

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

**Decision on certain practicalities regarding individuals who have the dual status
of witness and victim**

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

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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
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**Victims Participation and Reparations
Section**

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision ("Decision"):

I. BACKGROUND

1. On 30 October 2007, the Presiding Judge of Trial Chamber I drew the attention of the parties and participants to the general position of victims who are also witnesses and provided the opportunity to make submissions on the issue.¹
2. On 13 November 2007 the Victims and Witnesses Unit ("VWU") submitted a "Report on Security Issues Relating to the dual status of Witnesses and Victims" ("initial report").²
3. On 21 November 2007, the Office of Public Counsel for Victims ("OPCV") requested leave to submit observations.³
4. In an oral order of 4 December 2007, the Presiding Judge requested the parties, the participants and the relevant sections of the Registry to discuss the issue between themselves, and thereafter to draft a comprehensive document addressing the circumstances of individuals who hold the dual status of witnesses and victims.⁴
5. A first joint report was submitted by the Registry on 16 January 2008.⁵ The discussions leading to the report involved the defence, the Office of the Prosecutor ("prosecution"), the victims' legal representatives, the Office of

¹ Transcript of hearing on 30 October 2007, ICC-01/04-01/06-T58-ENG, page 17, lines 17-24.

² ICC-01/04-01/06-1026-Conf.

³ OPCV's request to submit observations otherwise be heard on point E of the order of 14 November 2007 and on the issue of the dual status of witnesses/victims, 21 November 2007, ICC-01/04-01/06-1038.

⁴ Transcript of hearing on 4 December 2007, ICC-01/04-01/06-T62-ENG, page 29, lines 5-11.

⁵ Joint Report, Proposed mechanisms for exchange of information on individuals enjoying dual status, 16 January 2008, ICC-01/04-01/06-1117-Conf.

Public Counsel for Defence, and the Registry (namely the VWU and the Victims Participation and Reparations Section ("VPRS")).

6. On 18 January 2008, the Trial Chamber issued the Decision on victims' participation,⁶ in which the following conclusions were reached:
 - a. Victims appearing before the Court in person should not be treated automatically as witnesses as this will depend on whether or not they are called as witnesses during the proceedings;⁷
 - b. When considering an application by a victim who has dual status, the Chamber will establish whether their participation may adversely affect the rights of the defence at the relevant stage in the case, taking into consideration the modalities of participation by victims with dual status, the justification for their participation and the rights of the accused to a fair and expeditious trial;⁸
 - c. The VWU should be assisted in providing protection to victims and witnesses by other organs of the Court, provided this is not in conflict with their other functions and obligations;⁹
 - d. Careful consideration should be given to sharing information with the VWU on matters concerning protection, including providing information on any individuals who have dual status;¹⁰
 - e. The Chamber stipulated that the relevant sections of the Registry, the parties and the participants should continue their discussions on the

⁶ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

⁷ *Ibid*, paragraph 132.

⁸ *Ibid*, paragraph 134.

⁹ *Ibid*, paragraph 135.

¹⁰ *Ibid*.

proposed mechanisms for the exchange of information on persons with dual status of victim and witness and they should report back to the Chamber on the outcome.¹¹

7. On 18 February 2008, the Registry submitted a second joint report.¹²
8. The issue of witnesses with dual status was the subject of further oral submissions during the Status Conference held on 12 March 2008.¹³

II. SUBMISSIONS

9. Since the parties and the participants did not make individual submissions, but filed common joint reports, the Chamber will summarise the submissions of the parties, participants and sections of the Registry involved following the way in which the issues were presented to the Chamber in the joint reports.
10. In its initial report, the VWU made the following observations:¹⁴
 - a. Participation in the ICC protection programme should not prevent an individual from exercising his or her rights to participate or to apply for reparations;
 - b. Participation by victims must not compromise the security of a protected individual;
 - c. The fact that an individual participates in the ICC protection programme must remain confidential;

¹¹ ICC-01/04-01/06-1119, paragraph 138 h).

¹² Second Joint report, Proposed mechanisms for exchange of information on individuals enjoying dual status, 18 February 2008, ICC-01/04-01/06-1177-Conf.

