

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **24 September 2007**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

**Defence Submission on the Subjects that Require Early Determination: Trial Date,
Languages to be Used in the Proceedings, Disclosure and E-court Protocol**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Ms Caroline Buteau
Mr Marc Desalliers

BACKGROUND

1. At the status conference of 4 September 2007, Trial Chamber I (hereinafter “the Chamber”) heard preliminary representations from the parties on the setting of a timetable for making submissions regarding certain subjects that require early determination.¹
2. Following that hearing, on 5 September 2007, the Chamber issued its *Order setting out schedule for submissions and hearings regarding the subjects that require early determination*² (hereinafter “the Order of 5 September 2007”).
3. In particular, the Order of 5 September 2007 schedules a hearing on 1 October 2007 to address issues regarding: (a) the date of the trial; (b) the languages to be used in the proceedings; (c) the disclosure of evidence; and (d) an e-court protocol. The parties were invited to file written submissions on these issues no later than 12 September 2007, in the case of the Prosecutor, and 24 September, in the case of the Defence.
4. The Prosecutor filed his written submission on these first four issues on 11 September 2007.³

POSITION OF THE DEFENCE

A – The date of the trial

Date by which the parties shall be ready for the trial to commence

5. In setting the date for the commencement of the trial, a balance must be struck between the right of the accused to have adequate time and facilities for the

¹ ICC-01/04-01/06-T-50.

² ICC-01/04-01/06-947.

³ ICC-01/04-01/06-951.

preparation of his defence (article 67(1)(b) of the Statute) and his right to be tried without undue delay (article 67(1)(c) of the Statute).

6. The Defence is of the opinion that the determination of the commencement date is closely linked to the issues regarding the disclosure of evidence, which are raised at point C of the Order of 5 September 2007.
7. On the one hand, in order to be able to adequately prepare its defence, the Defence must have received all of the Prosecutor's evidence, without redaction or restriction. In particular, the accused can meaningfully prepare his defence only from the moment he is notified of:
 - the final list of witnesses that the Prosecutor intends to call, those witnesses' entire, unredacted statements and all related documents.
 - the final list of documents that the Prosecutor intends to rely on at trial, together with an unredacted version of those documents.
8. Following such notification, the Defence must have adequate time to review the documents and to carry out its own investigations.
9. That period of time can be no less than three months for the following reasons:
10. As the Prosecutor states in his submission of 11 September 2007, the amount of evidence disclosed to the Defence to date is very substantial,⁴ and is the result of almost three and a half years of investigation in the field.
11. The new Defence team was set up only very recently, and it must conduct a full review of all of this material, which represents a significant amount of work. Furthermore, it must commence, as soon as is materially possible to do so, its own investigations in the field.

⁴ Prosecution's Submission of 11 September 2007, paras. 22 and 23.

12. The Defence has only very limited means and resources to handle this important investigative work. Bearing in mind these restrictions, the significant distance to be covered in order to conduct investigations, the logistical and instability problems in the regions in which any investigations would be conducted, a time limit of at least three months to review all the evidence disclosed by the Prosecutor will be essential.
13. On the other hand, to ensure that the accused may be tried without undue delay, the Defence requests the Chamber to set a deadline for the Prosecutor to notify the material listed in paragraph 7 of these submissions.
14. The Prosecutor anticipates being able to complete this disclosure by the end of October 2007,⁵ subject to security issues. At paragraph 25 of his submission of 11 September 2007, the Prosecutor adds that the disclosure of a high proportion of the materials depends on the lifting of confidentiality restrictions by their sources, and that once it has submitted a request, the granting of the request and the time required to obtain a response are beyond its control.
15. The Defence nevertheless submits that if the Prosecutor cannot obtain permission to disclose certain documents, he must simply forgo the possibility of using them at trial, and full disclosure of evidence should not be delayed indefinitely for failure to obtain the permissions.
16. To conclude on this point, the Defence is therefore unable to express an opinion on the exact date by which it shall be ready to commence trial; however, it requests, firstly, that this Chamber set a date by which the Prosecutor must have disclosed to the Defence all of its evidentiary material, without redaction, and that the Chamber schedule the trial to commence three months thereafter.

⁵ Prosecution's Submission of 11 September 2007, para. 24.

Volume of evidence on which the Prosecutor intends to rely

17. It is of course the Prosecutor's prerogative to determine the amount of evidence on which he intends to rely at trial. Nevertheless, the Defence notes that on the very eve of the commencement of the trial, there is a risk that the prosecution evidence will increase "potentially significantly",⁶ despite the considerable amount of time during which the Office of the Prosecutor has been conducting investigations. This potentially significant increase in the amount of evidence only confirms the need to set a date by which the Prosecutor must have disclosed all of the evidence he intends to use at trial, and to grant the Defence adequate time for its investigations, for the reasons stated at point A.

