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

Date: 18 May 2009

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

**Observations of the legal representatives of victims
on the access to standard applications forms for victims' participation and related
documents**

Source: The legal representatives of victims a/0001/06 à a/0003/06, a/0047/06 to a/0052/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0227/06, a/0229/06 to a/0233/06, a/0236/06, a/0238/06 to a/0240/06, a/0244/06, a/0245/06, a/0248/06 à a/0250/06, a/0001/07 to a/0003/07, a/0005/07, a/0054/07 to a/0060/07, a/0063/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 à a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0188/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07 to a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0007/08, a/0122/08 to a/0126/08, a/0130/08, a/0149/08, a/0404/08 à a/0407/08, a/0409/08, a/0612/08 and a/0613/08

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

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Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**The Office of Public Counsel for
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Ms Paolina Massidda
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States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Ms Silvana Arbia & Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

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**Victims Participation and Reparations
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Ms Fiona McKay

Other

I. Procedural Background

1. On 8 May 2009, Trial Chamber I (the “Chamber”) issued an oral decision ordering the Registry to transmit to the parties and participants seven new victims’ requests for participation, in a redacted form, before 11 May 2009¹.

2. On the same day, the Chamber ordered the transmission, to the Prosecution and the Defence, of supplementary information related to victims who had already been granted participation at trial in the case *The Prosecutor v. Thomas Lubanga Dyilo*² and contained in 21 Annexes attached to the Registry’s report³.

3. On 11 May 2009, the Victims’ Participation and Reparation Section (the “VPRS”) transmitted to the Prosecution and the Defence the 21 Annexes containing supplementary information related to victims a/0002/06, a/0047/06, a/0048/06, a/0050/06, a/0052/06, a/0105/06, a/0231/06, a/0232/06, a/0245/06, a/0246/06, a/0248/06, a/0001/07, a/0005/07, a/0149/07, a/0155/07, a/0125/08, a/0612/08, a/0613/08, a/0252/07, a/0255/07 and a/0256/07⁴.

4. On 12 May 2009, the VPRS filed its “Transmission to the parties of seven new victims’ applications for participation in accordance with Trial Chamber I’s oral decision of 8 May 2009”, with the applications for participation classified confidential *ex parte* only available to the Prosecution and the Defence⁵. Despite the fact that in its filing the VPRS acknowledged that in accordance with the oral decision of Chamber

¹ See the transcript of the hearing held on 8 May 2009, No. ICC-01/04-01/06-T-171-ENG RT, p. 44.

² See the transcript of the hearing held on 8 May 2009, *supra* note 1, p. 41.

³ See the Registry’s report, No. ICC-01/04-01/06-1817-Conf-Exp.

⁴ See the “Transmission of the information contained in the Registry’s report ICC-01/04-01/06-1817-Conf-Exp in accordance with Trial Chamber I’s oral decision of 8 May 2009” with Confidential Annexes *ex parte* Defence and prosecution only, No. ICC- 01/04-01/06-1866, 11 May 2009.

⁵ See the “Transmission to the parties of seven new victims’ applications for participation in accordance with Trial Chamber I’s oral decision of 8 May 2009”, No. ICC-01/04-01/06-1869, 12 May 2009.

the new victims' applications had to be notified "*to the parties and the participants*"⁶, said applications were only made available to the Prosecution and the Defence, in non-compliance with the order of the Chamber.

5. During the hearing held on 13 May 2009, the Principal Counsel of the Office of Public Counsel for Victims (the "Office" or the "OPCV") drew the attention of the Chamber on the fact that the Annexes to the Registry's report related to the victims she represents were not notified to her despite the fact they emanated directly from the Office and clearly concern the interests of her clients. Furthermore, she addressed a general issue concerning the fact that redacted versions of the requests for participation and related documents, such as supplementary information, are not notified to the legal representatives of victims concerned⁷. This request was unopposed by the Prosecution and the Defence.

6. During the hearing held on 14 May 2009, Mr Mulamba and the Principal Counsel of the Office further informed the Chamber that despite its oral decision of 8 May 2009, the Legal Representatives had not been notified of the seven new victims' applications⁸. The Prosecution and the Defence did not raise any issue concerning the matter.

7. During the said hearing, the Presiding Judge of the Chamber requested the Principal Counsel of the Office to contact the VPRS to inquiry about the issue⁹.

8. The same day the Principal Counsel of the Office addressed an e-mail to the Head of the VPRS requesting her to provide observations concerning the matter. On 15 May 2009, the Head of the VPRS sent an email containing observations related to the transmission of the standard application forms to the legal representatives of

⁶ See *supra* note 5, par. 1.