¹³ Transcript of hearing on 12 March 2008, ICC/01/04-01/06-T-78-CONF-ENG.

¹⁴ Victims and Witnesses Unit's report on security issues relating to the dual status of witnesses and victims, 13 November 2007, ICC-01/04-01/06-1026-Conf, paragraphs 2-7.

- d. The VWU should facilitate all contact between the protected individual and the Court (or persons appointed by the Court);
- e. The VWU does not have an obligation to disclose to a party or the participants details of contact with a protected individual;
- f. The VWU must have knowledge of the dual status of a protected individual in order to conduct a proper risk-assessment and to reduce risks.

11. The VWU formulated the following practical solutions:¹⁵

- a. The VWU assessment procedure should include questions on whether the applicant may have dual status;
- b. The Chamber could order the referring bodies to inform the relevant party or participant, and the VWU, if they are aware of an individual's potential dual status;
- c. The Chamber could order that all victims' applications, and any decisions thereon granting participation, should be notified to the VWU;
- d. The VWU could have limited access to the relevant records of the VPRS;
- e. The VWU could inform the VPRS of the dual status of an individual in order for the latter to take it into account when communicating with

¹⁵ *Ibid.*, paragraphs 14-19.

applicants, and when submitting any confidential *ex parte* reports to the Chamber;

- f. Additionally, the VWU could advise a witness to seek legal advice when the VWU is aware that the witness may also be a potential victim.

Communication between the legal representative of a victim and the prosecution

12. The following areas of **agreement** are clear from the first joint report as regards this issue:¹⁶

- a. When legal representatives of victims become aware that an individual may have dual status, they may provide the prosecution with the name of the individual, his or her date of birth and other identifying information, to the extent possible;
- b. The prosecution should thereafter check if the witness has dual status, and if so, communicate this in writing to the legal representative (whether or not the witness is in the ICC protection programme);
- c. As a precondition for a. and b. above, there must be a solicitor-client relationship between the individual and the legal representative;
- d. All communications within this context must be treated as confidential;
- e. The legal representatives must have the victim's consent to disclose his or her identity to the prosecution;

¹⁶ Joint Report, Proposed mechanisms for exchange of information on individuals enjoying dual status, 16 January 2008, ICC-01/04-01/06-1117-Conf, paragraphs 6-10.

- f. In cases where it is impossible for the legal representative to obtain consent from the victim to disclose his or her identity to the prosecution (for instance, if the person is already in the ICC protection programme) the usual mechanism will fail and an alternative must be devised.

13. The following areas of **disagreement** are evident from the first joint report:

- a. While the parties and participants agreed that an *inter partes* approach should be adopted regarding exchange of information on the dual status of an individual, the Registry (mainly the VPRS) expressed its concern as to when, for reasons of protection of such individuals, the information should be transmitted to the relevant sections of the Registry (as a neutral body);¹⁷
- b. The prosecution opposed a proposed solution that the VWU, upon request by a legal representative, should reveal to that representative whether an individual has been admitted under the ICC protection programme (even under strict confidentiality), arguing that any communication of this kind with its witnesses must be subject to the prosecution's consent. The victims' legal representatives disagreed with the prosecution's stance on this issue;¹⁸
- c. The VWU is unwilling to communicate to the prosecution the fact that an individual is a victim applicant or victim participating in the proceedings, if he or she clearly requests in the application form that this information should not be disclosed.¹⁹

¹⁷ *Ibid*, paragraphs 4-5.

¹⁸ *Ibid*, paragraphs 11-13.

¹⁹ *Ibid*, paragraph 14.