Anticipated number of witnesses that the parties intend to call at trial

18. At this stage of the proceedings, the Defence is unable to state the number of witnesses it may call to trial. Naturally, it must first complete its review of the prosecution evidence and conduct its own investigations in the field before it can make an initial assessment. Furthermore, it is probable that the Defence will only be able to determine the exact number of its witnesses at the close of the prosecution case.

B – Languages in which testimonies will be given at trial

19. Since the Defence cannot know, at this stage of the proceedings, who its witnesses will be at trial, it is unable to say for certain which languages will be used by these witnesses at the hearings.
20. Nevertheless, information gathered by the Defence indicates that, in addition to French and English, the other languages used by the witnesses will be Swahili and Kilendu. Although Kilendu seems not to vary greatly from one region to another, Swahili can vary significantly according to the regions in

⁶ Prosecution's Submission of 11 September 2007, para. 13.

which it is spoken. Indeed, the Swahili spoken in East Africa (Kenya, Tanzania) differs amply from that spoken in Central Africa, including that spoken in the Democratic Republic of the Congo.

21. Furthermore, the Swahili spoken in the DRC itself may differ according to the various regions of the country. For example, the Swahili spoken in Ituri will be noticeably different from that spoken in North Kivu, although the differences are not as marked as the differences between the Swahili spoken in East Africa and the Swahili spoken in Central Africa. The Defence is nevertheless of the opinion that interpreters at the trial should be familiar with the Swahili spoken in Ituri, since the majority of the witnesses who speak Swahili will probably be from that region.

C – Issues relating to the disclosure of evidence by the Prosecutor

Disclosure of evidence to the Defence

22. The Prosecutor's duty to disclose exculpatory evidence is provided for in article 67(2) of the Statute, which reads:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

23. This article basically copies the rule stated in rule 68(i) of the *Rules of Procedure and Evidence* of the ICTR and rule 68(A) of the *Rules of Procedure and Evidence* of the ICTY.
24. The Prosecutor states that, despite repeated invitations on his part, the Defence has yet to provide him with its list of keywords which would allow for the identification of potentially exculpatory material in the prosecution evidence.⁷ On this point, the Defence submits that the responsibility for

⁷ Prosecution's submission of 11 September 2007, paras. 28 and 29.

determining which evidence in the prosecution file tends to suggest the innocence of the accused rests solely on the Prosecutor,⁸ and that the accused does not have to be consulted to reach a conclusion on what material might weaken the Prosecution's evidence.⁹

25. Not only is ICTY and ICTR case law on the duty to disclose exculpatory evidence relevant in the case in point, but the Prosecutor's duty under the Statute goes even further in that he is required to investigate not only incriminating but also exculpatory circumstances.¹⁰ Accordingly, he should not restrict himself to the transmission of any exculpatory material he might come across in the course of his investigation into incriminating circumstances; he must actively search for such exculpatory material.
26. As sole custodian of the statements and documents gathered in the course of his investigations, the Prosecutor is the only one in a position to meaningfully identify the evidence governed by article 67(2) of the Statute and rule 77 of the *Rules of Procedure and Evidence*.
27. The Prosecutor's request that the Defence provide him with a list of keywords to enable the identification of potentially exculpatory evidence cannot be granted for the reasons set out below.
28. Firstly, the Prosecutor cannot transfer his own obligation onto the Defence. Should the need arise, it will be up to the Defence to make specific requests to the Prosecutor under article 67(2) and rule 77.
29. Secondly, such searches are very largely random and cannot in any event yield satisfactory results.

⁸ *The Prosecutor v. Brđanin*, Case No. IT-99-36-T, para. 23.

⁹ *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, para. 264.

¹⁰ Article 54(1)(a) of the *Rome Statute of the International Criminal Court*.

30. Lastly, even if the Defence were to provide the Prosecutor with a list of keywords, this would not, in any event, absolve him of his obligation to identify and disclose materials that satisfy the requirements of article 67(2) of the Statute. As the Defence is obviously not privy to the Prosecutor's entire case, it would be rather surprising for the Prosecutor to justify his failure to transmit exculpatory information or information which may affect the credibility of a Prosecution witness merely because this information was not covered by the list of keywords submitted by the Defence.
31. The Defence further emphasises that under article 67(2) of the Statute, the Prosecutor must disclose exculpatory evidence "as soon as practicable". The duty is therefore not to disclose the evidence gradually,¹¹ but to do so when it becomes materially practicable. While the parties are currently in discussion regarding the establishment of a more direct system of disclosure,¹² disclosure meetings between the parties could, and should, take place more frequently than the current two- to three-week intervals. The offices of the Defence team are located in the same building as the offices of the Prosecutor, and a disclosure meeting could be held every week if evidence needs to be disclosed to the Defence.

