

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 June 2008

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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

Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses.

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The 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**

Other

Background and submissions

1. On 2 May 2008 the Office of the Prosecutor (“prosecution”) sought an order from the Chamber limiting disclosure to the public by the accused and the defence of non-public evidence and a further order regulating contact between the defence and the prosecution’s witnesses.¹
2. With regard to the disclosure of non-public information, the prosecution submitted that the proposed order should extend to all information and evidence disclosed to the defence by the prosecution except to the extent that disclosure is necessary for the preparation and presentation of its case. Where disclosure is necessary, the prosecution submitted each member of the public to whom the material is to be disclosed should be ordered not to copy or publicise the material or show or provide it to any other person. All copies of documents made available in these circumstances should be returned when access by the member of the public is no longer necessary.²
3. The prosecution suggested that a log should be kept of each instance of disclosure of this kind, and it suggested a wide-ranging definition of the term “public”. The prosecution also submitted that all material held by any member of the defence team who withdraws from the case should be returned to the lead counsel.³
4. With regard to contact by the prosecution and the defence and the witnesses to be called by the other party, the prosecution accepted that this may occur, so long as the witness consents. The prosecution submitted that the details of contact of this kind – such as the proposed location thereof – may raise specific protection or access issues which it or the Victims and Witnesses Unit

¹ Prosecution’s application for non-disclosure order and order on régulation of contact with witnesses, ICC-01/04-01/06-1300.

² *Ibid*, paragraphs 4 and 5.

³ *Ibid*, paragraphs 6 to 8.

may wish to raise with the Trial Chamber.⁴

5. Accordingly, the prosecution sought an order requiring the defence to inform the prosecution of its intention to contact any prosecution witness, together with the date and location of the proposed contact, so that the prosecution can establish whether or not the witness consents, and in order to send a representative to the interview. It submitted that the interview should be arranged by the Victims and Witnesses Unit. The prosecution agreed to be bound by this regime should it seek to contact defence witnesses.⁵
6. On 26 May 2008, the defence filed its response to the prosecution's filing on these two proposed orders. The defence did not oppose the prosecution's proposal on non-disclosure of non-public information but argued that such an order – including the requirement that a departing member of the team should return all material to the lead counsel – ought to apply equally to the prosecution. However, the defence submitted that the restriction should only cover information which would permit a third party to discover the identity of anyone on the list of witnesses the prosecution is intending to call.⁶
7. As regards contacting witnesses, the defence submitted that a party may not communicate with a witness who is to be called by the other party without the consent of the latter. It submitted that the party intending to call a witness is best placed to evaluate the impact communication of this kind may have on the security of the witness and on his or her ability to testify.⁷

⁴ *Ibid*, paragraphs 12-13.

⁵ *Ibid*, paragraphs 13 and 14

⁶ Réponse de la défense à la « Prosecution's application for non-disclosure order and order on régulation of contact with witnesses» datée du 2 mai 2008, ICC-01/04-01/06-1356, paragraphs 2-4.

⁷ *Ibid*, paragraph 5.

Analysis

8. The provision of information, *inter partes*, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited – for whatever reason – it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements.
9. Once information has been characterised as being non-public (whether it is characterised as “confidential”, “*ex parte*” or “under seal”), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant.
10. Accordingly, the Chamber is persuaded by the merits of the prosecution’s application for limiting disclosure of non-public information as set out in paragraphs 12 and 13 below.
11. With regard to permitting contact between a party or a participant and the witnesses to be called by the other party or a participant, the overarching consideration is the consent of the witness. Once a witness consents, unless the Chamber rules otherwise, contact should be facilitated. If the party or participant who intends to call a witness objects to the meeting, it shall raise the matter with the Chamber by way of an application in advance of the interview. The party or participant calling the witness is entitled to have a representative present during the interview, unless – again, following an application – the Chamber rules otherwise.

Orders

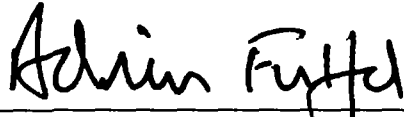
12. The Chamber hereby orders that whenever information, which is characterised in manner more restrictive than “public”, is provided to a party

or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation. For the purposes of this order, the term “public” includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their legal representatives.

13. Any member of the legal teams of the prosecution, the defence or a participating victim shall, upon no longer being part of those teams, return all “non-public” material in their possession to the relevant person within the team.
14. A party or a participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or the participant of the proposal, setting out the suggested time and location of the interview. If the witness consents, the party or participant shall make such contact through the Victims and Witnesses Unit, which shall make the necessary arrangements for the interview. A representative of the Victims and Witnesses Unit shall be present during the interview and the party or participant intending to call the witness may also attend the interview, unless

the Chamber has, on an application, ruled otherwise.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Rene Blattmann

Dated this 3 June 2008

At The Hague, The Netherlands