14. During the Status Conference of 28 May 2008, the OPCV submitted that communication between the legal representatives of victims with dual status and the prosecution is also required in relation to judicial protective and special measures under Rules 87 and 88 of the Rules of Procedure and Evidence ("Rules"), in order to avoid a multiplication of requests for protective or special measures before the Chamber in relation to the same individuals.²⁰

Communication between the legal representative of a victim and the defence

15. The first joint report reveals that there is **agreement** that the legal representatives must communicate the name of a victim to the defence where the identity is already known to them; and the defence should then inform the legal representatives if the individual is a potential defence witness. However, it was recognised that difficulties may arise when the defence is unaware of the identity of the individual.²¹

Information to be provided to the Registry

16. The first joint report contains **agreement** as regards the following:²²

- a. The parties and the participants should communicate to the VWU the fact of the dual status of an individual as soon as they become aware of it;
- b. If the existence of dual status is known at the time of a referral to the ICC protection programme, this should be communicated to the VWU;

²⁰ Transcript of hearing on 28 May 2008, ICC-01/04-01/06-T-88-ENG, page 63, lines 19-25, page 64 lines 1-10.

²¹ ICC-01/04-01/06-1117-Conf, paragraphs 15-16.

²² *Ibid*, paragraphs 17-20.

- c. The above requirement applies when a legal representative refers a victim to the ICC protection programme;
- d. During the assessment interviews, the VWU will ask applicants who are witnesses whether they have applied for participation and *vice versa*;
- e. The VPRS submitted that when an applicant does not have a legal representative, the VPRS should be notified as to whether he or she has dual status in order for it to take this into consideration, particularly when making recommendations on redactions to the Chamber.

Modalities of contact with individuals enjoying dual status

17. The first report reveals that there is **disagreement** on this issue. The prosecution accepted that it will approach the legal representative of a witness with dual status when it has been advised of such representation, in order to contact the individual. However the prosecution submitted that in cases of urgency (e.g. in order to preserve or collect evidence) it may not be able to contact the legal representative in advance. The OPCV opposed any contact without the legal representative receiving prior notice.²³
18. There is **agreement** on the following:²⁴
 - a. When the defence wishes to contact an individual with dual status, it shall provide notice to the legal representative, whenever it has been advised of their existence;

²³ *Ibid* , paragraphs 21-22.

²⁴ *Ibid* , paragraph 24.

- b. If a person with dual status seeks to contact the parties or participants, the VWU will facilitate this; however the fact of this contact will not be communicated to the other party or the other participants.

Contact between a witness with dual status and his or her legal representative

- 19. **The prosecution generally does not object** to the presence of a legal representative of the participating victim when, as a witness, he or she reviews their statement or statements.²⁵
- 20. **The defence similarly has no objections** to the presence of the legal representative during this process in the case of a witness with a dual status. The defence suggested that this should not confer a different status on the person appearing as a witness: the fact that his legal representative is present should not grant him any additional rights.²⁶ The defence further submitted that in many national systems witnesses have no access to the record and he or she is not given a copy of their statement. The defence argued that the Chamber should apply to witnesses with dual status the same system that applies to witnesses who are not participating as victims, treating their testimony in the same way.²⁷

Providing the legal representatives with a copy of the signed statements made by prosecution or defence witnesses with dual status

- 21. There is no clear agreement among the parties and participants in this regard.
- 22. In the second joint report the **prosecution's** position was as follows:²⁸

²⁵ ICC/01/04-01/06-T-78-CONF-ENG, page 29, lines 4-5.

²⁶ ICC/01/04-01/06-T-78-CONF-ENG, page 29, lines 12-16.

²⁷ ICC/01/04-01/06-T-78-CONF-ENG, page 40, line 25 and page 41, lines 1-8.

²⁸ ICC-01/04-01/06-1177-Conf, paragraphs 5-6.

- a. It agreed to provide legal representatives of **victims with dual status who have been granted the right to participate**, upon request, with a copy of their signed statement, under strict confidentiality (subject, however, to paragraph 23 below).
 - b. They argued that the treatment of **victim applicants** will be different, given their status is uncertain. The prosecution submitted that their legal representatives should be encouraged to submit detailed requests which outline the reasons for being afforded access to the statement or statements, and the prosecution seeks to retain the right to not provide certain statements or, alternatively, to submit them in redacted or summary form.
23. Generally, the **prosecution** argued that it retains discretion over whether to provide the legal representative with the statement and other documents supplied by a witness with dual status²⁹ or by a victim-applicant. The prosecution submitted it retains a broad discretion which overrides the obligation of the legal representatives to secure the interests of their clients. The prosecution also accepted a problem may arise if the person concerned does not give his or her consent.³⁰
24. Both the **OPCV and the legal representatives object** to the prosecution's claim to have discretion over whether or not the statements are provided to the legal representatives, and particularly the suggestion that the prosecution should be allowed to delay this "when valid grounds exist".

