



Original: **French**

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

Date: **24 September 2007**

**TRIAL CHAMBER I**

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

**Registrar:** Mr Bruno Cathala

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

**Public Document**

**Submissions on Preliminary Issues**

**The Office of the Prosecutor**

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

**Counsel for Victims a/0001/06 to a/0003/06**

Mr Luc Walley  
Mr Franck Mulenda

**Counsel for the Defence**

Ms Catherine Mabilie

**Counsel for Victim a/0105/06**

Ms Carine Bapita Buyangandu

1. Noting the decision of 5 September 2007 by which the Chamber invited the participants to file submissions on the subjects that require early determination.
2. Noting the submissions filed by the Prosecution on 11 September 2007.

**A. The date of the trial**

3. It is difficult for the representatives of the victims to express an opinion on the commencement of the trial without knowing the conditions under which they will be acting, without also having gained access to the full record, and without knowing which witnesses the Prosecutor and the Defence intend to call to testify before the Court. Indeed, fair trial principles imply that the representatives of victims must also have adequate time to review the documents that will be disclosed to them and to prepare for the hearing with their clients. The undersigned therefore reserve their response regarding the exact date for the commencement of the trial.
4. Furthermore, the time required by the representatives of the victims to prepare for the trial is partly dependent on the decision the Court will take as to whether regulation 56 of the *Regulations of the Court* shall apply. If witnesses must be called at trial and evidence tendered for the purposes of a decision on reparations, the preparation time required by Counsel for the victims will be much longer.
5. Moreover, the victims recall that the charges were confirmed almost nine months ago, and that it is in the interest of the fair administration of justice that the trial commence as soon as possible. Those who took the risk of participating in these proceedings have now been waiting for more than one year, and the trust they have placed in the Court is being severely tested.

## **B. Languages used in the proceedings**

6. Since the language chosen by the accused is French, a language with which Counsel, the victims and probably also the majority of the Congolese witnesses are familiar, the representatives of the victims respectfully suggest that the proceedings first be recorded in French, and then translated into English, rather than vice versa. They also request that, as far as practicable, there be direct interpretation or translation into French if other languages are used in court by witnesses or participants, or in documents tendered by the parties (rather than translations into French from the English translation).
7. They further request that procedural documents (decisions of the Chamber, notes and briefs from participants, documents and so on) be translated in good time, that is, within a time frame which would, if necessary, enable non-English-speaking counsel to use the translations in their work and, where required, to transmit them to those of their clients who can read French, subject to the provisions regarding confidential documents.
8. Some victims may wish to participate in the proceedings in person or to express their views and concerns in person before the Court. In such cases, Counsel reserve the possibility of eventually requesting simultaneous translation into Swahili or Alur.

## **C. Disclosure of materials**

9. Insofar as victims' access to materials and documents is part of the arrangements for their participation in the proceedings, the undersigned will return to this point in the submission to be filed on the issues referred to in point E of the decision of 5 September.

10. The representatives of Victims a/0001/06 to a/0003/06 wish that, pursuant to rule 131(2), all documents presented by the parties before the Pre-Trial Chamber and the transcripts of the hearings of that Chamber – or the redacted versions thereof, where required for reasons of witness confidentiality or protection – be made available through Ringtail.
11. Counsel for the victims also wish this to apply to all documents which will be presented by the parties before the Court during the proceedings and to the transcripts of the proceedings.
12. Indeed, the Pre-Trial Chamber initially restricted access by the representatives of the victims to public documents only,<sup>1</sup> making reference to maintaining victims' anonymity (vis-à-vis the Defence, not the public, as the decision pertaining to victim a/0105/06) makes clear:<sup>2</sup> *"in principle, the anonymous participation of the [...] victims at this stage in proceedings should be limited to: i) access to the public documents only; and ii) presence at the public hearings only".*<sup>3</sup>
13. The representatives of the victims consider that, due to its general nature and lack of reasoning, the decision was contrary, if not to the letter, at least to the spirit of rule 121(9), even though it was undoubtedly also influenced by the proximity of the confirmation hearing, which prevented a review of all of the documents in the record in order to identify possible redactions.
14. The Pre-Trial Chamber qualified its position by inviting the parties, in an oral decision, to disclose to the victims not only documents classified as public, but also confidential documents which the parties considered should not remain confidential in the future: *"the Chamber gives the Prosecutor to identify before*

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<sup>1</sup> *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*, ICC-01/04-01/06-462-tEN, 22 September 2006.

<sup>2</sup> See the *Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601-tEN, 20 October 2006.

<sup>3</sup> See the *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*.

