

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

No.: ICC-01/04-01/06  
Date: 21 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**

**OPCV' s request to submit observations or otherwise be heard on point E of the  
Order of 14 November 2007 and on the issue of the dual status of witnesses/victims**

**The Office of the Prosecutor**

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

**Legal Representatives of victims**

a/0001/06 à a/0003/06 et a/0105/06  
Me Luc Walley  
Me Franck Mulenda  
Me Carine Bapita Buyangandu

**Counsel for Thomas Lubanga Dyilo**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

**Office of Public Counsel for Victims**

Ms Paolina Massidda

## I. Background

2. On 6 March 2007, the Presidency issued the “Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Thomas Lubanga Dyilo”.<sup>1</sup>

3. On 5 June 2007, the Presidency issued the “Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v. Thomas Lubanga Dyilo to Trial Chamber I”.<sup>2</sup>

4. On 17 August 2007, the Pre-Trial Chamber I issued the “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation.”<sup>3</sup> The said decision directed the Registrar to automatically appoint the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as legal representative for unrepresented applicants in the situation in the Democratic Republic of the Congo.<sup>4</sup>

5. Pursuant to this decision, on 24 August 2007 and on 13 September 2007, the Registrar appointed the Principal Counsel of the OPCV as legal representative for the applicants who do not have a legal representative.<sup>5</sup> The letters were respectively filed in the situation record on 31 August 2007 and on 27 September 2007.<sup>6</sup>

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<sup>1</sup> See the “Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Thomas Lubanga Dyilo” (Presidency), No. ICC-01-04-01-06-842, 6 March 2007.

<sup>2</sup> See the “Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v. Thomas Lubanga Dyilo to Trial Chamber I” (Presidency), No. ICC-01/04-01/06-920, 5 June 2007.

<sup>3</sup> See the “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation” (PTC I), No. ICC-01/04-374, 17 August 2007.

<sup>4</sup> *Ibid.*, p. 24.

<sup>5</sup> See the letters of the Registrar, VPRS/A/037/fm, 24 August 2007 and VPRS/A/044/fm-ig, 13 September 2007.

<sup>6</sup> See the “Enregistrement d’un courrier du représentant légal retirant sa demande d’anonymat et d’autres documents relatifs à la représentation légale de demandeurs aux fins de participation”, No. ICC-01/04-380, 31 August 2007. See also the “Registration of appointment of the OPCV and amendment to appointment”, No. ICC-01/04-401-Conf, 27 September 2007.

6. During the hearing held on 30 October 2007, Presiding Judge Fulford expressly pointed out to the participants that *“one issue that it seems to us is going to require discrete determination by the Bench is the position of victims who are also witnesses, and there is, as it seems to us at the moment, a separate or there are potentially separate considerations which apply to victims who are witnesses. We therefore intend to give everyone an opportunity to make such representations as is thought appropriate on that issue.”*<sup>7</sup>

7. During the same hearing, the Chief of the Victims and Witnesses Unit raised with the Chamber a practical issue related to protected witnesses who are also victims<sup>8</sup> and who are assisted by a legal representative.<sup>9</sup>

8. On 13 November 2007, the Victims and Witnesses Unit submitted its “Report on Security Issues Relating to the dual status of Witnesses and Victims.”<sup>10</sup>

9. On 14 November 2007, Trial Chamber I issued an “Order scheduling a hearing”<sup>11</sup> for 29 November 2007 to discuss, *inter alia*, the request of the Office of Public Counsel for Victims to access documents in the case record<sup>12</sup> and protective measures for victims’ applicants.<sup>13</sup> The Order did not specify whether the Office would be granted the possibility to submit observations on other issues than the one listed in point B.

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<sup>7</sup> See the Transcription of the hearing of 30 October 2007, No. ICC-01/04-01/06-T-58-ENG, p. 17, lines 2-7 (realtime).

<sup>8</sup> The Office is using the term “victims” as including victims already allowed to participate as well as victims’ applicants.

<sup>9</sup> See the Transcription of the hearing of 30 October 2007, No. ICC-01/04-01/06-T-60-ENG, p. 3, lines 1-15 (realtime).

<sup>10</sup> See the “Victims and Witnesses Unit Report on Security Issues Relating to the dual status of Witnesses and Victims”, No. ICC-01/04-01/06-1026-Conf, 13 November 2007.