⁷ See the transcript of the hearing held on 13 May 2009, No. ICC-01/04-01/06-T-173-ENG RT, pp. 54-55.

⁸ See the transcript of the hearing held on 14 May 2009, No. ICC-01/04-01/06-T-174-ENG RT, p. 12.

⁹ See the transcript of the hearing held on 14 May 2009, *supra* note 8, p. 15.

victims¹⁰. A copy of this email was later sent to the parties as ordered by the Chamber¹¹. In her email, the Head of the VPRS argued that the transmission of the requests for participation and the related documents are done by the Registry in the framework of rule 89(1) of the Rules of Procedure and Evidence (the “Rules”) and that there is no legal basis for the transmission of said documents to the legal representatives of victims.

9. On the same day, the Chamber authorised the Legal Representatives to make observations on the said email before 18 May 2009¹².

10. The Legal Representatives note that the matter raised during the hearings concern on the one hand their access to documents emanating from and pertaining directly to their clients, and on the other hand, the access to certain documents filed in the case record and related to victims’ participation. Accordingly, the Legal Representatives respectfully submit the following observations.

II. Access of legal representatives of victims to documents pertaining to their clients

11. The Legal Representatives contend that this issue is different than the one addressed in the email of the Head of the VPRS but is also cumbersome when dealing with notification issues.

12. The Legal Representatives have requested to be notified of the Annexes to the Registry’s report pertaining to their clients, as well as to the redacted version of the requests for participation and related documents pertaining to their clients. These documents emanate directly from their clients and clearly concern their personal

¹⁰ See the email entitled “RE: NOTIFICATION OF STANDARD APPLICATIONS FORMS AND RELATED DOCUMENTS TO THE LEGAL REPRESENTATIVES”, dated 15 May 2009.

¹¹ See the transcript of the hearing held on 15 May 2009, No. ICC-01/04-01/06-T-175-ENG RT, p. 50.

¹² *Idem*, p. 27.

interests. Therefore the Legal Representatives fail to see any reason why such documents should not be notified to them.

13. To argue that there is no legal basis for the VPRS to oblige is not only incorrect but also a legal absurdity since the documents relate to the interests of the victims the Legal Representatives represent and, pursuant to the Decision on victims' participation, they shall be notified of all the documents pertaining to the interests of their clients¹³.

14. In this regard the Legal Representatives recall principle 21 of the Basic Principles on the Role of Lawyers, pursuant to which "[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time"¹⁴. The principle of access of counsel to documents pertaining to the interest of their clients has been applied constantly by the European Court of Human Rights¹⁵.

15. Moreover, the fact that the Legal Representatives are not notified of the redacted versions of the documents pertaining to their clients has already proven to be damaging in the course of the defence of the interests of the individual concerned during the proceedings. Indeed, when the Defence seeks the lifting of the said redactions, the Legal Representatives are not in the position to provide their observations in the matter, simply because they do not know which redactions have

¹³ See the "Decision on victims' participation", No. ICC-01/04-01/06-1119, 18 January 2008, paras. 105 ff.

¹⁴ See the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990. The document is available on the website of the Office of the United Nations High Commissioner for Human Rights at the following address:

<http://www2.ohchr.org/english/law/lawyers.htm>.

¹⁵ See ECHR, *Mantovanelli v. France*, Application No. 21497/93, Judgment of 18 March 1997, para. 33; *Nideröst-Huber v. Switzerland*, Application No. 18990/91, Judgment of 18 February 1997, para. 24; *Lobo Machado v. Portugal*, Application No. 15764/89, Judgment of 20 February 1996, para. 31; *Vermeulen v. Belgium*, Application No. 19075/91, Judgment of 20 February 1996, para. 33; *Ruiz-Mateos v. Spain*, Application No. 12952/87, Judgment of 12 September 1993, para. 63.

been applied and therefore are unable to advise whether such redactions need to be maintained or can be lifted. Such appreciation can only be made by the Legal Representative who has the direct contact with his/her clients and who knows the interests at stake. Furthermore, when Legal Representatives request to lift the anonymity of some of their clients, they are not in a position to verify whether part of the original redactions should be maintained or lifted.

