162-Conf, paragraph 11.

³¹ ICC-01/04-01/06-2162-Conf, paragraph 5.


Registry staff should only be called to testify on substantive issues during a trial if that course is necessary and the evidence is otherwise unavailable, or whether some other approach is more appropriate for trials at the ICC.

19. The Chamber agrees that it is wholly unnecessary to identify this Associate Legal Officer in the title of the application by her name, and given the sensitive nature of her work this could have adverse consequences for her role in the future. Therefore, the defence Request is to be re-filed with a new title, in which this job description is substituted for [REDACTED] name.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 14 December 2009

At The Hague, The Netherlands