<sup>11</sup> See the “Order Scheduling a hearing” (TC I), No. ICC-01/04-01/06-1027, 14 November 2007.

<sup>12</sup> *Ibid.*, pp. 3-4.

<sup>13</sup> *Ibid.*, pp. 6-7.

10. On 16 November 2007, in an “Order amending scheduling for hearing”, Trial Chamber I rescheduled the hearing on 5 December 2007.<sup>14</sup>

## II. Legal basis for the OPCV for appearing before the Chamber

11. Pursuant to regulation 81(4) of the Regulations of the Court, “[t]he Office of Public Counsel for victims shall provide support and assistance to [...] victims, including, where appropriate [...] [a]ppearing before a Chamber in respect of specific issues.”

12. The provision does not specify if such possibility is triggered by a request of a Chamber in this sense or by the Office itself in requesting leave to appear before the Chamber in respect of specific issues.

13. However, the *chapeau* of regulation 81(4) of the Regulations of the Court clearly provides for an obligation binding upon the Office to provide, where appropriate, support and assistance to victims *inter alia* in appearing before the Chamber in respect of specific issues.

14. The Office, therefore, considers it is entitled to request the Chamber leave to appear in respect of specific issues which have an impact on the personal interests of the victims it is currently representing. Furthermore, the Office argues that since Trial Chamber I is dealing with issues which need to be considered before the start of the trial, it is the appropriate time for the OPCV to appear before the Trial Chamber in respect of issues which may affect the expeditious conduct of the proceedings if not discussed at this stage.

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<sup>14</sup> See the “Order amending scheduling for hearing” (TC I), No. ICC-01/04-01/06-1031, 16 November 2007.

15. Undoubtedly, the issues related to the dual status of witnesses/victims and to the protective measures are of such nature to impact in different ways on the proceedings. Furthermore, considering the practical implications of these issues, the Office contends that a standard approach has to be found at this stage of the proceedings.

16. The Office finally notes that the issue raised by the Chief of the Victims and Witnesses Unit during the hearing held on 30 October 2007 is far from being “hypothetical”<sup>15</sup>. In fact, following the Pre-Trial Chamber I’s decision dated 17 August 2007, the Principal Counsel is representing, *inter alia*, victims a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06 and a/0052/06 who are also witnesses for the Prosecution and were accepted in the protection programme.<sup>16</sup>

17. Therefore, the Office argues that these victims have the right to present views and concerns in relation to their specific status and that it is appropriate for their legal representative to be heard by the Trial Chamber on the issue.

### **III. The personal interests of the victims are affected by the discussions on protective measures**

18. The Rome Statute grants victims of crimes falling under the jurisdiction of the Court explicit rights to submit observations and to have their views and concerns presented and considered “*where [their] personal interests are affected*” in accordance with article 68(3) of the Rome Statute.

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<sup>15</sup> See the Transcription of the hearing of 30 October 2007, No. ICC-01/04-01/06-T-60-EN, p. 3, line 2 (realtime).

<sup>16</sup> See the “Decision on applications for participation in the 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*” (PTC I), No. ICC-01/04-01/06-601-tEN, 20 October 2006, p. 10.

19. The review of the numerous articles and rules which govern victims' participation in the proceedings before the Court reveals that victims' participation is not restricted in time.

20. In particular, article 68(3) of the Rome Statute does not make any difference between the different stages of the proceedings before the Court, nor differentiate amongst applicants and victims allowed to participate in the proceedings before the Court, covering therefore both categories of individuals, provided "*their personal interests [...] are affected*".

21. This reasoning lead the Single Judge of Pre-Trial Chamber II, in its decision dated 10 August 2007, to establish "*that the 'personal interests' of victims may be affected by the adoption of, or the failure to adopt, measures bearing upon their security and privacy appears hardly debatable. Accordingly, it would be consistent with article 68, paragraph 3, and therefore appropriate for victims (specifically those victims who may be affected by the measures in question) to be authorised to present their 'views and concerns' for these purposes even prior to and irrespective of their being granted victim status in a given case. In particular, participation within this context may take the form of authorisation to provide their point of view whenever the Pre-Trial Chamber considers the adoption of protective measures on its own and considers it appropriate that victims potentially affected by such measures should submit their views. Moreover, since failure to adopt protective measures may affect the victims' fundamental interest in the protection of their security, it is the view of the Single Judge that victims in the context of a situation should be allowed to submit requests aimed at obtaining the adoption of such measures by the Pre-Trial Chamber.*"<sup>17</sup>

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<sup>17</sup> See the "Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/127/06" (PTC II), No. ICC-02/04-101, 10 August 2007, par. 98, pp. 37-38 (footnote omitted). We underline.

