

1 International Criminal Court

2 Trial Chamber I - Courtroom 1

3 Presiding Judge Adrian Fulford,

4 Judge Elizabeth Odio Benito and Judge René Blattmann

5 Situation in the Democratic Republic of the Congo -

6 ICC-01/04-01/06

7 In the case of The Prosecutor v. Thomas Lubanga Dyilo

8 Thursday, 6 May 2010

9 (The hearing starts at 2.32 p.m.)

10 (Open session)

11 THE COURT USHER: All rise. The International Criminal
12 Court is now in session. Please be seated.

13 PRESIDING JUDGE FULFORD: This is the decision of Trial
14 Chamber I on whether there can be disclosure of information to an
15 accused's counsel which is withheld from the accused.

16 Background:

17 1. On 18 March 2010, Trial Chamber I dealt with the issue
18 of discussions between the Defence teams appearing before Trial
19 Chambers I and II as regards four common witnesses; that is, four
20 witnesses who are relevant to both the Lubanga and Katanga and Ngudjolo
21 trials: Witnesses 2, 12, 30 and 157 (see Transcript 265, page 59 et
22 seq).

23 2. The decision of 18 March 2010 was directed particularly
24 at the "proper ambit of any restrictions that can be imposed on the
25 exchange of information between the various Defence teams, including

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1 their representatives in the DRC" (page 61, lines 18 and 19). The
2 Chamber set out the power of the Chamber in this regard as follows:

3 "Essentially, but not exhaustively, the powers of the Chamber
4 under Article 64(6)(c) (to provide for the protection of
5 confidential information), Articles 64(6)(e) and 68 (to protect
6 victims and witnesses) and Article 72 (the protection of national
7 security information) mean that the Chamber has a clear obligation
8 to protect confidential and national security information, along
9 with those who are affected by the work of the Court. Pursuant
10 to Rule 87(1) of the Rules of Procedure and Evidence, the Chamber
11 may, upon request or proprio motu, order measures to protect
12 a victim, a witness or another person at risk on account of
13 testimony given by a witness pursuant to Article 68(1) and (2).
14 Beyond that, there is no general power to limit the conversations
15 that Defence teams may wish to conduct with each other (see
16 Transcript 265, page 61 and 62)."

17 3. The Chamber then addressed the particular position of
18 these four common witnesses, and the ability of the Defence teams in
19 each case to ensure that they do not disclose confidential information
20 that was otherwise not in the possession of another defence team, having
21 been provided with schedules which set out the relevant disclosure
22 regimes in the two cases.

23 4. It is to be stressed that the decision was concerned
24 with the exchange of information between the defence teams appearing
25 respectively in Trial Chambers I and II, and it did not involve any

1 analysis of whether restrictions may properly be imposed as to the
2 information counsel provides to the accused they represent.

3 However, in one sentence of obiter dicta, the Presiding Judge
4 observed, when addressing the provisions of Article 8(3) of the
5 Professional Code of Conduct for Counsel (which lists those to whom
6 counsel may reveal protected information) that "[t]he accused's
7 omission from this provision is of particular importance."

8 In part, because of submissions that have been based on that
9 observation, the issue in the present decision is whether counsel may
10 be required to withhold confidential information from the accused he
11 or she represents.

12 5. It is of note that Trial Chamber I addressed a related
13 issue in its decision on the Defence application to exclude certain
14 representatives of victims from the Chamber during the non-public
15 evidence of various Defence witnesses (11 March 2010, document 2340).
16 Essentially, the Defence sought to exclude from the Chamber the legal
17 representatives of victims whose views and concerns were not engaged
18 by any Defence witness currently giving evidence. The Chamber dealt
19 with this suggestion as follows:

20 "38. The resolution of the application to exclude the
21 non-participating legal representatives can be shortly stated.
22 In their joint response, the legal representatives have set out
23 unequivocally that they will not disclose to their clients (or,
24 by clear implication, anyone else not authorised under the Code
25 of Conduct) any of the information that is covered by protective

