

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 9 November 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

Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5)

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a/0001/06 to a/0003/06 and a/0105/06

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TRIAL CHAMBER I ("Trial Chamber") of the International Criminal Court ("Court"), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference on 2 October 2007, delivers the following decision on the implementation of the reporting system between the Registrar and the Trial Chamber on victims applications:

A. Background and submissions

1. On 25 September 2007, the Trial Chamber issued "The Trial Chamber's Agenda for the Hearing on Monday 1st October 2007",¹ in which it included the topic of the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 of the Rules of Procedure and Evidence ("Rules") and Regulation 86(5) of the Regulations of the Court ("Regulations"). The parties and participants were invited to make oral submissions on the following matters:

The nature of the Registry's involvement

- a Regulation of the Court 86(5) does not stipulate that the reports prepared by the Registrar are to be disclosed to the prosecution and to the defence: Should the reports be disclosed to the prosecution and the defence, and if so in which form (redacted or not)?
- b. If they are to be disclosed, should the prosecution and the defence have an opportunity to reply?
- c To what extent, if at all, should the Registrar as the author of the reports carry out an "overview", a "review" or a "summary" of the information set out in the reports? Should the Registrar set out in a "factual", non-judgmental way whether the criteria which will be adopted in due course by the Trial Chamber has been addressed?
- d. To what extent, if at all, should the Registrar express any "preliminary view" on the merits of the applications?

¹ ICC-01/04-01/06-962.

- e. How should the Registrar fulfil his obligations under Regulation 86(5) (and in particular how should he "endeavour to present one report ...")?
- f. Should the Registrar highlight issues that appear to arise from the applications for the Chamber's consideration?

ii. Representation

To what extent should communications between the Registry and the Chamber on the subject of legal representation for victims (i.e. on the overall number of representatives) be disclosed to the parties, and, if so, should it be the subject of submissions?²

- 2. The Registrar was invited to appear at the hearing, assisted, if he so wished, by a representative from the Victims Participation and Reparations Section.³

a. Submissions of the parties and participants

- 3. During the hearing on 2 October 2007, the parties and participants, perhaps unsurprisingly, were united in their view that there should be disclosure of the reports, and that they should be completed in a non-judgmental way, without any element of "pre-assessment" of the merits of the applications.
- 4. The prosecution argued that it lies within the discretion of the Trial Chamber to disclose the report to the parties. Given the way the reports have been structured in the past, they contain essential data (most particularly summaries of information) which has been of assistance to the Prosecutor and should be disclosed to all the parties and participants in the proceedings.⁴
- 5. The prosecution argued that disclosure of the reports to it cannot entail any risk to the victims, and in those circumstances, requested disclosure of non-

² *Ibid* , paragraph 7.

³ *Ibid* , Paragraph 8.

⁴ Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-54-ENG, page 20, lines 1-9; page 21, line 1

redacted versions of all the reports.⁵

6. The defence contended that the reports, disclosed without redactions, would facilitate its work.⁶
7. The legal representative of victims a/0001/06, a/0002/06, and a/0003/06 submitted that they wish to receive, not only their individual reports, but also those for all other pending applications. He argued that potential issues such as common legal representation and conflict of interests amongst victims could be of significance for his clients.⁷
8. The legal representative of victim a/0105/06 stressed her desire to be in a position to check the accuracy of the reports, and particularly any information supplied by intermediaries and persons in the field whose identities she also wished to know.⁸

b. Observations of the Registry

9. The representative of the Victims Participation and Reparations Section stated that it was her understanding that the purpose of the reports "is to assist the Trial Chamber in considering applications received from victims" and that the contents of the reports prepared by the Victims Participation and Reparations Section would greatly depend on what the Trial Chamber decides is helpful.⁹
10. In relation to the disclosure of the reports to the parties and participants, the representative of the Victims Participation and Reparations Section expressed concerns that the reports sometimes contain information not set out in the applications which should properly be treated as confidential or as requiring

⁵ *Ibid*, page 22, lines 15-19.

⁶ *Ibid*, page 32, lines 12-25.

⁷ *Ibid*, page 34, lines 3-13.

⁸ *Ibid*, page 36, lines 11-25.

