Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **20 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 Document

Decision on the "Prosecution's Submission pursuant to the Trial Chamber's 'Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008'" and the Prosecution's related application for authorisation to add one item to the evidence to be relied on at trial

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

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Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Background and Submissions

The Prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008

1. During the status conference on 12 and 13 March 2008, the Chamber granted the Office of the Prosecutor ("prosecution") until Friday 28 March 2008 to serve its evidence in full, save to the extent that redactions had been approved in advance by the Chamber.[1] On 21 April and 8 May 2008 the prosecution requested the Trial Chamber's authorisation to add certain items to the evidence to be relied upon at trial and to disclose those items to the defence, notwithstanding the expiration of the deadline.[2]

2. On 4 June 2008, the Trial Chamber issued its Decision on the prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008 ("Decision").[3] The Chamber, *inter alia,* instructed the prosecution to provide additional information by 10 June 2008, in relation to items DRC-OTP-0192-0369,[4] DRC-OTP-0192-0643, DRC-OTP-0192-0652, DRC-OTP-0192-0664, DRC-OTP-0192-0680, a "statement of limited use" in relation to witness DRC-OTP-WWWW-0055 (DRC-OTP-0187-0029)[5] and items 13-45 and 47-50 of the List of disclosed materials.[6]

3. In relation to items DRC-OTP-0192-0369, DRC-OTP-0192-0643, DRC-OTP-0192-0652, DRC-OTP-0192-0664, DRC-OTP-0192-0680 and DRC-OTP-0187-0029 the Chamber, in its Decision, instructed the prosecution to provide a

[1] Transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79-ENG, page 10, lines 3-5.
[2] Prosecution's communication of original versions of 37 items disclosed to the Defence on 15 April 2008 and application for authorisation to add 19 further items of disclosed evidence to the evidence to be relied on at trial, 21 April 2008, ICC-01/04-01/06-1287; Prosecution's application for authorisation to add further items to the evidence to be relied on at trial, 8 May 2008, ICC-01/04-01/06-1312.
[3] ICC-01/04-01/06-1377.
[4] *Ibid*, paragraph 32(c).
[5] *Ibid*, paragraph 33(b).
[6] *Ibid*, paragraph 32(d)

description of the nature of these items, the reasons for their proposed late disclosure, their relevance to the prosecution's presentation of evidence, and the manner in which it is proposed they will be entered into evidence, by 10 June 2008.[7]

4. In relation to items 13-45 and 47-50, the Chamber instructed the prosecution to file an application seeking authorisation to rely on the material, if it intended to rely on them as incriminatory evidence at trial stating the reasons for late disclosure, the relevance of these items to the prosecution's presentation of evidence, and the manner in which it is proposed the items will be entered into evidence, by 10 June 2008.[8]

5. In its submission of 10 June 2008, the prosecution explained that document DRC-OTP-1092-0369 is a transcript of the audio recording of the first part of the interview of witness DRC-OTP-WWWW-0055 which was conducted in March 2005 (item DRC-OTP-0113-0047).[9] It recalled that the Trial Chamber had authorised the prosecution to rely on the audio recording of this interview in its Decision on 4 June 2008.[10]

6. The prosecution submitted that late disclosure had been necessary as a result of a processing error: the corresponding audio file to the transcript was missed when items relevant to the witness were being designated for disclosure.[11] The prosecution submitted that the information contained in this transcript is relevant as it forms a part of the totality of the interview of a witness who will be called by the prosecution. Moreover, the prosecution stated that it does not anticipate that the transcript will be entered into

[7] *Ibid*, paragraphs 32(c) and 33(b).
[8] *Ibid*, paragraph 32(d).
[9] Prosecution's Submission pursuant to the Trial Chamber's 'Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008, 10 June 2008, ICC-01/04-01/06-1390, paragraph 5
[10] ICC-01/04-01/06-1377, paragraph 32(b).
[11] *Ibid*, paragraph 6.

evidence, save in the exceptional circumstance that it becomes necessary to refresh the witness's memory on the stand. The witness, it confirmed, will be present at trial to testify on the matters contained therein and therefore the transcript is to be used to complement the original evidence, the audio file, and to assist in its review.[12]

7. With regard to items 13-45 and 47-50, the prosecution explained that they contain transcripts of the audio/video recordings of the interview of witness DRC-OTP-WWWW-0055 in January and March 2008 and the interview of witness DRC-OTP-WWWW-0297 on 15 March 2008. The prosecution noted that the audio/video recordings were disclosed to the defence before 28 March 2008.[13]

