

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 May 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**  
**URGENT**

**Decision on prosecution's application for authorisation to add the non-redacted version of an expert report on age determination to the evidence to be relied on at the trial**

Decision/Order/Judgment 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 the Victims**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Catherine Bapita Buyangandu

**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  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The Office of the Prosecutor ("prosecution") filed a "Prosecution's application for authorisation to add the unredacted version of an expert report on age determination to the evidence to be relied on at the trial" on 10 April 2008 which seeks authorisation from the Trial Chamber to add the unredacted version of an expert report to its list of incriminating evidence.<sup>1</sup>

### **Background and submissions**

2. The application arises due to an oversight on the part of the prosecution who failed to disclose in non-redacted form an expert report on age-determination (examination of radiographs for the determination of the bone and dental age of a prosecution witness WWWW-0297)<sup>2</sup> which was previously disclosed to the defence in redacted form on 29 January 2008.<sup>3</sup> Following implementation of protective measures, the prosecution disclosed the identity of the witness to the defence on 29 February 2008,<sup>4</sup> and save for this expert report, all materials relating to the witness were disclosed to the defence in non-redacted form, or with minor redactions which had been authorised by the Chamber by 28 March 2008.<sup>5</sup>
3. On 4 April 2008, the prosecution provided the defence with a chart setting out the relationship between nine prosecution witnesses, the x-ray examinations of each of them, the experts' reports on their age determination and the radiographer's reports on the process of digitalisation of the x-rays, and included in this was the expert report in question and the names of the nine witnesses.<sup>6</sup>

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<sup>1</sup> Prosecution's application for authorisation to add the non-redacted version of an expert report on age determination to the evidence to be relied on at trial, 10 April 2008, ICC-01/04-01/06-1274, paragraph 7.

<sup>2</sup> DRC-OTP-0182-0432.

<sup>3</sup> ICC-01/04-01/06-1274, paragraphs 1 and 2; see Prosecution's communication of originals of incriminatory evidence disclosed to the defence on 29 January 2008, 31 January 2008, ICC-01/04-01/06-1145, paragraphs 6 and 7.

<sup>4</sup> ICC-01/04-01/06-1274, paragraph 2; see Prosecution's communication of original versions of incriminatory evidence disclosed to the defence on 29 February 2008, 3 March 2008, ICC-01/04-01/06-1205, paragraph 5, with confidential prosecution and defence only Annex 2, item 26.

<sup>5</sup> ICC-01/04-01/06-1274, paragraph 2.

<sup>6</sup> ICC-01/04-01/06-1274, paragraph 3.

4. It was not until 7 and 8 April 2008 that the prosecution realised that it had not disclosed the expert report in non-redacted form, being alerted to this fact by the defence.<sup>7</sup> The prosecution then invited the defence to a disclosure meeting on 8 April when it disclosed the expert report in full.<sup>8</sup>
5. The prosecution now applies to the Trial Chamber to add the non-redacted version of the expert report to its list of incriminating evidence.<sup>9</sup>
6. The defence has not responded to the prosecution's application.

### **Analysis**

7. At the Status Conference on 13 March 2008, the Trial Chamber set a deadline for prosecution disclosure of all incriminatory evidence to take place by 28 March 2008.<sup>10</sup>
8. Whilst the Chamber disapproves of the late disclosure of the non-redacted version of this expert report due to an oversight which the Chamber emphasises should, whenever possible, be avoided,<sup>11</sup> in this instance, it was clearly the prosecution's intention to include this expert report in its list of incriminating evidence, the expert report having already been disclosed to the defence in a redacted form on 29 January 2008, and the identity of the witness concerned having been revealed to the defence on 29 February 2008. The defence would not have known that the expert report in question related to the particular witness until 4 April 2008 upon receipt of the chart from the prosecution. However, the Chamber considers that the right of the defence to receive the evidence sufficiently in advance of the trial has not been unduly prejudiced by the late service of the non-redacted version of the expert report on this occasion: in particular, it has not been suggested that this causes the accused prejudice

<sup>7</sup> ICC-01/04-01/06-1274, paragraph 4.

<sup>8</sup> ICC-01/04-01/06-1274, paragraph 4.

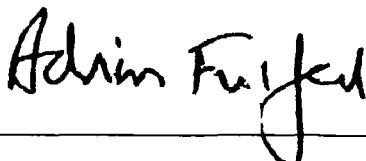
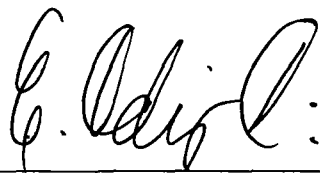

<sup>9</sup> ICC-01/04-01/06-1274, paragraph 7.

<sup>10</sup> ICC-01/04-01/06-T-79-ENG, page 10, lines 3-13.

<sup>11</sup> Decision on disclosure issues, responsibilities for protective measures and other procedural matters, public redacted version, 8 May 2008, ICC-01/04-01/06-1311-Anx2, paragraph 86.

in his preparation of the case for trial. For these reasons, the Chamber grants the prosecution's application as filed.

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

  
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Judge Adrian Fulford  
\_\_\_\_\_  
Judge Elizabeth Odio Benito  
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Judge René Blattmann

Dated this 20 May 2008

At The Hague, The Netherlands