22. This position also finds support in the broad definition of victims contained in rule 85 of the Rules of Procedure and Evidence which does not specify any limitation for participation, but merely links the term “victim” to the commission of a crime falling under the jurisdiction of the Court.

23. Therefore, the interests of victims are directly concerned by any issue concerning their protection. Accordingly, the Office submits that it is appropriate that the Trial Chamber allows their legal representative to present their views and concerns.

24. This matter is of vital importance for victims since most of them requested that the Court ensure that their identity, and any other information which may lead to their identification, not be revealed either to the Prosecutor, the Defence, a State, or any other participant.

25. Recently, the Principal Counsel undertook a mission in order to, *inter alia*, provide legal assistance and legal advices to the victims she is representing, as well as to gather useful information in relation to the re-examination of their respective applications for participation. As a result of this mission, the Office is currently in a position to provide the Trial Chamber with information on security concerns of the victims it represents.

26. Concerning the specific issue listed under point E. of the Order of 14 November 2007, the Office would like to address the issue of the obligation binding upon the Court to take appropriate measures to protect victims in accordance with article 68(1) of the Rome Statute, as well as the obligation binding upon the Victims and Witnesses Unit to provide its services to, *inter alia*, “victims

*appearing before the Court*", in accordance with article 43(6) of the Rome Statute, which solely applies to the *proprio motu* powers of such Unit.

#### **IV. The personal interests of the victims are affected by the discussions on the dual status as witnesses/victims**

27. As a preliminary remark, the Office notes that it will be in the interest of justice that persons cumulating the dual status of witnesses/victims be assisted by a legal representative. In fact, the complexity of rights and obligations entailed by the dual status is such that a lay person cannot fully comprehend; therefore the Office argues that the assistance of a legal representative is needed.

28. In relation to the dual status of witnesses/victims, the Office respectfully submits that such dual status entails both legal and practical issues which may affect the personal interests of victims and need consideration at this stage of the proceedings. Since the Principal Counsel has been appointed as legal representative of some victims who are also witnesses, and considering that she has conferred with some of them, the OPCV submits that it should be heard on the matter.

29. In particular, the Office would like to address the following issues:

- *Manner of contacting the witnesses/victims*

30. Pre-Trial I, in its decision dated 17 August 2007, ordered "*the Prosecution to abstain from any direct contact with the applicants [...] and, if necessary, to contact applicants only through their legal representatives*".<sup>18</sup>

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<sup>18</sup> See *supra* note 3, p. 24.

31. In a previous decision dated 19 September 2006, Pre-Trial Chamber I decided that *“all contact by the Prosecution and the Defence with witnesses on whom the other party intends to rely at the confirmation hearing and who have been accepted into the witness protection programme run by the Victims and Witnesses Unit shall be (a) subject to prior approval by the Chamber and (b) arranged through the Victims and Witnesses Unit.”*<sup>19</sup>

32. The Office argues that the subsequent decision dated 17 August 2007 supersedes the previous one dated 19 September 2006, in particular since the latter was clearly confined for the purposes of the confirmation of the charges hearing.<sup>20</sup>

33. During the hearing held on 30 October 2007, Trial Chamber I instructed the Office of the Prosecutor to contact the witnesses in relation to the place of trial<sup>21</sup>. The Office in its *“Observations du Bureau du conseil public suite à l'invitation de la Chambre de première instance”* submitted that when witnesses and/or victims have a legal representative, he or she should be consulted on the issue<sup>22</sup>.

34. The Office submits that the issue relating to the manner of contacting witnesses/victims needs consideration by the Trial Chamber.

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<sup>19</sup> See the *“Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses”* (PTC I), No. ICC-01/04-01/06-447, 19 September 2006, p. 6.

<sup>20</sup> *Ibid.*, p. 4.