²⁹ ICC/01/04-01/06-T-78-CONF-ENG, page 65, line 24, page 66, line 1, page 67, line 25, page 68, lines 2-3 and page 69, lines 16-18.

³⁰ ICC-01/04-01/06-1177-Conf, paragraphs 7-9, ICC/01/04-01/06-T-78-CONF-ENG, page 68, lines 2-3.

25. The **defence** submitted it has no legal obligation to provide this information. However, the defence agreed to evaluate, on a case-by-case basis, the requests of legal representatives for access to the statements of their clients.³¹
26. The **legal representative of victim a/0105/06** submitted that whenever a victim who is participating in the proceedings is called as a witness, that individual will need legal representation and should be given a copy of his or her statement. Furthermore, the legal representative contended that the statement may be useful for the purpose of addressing reparations. For these reasons, it was suggested that the legal representatives of victims with dual status should be given a copy of their client's statement since it may describe the harm suffered by the victim.³²

Providing the legal representatives with material such as the notes and documents made by a witness with dual status

27. The same areas of disagreement, as identified in the preceding section, were set out in the second joint report.
28. The **prosecution agreed** to provide materials compiled by witnesses with dual status, save to the extent that they may relate to the internal workings of the prosecution and whilst retaining the discretion to decide on disclosure on a case-by-case basis as regards victim-applicants.³³ The **OPCV**, however, objected to this attempt by the prosecution to remain the arbiter in this regard.³⁴ The **defence** suggested it has no legal obligation to provide this information and instead it should be free to evaluate any requests on a case-by-case basis.³⁵

³¹ ICC-01/04-01/06-1177-Conf, paragraph 10.

³² ICC/01/04-01/06-T-78-CONF-ENG, page 52, lines 6-25.

³³ ICC-01/04-01/06-1177-Conf, paragraphs 11-12.

³⁴ *Ibid*, paragraph 13.

³⁵ *Ibid*, paragraph 14.

Attendance by the legal representatives during the medical examination of witnesses with dual status and furnishing the legal representatives with a copy of any medical report

29. The **prosecution does not object** to a legal representative being present during the medical examination of a victim or victim-applicant who has dual status, provided the latter consents.³⁶
30. The **OPCV agreed** that consent is necessary but submitted that problems may arise when the legal representative is appointed by the Court at a late stage in the proceedings or after the individual has been admitted into the ICC protection programme.³⁷ However, the OPCV suggested that this difficulty could be internally resolved between the Registry and VWU.³⁸
31. In the second joint report, the **defence objected** to the legal representative being present during the medical examination, but noted that once the witness receives any medical report, he or she is free to give it to his or her legal representative.³⁹ However, during the Status Conference of 12 March 2008 the defence indicated that although it does not accept that the presence of the legal representative serves any useful purpose, it will not object, so long as the legal representative is not obstructive.⁴⁰

Attendance of the legal representative at meetings when a witness with dual status is being interviewed

32. For those victims with dual status, the **prosecution did not object** (provided the individual gives consent), to the legal representative either being present

³⁶ *Ibid*, paragraph 15; ICC/01/04-01/06-T-78-CONF-ENG, page 74, lines 11-14.

³⁷ ICC-01/04-01/06-1177-Conf, paragraph 16.

³⁸ ICC/01/04-01/06-T-78-CONF-ENG, page 70, lines 4-16.

³⁹ ICC-01/04-01/06-1177-Conf, paragraph 17.