16. Finally, the Legal Representatives would like to note that the issue could have repercussions on other proceedings before the Court, in which the Legal Representatives might not be in the position to secure the interests of their clients because of the absence of notification of relevant documents. This has already been the case for the OPCV, one of its client also been a witness in another case before the Court. Indeed, Trial Chamber II recently requested the Principal Counsel of the Office, who is the legal representative of the person concerned, to provide her views on a request filed by the Prosecution and related to redactions in one document emanating directly from the Office. The Principal Counsel was unaware of the extent of the redactions since the document in question had never been notified to her¹⁶.

17. It is true that Legal Representatives have access to the unredacted versions of the said document and therefore they know their content, however, the said documents receive a new number when they are transmitted to the Prosecution and the Defence and therefore they are referred to by the parties during the proceedings with this new number. Since the Legal Representatives are not notified of the said documents, they are not in a position to know whether the document concerns their clients because they are not familiar with the numbering referred to by the Prosecution and/or the Defence during the proceedings.

¹⁶ See the « Éléments d'information relatifs au document DRC-OTP-0207-0130 », No. ICC-01/04-01/07-1126, 11 May 2009.

III. Access of legal representatives to documents filed in the case record and pertaining to victims' participation

18. Turning to the very heart of the email concerned, the Legal Representatives preliminary cannot but note that contrary to the assertion of the VPRS, the order of the Chamber of the 8 May 2009 was very clear. Indeed the Presiding Judge ordered "[seven new applications to participate to] *be notified to the parties and the participants with redactions as necessary for their comments*"¹⁷. Furthermore, during the hearing held on 14 May 2009, the Presiding Judge, after having heard the submissions by the Legal Representatives, commented that *"this clearly need to be resolved very quickly and definitively, because if the effect if the redactions is that you don't receive the annex at all, that's really not in line with what we intended"*¹⁸.

19. Accordingly, the refusal of the VPRS to oblige, without seeking prior clarification of the Chamber is a violation of regulation 29 of the Regulations of the Court and, at the minimum, leads to legal uncertainties. Indeed, if the VPRS was of the view that it needed clarification of the Chamber prior to the said notification, they should have approached the Chamber before the expiration of the deadline ordered by the Chamber itself, and not in an email dated 15 May 2009, namely 4 days after the expiration of the deadline and after the Legal Representatives sought to the execution of a decision which was unexecuted.

20. The VPRS argues that there exists no legal basis to depart from the existing practice of the Chamber. The Legal Representatives contend in this regard that a decision of the Chamber constitutes a legal basis. Furthermore, they are of the view that although rule 89(1) of the Rules states the "[s]ubject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber", the fact that the legal representatives if victims are not mentioned

¹⁷ See the transcript of the hearing held on 8 May 2009, *supra* note 1, p. 44 (we underline).

¹⁸ See the transcript of the hearing held on 14 May 2009, *supra* note 8, p. 14.

cannot be understood that such notification cannot be ordered. It simply imposes an obligation on the Chamber to notify at least the Defence and the Prosecution. In this regard, it is interesting to note that the parties did not oppose the decision of the Chamber dated 8 May 2009. In any case, the notification concerns redacted version of victims' requests for participation and therefore no issue of security and well-being of the persons concerned can be raised since all information which could lead to the identification of the said persons have been redacted.

21. Finally, the Legal Representatives recall that during the proceedings they have been notified, and continue to be notified of redacted versions of documents pertaining to the participation of victims, such as the Annex to the Decision on participation of victims containing the analysis of victims application sorted by groups¹⁹. This practice shows that the Chamber considers the notification of such kind of documents to the participating victims to be relevant and appropriate.

FOR THE FOREGOING REASONS, the Legal Representatives respectfully request the Trial Chamber to order that all documents filed by the VPRS concerning their clients be notified to them.

Moreover, the Legal Representatives respectfully request the Chamber to order the VPRS to comply with its order dated 8 May 2009 and therefore to transmit the seven new applications to them.

¹⁹ See the "Order issuing Annexes to the 'Decision on the applications by victims to participate in the proceedings' of 15 December 2008", No. ICC-01/04-01/06-1563-Conf-Anx A2, 19 December 2008. See also the "Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008", No. ICC-01/04-01/06-1861 + Anxs A1 & A2, 8 May 2009.

Finally, the Legal Representatives request the Trial Chamber to extend the deadline originally fixed to 18 May 2009 for any observations they might have on the seven new applications, to seven days after the transmission to them of the said new victims' applications.


Ms Paolina Massidda

Mr Jean Chrysostome Mulamba Nsokoloni

Ms Carine Bapita Buyangandu

Dated this 18th day of May 2009

At The Hague, The Netherlands