



Original: English

No.: ICC-01/04-01/06
Date: 31 December 2008

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

**Victims and Witnesses Unit report on practices used to prepare and familiarise
witnesses for giving testimony at trial**

Source: Registrar

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean-Louis Gilissen
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese
Ms Paolina Massidda

Legal Representatives of Applicants

-

Unrepresented Victims

-

**Unrepresented Applicants for
Participation/Reparation**

-

**The Office of Public Counsel for
Victims**

-

**The Office of Public Counsel for the
Defence**

-

States Representatives

-

Amicus Curiae

-

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

-

Victims and Witnesses Unit

Mr Simo Väättäinen

Detention Section

-

**Victims Participation and Reparations
Section**

-

Other

-

The Registrar of the International Criminal Court (the Court);

NOTING the Pre-Trial Chamber's "Decision on the Practices of Witness Familiarisation and Witness Proofing" of 8 November 2006¹;

NOTING the Trial Chamber's "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial" of 30 November 2007 ("Decision of 30 November 2007")²;

NOTING the Trial Chamber's "Decision on various issues related to witnesses' testimony during trial" of 29 January 2008 ("Dual Status Decision")³;

NOTING the status conference held on 12 March 2008⁴;

NOTING the "Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" of 31 January 2008 ("Protocol")⁵;

NOTING the Trial Chamber's "Decision regarding the Protocol on the practices to be used to prepare witnesses for trial" of 23 May 2008 ("Decision of 23 May 2008")⁶;

¹ ICC-01/04-01/06-679.

² ICC-01/04-01/06-1049.

³ ICC-01/04-01/06-1140.

⁴ ICC-01/04-01/06-T-78-CONF-ENG.

⁵ ICC-01/04-01/06-1150-Conf.

⁶ ICC-01/04-01/06-1351.

NOTING the Trial Chamber's "Decision on certain practicalities regarding individuals who have the dual status of witness and victim" of 5 June 2008⁷;

NOTING Articles 43(6) and 68(1) and (4) of the Rome Statute, Rules 16 to 19 and 87 to 88 of the Rules of Procedure and Evidence, Regulation 41 of the Regulations of the Court and Regulations 79 to 96 of the Regulations of the Registry;

CONSIDERING that in its Decision of 30 November 2007 the Trial Chamber held that the "Victims and Witnesses Unit shall make available to the witness a copy of any witness statement they may have made in order to refresh their memory"⁸ and that "[w]hile witness familiarisation [...] will be permitted as well as the practice of providing a witness, for the sole purpose of refreshing memory, with his or her previous statements prior to testimony in Court, the practice of "witness proofing" [...] is prohibited."⁹;

CONSIDERING that the Trial Chamber further held that "[o]nce the process of witness familiarisation has been commenced, any further meeting between a party and its witness outside of Court is prohibited"¹⁰;

CONSIDERING that in the status conference held on 12 March 2008 the representative of the Registry raised the issue of the definition of statement and outlined that for the purposes of the familiarisation process only written and signed documents would be considered as statements¹¹;

⁷ ICC-01/04-01/06-1379.

⁸ ICC-01/04-01/06-1049, para. 55.

⁹ ICC-01/04-01/06-1049, para. 57.

¹⁰ ICC-01/04-01/06-1049, para. 56.

¹¹ ICC-01/04-01/06-T-78-CONF-ENG, page 15 line 23 to page 17 line 22.

CONSIDERING that the Trial Chamber in the 23 May 2008 Decision held that it will be appropriate for the advisers of witnesses who also participate as victims to receive copies of their witness statements and any related materials and that a similar opportunity of gaining access to this documentation cannot be denied to witnesses without legal representation¹²;

CONSIDERING that the Trial Chamber in this decision held that “[a]lthough representatives of the parties or participants may be present during the familiarisation process, including when the written records are read, they will be unable to speak with the witness about the evidence, and as a result they will only be permitted to watch the procedure”¹³;

CONSIDERING that the Trial Chamber further ordered that “[t]he Protocol on the practices used to prepare and familiarise witnesses and, if it is reasonably practicable, the Registry’s familiarisation film should be altered to reflect the Chamber’s decisions of 30 November 2007, 29 January 2008 and the present decision”¹⁴;

SUBMITS the Victims and Witnesses Unit’s report on the practices used to prepare and familiarise witnesses for giving testimony at trial.

¹² ICC-01/04-01/06-1351, para. 34.

¹³ ICC-01/04-01/06-1351, para. 39.

¹⁴ ICC-01/04-01/06-1351, para. 43.

1) Introductory remarks

1. In preparation for the commencement of the trial and pursuant to the Trial Chamber's Decision of 23 May 2008¹⁵, the Victims and Witnesses Unit ("VWU") has reviewed its Protocol and internal policies and practices.
2. The VWU herewith submits how it intends to proceed on the implementation of the Trial Chamber's decision and wishes to bring to the attention of the Trial Chamber some observations relating to the practical implication of the Trial Chamber's orders.