Disclosure of the list of witnesses and copies of all their statements

32. The Prosecutor has announced that at this stage, he anticipates calling between 45 and 50 witnesses to testify at trial, and that even if this figure were to increase, the increase would not be significant. The Defence maintains that the Prosecutor should transmit to it the list of all the witnesses he intends to

¹¹ Prosecution's Submission of 11 September 2007, para. 26.

¹² Prosecution's Submission of 11 September 2007, para. 27.

call to testify at trial in addition to providing it with an unredacted version of all the written statements of such witnesses.

33. The Defence notes that the Prosecutor has initiated or intends to initiate the necessary steps to secure the lifting of all restrictions on the disclosure of the material currently in his possession or control, which should include the list of witnesses and witness statements. The Defence however adds that to date, it has not received any information that would allow it to determine which witnesses the Prosecutor intends to call to testify before the Chamber. In the view of the Defence, it is not necessary for the Prosecutor to wait until the restrictions are lifted for all the witnesses before he begins to disclose evidence pertaining thereto to the Defence.

Disclosure to other parties

34. Regarding the issue of disclosure of prosecution evidence to the victims, the Defence shares that Prosecutor's view¹³ that victims should have access only to materials tendered into evidence by the parties and available to the public.

Disclosure to the Chamber

35. The Defence further agrees with the Prosecutor that materials disclosed to the Defence pursuant to article 67(2) and rule 77 need not be disclosed to the Chamber. The Defence has no objection to the originals of these documents being in the Prosecutor's keeping, subject, of course, to its right of inspection as provided for in rule 77.

¹³ Prosecution's Submission of 11 September 2007, paras. 32 *et seq.*

D –The e-Court Protocol

36. With respect for the Prosecutor's opinion on the objectives sought in the adoption of a protocol for the use of the Court's electronic system, the Defence submits that it is not inconsistent with the goals of regulation 26 of the *Regulations of the Court* to add to documents transmitted electronically between the parties metadata aimed at facilitating the use of these documents and searching within them.
37. As the Prosecutor emphasises in his submission of 11 September 2007,¹⁴ a substantial amount of the documents in his case file is not electronically searchable. This is clear proof of the need to attach to the documents disclosed information that will enable them to be located based on certain search criteria.
38. Amongst other difficulties, the disclosed documents are uploaded as TIFF files into Ringtail. This provides only an image of the document which is not subject to keyword searching. Moreover, some documents are handwritten, which further complicates search options.
39. It is therefore crucial for the parties to have a minimum of information to make use of the mass of documents disclosed to them, and the Single Judge's decision of 28 September 2006¹⁵ addresses this shortcoming by setting out the fields to be filled by the parties. In fact, the parties had provided in their e-Court protocol that it would be for the Chamber to decide in the course of proceedings what metadata the parties would have to add to their documents.¹⁶

¹⁴ Prosecution's Submission of 11 September 2007, para. 29.

¹⁵ ICC-01/04-01/06-360.

¹⁶ ICC-01/04-01/06-201, Anx 1, paras. 32 and 34.

40. Admittedly, the addition of metadata increases the workload of the parties, but in the view of the Defence, this factor should not be taken into account, and the ease of use it offers is ample justification for the efforts made.
41. Accordingly, the Defence submits that the system in place following the Pre-Trial Chamber's decision of 28 September 2006¹⁷ should be maintained, and that for the adequate preparation of its case, the following fields should be added in the case of documentary evidence:
- i. the complete chain of custody of the item
 - ii. the date the source lifted restrictions, where applicable (article 54(e) of the Statute)).

CONCLUSION

42. To recapitulate:
1. Date of trial: the Defence would like to have a time limit of three months starting from the end of the disclosure of the Prosecutor's evidence along with the final list of Prosecution witnesses and the final list of documents on which the Prosecutor intends to rely at trial.
 2. Languages: the Defence anticipates that its witnesses will speak mainly in French, Swahili (as spoken in Ituri) and Kilendu.
 3. Disclosure of evidence: the Defence would like the Prosecutor to have fulfilled all his disclosure obligations on 31 October 2007 at the latest, and that all documents should be disclosed in complete and unredacted form.
 4. E-court protocol: the Defence would like the system put in place by the Single Judge on 28 September 2006 to be maintained while taking account of the suggested additions set out at paragraph 41 above.

¹⁷ See footnote 14 above.

Without prejudice.

Catherine Mabile, Lead Counsel [signed]

Dated this 24 September 2007

At The Hague