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**International
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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 defence observations regarding the right of the legal
representatives of victims to question defence witnesses and on the notion of
personal interest**

-and-

**Decision on the defence application to exclude certain representatives of victims
from the Chamber during the non-public evidence of various defence witnesses**

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

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decisions on the right of the legal representatives of victims to question defence witnesses and on the notion of “personal interest” of victims in accordance with Article 68(3) of the Rome Statute (“Statute”) and on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses.

I. Background

1. On 9 October 2009 the legal representatives of victims filed their joint observations regarding disclosure of information, in which they requested disclosure from the defence of evidence relating to defence witnesses, such as the defence list of witnesses and the summaries of their witness statements.¹
2. On 13 October 2009, the defence filed its response to the observations of the legal representatives of victims, in which it argued that the Chamber should only grant those victims whose identities had been revealed, and whose interests are affected by the evidence, leave to question the defence witnesses.²
3. During the status conference on 9 December 2009, the Chamber, in an Oral Decision, invited the defence to develop its observations by way of written submissions, to enable the Office of the Prosecutor (“prosecution”) and the legal representatives more effectively to respond.³

¹ Observations conjointes des représentants légaux concernant la divulgation par la Défense, 9 October 2009, ICC-01/04-01/06-2154, page 10.

² Réponse de la Défense aux “Observations conjointes des représentants légaux concernant la divulgation par la Défense” datées du 9 octobre 2009, 13 October 2009, ICC-01/04-01/06-2158, page 11.

³ Transcript of hearing on 9 December 2009, ICC-01/04-01/06-T-222-ENG-ET, page 29, lines 4 – 13.

4. On 20 January 2010, the defence submitted to the Chamber its observations on the right of victims to put questions to defence witnesses and on the notion of “personal interest”.⁴
5. On 26 January 2010, the legal representatives of victims presented their joint response to the defence observations on the right of victims to put questions to defence witnesses and on the notion of “personal interest”.⁵ The prosecution did not file any written submissions in response.
6. On 27 January 2010, the defence raised the suggestion that when certain defence witnesses for whom there are security concerns are called to give evidence, the representatives of victims who have not been given leave to question them should be asked to leave the Court during those parts of their testimony that are heard in private.⁶ The Chamber set a deadline for written submissions on the issue,⁷ and on 29 January 2010, the defence filed their written submissions,⁸ followed by the joint response of the legal representatives of victims on 3 February 2010.⁹ The prosecution did not file any written submissions in response.

⁴ Observations de la Défense sur le droit des victimes d’interroger les témoins de la Défense et sur la notion d’ “intérêt personnel”, 20 January 2010, ICC-01/04-01/06-2253.

⁵ Réponse conjointe des représentants légaux des victimes aux “Observations de la Défense sur le droit des victimes d’interroger les témoins de la Défense et sur la notion d’ ‘intérêt personnel’”, 26 January 2010, ICC-01/04-01/06-2267.

⁶ Transcript of hearing on 27 January 2010, ICC-01/04-01/06-T-236-CONF-ENG-ET, page 4, lines 2 – 20.

⁷ ICC-01/04-01/06-T-236-CONF-ENG-ET, page 4, line 21 to page 5, line 2.

⁸ Observations de la Défense sur la protection de l’identité des témoins de la Défense autorisés à conserver l’anonymat vis-à-vis du public, à l’égard des victimes participantes dont l’intérêt personnel n’est pas concerné par leurs témoignages, 29 January 2010, ICC-01/04-01/06-2275.

⁹ Réponse conjointe des Représentants légaux des victimes aux observations de la Défense sur la protection de l’identité de ses témoins à l’égard des victimes participantes, 3 February 2010, ICC-01/04-01/06-2281-Conf. These submissions were initially filed publicly on 3 February 2010 (notified on 4 February). Following an urgent request by the defence on 4 February (ICC-01/04-01/06-2282), the legal representatives’ submissions were reclassified confidential on 4 February. A public redacted version was filed on 5 February (ICC-01/04-01/06-2281-Red).

