



Original: English

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

Date: 02 May 2008

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 Document
Prosecution's Application for Non-Disclosure Order and Order on Regulation of
Contact with Witnesses

Source: [Office of the Prosecutor]

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Victims Participation and Reparations
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Other

I. Introduction

1. As ordered by the Trial Chamber at the Status Conference on 13 March 2008¹, on 28 March 2008, the Prosecution disclosed to the Defence all its incriminatory evidence it intended to rely on, including the identities of all its witnesses.² The Prosecution has also disclosed and continues to disclose material pursuant to Rule 67(2) of the Rules of Procedure and Evidence ("Rules"), subject to protection and confidentiality concerns.
2. In view of the above, and pursuant to Articles 64 (2) and 68 of the Rome Statute ("Statute") and Rules 87 and 88 of the Rules the Prosecution herewith makes an application for the following orders: i) a non-disclosure order on the Defence so that the identities of Prosecution witnesses and other disclosed information are not disclosed to the public, except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the Defence case, and ii) an order regulating the contact by the Defence and Prosecution with witnesses on whom the other party intends to rely on at trial.
3. The Prosecution submits that these orders would not only bolster the protection regimes that are currently in effect for certain witnesses, as envisaged by Rule 88 of the Rules; but also, and importantly, it would further instil a sense of security in the minds of witnesses.³

¹ ICC-01/04-01/06-T-79-ENG ET WT, page 10.

² Except material which is the subject of redactions.

³ The Prosecution intends to inform its witnesses of the content of the order in the event that it is granted by the Trial Chamber.

II. Non-Disclosure Order

4. The Prosecution avers that the non-disclosure order should expressly prevent the disclosure by the Accused and Defence of non-public evidence and information disclosed to them by the Prosecution (including the identities, whereabouts and any other identifying features of the witnesses the Prosecution intends to call and exculpatory, incriminatory and Rule 77 evidence) to the public except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of their case.
5. If the Defence finds it directly and specifically necessary to disclose any of the material for the purposes of preparation and presentation of their case, it is suggested that they inform each person among the public to whom such material is shown or disclosed, that he or she shall not copy, reproduce or publicise such material, in whole or in part, and is not to show or disclose it to any other person. If provided with the original or any copy or duplicate of such material, such person shall return it to the Defence when such material is no longer necessary.
6. In the above regard, the Prosecution submits that the Defence shall keep a log of the name, address and function of any person or entity receiving the information or document for the purposes of presentation and preparation of their case, as well as the date of disclosure.⁴ This way, should there be an allegation of breach of the order, the records kept by the Defence would be of assistance in determining the source of the breach.

⁴ The Prosecution underscores that this recommendation, and in fact this application, should not be understood as directed at the Defence; rather it seeks to invoke precautionary measures to counter situations that may surface posing a danger to witnesses that are beyond the control of the parties.

7. The Prosecution submits that the term “public” should include all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the International Criminal Court (ICC), relevant members of the Registry, the Prosecutor and his representatives, the Accused, his counsel, his legal assistants and other members of the Defence team, their agents and representatives. Further, it should include the family, friends, associates of the Accused and other accused and their defence counsel in cases before the ICC as well as media and journalists.⁵
8. Further, the Prosecution submits that in the event a member of the Defence team withdraws from the case, all material in his/her possession should be returned to lead counsel, thereby ensuring that the order covers former members of the Defence team.
9. The Prosecution submits that the above obligations upon the Defence do not hinder their ability to prepare or present their case and therefore do not infringe upon the rights of their client as prescribed in Article 67 of the Statute; rather they preserve both the rights of the Accused and the security of witnesses.