⁹ *Ibid*, page 13, lines 14-22.

protection for other reasons (for instance, where intermediaries whose identities should not be revealed were involved in gathering information, or due to the security context).¹⁰

B. Relevant provisions of the Statute, Rules and Regulations

11. Article 68 of the Rome Statute ("Statute") provides that "where the personal interests of victims are affected, the court shall permit their views and concerns to be presented and considered" in an appropriate manner.

12. Rule 89(1) of the Rules provides that "[i]n order to present their views and concerns" in the proceedings, the victims need to file a written application. Copies of the applications are to be provided to the prosecution and the defence, who are entitled to reply. By this same provision, if the Chamber accepts an application, it must then specify the proceedings and the manner in which the participation is appropriate.

13. In describing, in part, the procedure to be followed, Regulation 86(5) of the Regulations provides that the Registrar shall present all applications to the Chamber together with a report thereon. Regulation 86(9) requires that a specialized unit dealing with victim's participation and reparations be set up, its purpose being to assume responsibility for assisting victims during the application process.

C. Decisions in proceedings before the Pre-Trial Chambers

14. Pursuant to Regulation 86, the Registry has been providing reports to the Pre-Trial Chambers. The practice as to the form and contents of the reports has

¹⁰ *Ibid*, page 15, lines 15-19, page 16, lines 1-5.

varied between the Chambers of the Pre-Trial Division. The Victims Participation and Reparations Section has now approached the Trial Chamber seeking directions on how the reports on applications to participate during the trial should be prepared.

15. During the phase up to the confirmation of the charges in the present case, Pre-Trial Chamber I did not disclose the reports prepared by the Registry to the parties and participants. In doing so, the Pre-Trial Chamber did not provide a reasoned decision on the issue, orally or in writing.

16. However, within the broader context of the Situation of the Democratic Republic, the Single Judge of Pre-Trial Chamber I in her decision of 17 July 2007 ordered the Registrar to provide, at the earliest opportunity, the prosecution and the Office of Public Counsel for the Defence ("OPCD") with a copy of the applications for participation together with the report on the applications prepared by the Registry.¹¹ However, in its decision of 17 August 2007, the Pre-Trial Chamber declined to follow the decision of the Single Judge and expressed its reasons as follows:¹²

37. The Chamber takes note of the observations of the OPCD and the Prosecution that previous Reports have contained information which resolves ambiguities in the Applications or contained additional information not included in the Applications. To this end, the Chamber will instruct the Registry that only complete Applications should be transmitted, subject to the Registry being unable to gather the required information. This will ensure that the Prosecution and the OPCD will receive all of the information required for them to exercise their rights to make observations pursuant to rule 89 (4) of the Rules.

38. The Chamber further takes note of article 21 (1) (a) of the Statute, which requires the

¹¹ Decision authorising the filing of observations on applications for participation in the proceedings, ICC-01/04-358-tENG, page 4.

¹² Decision on the requests of the legal representative of applicants on application process for victims' participation and legal representation, ICC-01/04-374.

Chamber to apply, in the first place, the Statute, Elements of Crimes and Rules of Procedure and Evidence. There being no express provision in the Statute or the Rules requiring the Chamber to transmit the report to the participants, and recognizing that the function of the Report is to assist the Chamber in issuing only one decision on a number of Applications, the Chamber decides that it will not order that the Report be transmitted to the participants.

17. Pre-Trial Chamber II has not disclosed the reports submitted to the Chamber by the Registry to the parties and did not provide a reasoned decision on the issue, orally or in writing.

D. Analysis and conclusions

a. The contents of the reports

18. Although a decision on the precise details of the Trial Chamber's requirements as to the contents of the reports will await further discussion between the Chamber and the Victims Participation and Reparations Section, it is convenient to set out in this decision the broad approach the Trial Chamber intends to adopt.

19. The reports should contain, *inter alia*:

- summaries of the matters contained in the original applications, set out on an applicant-by-applicant basis (these will take the form of narrative summaries, along with a grid or a series of boxes dealing with formal matters, for ease of reference but in each case based solely on the application forms);
- a grouping of applications in one report when there are links founded

on such matters as time, circumstance or issue;

- any other information which may be relevant to the chamber's decision on the application (for instance, as supplied by States, the Prosecutor and intergovernmental or non-governmental organisations pursuant to Regulation 86 (4)).
- any other assistance the Victims Participation and Reparations Section can give to assist the Chamber in its task of assessing the merits of the applications, whilst carefully the avoiding expressing any views on the merits.