II. Submissions of the parties and participants

A. Defence

7. The defence submits, first, that the conditions under which victims are to be allowed to put questions to defence witnesses should not be the same as applies to prosecution witnesses, as it is argued that defence witnesses would otherwise face successive examinations carried out by multiple accusers, thereby undermining the fair balance of the proceedings.¹⁰
8. Secondly, the defence maintains that if a broad interpretation of “personal interest” is applied when determining whether a victim is to be given leave to examine a defence witness, this could seriously affect the fairness of the trial.¹¹
9. Thirdly, it is the defence’s submission, that the “personal interest” of the victims who wish to participate can only be fairly evaluated if their identities are known.¹²
10. Fourthly, it is argued by the defence that the questioning of its witnesses by victims on matters of general concern is unjustified and harmful: unjustified, because a victim who has not been personally affected is not entitled to a privileged position, thereby enabling him or her to investigate the facts alleged by the witness; and harmful because it would lead to a situation in which the defence witnesses will be subjected to multiple examinations.¹³
11. The defence finally, on this issue, suggests that, to avoid an imbalance between the prosecution and the defence, in this context the notion of

¹⁰ ICC-01/04-01/06-2253, paragraphs 5 and 14.

¹¹ ICC-01/04-01/06-2253, paragraph 6.

¹² ICC-01/04-01/06-2253, paragraph 18.

¹³ ICC-01/04-01/06-2253, paragraphs 20 – 22.

“personal interest” should be restricted to those who are personally, indeed specifically, affected by the evidence.¹⁴

12. As to the suggested exclusion of the representatives of victims during the non-public evidence of certain defence witnesses, essentially the oral argument advanced was that the legal representatives act for a large number of victims and, in the course of their (proper) communications with their clients, information will inevitably be disclosed which may lead to a material breach in the protective measures that the Chamber has approved, because of the number of people involved. This argument inevitably applies equally to disclosure of the defence list of witnesses, to the extent that it includes the names of witnesses who are to remain anonymous vis-à-vis the public.¹⁵ On 27 January 2010, defence counsel raised the question of whether the Chamber is empowered to order the representatives of victims to withhold information from their clients, and if the court does have that power, whether it should be used.¹⁶

13. In the defence written submissions,¹⁷ the Chamber was reminded that, in its Oral Decision of 9 December 2009, the Bench indicated that disclosure to participating victims of the list of defence witnesses, the summaries of their depositions or declarations, and confidential information generally, depended on a prior Decision of the Chamber concerning whether their personal interests were materially affected by the evidence of the witnesses. It was suggested that in its Decision of 27 January 2010, the Chamber reiterated this principle.¹⁸

¹⁴ ICC-01/04-01/06-2253, paragraph 24.

¹⁵ ICC-01/04-01/06-T-236-CONF-ENG-ET, page 3, lines 12 – 25.

¹⁶ ICC-01/04-01/06-T-236-CONF-ENG-ET, page 4, lines 7 – 9.

¹⁷ ICC-01/04-01/06-2275.

¹⁸ ICC-01/04-01/06-2275, paragraph 1.

14. The defence argues that some participating victims (who are mostly anonymous) may have hostile feelings or intentions towards the defence witnesses.¹⁹ Further, it was suggested that the defence witnesses are not protected before or after their evidence in court,²⁰ and it is contended that the Chamber has previously observed that service of confidential material on all participating victims may lead to a situation in which the restrictions on access are breached.²¹
15. It is argued that caution dictates that only those who strictly need to hear the confidential material (which will include the identity of the relevant defence witness and others associated with him or her) should be present in Court, namely the legal representatives who have been granted leave to question the witness.²² The defence suggests this was the effect of the Chamber's Decisions on 9 December 2009 and 27 January 2010.²³
16. The defence argues that, even if the representatives of victims remind their lay clients of the need to protect the confidential nature of the information, this will not provide a sufficient guarantee for the security of the relevant witnesses.²⁴
17. In the alternative, the defence invites the Chamber to order the legal representatives not to reveal the identities of the protected witnesses to the victims they represent.²⁵

¹⁹ ICC-01/04-01/06-2275, paragraph 6.

²⁰ ICC-01/04-01/06-2275, paragraph 8.