III. Order Regulating Contact with Witnesses

10. The Prosecution seeks an order regulating the contact with witnesses so that, *inter alia*, should a witness receive a phone call or a visit by a person identifying themselves as representing or working for the opposing party, the parties and the Victims and Witnesses Unit (VWU) would be in a better position to either confirm this or determine that it emanates from a third

⁵ Such orders exist in international criminal law and practice, for example see International Criminal Tribunal for the Former Yugoslavia cases *Prosecutor v. Sefer Halilovic*, “Decision on Prosecution’s Request for Order of Non-Disclosure”, Case No. IT-01-48-PT, 22 January 2004. Also, *Prosecutor v. Ante Gotovina*, “Decision of Prosecution’s Motion for Non-Disclosure to Public of Material Disclosed Pursuant to Rules 66 and 68”, Case No. 01-45-PT, 14 July 2006.

entity, thereby posing a threat to the safety of the witness. The Prosecution submits that there is an impending need to render a regulation of contact order, further exemplified by the information contained in the Registry's under seal filing of their Investigative Report on 09 April 2008⁶. The regulation of contact would augment the witness protection measures in force.

11. The Prosecution notes that a similar order was rendered by the Pre-Trial Chamber in its Decision on 19 September 2006 regulating the contact by the parties with witnesses on whom they intended to rely on at the Confirmation Hearing.⁷ Although this Decision was rendered at the pre-trial stage, the Prosecution submits that the issues of witness protection and contact confronted at the pre-trial stage are not distinct to the issues of witness protection and contact confronted at the trial stage; they are more acute at the present stage.
12. Accordingly, the Prosecution asks the Trial Chamber to regulate the contact with Prosecution witnesses that might be contemplated by the Defence to enhance the protection of those witnesses. The Prosecution accepts that any party may contact and speak to witnesses of the opposing party so long as the witness consents. However, the Prosecution seeks specific relief that obliges the Defence to provide the Prosecution and the Victims and Witnesses Unit (VWU) with reasonable notice of the Defence's intent to do so; such a procedure would allow the Prosecution and VWU to make arrangements whenever the witnesses do not wish to be approached in their homes or places of business and provide the opportunity to the

⁶ *Prosecutor v Thomas Lubanga*, "Rapport d'enquête du Greffier", Prosecution and Defence only, Case No: ICC-01/04-01/06-1271-US-Exp.

⁷ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses", Case No. ICC-01/04-01/06-447.

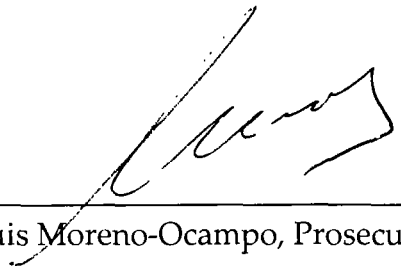
Prosecution to be present. Further, should specific protection or access issues arise (for example where the consent of the witness is unclear or a curtailment of the contact might be necessary) the above-mentioned process would allow the Prosecution and the VWU to raise them with the Trial Chamber for relief.

13. Therefore, it is suggested that the Defence inform the Prosecution of its intent to contact a Prosecution witness so that the Prosecution can ask the witness whether he/she agrees to be contacted or interviewed and whether there are any objections to the Prosecution disclosing their contact details and whereabouts to the Defence, if not already known. The Defence should also inform the Prosecution of the date and location of the proposed interview so that the Prosecution may be present. This contact should then proceed and be effected through the assistance of the VWU.
14. The Prosecution makes the observation that the above-mentioned process whereby a party is required to inform the opposing party and the VWU in order to contact witnesses of the opposing party, would be equally applicable to the Prosecution when and if it intends to contact Defence witnesses.

IV. Relief Sought

15. The Prosecution respectfully requests the Trial Chamber, pursuant to Articles 64 (2) and 68 of the Statute and Rules 87 and 88 of the Rules, to render orders for non-disclosure and the regulation of contact with witnesses. Accordingly, the Prosecution submits that the order on non-disclosure could incorporate the elements contained in paras. 4 to 8, *supra*. The Prosecution further submits that the order on regulation of contact

with witnesses could incorporate the elements contained in paras 12 to 14
supra.



Luis Moreno-Ocampo, Prosecutor

Dated this 02nd day of May 2008

At The Hague, Netherlands