1 measures ordered by the Chamber. This includes the identities
2 of the witnesses who have been granted anonymity. Therefore,
3 although, as the Chamber has observed, the Judges 'cannot
4 interfere with proper communications between counsel and their
5 lay clients, the prohibition on divulging information in this
6 category is a clear exception to the general rule that there
7 must be unimpeded communication between lawyers and those they
8 represent. As set out above, Article 8(4) of the code includes
9 '[i]n particular, counsel shall not reveal the identity of
10 protected victims and witnesses, or any confidential information
11 that may reveal their identity and whereabouts, unless he or
12 she has been authorised to do so by an order of the Court.'"

13 6. The present issue is before the Chamber because the
14 Prosecution, in response to Mr Katanga's urgent Defence request for
15 the disclosure of Lubanga transcripts (see filings of 18 March 2010,
16 document 2361 and 25 March 2010, document 2377) suggested, citing
17 Article 8(2) of the Code of Professional Conduct for Counsel, that
18 defence lawyers are unable to share with the accused information falling
19 under "Article 64, paragraph 6(c), Article 64, paragraph 7, Article
20 67, paragraph 1(b), Article 68, and Article 72 of the Statute, Rules
21 72, 73, and 81 of the Rules of Procedure and Evidence and Regulation
22 97 of the Regulations of the Court. Counsel shall also comply with
23 the relevant provisions of this code and any order of the Court."

24 In summary, the argument is that defence counsel cannot
25 provide, inter alia, any confidential, sensitive, privileged or

1 national security information to the accused (see paragraph 14 of the
2 Prosecution's submissions of 25 March 2010, document 2377).

3 7. On 29 March 2010, counsel on behalf of the accused Katanga
4 responded to this suggested interpretation of Article 8 of the Code
5 of Professional Conduct for Counsel (document 2386, 31 March 2010).
6 It is emphasised that the observation set out above by the Presiding
7 Judge in the Lubanga trial that '[t]he accused's omission from this
8 provision is of particular importance' was obiter dicta.

9 In short, the Defence on behalf of Mr Katanga submits that
10 the entitlement to disclosure under the Rome Statute framework is the
11 accused's rather than his or her counsel (paragraphs 11 and 12); that
12 international practice supports the contention that full disclosure
13 to the accused is one of the principles of fundamental justice and
14 that it is impermissible to order disclosure to counsel but not to
15 the accused, save, for instance, where disclosure to an accused is
16 being abused and the Court has ordered that his rights should, as a
17 result, be restricted (paragraphs 13-16).

18 8. It is also suggested that under the Romano-Germanic legal
19 systems, restrictions on disclosure in these circumstances can only
20 be granted by a judge, who is obliged to provide written reasons
21 (paragraph 17). The positions at the European Court Of Human Rights
22 (paragraphs 18 and 22) and at the International Tribunals for the former
23 Yugoslavia and Rwanda are respectively considered (paragraphs 19-21
24 and 23), and it is argued that an accused has the right to communicate
25 freely with counsel of his or her choosing, a right which cannot be

1 fully implemented if some relevant information is excluded from their
2 discussions (paragraph 25). Finally, it is contended that the
3 interpretation of Article 8 of the Code of Conduct that is appropriate
4 for the legal representatives of victims should not be applied to defence
5 counsel instructed for an accused, and that the statutory provisions,
6 such as Article 67(1)(b) (the right of the accused to communicate freely
7 with his counsel), should determine the effect of Article 8 of the
8 Code as regards communications between the accused and his or her counsel
9 (paragraph 30 et seq).

10 9. The Office of Public Counsel for Victims ("the OPCV")
11 filed submissions on 29 March 2010 (document 2380), which does not
12 address this issue concerning the Code of Professional Conduct for
13 Counsel.