²¹ ICC-01/04-01/06-2275, paragraph 9.

²² ICC-01/04-01/06-2275, paragraph 10.

²³ ICC-01/04-01/06-2275, paragraph 11; ICC-01/04-01/06-T-222-ENG-ET, page 16, line 13 to page 34, line 1; ICC-01/04-01/06-T-236-CONF-ENG-ET, page 5, line 21 to page 20, line 9.

²⁴ ICC-01/04-01/06-2275, paragraph 16.

²⁵ ICC-01/04-01/06-2275, paragraph 18.

B. Legal Representatives

18. In their joint submission the legal representatives argue primarily that the defence observations should be rejected *in limine*, since they essentially repeat the same arguments already submitted to the Chamber on 13 October 2009,²⁶ without adding any matters of substance.²⁷
19. The legal representatives advance submissions as to the definition of “personal interests”, which it is suggested includes, *inter alia*, the establishment of the truth, ensuring the ends of justice, and enabling the victims to apply for reparations.²⁸ They submit that the approach of the defence on this issue is not supported by the Rome Statute framework or the Court’s case law.²⁹ Indeed, the legal representatives refer to the jurisprudence of various chambers of this Court on the notion of “personal interest”, as well as to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights.³⁰
20. The legal representatives remind the Chamber that it has already authorised questions to prosecution witnesses on various topics, when it was established that the personal interests of the victims were engaged, such as those set out in paragraph 23 of their joint response. They argue there is no identifiable reason why the legal representatives should not be permitted to examine defence witnesses on the topics already addressed during the examination of prosecution witnesses. Furthermore, they emphasise that the notion of the “personal interest” of victims should not vary depending on which party calls a witness or who introduces a particular item of evidence.³¹

²⁶ ICC-01/04-01/06-2158.

²⁷ ICC-01/04-01/06-2267, paragraphs 9 – 11.

²⁸ ICC-01/04-01/06-2267, paragraphs 13 – 15.

²⁹ ICC-01/04-01/06-2267, paragraph 26.

³⁰ ICC-01/04-01/06-2267, paragraphs 13 – 16.

³¹ ICC-01/04-01/06-2267, paragraphs 24 – 25.

21. The legal representatives submit that the definition of “personal interest” formulated by the defence runs contrary to the spirit of the texts of the Court, contradicting the established position of Trial Chamber I, which, they suggest, is supported by the consistent jurisprudence of the Court, international law and academic writing. They describe an apparent lack of any serious argument for refusing participating victims the opportunity to question defence witnesses on matters of general concern, as has occurred throughout the trial thus far.³²
22. Finally, on this issue, the legal representatives challenge the defence argument that unfairness will be created by multiple examinations by counsel. The legal representatives suggest that the interests of victims are distinct from those of the prosecution, and that, in the main, participating victims have raised matters that have not been addressed by the prosecution.³³ Finally, they argue that victims have an additional “personal interest” that justifies questions to defence witnesses: the latter will seek to undermine the credibility of prosecution witnesses and the probity of evidence presented to date.³⁴
23. Turning to the issue of the suggested exclusion from the courtroom of non-participating legal representatives during the evidence of defence witnesses whose identities are to be withheld from the public, the legal representatives critically submit that they consider themselves to be bound by the “fraternity rules”, the Code of Professional Conduct for counsel (“Code of Conduct”) and by the texts of the Court. In consequence, they submit to the Chamber that, in these circumstances, they will not disclose to their clients any confidential information on protected witnesses, including their names and addresses.³⁵ In

³² ICC-01/04-01/06-2267, paragraph 26.

³³ ICC-01/04-01/06-2267, paragraph 27.

³⁴ ICC-01/04-01/06-2267, paragraph 28.

³⁵ ICC-01/04-01/06-2281-Red, paragraph 2.

support of this submission, the legal representatives refer to Article 8(3) of the Code of Conduct:

Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.

