

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **11 March 2009**

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

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

**Confidential, *ex parte*,
only available to the applicant Legal Representatives and the Registry**

**Request for review of the Registrar's decision on the application for legal
assistance paid by the Court filed by Messrs Walley, Mulenda, Diakiese and
Mulamba in *The Prosecutor v. Thomas Lubanga Dyilo***

**Source: Legal Representatives of Victims a/0001/06, a/0002/06, a/0003/06, a/0049/06,
a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08,
a/0409/08, a/0149/07 and a/0162/07**

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

Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Mr Hervé Diakiese

Mr Luc Walley

Mr Franck Mulenda

Mr Jean Chrysostome Mulamba

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Background

1. By decisions dated 15¹ and 18 December 2008,² Trial Chamber I granted a/0001/06, a/0002/06, a/0003/06, a/0007/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 (“the Applicants”) represented by Messrs Walley, Mulenda, Diakiese and Mulamba (“the Legal Representatives”) victim status in the proceedings in *The Prosecutor v. Thomas Lubanga Dyilo*.

2. By decisions dated 9 June 2008,³ 22 December 2008⁴ and 9 January 2009,⁵ the Registrar decided provisionally to consider all of the applicants wholly indigent under regulation 85(1) *in fine* of the Regulations of the Court, with the exception of Applicants a/0149/07, a/162/07, a/0404/08, a/0405/08, a/0407/08 and a/0409/08.

3. By oral decision,⁶ Trial Chamber I authorised the Legal Representatives of the victims to form two teams, with the Office of Public Counsel for Victims representing a third group of victims.

4. By e-mail dated 30 January 2009, the Legal Representatives notified the Registry of their action plan for the period from 1 February to 31 July 2009.

5. The Legal Representatives’ action plan provides for:

- a roster ensuring the continuous presence in The Hague of one counsel from the team and the case manager;
- three ten-day missions in the Democratic Republic of the Congo (including travel days) for two counsel for the duration of the plan;

¹ ICC-01/04-01/06-1556.

² ICC-01/04-01/06-1562.

³ ICC-01/04-01/06-1383-tENG-Corr.

⁴ ICC-01/04-01/06-1572-tENG.

⁵ ICC-01/04-01/06-1597.

⁶ Decision of 22 January 2009, ICC-01/04-01/06-T-105-ENG, page 12, line 23, to page 13, line 12.

- office work of counsel who are not in The Hague to be remunerated up to a maximum number of hours;
- accommodation costs in The Hague to be reimbursed at a fixed rate; travel costs to be reimbursed on the basis of the actual costs;
- a compensatory allowance for the overheads of their chambers when they are in The Hague;
- provision of insurance for medical costs and repatriation in the event of accident or illness occurring in the Netherlands.

6. The Registrar issued her decision on the action plan on 25 February 2009 and considered, *inter alia*, that:⁷

[TRANSLATION] Pursuant to articles 13 and 14 of the Code of Professional Conduct for counsel, the Legal Representatives have an obligation to inform and consult their clients; it nevertheless does not appear reasonably necessary for two Legal Representatives to meet the applicants at the same time and in the same places.

7. The Registrar added in another recital⁸ that:

[TRANSLATION] The Legal Representatives' medical insurance and repatriation costs are not reasonably necessary costs for the Applicants' legal representation to be borne by the Registry as part of legal assistance paid by the Court.

8. Hence, the Registrar decided on these two points:⁹

[TRANSLATION] That the costs of missions conducted by a Legal Representative may be borne by the scheme of legal assistance paid by the Court on the basis of mission plans; that any mission request shall be assessed by the Registrar on a case-by-case basis, taking into account the progress of the proceedings, in accordance with the work plan approved pursuant to regulation 134 of the Regulations of the Registry;

[TRANSLATION] Not to grant the application for the costs of the Legal Representatives' medical insurance and repatriation to be covered by legal assistance paid by the Court;

⁷ Page 4 of the Registrar's decision of 25 February 2009.

⁸ Page 4 of the Registrar's decision of 25 February 2009.

⁹ Page 5 of the Registrar's decision of 25 February 2009.

9. The Registrar's decision was notified by an e-mail from the Victims Participation and Reparations Section on 25 February 2009.

10. In that e-mail, the Victims Participation and Reparations Section observes that:

[TRANSLATION] **Field missions**

The Registry considers that, at this stage of the proceedings and for the relevant period, the principle of organising two field missions is reasonable. Indeed, it is assumed that you received instructions from your clients prior to the commencement of the trial stage. It appears reasonable that you should inform them of the legal developments which occurred during the relevant period and that you should consult them regarding those developments to receive their instructions, if any.¹⁰

[TRANSLATION] **Insurance**

Medical insurance and repatriation costs shall be borne by each counsel.¹¹

11. Pursuant to regulation 85(4) of the Regulations of the Court, the Legal Representatives hereby apply to the Presidency for a review of the Registry's decision of 25 February 2009 and of the observations of the Victims Participation and Reparations Section dated 25 February 2009 insofar as they relate to the two points set out above.

12. Since this request contains information concerning the client/counsel relationship and other information relating to the organisation of the safety of victims and their counsel, it has been filed *ex parte*.

Discussion

a) Field missions

13. The action plan provides for the organisation of three missions of at least ten days (including travel days) by two counsel during the period from 1 February to 31 July 2009. It should be noted that the team of Legal Representatives in question comprises three Congolese lawyers and one Belgian lawyer.

¹⁰ Page 1 of the e-mail from the Victims Participation and Reparations Section dated 25 February 2009.

¹¹ Page 2 of the e-mail referred to at footnote 10 above.