14 10. Counsel for Mr Lubanga filed submissions (document 2386,
15 31 March 2010), which essentially supported the observations of counsel
16 for Mr Katanga. In particular, it was stressed that under French law
17 only exceptional circumstances can justify withholding parts of the
18 file (paragraph 8).

19 Analysis:

20 11. The personal right of the accused under the Rome Statute
21 to receive all the material relevant to his or her trial has clear
22 foundations. By Article 67(1)(b) he or she has the right to communicate
23 freely with counsel of his or her choosing and, although some of the
24 main provisions - for instance, Article 67(2) of the Rome Statute and
25 Rule 77 of the Rules of Procedure and Evidence - refer to the "defence"

1 generically as opposed to the accused individually, there is no
2 sustainable statutory interpretation to support the conclusion that
3 it was contemplated under the Rome Statute framework that the accused
4 could be routinely denied access to relevant confidential, sensitive,
5 privileged or national security material that has been served on his
6 or her counsel. If the drafters of the Rome Statute framework had
7 intended to derogate from the accused's rights in such a fundamental
8 way, this would have been the subject of express provision. Furthermore,
9 the participating victims (who are entitled to express their views
10 and concerns under Article 68(3) of the Rome Statute) and their legal
11 representatives are self-evidently not in the same position as an
12 accused and his or her counsel, and the participating victims do not
13 share the same entitlements under the Court's provisions as an accused
14 standing trial.

15 12. If the Prosecution's interpretation of Article 8(3)
16 of the code is correct, no confidential, sensitive, privileged or
17 national security information in the case could be provided to the
18 accused without a specific order of the Chamber granting authorisation
19 under Article 8(4), given the absence of a specific provision enabling
20 disclosure by defence counsel in these circumstances. This approach
21 would tend to operate to deny the accused access to a substantial quantity
22 of evidence relevant to the case, because the Court would be required
23 to balance the accused's application for personal access to disclosed
24 material against the requirements of confidentiality, sensitivity,
25 privilege or national security, and, moreover, the Chamber would be

1 asked to rule item by item on disclosure and its extent. This would
2 result in unfairness to the accused because of the lack of, or delays
3 to, access to relevant trial material and it would impose an intolerable
4 burden on the Chamber, given the number of individual rulings that
5 would be necessary.

6 13. Accordingly, Article 8(3) of the Code of Professional
7 Conduct for Counsel does not apply to restrict the information that
8 can properly pass between the accused and his defence team. However,
9 it has been recognised by counsel for Katanga and Lubanga that in
10 exceptional circumstances restrictions may be appropriate, for
11 instance if it is sufficiently demonstrated that an accused has been
12 misusing confidential or protected information to intimidate witnesses
13 or participating victims. As set out in the submissions of counsel,
14 exceptions of this kind, although sparingly applied, are recognised
15 in the Romano-Germanic and common law systems, as well as before the
16 ad hoc tribunals. It would be inappropriate for the Chamber in the
17 course of this decision to seek to delineate the circumstances when
18 exceptions may properly be applied; instead, it will be for individual
19 Chambers to resolve requests for a limitation on disclosure to the
20 accused on a case-by-case basis.

21 14. It follows that the defence teams appearing before Trial
22 Chambers I and II are entitled to discuss the testimony of the four
23 common witnesses, providing all of the information received to the
24 three accused, so long as they ensure that they do not discuss or exchange
25 confidential information that has not been provided to the other team.

1 This decision is to be communicated to Trial Chamber II and
2 the parties and participants in the Katanga and Ngudjolo case.
3 That ends this ruling. I didn't throughout put in the paragraph numbers.
4 I didn't look to see whether the stenographers inserted them. If they
5 didn't, could they please do so before the edited version is published.

6 Private session, please.

7 (Public session at 2.55 p.m.)

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18 (The hearing ends at 3.04 p.m.)
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