24. Therefore, it is suggested that the defence argument is based on a fundamentally flawed understanding of the Code of Conduct, or on the unfounded suspicion that one or more of the legal representatives may violate his or her professional obligations.³⁶
25. Additionally, the legal representatives advance the argument that if they are excluded from the Chamber when evidence that tends to reveal the identity of the witnesses is being given, they will inevitably be absent for other important areas of the witnesses' testimony, which are impossible to separate from the issue of identity. This will impede their understanding of the case and their ability to represent their clients, not least because it may deny them the opportunity to apply to question a witness should matters arise *ex improviso* of relevance to their clients. The legal representatives in this category are further hampered because the short summaries of the defence witnesses are not served on them if a decision has been made that their interests are not engaged.³⁷
26. Finally, the legal representatives observe that they have been present throughout the prosecution case, when many protected witnesses were called, regardless of whether they had been granted leave to ask questions.³⁸

³⁶ ICC-01/04-01/06-2281-Red, paragraph 4.

³⁷ ICC-01/04-01/06-2281-Red, paragraph 15.

³⁸ ICC-01/04-01/06-2281-Red, paragraph 17.

III. Relevant Provisions

27. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

[...]

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.

[...]

Article 69 of the Statute

Evidence

[...]

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

[...]

Rule 86 of the Rules of Procedure and Evidence ("Rules")

General principle

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

Rule 89 of the Rules

Application for participation of victims in the proceedings

1. [...] [T]he Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

Rule 91 of the Rules

Participation of the legal representatives in the proceedings

[...]

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67

and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

Article 8 of the Code of Professional Conduct for counsel
Respect for professional secrecy and confidentiality

1. Counsel shall respect and actively exercise all care to ensure respect for professional secrecy and confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

2. The relevant provisions referred to in paragraph 1 of this article include, *inter alia*, article 64, paragraph 6 (c), article 64, paragraph 7, article 67, paragraph 1 (b), article 68, and article 72 of the Statute, rules 72, 73, and 81 of the Rules of Procedure and Evidence and regulation 97 of the Regulations of the Court. Counsel shall also comply with the relevant provisions of this Code and any order of the Court.

3. Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case.

4. Subject to paragraph 3 of this article, counsel may only disclose the information protected under paragraphs 1 and 2 of this article, where such disclosure is provided for by a particular provision of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court or this Code or where such disclosure is ordered by the Court. In particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.

IV. Analysis and Conclusions

28. The defence seeks, at this stage of the trial, to apply a new and more limited meaning or definition to the concept of "personal interest", to be applied only when the legal representatives of victims seek to question defence witnesses.

However, the Chamber is unpersuaded that there is any justification for redefining the meaning of “personal interests” under Article 68(3) of the Statute for the purposes of the evidence of defence witnesses. The jurisprudence of the Court on this issue is established: see particularly the Chamber’s Decision of 18 January 2008,³⁹ which (on this issue) was approved by the Appeals Chamber on 11 July 2008.⁴⁰

29. In its 18 January 2008 Decision, the Chamber decided as follows:

Following an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings, thereafter in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek. A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient. These applications will necessarily be examined on a case-by-case basis, since the question of whether “personal interests” are affected is necessarily fact-dependent.⁴¹

30. The Appeals Chamber, reviewing the above decision, concluded:

The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.⁴²

31. The Chamber has established that “a victim who wishes to participate in relation to any identified stage of the proceedings should set out in a discrete

³⁹ Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paragraphs 96 – 97.

⁴⁰ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraphs 4 and 104.

⁴¹ ICC-01/04-01/06-1119, paragraph 96.

⁴² ICC-01/04-01/06-1432, paragraph 104.

written application the nature and the detail of the proposed intervention (e.g. by providing the questions that he or she seeks to put). At this stage, the victim must describe the way in which his or her personal interest is affected, for example by identifying how the harm he or she suffered relates to the evidence or the issues the Chamber is considering in its determination of the charges".⁴³

32. The Appeals Chamber has similarly concluded that "any determination of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis".⁴⁴

33. During the trial, participating victims have been granted the opportunity to examine a variety of witnesses (see Rule 91(3)(a) of the Rules which includes the possibility of questioning expert witnesses and the accused), but only if they have set out sufficient justification in a written or oral application in advance, and the Chamber has consistently confined their questions to the particular issues and evidence which engage their personal interests (see, for example, the Oral Decision on the application to question Mr Garreton).⁴⁵

34. The Chamber is of the view that the determination as to whether victims' personal interests justify their intervention or participation, whether, for instance, by presenting their views and concerns, asking questions or merely attending hearings, requires that account is taken of a wide variety of issues which will include the timing of the proposed participation, because different considerations may apply during the various stages of the trial.