*Tuesday at 9.30, and to the Defence before Friday the 17th at 1600 hours, the material documents including the list of -- respective lists of evidence which they consider that they **shouldn't** be confidential. The Chamber orders the Registrar to make it possible for the legal representative of victims to have access to these documents and materials via Ringtail."*<sup>4</sup>

15. Rule 131(2) of the *Rules of Procedure and Evidence* provides that: "*Subject to any restrictions concerning confidentiality and the protection of national security information, **the record may be consulted** by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and **the victims or their legal representatives** participating in the proceedings pursuant to rules 89 to 91.*" This also applies *mutatis mutandis* to the materials which will supplement the record during the trial phase.
16. This provision contains a general rule and an exception. The rule being that the record is open for consultation, every exception, every restriction in the case in point, must be justified by the need to protect confidentiality. Confidentiality is not determined in the absolute. Neither the Statute nor the *Rules of Procedure and Evidence* nor the *Regulations of the Court* make provision for classification of a document in the absolute. Quite the contrary; confidentiality is always determined according to its purpose, be it the protection of victims and witnesses (articles 54, 64 and 68), the national security of a state (article 72), the requirements of other investigations (rule 81) or to honour a commitment made to a third party (rule 82).
17. Regulation 14 of the *Regulations of the Registry* provides for the classification of documents according to level of confidentiality. It defines confidential documents as those that may not be disclosed to the public. Only documents

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<sup>4</sup> See Livenote English transcript, 13 November 2006, p.79, line 8.

classified as “under seal” may not be disclosed to some participants in the proceedings.

18. In fact, confidentiality requirements depend on the party to whom the disclosure is made and must be evaluated *in concreto*. Accordingly, the protection of a victim’s privacy (in a case of sexual violence, for example) may require confidentiality vis à vis the public, but not the participants; the protection of a prosecution witness may require confidentiality vis à vis the Defence, and that of a Defence witness vis à vis the victims.
19. The Prosecutor may from time to time consider that certain documents may be disclosed to some victims (if, for example, such documents directly concern them), but not to the Defence or to other victims. This would be consistent with the spirit of rule 87(3).
20. Accordingly, the Court has previously held that the identity of some victims could be disclosed to the Prosecutor, but not to the Defence.<sup>5</sup> The Court also recently decided that certain documents could be disclosed to the OPCD, but not to Counsel for the Defence.<sup>6</sup>
21. All participants are bound by a duty of confidentiality that may be imposed by the Court. Legal representatives are subject to a code of professional conduct for counsel. If the need arises, the court may prohibit counsel from disclosing a piece of information to his or her client, or even to another member of his or her team.<sup>7</sup>

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<sup>5</sup>Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. ICC-01/04-01/06-228tEN, 28 July 2006.

<sup>6</sup> Decision of Pre-Trial Chamber I of 17 August 2007, ICC-01/04-374.

<sup>7</sup> See, by way of analogy, *ibid.*, paras. 23-26

22. Lastly, a document may always be redacted if the need arises. To quite simply bar a participant from inspecting a document that will be used in the proceedings is an extreme measure that must remain exceptional.
23. What the Prosecutor proposes in his 11 September submission appears to be a return to a level of confidentiality even lower than that applied during the confirmation hearing. He is, in fact, proposing that barring any exceptions, to be decided on a case-by-case basis, victims should have access only to documents tendered as evidence that are “publicly available”, which is significantly more restrictive than the position taken by Pre-Trial Chamber I.
24. Such restriction in the disclosure of the record, which would make scant distinction between the victims participating in the proceedings and the general public, would make it impossible for the victims to prepare for the trial and therefore to participate meaningfully in the proceedings.
25. Since the rule is disclosure, it is the exception that should be decided on a case-by-case basis, as is the case for the Defence.
26. Evidence should be disclosed to participants within a reasonable time frame and at least one, preferably two, months before the commencement of the trial. Pursuant to article 64(3)(c) of the *Rome Statute*, it is indeed the Trial Chamber’s duty to “*provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial*”.
27. Accordingly, the legal representatives here and now request that the Chamber grant them access to the complete index of the record of the case at the very least, and reserve the possibility of making a supplemental submission on their position as part of their submissions regarding the arrangements for the

participation of victims, in particular with regard to the possible effects that granting of protective measures to a victim (anonymity) should have.

#### **D. The e-Court Protocol**

28. The representatives of the victims only had very limited experience in using the e-Court Protocol at the confirmation hearing. So far, they have access to only a small part of the documents tendered into evidence at the confirmation hearing, and a few subsequently disclosed materials. They are still unaware to what extent they will be able to file documents during the trial as this depends on the decision that will be taken on the arrangements for participation.
29. The representatives note that the e-Court Protocol is not tailored to suit the victims and does not allow the metadata to include information of particular interest to them, such as the victim number to which the document pertains, the harm suffered, or the prospects for reparation. However, they are sensitive to the Prosecution's argument in this regard.<sup>8</sup>
30. The undersigned representatives of the victims would like a general discussion on the e-Court Protocol, and any necessary adjustments thereto, involving all participants, including the Office of Public Counsel for Victims.

**FOR THESE REASONS,**

**MAY IT PLEASE THE COURT**

To order the immediate disclosure to the representatives of the victims of the complete index of the record of the case;

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<sup>8</sup> Submission of 11 September, ICC-01/04-01/06-951, para. 42.

To take formal note of the reservations formulated above by the undersigned representatives of the victims.

*[signed]*

**Luc Walley and Franck Mulenda (absent at signature)**

**Counsel for Victims a/0001/06, a/0002/06, and a/0003/06**

Dated this 24 September 2007

At Brussels and Kinshasa