

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 January 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

Prosecution's Response to the 'Victim and Witnesses Unit report on practices used to prepare and familiarise witnesses for giving testimony at trial' dated 31 December 2008, and Request for Clarification

Source: [Office of the Prosecutor]

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabile

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

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

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 Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 30 November 2007, the Trial Chamber rendered the "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial".¹ On 23 May 2008, the Trial Chamber rendered its "Decision regarding the Protocol on the practices to be used to prepare witnesses for trial".²
2. On 31 December 2008, the Victim and Witnesses Unit (VWU) filed a report on the practices it intends to use to prepare and familiarise witnesses for giving testimony at trial (the 31 December 2008 Familiarisation Report).³
3. The Prosecution responds to three points raised in the 31 December 2008 Familiarisation Report and seeks clarification on an additional point.

A. *Presence of Support Assistance during Familiarisation*

4. The 31 December 2008 Familiarisation Report, paragraphs 12 and 13, states that Support Assistants of the VWU will not be present at all times during the familiarisation process. In particular, the VWU will not guarantee its presence even when a party or legal representative is present to observe the familiarisation. Thus, VWU anticipates that witnesses may be left alone with the attending parties and legal representatives. The Prosecution makes two observations on this proposition.
5. Firstly, the VWU's role is to ensure that witnesses, in particular vulnerable witnesses, are fully supported during the familiarisation process. At least nine of the Prosecution's witnesses are former child soldiers who require a heightened level of support and assistance by the VWU. That support and

¹ ICC-01/04-01/06-1049.

² ICC-01/04-01/06-1351.

³ ICC-01/04-01/06-1578.

assistance should include, at a minimum, VWU's continuous presence during familiarisation. As the Trial Chamber noted in its 30 November 2007 decision, particular attention should be given to vulnerable witnesses such as children to ensure their psychological well-being, which is of paramount importance under Article 68 of the Rome Statute and Rule 88 of the Rules of Procedure and Evidence (Rules).⁴

6. Secondly, the Prosecution submits that the familiarisation process has been carefully delineated by the Trial Chamber in its 30 November 2007 and 23 May 2008 decisions. By agreement of the parties and as ordered by the Trial Chamber,⁵ the VWU has been assigned to facilitate and manage the familiarisation process. As the neutral manager, it will also safeguard against unauthorized communications between the witnesses and legal representatives who may be present as observers and/or to respond to questions from witnesses that may be inappropriately addressed to observers. Moreover, the absence of a VWU representative when a party or legal representative is with a witness could lead to allegations at trial of witness tampering; the presence of a VWU representative should prevent most allegations, and the VWU representative could shed light on any allegations that might thereafter be made.
7. The Prosecution submits that a VWU Support Assistant should be present for a significant portion of familiarisation and be nearby and readily available to assist when not physically present. For the nine vulnerable witnesses, the VWU Support Assistant should be continuously present during familiarisation; and that the VWU Support Assistant should always be present whenever a party or legal representative is present to observe.

⁴ ICC-01/04-01/06-1049 at para. 32.

⁵ ICC-01/04-01/06-1049 at paragraph 33.

B. *Interpretation of 'Statements'*

8. In its introductory paragraphs on page 4 of the 31 December 2008 Familiarisation Report, the VWU contends that only written and signed statements constitute statements for the purpose of familiarisation. The Prosecution submits that the VWU has adopted an erroneously restrictive interpretation of the statements to be provided to the witnesses for familiarisation, since it provides a witness with either none of his or her prior testimony (as in the case of Article 55(2) interviewees for which no signed statement has been generated), or only one of a series of recorded interviews between the Office of the Prosecutor (OTP) and the witness.
9. The Prosecution has disclosed all forms of each witness's recorded interview taken by and in the possession of the OTP, and submits that all forms should be provided to the witness for his or her familiarisation as together they record the totality of the information the witness provided to the OTP. In addition to signed statements, these records include unsigned screening notes, draft statements, and recorded interviews conducted under Article 55(2). The Article 55(2) recorded interviews are not in this case in the form of written and signed statements. Rather, the only record of these Article 55(2) interviews is the audio and/or video recording and a later-generated transcript. As the audio and/or video recording is the original form of the interview, the Prosecution submits that each witness interviewed under Article 55(2) should be given the audio and/or video recording of his or her interview, the corresponding transcript, and, as with all other witnesses, any other record of his or her interview(s) with the OTP as described above.
10. Additionally, certain recent re-interviews of witnesses were only audio and video recorded, and there are no signed statements. Under the VWU's

interpretation, these would not be available for familiarisation purposes, even though they are recorded statements.

11. The Prosecution submits that the statements provided to a witness for familiarisation must include more than just a written, signed statement. The witness must be provided with all records of interviews by the OTP, including screening notes, draft unsigned statements, signed statements, and audio/video recordings of interviews as well as corresponding transcriptions, or any other prior statements in the possession of the OTP.

C. Restriction on 'related materials'

12. In paragraph 6 of the 31 December 2008 Familiarisation Report, the VWU states that it will not provide the witness with additional materials related to a witness's statements for the purpose of familiarisation. The Prosecution disagrees with this proposition for two reasons.
13. First, the Trial Chamber's decision of 23 May 2008 includes related materials as part of the documentation that should be provided to witnesses.⁶
14. Second, documents referenced in a witness statement are integral parts of that statement and should be provided to a witness so that he or she will be fully familiar with the information contained therein. In order to limit the number of items a witness may be asked to review, however, the Prosecution proposes providing each witness with documents referred to in his or her statement *that have been disclosed*. That limitation will focus the witness on only the relevant documents that may actually be the subject of questioning by either party. If the witness is allowed to read a prior statement but prevented from reading the underlying document to which the statement may refer the witness will not be fully informed and

⁶ ICC-01/04-01/06-1351 at paragraph 34.

therefore the familiarization process will be incomplete. Providing documents referenced in the statements, in contrast, will serve the interests of focused familiarisation and most effectively use Court resources.

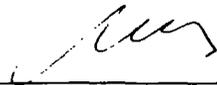
D. Presence of Parties during Familiarisation

15. In paragraphs 9-11 of the 31 December 2008 Familiarisation Report, the VWU interprets the Trial Chamber's 23 May 2008 order as permitting representatives of both parties to be present as silent observers during the familiarisation of witnesses called by one party.
16. The Prosecution seeks clarification on whether the Trial Chamber's 23 May 2008 Order permits representatives of the defence to observe the familiarisation of witnesses being called by the Prosecution, and vice versa.

Relief Requested

17. Based on the foregoing, the Prosecution requests that Trial Chamber instruct the VWU to: (i) ensure its representatives are present during complete familiarisation, at least for vulnerable witnesses, and ensure that its representatives are always present if a party is also present, (ii) interpret "statements" for familiarisation purposes to include screening notes, unsigned statements, signed statements, audio/video recordings and transcriptions; and (iii) also provide each witness with disclosed documents referenced in the witness's statements for review during familiarisation.

18. The Prosecution further requests that the Trial Chamber clarify whether a party not calling a witness may be present during the familiarisation of that witness.



Luis Moreno-Ocampo
Prosecutor

Dated this 9th day of January 2009
At The Hague, Netherlands