<sup>21</sup> See the Transcription of the hearing of 30 October 2007, No. ICC-01/04-01/06-T-60-EN, p. 4, line 3 (realtime).

<sup>22</sup> See *inter alia* the submissions by the OPCV on the place of the trial in the *“Observations du Bureau du conseil public suite à l'invitation de la Chambre de première instance”*, No. ICC-01/04-01/06-1021-Conf, 9 November 2007, paras 82-83, pp. 19-20.

- *Knowledge of the dual status by the participants*

35. The Office notes that there is no system or mechanism in place which allows the participants of being aware of the dual status of some witnesses/victims.

36. In the specific cases of victims a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06 and a/0052/06, the OPCV was able to identify the dual status through the reading of a public decision.<sup>23</sup> However, at this stage, the Office does not know if other victims it represents enjoy the dual status.

37. The Office also notes that the issue of the timely knowledge by the legal representative of the dual status may have important consequences for the effectiveness of the rights of victims to be informed of their right to participate or of their possibility to file a new application later in the proceedings in accordance with rule 89(2) of the Rules of Procedure and Evidence.

38. The Office considers that the determination of who should have access to this piece of information, at which stage of the proceedings and which mechanism can be agreed upon for the sharing of information on the dual status needs consideration by the Trial Chamber. This issue has, *inter alia*, important implications upon the Registry's obligation to inform and/or notify victims and to assess the disclosure of information contained in the application (for participation and/or for reparation) in accordance with regulations 99(1) and (2) of the Regulations of the Registry.

- *Proceedings related to witnesses/victims*

39. The Office notes that, on several occasions, Trial Chamber I has held *ex parte* hearings on various issues. It seems that one of the issues at stake during some of

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<sup>23</sup> See *supra* note 16.

these proceedings dealt with the protection and well-being of six witnesses/victims, as shown by the "Decision issuing a redacted version of 'Decision on the prosecution's filing entitled 'Prosecution's provision of information to the Trial Chamber' filed on 3 September 2007'." <sup>24</sup> However, the six witnesses/victims were not represented during these proceedings despite the fact that they do have a direct impact on their personal interests; interest which would have justified, in the Office's view, the participation of their legal representative in the proceedings.

40. Accordingly, and since the Chamber itself considered that "*an ex parte procedure is being used to provide information to the Chamber concerning six particular witnesses, but not to the accused, notwithstanding the fact that the detail of that information, or part of it, may be of significance to the accused,*" <sup>25</sup> the Office argues that such information may also be of significance for the six witnesses/victims and *a fortiori* for their legal representative.

41. The Office is of the opinion that other proceedings may also impact on the personal interests of witnesses/victims, in particular any proceedings dealing with the variation of protective measures, redactions of documents to be disclosed or otherwise communicated to the parties and participants, and any preliminary discussion, if any, on modalities for participation of persons cumulating the dual status.

42. Therefore, the Office submits that the issue related to the participation of the legal representative in proceedings concerning the witnesses/victims needs consideration by the Trial Chamber.

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<sup>24</sup> See the "Decision issuing a redacted version of 'Decision on the prosecution's filing entitled 'Prosecution's provision of information to the Trial Chamber' filed on 3 September 2007'", No. ICC-01/04-01/06-963 and annex, 26 September 2007. This decision contains reference to issues of protection of the six witnesses/victims and on the issue of redaction of certain information.

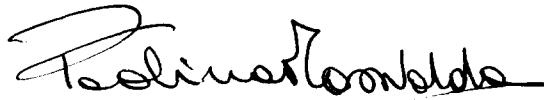
<sup>25</sup> *Ibid.*, para. 29.

- *Access to documents and material*

43. The issue will be covered by the Office in its oral submissions under point B of the order scheduling a hearing.<sup>26</sup>

#### **FOR THE FOREGOING REASONS**

44. The Office respectfully requests Trial Chamber I to allow the Principal Counsel to appear before the Chamber during the hearing to be held on 5 December 2007 or to submit written observations in relation to point E. of the "Order scheduling a hearing" dealing with protective measures for victims' applicants, as well as on the dual status of witnesses/victims.



**Paolina Massidda**  
**Principal Counsel**  
**Office of Public Counsel for Victims**

Dated this 21<sup>st</sup> day of November 2007

At The Hague

The Netherlands

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<sup>26</sup> See *supra* note 11.