20. The reports should not contain any comment or expression of views on the overall merits of the application to participate (however, this is not to prevent the Victims Participation and Reparations Section, for instance, from directing the attention of the Trial Chamber in a neutral way to particular issues or facts that it is considered are likely to be relevant to the Chamber's decision).

b. Disclosure of the reports to the parties and participants

21. The question for the Trial Chamber is whether it is necessary, on the grounds of fairness, to order disclosure of the reports to the parties and the participants (and including the applicant victim under consideration). As regards the approach the Trial Chamber has taken in answering that question, although there is an argument that the decision on this issue is more properly described as administrative rather than judicial or quasi-judicial in nature, the Trial Chamber has reached its decision on the basis of the underlying issues involved rather than the "label" to be applied to the process.

22. As the primary fact-finding body there is a particular necessity for the Trial

Chamber to ensure that its decision on the victims' applications to participate is reached in an appropriately fair and transparent manner. To that end, the Trial Chamber exceptionally invited submissions from the parties and the participants on the issues arising out of the victims' reports so that as the first Trial Chamber it can adopt the procedures that are most convenient for the particular circumstances of this case. However, it is important to bear in mind that these reports are essentially a tool created for the Chamber's assistance, to enable it to decide effectively and fairly on applications for participation by individual victims.

23. The Trial Chamber readily recognises the importance of this decision, given that participation by victims will have an undoubted impact on the way in which the trial will unfold: for instance, it may affect the number of submissions that are made and the extent of the questioning of witnesses. It is also an issue of great significance to the victims. That said, the central consideration on this particular issue is whether it is necessary and proportionate to order the disclosure of the reports in addition to the applications. It is to be remembered that the application forms are the primary source of material in that they are completed by the victims and they set out the entirety of the reasons advanced by the particular individual for seeking the opportunity to participate.

24. In contrast, the reports are essentially secondary documents, completed as just observed to assist the Chamber with a particular task, which lay out the relevant information in ways that are designed to enable an efficient and focused decision by the Chamber on the applications. Although additional material may be added by the Victims Participation and Reparations Section to assist the Chamber in assessing whether the particular application or applications come within the criteria the Chamber has identified in the instant case, the Trial Chamber is of the clear view that by disclosing the application

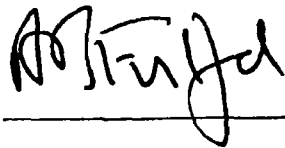
forms, the parties and the participants are provided with the essential details necessary for them to make informed submissions on the various requests to participate. Furthermore, by limiting and defining the kind of material that is to be provided to the Chamber (as set out above) - and in particular by excluding preliminary assessments by the authors of the reports - the Trial Chamber has removed the risk of influence by extraneous matters such as the judgment of others.

25. The Trial Chamber is heedful of the absence of any reference to disclosure of the reports - mandatory or otherwise - in the ICC provisions. Although this lack of provision for disclosure is not determinative of the issue, because the Trial Chamber undoubtedly has the authority to control disclosure for the purposes of the trial in the interests of justice, nonetheless the regulatory distinction between the applications on the one hand (compulsory disclosure) and the reports on the other (disclosure unmentioned) is of some significance. The Trial Chamber has also been influenced by the submission of the Registry that the reports sometimes contain information not set out in the applications which should be treated as confidential or as requiring protection for some other reason. In the result, subject to the following paragraph, the reports will not be disclosed to the parties or the participants.

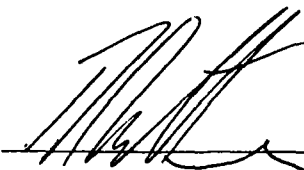
26. Since disclosure is not a once-and-for-all event but rather is something that will be kept under review during the entirety of the proceedings, one of the functions of the Trial Chamber will be to ensure that should any particular fact or matter emerge relevant to the reports that the Chamber considers justifies disclosure, that will occur, subject always to the Chamber having secured an appropriate level of protection for confidential information, the disclosure of which could be harmful to the welfare of individual victims.

27. Therefore, the reports prepared by the Victims Participation and Reparations Section are not to be provided to the parties and participants unless the Trial Chamber orders otherwise.

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



Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 9 November 2007

At The Hague, The Netherlands