8. The prosecution submitted that the reason for its application to rely on items 13-45 and 47-50, at this stage, was that the transcripts were generated after the completion of the interviews of the witnesses, and were not ready prior to the disclosure deadline of 28 March 2008.[14] It set out that the transcripts are relevant to the prosecution's case insofar as they record the content of substantive interviews with witnesses who will be testifying at trial. The prosecution further suggested that the transcripts facilitate the review of the corresponding audio/video recordings. The prosecution indicated that it did not anticipate that the transcripts would be entered as evidence, as the witnesses will be present to testify on matters referred to therein.[15]

9. The prosecution submitted that items DRC-OTP-0192-0643,[16] DRC-OTP-0192-0652,[17] DRC-OTP-0192-0664,[18] DRC-OTP-0192-0680[19] are four sections of the

[12] *Ibid.*, paragraph 8.
[13] *Ibid*., paragraphs 10 and 11.
[14] *Ibid.*
[15] *Ibid.*, paragraph 13.
[16] ICC-01/04-01/06-1390-Conf-Anx1.
[17] ICC-01/04-01/06-1390-Conf-Anx2.
[18] ICC-01/04-01/06-1390-Conf-Anx3.

transcripts of the audio/video recording of the interview of witness DRC-OTP-WWWW-0055 conducted on 11 November 2005.[20] DRC-OTP-0187-0029,[21] in the prosecution's description, is a "statement of limited use" written in Swahili and signed by the witness on 27 January 2008 in relation to his interview in January and March 2008, pursuant to Article 54(3)(d) of the Rome Statute ("Statute").[22] The Chamber authorised the admission into evidence of the recordings to which these items relate on 4 June 2008.[23]

10. The prosecution submitted that the late disclosure of the transcripts arose out of an inadvertent error on its part. The prosecution argued that the transcripts are relevant to the presentation of its evidence, because they record the content of a second attempt to interview the witness. Moreover, the transcripts form a portion of the totality of the interview of the witness who will be called by the prosecution to testify. The prosecution submitted it does not anticipate that these transcripts will be entered into evidence as the witnesses will be present to testify on the specific matters provided by the transcripts, but rather that they may be used to refresh the witness's memory.[24] As regards the statement of limited use, the prosecution noted that it had been read into the recording of the witness's interview in January 2008, which was disclosed to the defence by 28 March 2008.[25] The prosecution also stated that a translation of the item had previously been disclosed to the defence on 16 May 2008.[26] Therefore, the prosecution averred that no prejudice would be occasioned to the defence by disclosure of the signed

[19] ICC-01/04-01/06-1390-Conf-Anx4.
[20] ICC-01/04-01/06-1390, paragraph 14.
[21] ICC-01/04-01/06-1390-Conf-Anx5 and translation in French, ICC-01/04-01/06-1390-Conf-Anx6 (ERN:DRC-0TP-0193-0144).
[22] ICC-01/04-01/06-1390, paragraph 14.
[23] ICC-01/04-01/06-1377, paragraph 32(b).
[24] ICC-01/04-01/06-1390, paragraphs 17-18.
[25] *Ibid*, paragraph 15.
[26] *Ibid.*, footnote 7, referring to : Prosecution's further information on the Prosecution's compliance with Trial Chamber's 24 April 2008 Decision and application for authorisation to add one item to the defence to be relied on at trial, 21 May 2008, ICC-01/04-01/06-1344, paragraph 6 and Confidential Annex 2.

original.[27]

11. In its submission of 28 November 2008, the defence indicated that it did not oppose the application of the prosecution to add the items considered in the Chamber's Decision of 4 June 2008 to the list of evidence to be relied on at trial.[28]

12. However, it submitted that it did object to the proposed use of the evidence by the prosecution to refresh the memory of witness whilst on the stand.[29] The defence submitted that this practice constituted 'witness proofing', and was forbidden by the Chamber in its "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial".[30]

The prosecution's application for authorisation to add one item to the evidence to be relied on at trial

13. On 21 May 2008, the prosecution submitted an application to add DRC-OTP-0193-0144, a French translation of the "statement of limited use" of witness DRC-OTP-WWWW-0055, referred to above,[31] to the list of evidence to be relied on at trial.[32]

14. The prosecution recalled that the text of this document had been read out to the witness in Swahili during the witness's interview in January 2008, and its contents are therefore already included in the materials which were disclosed

[27] ICC-01/04-01/06-1390, paragraph 15.
[28] Réponse de la Défence à la «*Prosecution's Submission pursuant to the Trial Chamber's 'Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008*», 28 November 2008, ICC-01/04-01/06-1508, paragraph 3.
[29] *Ibid*, paragraph 5.
[30] ICC-01/04-01-06-1049-tFRA, paragraph 57, referred to by the defence in ICC-01/04-01/06-1508, paragraph 5.
[31] DRC-OTP-0187-0029, see paragraph 9 above.
[32] Prosecution's further information on the Prosecution's compliance with Trial Chamber's 24 April 2008 Decision and application for authorisation to add one item to the evidence to be replied on at trial, 21 May 2008, ICC-01/04-01/06-1344.