2) Commencement of the familiarisation process

3. Considering that once the process of witness familiarisation has commenced, any further meeting between a party and its witnesses outside of Court is prohibited,¹⁶ it is essential that the commencement of the familiarisation process can be clearly delineated.
4. The VWU's interpretation is that the starting point of the familiarisation process is when the witness arrives in the Netherlands prior to giving evidence at the Court.¹⁷ Fixing the commencement of the familiarisation process to the time when the witness arrives in the Netherlands has the benefit of being a clear demarcation for all entities involved. Furthermore, if the familiarisation process started already in the field, possible changes in the schedule for testimony could consequently lead to ambiguity.

¹⁵ ICC-01/04-01/06-1351, para. 43.

¹⁶ ICC-01/04-01/06-1049, para. 56.

¹⁷ In cases where testimony will be given by video-link, the familiarisation process starts at the moment the witness arrives at the location of the video-link.

3) Reading of witness statements

5. The Trial Chamber ordered the VWU to make available to the witnesses a copy of any witness statement they may have made in order to refresh their memory.¹⁸ In order to transmit the required material to the witnesses, the VWU will be provided with the statements by the entity calling the witness.¹⁹
6. For the purposes of rereading the statements as outlined in the Trial Chamber's Decision of 23 May 2008²⁰, the VWU understands that this rereading exercise only relates to the actual witness statements and not to any related materials. The entity calling the witness will therefore have to provide the VWU with the copy of the written and signed witness statement.
7. The review of the statement will take place only within the premises of the VWU which is a secure area accessible to VWU staff and the staff of the Security Services Section of the Court exclusively. Throughout the statement review period witnesses will not be allowed to bring their statements back to their accommodation at the end of each day where potentially other witnesses may be residing. Instead such statements will be locked in a safe within the VWU premises and made available to the witness the following day to resume the reviewing process.

4) Presence during the reading of the statements

8. In the Decision of 23 May 2008, the Trial Chamber found that representatives of the parties or participants may be present during the familiarisation process, including when the written records are read. If the witness is also a

¹⁸ ICC-01/04-01/06-1049, para. 55: "Further, the Victims and Witnesses Unit shall make available to the witness a copy of any witness statement they may have made in order to refresh their memory. [...]"

¹⁹ See ICC-01/04-01/06-1049, para 55 : "[...] The party who is responsible for calling the witness for testimony before the Bench shall make any previous witness statements available to the Victims and Witnesses Unit."

²⁰ ICC-01/04-01/06-1351, paras 38 to 40.

participating victim who is represented, the representative can also be present, subject to the witness's consent.²¹

9. In implementing the Trial Chamber's decision, the VWU has concerns in relation to the high number of persons that may be present during the reading of the statements.
10. The reviewing may take place over the course of several days and potentially in the presence of representatives of the parties and participants, the legal representative ("silent observers") and a person reading the statement, should the witness be illiterate. While the reading of the statement may in itself be an overwhelming emotional experience, the VWU has concerns that this setting could significantly increase the witness's level of pressure; in particular, as this setting could inhibit the witness from communicating freely and requesting the support needed from the VWU Support Assistants.
11. In order to minimise any adverse effect on the well-being of the witness, the VWU therefore recommends restricting the number of silent observers during the rereading process to a maximum of three, *i.e.* one representative of the prosecution, defence and legal representatives.
12. In addition, the VWU wants to highlight the fact that the Support Assistants will not necessarily be present at all times in the room where the witness is reviewing the statement.²² Due to the specific role of the Support Assistants, *i.e.* to provide psycho-social support to the witness whilst keeping professional boundaries, the Support Assistants have to refrain from any direct involvement in the statement reading in order to be in a position to provide neutral support to the witness.²³

²¹ ICC-01/04-01/06-1351, para. 39.

²² The VWU Protocol in this respect reads: "The witness will read the statement on the premises of the Victims and Witnesses Unit. The Victims and Witnesses Unit staff will be available to provide support services before, during and after the witness has read his or her statement."

²³ If the Trial Chamber ordered the Support Assistants to be present at all times in the room where the reading of the statement takes place, the VWU would need to recruit a minimum of three additional Support Assistants.

13. For these reasons, there is a possibility of a witness being alone with a representative of the party calling the witness and/or any other representative of a party or participant that may be present.
14. However, the VWU Support Assistants will check on the psychological and physical well-being of the witness regularly to see if the witness requires a break or any other assistance, and to provide support in the event that the witness is distressed. If it is assessed to be necessary to ensure the psychological and physical well-being of the witness, a Support Assistant will also be present in the room throughout the reading process. In addition, the witness waiting rooms have been equipped with an alarm system which allows the witnesses to contact the support assistants at any given time.
15. Should something exceptional occur during the statement reading process and come to the attention of VWU staff, the VWU will report this to the parties and the Chamber.²⁴ The VWU notes that it also intends to report this to the legal representative of the respective witness, if applicable.