14. The Registrar has decided that these missions must be conducted by one counsel. However, in the aforementioned decision,¹² the Registrar upheld the principle of three missions. Consequently, in its notification e-mail, the Victims Participation and Reparations Section decided that there must be a limit of two missions. Thus, it gratuitously introduced an additional restriction which is not stipulated in the Registrar's decision and which must, therefore, be removed.

15. Furthermore, the decision of the Victims Participation and Reparations Section may present a problem with regard to articles 14 and 15 of the Code of Professional Conduct for counsel, under which counsel shall consult a client on the means by which the objectives of his or her representation are to be pursued, and counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.¹³ If there were two missions with one counsel, it would mean that one of the three Congolese counsel would be unable to meet his clients during the relevant period.

16. Concerning the issue of the number of counsel participating in a mission, the Legal Representatives challenge the Registrar's decision to limit the number to one counsel.

17. The Legal Representatives reasoned their request for two counsel for each mission in their action plan:

[TRANSLATION] It might be envisaged that each mission would be conducted by two counsel (such that each counsel would participate in two missions). The advantages of counsel travelling in pairs would be:

- a reduction in security risks;
- counsel being able to consult each other when a decision has to be made in delicate situations;

¹² Registrar's decision of 25 February 2009, *supra*, footnote 7, page 5, second paragraph.

¹³ Code of Professional Conduct for counsel, Article 14(2)(b): "When representing a client, counsel shall: Consult the client on the means by which the objectives of his or her representation are to be pursued." Article 15(1): "Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation."

- counsel being able to introduce their colleague to their respective clients and intermediaries, to promote better collaboration within the team and facilitate any future replacements;
- counsel would benefit from the others' language knowledge;
- an increase in the cost-effectiveness of travel logistics (vehicle hire, etc.).¹⁴

18. The first reason for this request concerns the safety both of the clients and of the Legal Representatives.

19. The majority of the clients reside in the still-unstable area of Bunia in Ituri, which may also raise security risks for counsel. Many victims belong to the ethnic community of the Accused. To protect their safety, their anonymity must be preserved. This means, *inter alia*, that the different clients of one team, and even of one counsel, must not meet, and that each victim must therefore have an opportunity to be seen alone by his or her counsel. It is therefore necessary to organise clients' travel and arrange meetings in different places depending on the clients, to prevent clients and counsel from being identified. In fact, one counsel meeting a large number of the team's clients (the very reason for the grouping of counsel) easily arouses curiosity and exposes clients to reprisals. Organising such meetings involves considerable logistical constraints, which two counsel are better placed to handle. If one counsel alone were to bear the burden of this logistical organisation, it is patently clear that this would be detrimental to the quality of the mission (less time spent on counsel/client communication, increased duration of the mission, etc.) and would be inconsistent with counsel's obligations of diligence towards their clients, as recalled in articles 14 and 15 of the 15 of the Code of Professional Conduct for counsel.

20. Counsel would also be able to consult each other when a decision has to be made in delicate situations, which do not solely concern security, but may also relate to the approach to concerns expressed by a client.

¹⁴ Point 3, page 2 of the action plan.

21. A further advantage of the option of missions with two participants is that one counsel can introduce the other counsel to his or her clients and vice versa. This would foster a relationship of trust between clients and the various counsel in the team. This relationship of trust improves the quality of the client/counsel relationship since, during a future mission, one of the counsel will be able to inform another team member's clients – to whom he will have been introduced in a previous mission – of developments in the trial and provide any other relevant information. This would also strengthen the team spirit, since the victims have only recently been grouped for common representation.

22. Furthermore, a mission with two counsel enables a greater number of clients to be met than a mission with only one counsel. This makes it possible to share and optimise the various costs (such as car hire, fees for premises to meet with clients), while increasing the frequency of meetings between counsel and their clients.

23. Lastly, each counsel will benefit from the other team members' language knowledge. For example, not all counsel in the team speak Swahili, and some would not be able to meet certain clients effectively without the aid of an interpreter.

b) Medical insurance

24. In their action plan, the Legal Representatives made the following request:

[TRANSLATION] Counsel practising in the DRC invite the Registry to consider the possibility of providing them with insurance for medical expenses and repatriation in the event of accident or illness occurring in the Netherlands.¹⁵

25. In fact, this issue actually arose during the first week of the Thomas Lubanga trial, when Mr Mulenda required urgent hospital treatment throughout that week.

26. Mr Mulenda bore the resulting medical costs, since Congolese counsel do not receive any medical coverage for the duration of their time in The Hague.

¹⁵ Point 6, page 3 of the action plan.

27. In order to remedy this situation, the Court may request an extension to its collective insurance policy to cover counsel who find themselves in that situation and who make an application. That does not exclude a contribution from the counsel who will benefit from it. The Court will thus be fulfilling its obligations in respect of the host country, and at a reasonable cost.

FOR THESE REASONS,

MAY IT PLEASE THE PRESIDENCY TO

ALLOW the Legal Representatives' request for a review of the Registrar's decision of 25 February 2009 and of the e-mail from the Victims Participation and Reparations Section of 25 February 2009;

FIND AND RULE that the expenses of the three missions conducted by two Legal Representatives can be borne by the legal assistance paid by the Court on the basis of the action plan they submitted, for the relevant period;

GRANT the request that the medical insurance and repatriation expenses of the Legal Representatives be borne by the legal assistance paid by the Court in a manner to be determined later.

[signed]

Hervé Diakiese, Counsel

On behalf of the group of Victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0404/08, a/0405/08; a/0406/08; a/0409/08; a/0405/08; a/0405/08; a/0155/07; a/0156/07; a/0407/07; a/0149/07 and a/0162/07

Dated this 11 March 2009

At The Hague, The Netherlands