⁴³ ICC-01/04-01/06-1119, paragraph 103.

⁴⁴ Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, paragraph 28; Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", 16 May 2008, ICC-01/04-01/06-1335, paragraph 42.

⁴⁵ Transcript of hearing on 17 June 2009, ICC-01/04-01/06-T-193-ENG-ET, page 3, line 15 to page 10, line 21.

35. Against this background, the proper safeguard for the defence lies not in attempting to apply varying standards or definitions to the concept of the victims' personal interests based on the party or participant calling a particular witness, but instead in ensuring that the manner and the timing of the questioning is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. This is a quintessentially fact-based issue, which cannot be determined in advance, absent a detailed examination of the proposed manner of questioning of all the participating victims who have applied to examine the witness in question. The Chamber must take a global view for each witness, to ensure that the overall effect of the questioning by victims does not undermine the rights of the accused and his fair and impartial trial.

36. Addressing the issue on anonymity, as the Chamber observed in an earlier Decision, if a victim who previously has been anonymous vis-à-vis the accused wishes to question defence witnesses, it is likely that the Chamber will require anonymity to be lifted as regards the defence. The Chamber put the matter as follows:

However, the Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.⁴⁶

37. It follows that the Chamber will apply the principles already established to applications by victims to question witnesses during the evidence called by

⁴⁶ ICC-01/04-01/06-1119, paragraph 131.

the defence, at all times ensuring that the proceedings remain fair. The applications will be considered on their merits at the appropriate time, which (save exceptionally) is prior to the testimony of the witness in question.

38. The resolution of the application to exclude the non-participating legal representatives can be shortly stated. In their joint response, the legal representatives have set out unequivocally that they will not disclose to their clients (or, by clear implication, anyone else not authorised under the Code of Conduct) any of the information that is covered by protective measures ordered by the Chamber. This includes the identities of the witnesses who have been granted anonymity. Therefore, although, as the Chamber has observed, the judges “cannot interfere with proper communications between counsel and their lay clients”,⁴⁷ the prohibition on divulging information in this category is a clear exception to the general rule that there must be unimpeded communication between lawyers and those they represent. As set out above, Article 8(4) of the Code includes “[i]n particular, Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court”.

39. The presence of the representatives of participating victims during the evidence of defence witnesses when the court is sitting in closed session is an essential part of their right to participate in the proceedings, unless it is demonstrated that this will be inconsistent with the rights of the accused and a fair and expeditious trial. The Chamber notes that on 11 February 2010, it ruled that the legal representatives could remain in the courtroom during the examination of defence witness 24 when the issue of the possible exclusion of the representatives was raised by the defence in relation to this witness.⁴⁸ The


⁴⁷ Transcript of hearing on 11 February 2010, ICC-01/04-01/06-T-245-CONF-ENG-ET, page 2, lines 1 – 12.

⁴⁸ ICC-01/04-01/06-T-245-CONF-ENG-ET, page 1, line 20 to page 2 line 12.


absence of the legal representatives from the Chamber could markedly undermine their ability to discharge their professional obligations to their clients because they would be unaware of potentially important evidence given during closed-session hearings. The restrictions, set out above, on the dissemination of any information that may reveal the identity of protected individuals means that the concerns of the defence in this regard are met. Nonetheless, the parties and participants are entitled to raise discrete concerns that may result from the participation or presence of particular legal representatives at any stage.

40. It follows that the application to exclude from the Courtroom those legal representatives who have not been granted the opportunity to question the witness in question is rejected. Given the undertaking of the legal representatives and the terms of Article 8(4) of the Code of Conduct, it is unnecessary for the Chamber to make an order that the legal representatives must not reveal the identities of protected witnesses because the position is already clear.


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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 11 March 2010

At The Hague, The Netherlands