5) Provision of witness statements

16. Witnesses can request to retain a copy of their statement and any related materials.²⁵ In those instances, following the Trial Chamber's Decision of 23 May 2008²⁶, the VWU intends to proceed as described below.
17. *Dual status witnesses with a legal representative:* A copy of their statement and any other related materials shall be provided to the legal representative of the witness by the relevant party.

²⁴ ICC-01/04-01/06-1351, para. 40.

²⁵ The VWU notes that the Dual Status Decision makes reference to the Decision of 23 May 2008 and reads as follows: "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 status [...]. [I]t 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.", ICC-01/04-01/06-1379, para. 62.

²⁶ See ICC-01/04-01/06-1351, para. 34.

18. *Witnesses without legal representation/assistance*²⁷: The decision to provide such witnesses with their statement and any other related material or to withhold the documents, in total or in parts, will be based on fact sensitive decisions that take into account the circumstances of each witness.²⁸
19. Where the witness is participating in the ICCPP, the VWU Protection Officer, or an assigned representative, will take a fact-sensitive decision in consultation with the relevant party or participant, as appropriate. In case where the request of the witness is denied, the witness as well as the entity providing the statement and any related materials will be informed.
20. Where the witness is not participating in the ICCPP any such decision should be taken by the entity calling the witness. The VWU Protection Officer, or an assigned representative, will be available to provide advice.
21. If the request of the witness is granted, the copy of the statement and any related material shall be provided to the witness by the relevant party through the VWU. In such cases the Protection Officer, or an assigned representative, will give the witnesses an explanation of the need to protect the confidentiality of those documents.
22. If the request of the witness is denied, the entity calling the witness will provide an opportunity for the witness, upon request, to look at the statements and any relevant document.²⁹ Should the witness disagree with the decision to deny the request, the witness will be advised where to obtain legal advice.³⁰
23. Statements that are not retained by the witness will be returned to the relevant party after testimony, as provided for in the "Victims and Witnesses Unit

²⁷ The VWU notes that it understands the term representative as used in paragraph 34 of the Decision of 23 May 2008 to also include legal assistance pursuant to Article 55(2) of the Rome Statute.

²⁸ See ICC-01/04-01/06-1351, para. 34.

²⁹ See ICC-01/04-01/06-1351, para. 34.

³⁰ See Rule 17(2)(b)(i) of the Rules of Procedure and Evidence.

protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial".³¹

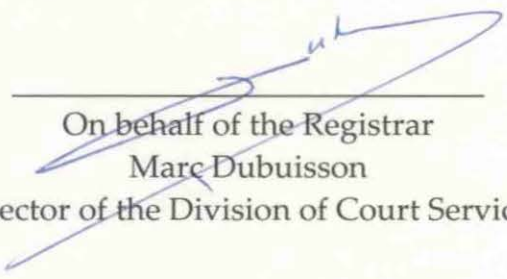
6) The Familiarisation Film

24. Finally, the VWU has reviewed the Registry's familiarisation film in order to assess whether it accurately reflects the decisions of the Chamber and has found some minor flaws in it. Mainly, the film does not take into account the full extent to which the legal representatives of victims may participate in the process. Also, the film does not reflect the prohibition of the party calling the witness to meet with the witness, once the process of familiarisation has commenced.
25. As a permanent solution, the VWU intends to change the film to address the issues as outlined above. The VWU has been advised that this will be possible in-house by adding and removing spoken text from the DVD. However, the VWU has been informed that this process is time and resource intensive. The amended text including the suggested additions and deletions is attached in a confidential annex to this report.³²
26. As a temporary measure, and given that the film will only be watched under supervision of VWU staff, the VWU intends to use the film for the purposes of the pending trial in its current format until the amended DVD is available. Speaking notes will be provided to the VWU member of staff showing the film addressing the issues as outlined above. The VWU staff members will pause the DVD at the indicated time codes and provide the additional information

³¹ The VWU Protocol in this respect reads: "The Victims and Witnesses Unit will keep the statement on its premises until the witness has finished testimony. The Victims and Witnesses Unit will keep record of the dates when the statements were provided to the Unit, made available to the witness and, if applicable, returned to the party. The Victims and Witnesses Unit will not be in a position to ascertain the content of the provided statement and to ensure that the witness apprehends all of the provided material.", see ICC-01/04-01/06-1150-Conf, para. 39. The VWU notes that should the Support Assistants be required to be present at all times during the reading of the statement, the VWU would need to recruit a minimum of three additional Support Assistants to cover this task.

³² Annex 1.

as outlined in the speaking notes. The speaking notes are attached in a confidential annex to the report.³³



On behalf of the Registrar
Marc Dubuisson
Director of the Division of Court Services

Dated this 31 December 2008

At The Hague, The Netherlands

³³ Annex 2.