⁴⁰ ICC/01/04-01/06-T-78-CONF-ENG, page 70, lines 24-25, page 71, lines 1-7 and page 73, lines 1-2.

during interviews or receiving a copy of the record of the interview (e.g. the transcript or statement). As regards victim-applicants, the prosecution submitted that valid grounds may exist to justify excluding the legal representative during their interviews.⁴¹

33. The **defence did not oppose** the presence of the legal representative of either a victim or a victim-applicant, if there is consent from the individual. The defence agreed it will provide notice to the legal representative when it intends to meet with someone with dual status. However, the defence suggested there may be occasions when the presence of a legal representative is not warranted (i.e. when it may interfere with its investigations).⁴²
34. The **legal representatives reiterated their concern** that the parties should not be afforded a broad discretion, based on “valid grounds”, to decide whether or not a legal representative should be present during an interview.⁴³

Providing information to the legal representative on the identity of the family or legal guardian of a child witness who has dual status

35. The **prosecution agreed** to share information related to the identity of the family or legal guardian of a child witness with the legal representatives of victims and victim-applicants with dual status, unless the individual is in the ICC protection programme. In the latter circumstance, the prosecution accepted that the VWU is the competent entity to make this decision.⁴⁴

⁴¹ ICC-01/04-01/06-1177-Conf, paragraphs 18-19.

⁴² *Ibid*, paragraph 20.

⁴³ *Ibid*, paragraph 21.

⁴⁴ *Ibid*, paragraphs 22-23.

36. The **defence** did not accept it should provide this information to the legal representatives, since this information is subject to the confidentiality of legal professional privilege.⁴⁵
37. As regards the VWU providing information about the family or legal guardian of a child witness, the VWU agreed to assist the relevant legal representative, but only after he or she has been unsuccessful in obtaining the information from the victim or applicant. The VWU indicated it will give advice on how to establish contact.⁴⁶

The proposal that when the VPRS needs to contact a participating or applicant victim without legal representation, the VWU will inform the VPRS as to whether the person is in the ICC protection programme (having first consulted with the party or participant who referred the witness)

38. The **prosecution and the defence** agreed with this proposal, on the basis that consent has been given by the referring party.⁴⁷
39. The **VPRS** indicated that on certain occasions it may be **impossible to inform the prosecution and defence about these requests** if the applicant-victim does not wish his or her identity to be revealed to one or both parties. In those circumstances, the VWU will inform the VPRS whether or not the applicant is in the protection programme and will facilitate contact with the applicant, but under two conditions: first, that the victim has requested that his or her identity should not be revealed to the parties, and, second, that the VPRS undertakes not to reveal that the individual is in the ICC protection programme or that he or she has dual status. However, the VPRS explained that it may be necessary for it to contact a victim-applicant in order to follow-up on an application or to

⁴⁵ *Ibid*, paragraph 24.

⁴⁶ *Ibid*, paragraph 32.

⁴⁷ *Ibid*, paragraphs 25-26

gather further information in order to complete the application. In these circumstances, the VPRS proposed that it should be provided with the relevant information by the VWU, regardless of whether the applicant requested that his or her identity should not be revealed to the parties.⁴⁸

40. Addressing this latter possibility, in the contention of the Registry this is an internal matter that could be properly solved in this way.⁴⁹

Whether a party should inform the legal representative of its intention to refer a witness with dual status or a witness who has applied to participate as a victim to the ICC protection programme

41. The **prosecution agreed** to inform the legal representative of both participating and applicant-victims of its intention to refer a witness to the ICC protection programme, on the basis that the content of the referral remains at all times strictly confidential between the prosecution and the VWU.⁵⁰
42. The defence agreed with this proposal, subject to the witness's consent.⁵¹

III. RELEVANT PROVISIONS

43. Article 43(6) of the Rome Statute ("Statute") on "The Registry" provides that:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

44. Article 68, paragraphs (1) and (3) of the Statute on the "Protection of victims and witnesses and their participation in the proceedings" establish the following:

⁴⁸ *Ibid*, paragraphs 27-29.

⁴⁹ ICC/01/04-01/06-T-78-CONF-ENG, page 75, lines 17-19, page 76, lines 22-25 and page 77, line 1.

⁵⁰ ICC-01/04-01/06-1177-Conf, paragraph 30.

⁵¹ *Ibid*, paragraph 31.