to the defence on 28 March 2008.[33] It further informed the Chamber that on 16 May 2008 it had provided the French translation of the signed version of the statement of limited use to the defence for pre-inspection, pursuant to Rule 77 of the Rules of Procedure and Evidence ("Rules"), and that the defence had accepted it on this basis.[34]

15. The prosecution submitted that since the full content of the document had been disclosed to the defence on 28 March 2008, delayed disclosure of the French translation would cause no prejudice to the accused,[35] and it should be admitted to the list of evidence to be relied on at trial if the Chamber is minded to grant the prosecution's application to add the Swahili version.[36]

16. The defence has made no submissions regarding this application.

Relevant Provisions

17. The following provisions are relevant to a consideration of the applications:

Article 67 of the Statute

Rights of the Accused

1 In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[...]

Article 69 of the Statute

Evidence

[33] *Ibid*, paragraph 5.
[34] *Ibid*, paragraph 6 and ICC-01/04-01/06-1344-Conf-Anx2.
[35] *Ibid*, paragraph 8.
[36] *Ibid*, paragraph 7.

[...]

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

[...]

Rule 76 of the Rules

Pre-Trial disclosure relating to prosecution witnesses

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 77 of the Rules

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Analysis and Conclusions

18. In its Decision of 4 June 2008, the Chamber authorised the prosecution to add a limited number of items to the list of evidence to be presented by the prosecution at trial, on the basis that these were directly related to material previously disclosed and did not contain new evidence. The Chamber decided that reliance on the items by the prosecution, which included transcripts of interviews and translations of transcripts, did not unduly prejudice the accused; indeed, it was stated, it will assist the accused in his preparation for trial, as it clarifies information already disclosed by the

prosecution before 28 March 2008.[37]

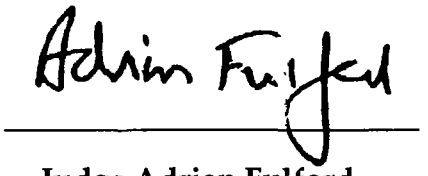
19. Following that principle, the Chamber notes that items DRC-OTP-0192-0369, 13-45 and 47-50, DRC-OTP-0192-0643, DRC-OTP-0192-0652, DRC-OTP-0192-0664 and DRC-OTP-0192-0680 are all transcripts of interviews of witnesses, the audio/visual recordings of which were previously disclosed by the prosecution to the defence, with the authorisation of the Chamber. Accordingly, the Chamber grants the application of the prosecution to add these items to the list of evidence to be relied on at trial.

20. The Chamber notes that item DRC-OTP-0187-0029 was read out to witness DRC-OTP-WWWW-0055 in Swahili during the witness's interview in January 2008, and its contents are therefore already included in the materials which were disclosed to the defence by 28 March 2008.[38] Therefore, the Chamber considers that admission of this document and its French translation, DRC-OTP-0193-0144, to the list of evidence to be relied on at trial will not unduly prejudice the accused; indeed, it may assist the accused in his preparation for trial as it clarifies information already disclosed. The Chamber also notes that witness DRC-OTP-WWWW-0055 is listed as the 23rd witness in the latest information provided by the prosecution on the order of the witnesses it intends to call.[39] The prosecution's applications to admit items DRC-OTP-0187-0029 and DRC-OTP-0193-0144, a "statement of limited use" written in Swahili and its French translation, are granted.

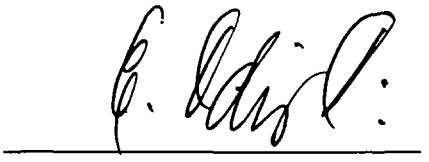
21. The Chamber reminds the parties that the present decision only addresses the issue of whether the prosecution may add certain items to the list of evidence it proposes to rely on at trial. If requested, the Trial Chamber will address the issue of the admissibility of these materials in due course.

[37] ICC-01/04-01/06-1377, paragraph 29.
[38] ICC-01/04-01/06-1390, paragraph 15.
[39] Prosecution's updated anticipated order of prosecution witnesses, 19 January 2009, ICC-01/04-01/06-1625.

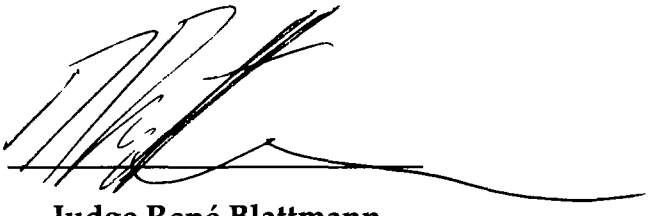
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 20 January 2009

At The Hague, The Netherlands