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

45. Rule 16, paragraph (1) and (2) of the Rules on the “Responsibilities of the Registrar relating to victims and witnesses” affirms that:

1 In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:

[...]

(b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91;

(c) Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91;

[...]

2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:

(a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;

(b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.

46. Rule 17 of the Rules provides in relation to the “Functions of the Unit” [VWU]:

2. The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:

(a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;

(ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

(iii) Assisting them in obtaining medical, psychological and other appropriate assistance;

[.]

(b) With respect to witnesses:

(i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;

(ii) Assisting them when they are called to testify before the Court;

[.]

47. Rule 18, paragraph (b) of the Rules provides the following in relation to the “Responsibilities of the Unit”:

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

[...]

(b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;

[...]

48. Rule 87, paragraph (1) states the following as regards “Protective measures”:

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

49. Regulation 96 of the Regulations of the Registry, paragraphs (1) and (3) offer the following on the ICC “Protection programme”:

1. The Registry shall take all necessary measures to maintain a protection programme for witnesses, including accompanying support persons, and others considered to be at risk of harm and/or death on account of a testimony given by such witnesses or as a result of their contact with the Court.

[...]

3. In assessing admission to the protection programme, in addition to the factors set out in article 68, the Registry shall consider, *inter alia*, the following:

(a) The involvement of the person before the Court;

(b) Whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court; and

(c) Whether the person agrees to enter the protection programme.

50. Regulation 97 of the Regulations of the Registry, paragraph (1), provides the following as to the “Confidentiality of communications”:

Where required for reasons of safety and security of the victim, the Registry shall take all necessary measures within its powers to ensure the confidentiality of the following communications: communications within the Court relating to specific victims, including communications within the Registry and between the Registry and other organs of the Court, between the Court and victims who have communicated with the Court; between the Court and victims’ legal representatives; between the Court and persons or organisations acting on behalf of victims; and between the Court and persons or organisations serving as intermediaries between the Court and victims.

51. Regulation 99, paragraph (1) of the Regulations of the Registry regulates the “Assessment of disclosure of information” as regards victims:

Upon receipt of an application from a victim and pending any decision by the Chamber, the Registry shall review the application and assess whether the disclosure to the prosecutor, the defence and/or other participants of any information contained in such an application, may jeopardise the safety and security of the victim concerned.

IV. ANALYSIS AND CONCLUSIONS

Introductory remarks

52. Prior to addressing the issues raised by the parties, the participants and the relevant sections of the Court on the subject of individuals with dual status, the Chamber identifies the following principles:

- a. Participation by an individual as a victim in the proceedings shall not compromise his or her security;
- b. The fact that an individual has dual status does not grant him or her rights in addition to those of someone who is only a victim or a witness; and
- c. Communication between the different sections of the Registry, as the Court’s neutral body with principal responsibility for the protection of witnesses and victims, must be direct and continuous.

The role of the VWU and communicating information to the Registry

53. The Chamber endorses the following matters, as agreed by the parties and participants:

- a. As a general rule, the fact that an individual participates in the ICC protection programme shall remain confidential;
- b. The VWU shall facilitate all contact between a protected individual and the other organs of the Court, the parties and the participants;
- c. The VWU does not have an obligation to disclose to a party or the participants the details of contact with a protected individual; and
- d. The VWU should be aware of the dual status of a protected individual in order to reduce possible risks and to facilitate a proper risk-assessment.

54. As regards the practical solutions proposed by the VWU, the Trial Chamber:

- a. Recommends that the VWU assessment-procedure includes questions as to whether the applicant may have dual status;
- b. Orders that the VWU is:
 - afforded access (as necessary) to the VPRS records,
 - notified of all applications communicated to the Chamber, and
 - is provided with the accompanying reports, as well as any decision of the Chamber granting participating status to an applicant.

- c. Orders the party who refers a witness to the ICC protection programme to inform the VWU as soon as possible if they are aware of an individual's potential dual status.
- d. Orders the VWU to inform the VPRS of the dual status of an individual in order for the section to take this into account when notifying applicants and when submitting any confidential *ex parte* report to the Chamber.
- e. Orders the VWU to advise witnesses with potential dual status to seek legal advice when it is aware that the witness may also be a potential victim.

Communication between the legal representative of a victim and the prosecution

55. The Chamber endorses the following procedure which was agreed upon by the parties, participants and the relevant sections of the Registry:
- a. When the legal representatives of victims become aware that their client has dual status, they should provide the prosecution with the name of the individual, his or her date of birth and other identifying information, to the extent possible;
 - b. Thereafter, the prosecution should check whether or not the witness has dual status, and if so, communicate this in writing to the legal representative (including when the witness is under the ICC protection programme);

- c. The prosecution should also verify whether it intends to make an application for protective or special measures under Rules 87 and 88 of the Rules and communicate this to the legal representative;
- d. The procedure under a., b. and c. above is subject to the following conditions:
 - there must be a solicitor-client relationship between the individual and the legal representative;
 - all communications must be confidential; and
 - legal representatives must have the victims' consent to disclose his or her identity to the prosecution.

56. In the event that the above *inter partes* mechanism fails, the Chamber orders that the following alternative procedure shall apply:

- a. The legal representative shall make an application to the Chamber in order to verify whether his or her client is in the ICC protection programme.
- b. Thereafter, the Chamber shall hold an *ex parte*, Registry-only hearing with the VWU and the VPRS in attendance (as the two sections of the Registry dealing with witnesses and victims).
- c. At that hearing, the Registry shall inform the Chamber as to whether the individual has dual status.

- d. If the person has dual status, it will be open to the Chamber to order the Registry to communicate with the individual, to seek his or her consent as regards the possible communication of this fact to the legal representative.

Communication between the legal representative of a victim and the defence

57. The Chamber endorses the following as agreed by the parties and participants:

- a. The legal representatives shall communicate the name of his or her client to the defence, where the identity of that victim is already known by the defence; and
- b. The defence shall thereafter inform the legal representatives if the name provided is a potential witness for the defence.

58. When the defence is unaware of the identity of the individual, the legal representative should make an application in accordance with paragraph 56 above.

Modalities of contact with individuals enjoying dual status

59. The Chamber approves the following, as agreed by the parties and participants:

- a. When a party wishes to contact an individual with dual status, it shall provide notice of this to the legal representative, when it is aware the person has legal representation;

- b. If a person with dual status requests to contact the parties or participants, the VWU will facilitate the contact, which will not be revealed to other parties and participants.

60. When in situations of urgency, in order to preserve or collect evidence, the prosecution or the defence does not contact the legal representative as set out in paragraph 59(a) above, the party who has contacted the individual shall as soon as possible thereafter inform the legal representative, and where applicable disclose any relevant material.

Contact between a witness with dual status and his or her legal representative

- 61. The Chamber endorses the agreement of the parties that, as a general rule, the legal representative may contact his or her client if they are a victim with dual status.

Providing the legal representatives with a copy of the signed statements and other materials, such as notes and documents, relating to a witness with dual status⁵²

- 62. The Chamber notes that as regards this particular issue there is no clear agreement between the parties and participants. Whilst the Chamber is sympathetic to the need for the parties to be able to control their own materials, it is persuaded that materials in the possession of the parties which not only relate to specific participating victims with dual status but were also produced with their direct involvement and assistance should, whenever possible, be provided to the legal representative of the relevant participating victim in order to enhance the role of both of them and to assist the Chamber.

⁵² See Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, paragraph 34.

63. Accordingly, the Chamber establishes the following procedure:

- a. If access is sought to materials in these circumstances, the legal representatives shall submit a detailed request outlining, *inter alia*, the reasons why access should be provided;
- b. Unless reasons exist for refusing access, the parties shall provide the legal representative of dual status victims, upon request, with a copy of these materials, under conditions of strict confidentiality;
- c. If a party considers that it should not provide particular materials or will only submit them in redacted or summary form, it shall inform the Chamber and the legal representative of the reasons; and
- d. The Chamber will then consider the matter, if an application is made by the legal representative.

Attendance by the legal representatives at the medical examination of witnesses with dual status and disclosure of any report to the legal representatives

- 64. The Chamber approves the agreement between the parties that as a general rule the legal representative may be present during a medical examination of a victim or victim-applicant with dual status, provided that there is consent from the individual concerned.
- 65. The presence of the legal representative must not in any way obstruct a proper medical examination.
- 66. The same procedure as stated in paragraph 56 above applies where the legal representative is unable to obtain the consent of the individual.

The attendance of the legal representative at interviews of a witness with dual status

67. The Chamber endorses the agreement between the parties that as a general rule the legal representative may be present during an interview of an individual with dual status, provided there is consent from the individual concerned.
68. The legal representative has the right to receive a copy of the statement, transcript or recording made during the interview.
69. The presence of the legal representative must not obstruct a proper interview.
70. If the party considers that the presence of the legal representative is inappropriate, it shall, as soon as practicable, inform the legal representative of the interview and, unless a delay cannot be justified because of urgency, establish whether the party wishes to raise the matter with the Chamber and (when relevant) ensure that sufficient time is afforded to enable this to happen prior to the interview.
71. Where applicable, it shall provide the legal representative with any relevant material.

Providing information to the legal representative about the family or legal guardian of a child witness with dual status

72. The Chamber notes the defence position that the information it holds in this respect is subject to legal professional privilege. However, no restriction on its disclosure would arise if the individual concerned gives his or her consent to

disclosure. Accordingly, weighing the submissions of the parties and participants, the Chamber hereby:

- a. Orders the parties to share this information with the legal representatives of victims with dual status, provided there is consent from the individual concerned; and
- b. Establishes that when the witness is in the ICC protection programme, the VWU is the competent entity to provide this information to the legal representative, provided there is consent from the individual concerned and the security of the individual or the operation of the protection programme is not put at risk.

Communication between the VPRS and the VWU

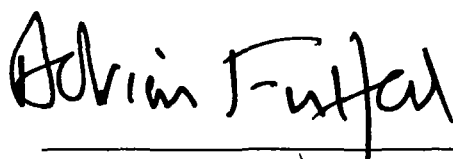
73. The proposal of the parties and participants is that whenever a victim or applicant is without legal representation, and the VPRS needs to contact the person, the VWU will inform the VPRS as to whether the person is in the ICC protection programme, having first consulted with the party or participant who referred the witness.
74. The Chamber considers that the issue of communication between the VWU and the VPRS is essentially an internal Registry issue, to be resolved by that organ of the Court. However, the Chamber is of the view that the prior consent of the party referring the victim to the protection programme is not a necessary precondition for this communication – indeed it is undesirable, particularly in those instances where the victim has indicated that he or she does not wish their identity to be revealed to one or both parties.

75. The Chamber therefore endorses the recommendations of the Registry in this regard and stipulates that the VWU shall indicate to the VPRS whether a victim applicant is in the protection programme in order to facilitate contact between the VPRS and the applicant.
76. The VWU shall take account of a victim's request that his or identity is not revealed to the parties, and instruct the VPRS not to reveal to any participant or party that the person is in the ICC protection programme and has dual status.

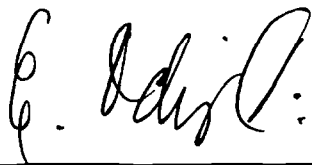
Whether the party should inform the legal representatives of its intention to refer a witness with dual status to the ICC protection programme

77. The Chamber endorses the agreement between the parties and participants that a party should inform the legal representative of victims and applicants of its intention to refer an individual to the ICC protection programme, where the party has knowledge of the individual's dual status.
78. However, the content of the referral shall remain at all times strictly confidential between the referring party and the VWU.

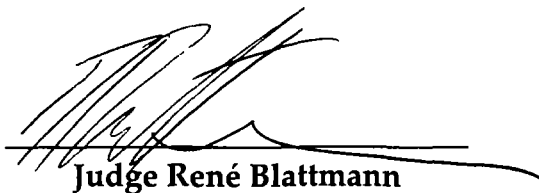
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 5 June 2008

At The Hague, The Netherlands