

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 8 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 Document
with confidential, Prosecution and Defence only annexes**

**Prosecution's application for authorisation to add further items to the evidence to
be relied on at trial**

Source: Office of the Prosecutor

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

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Background

1. On 15 April 2008, the Prosecution disclosed four video tapes, one audio tape, one Investigator's Note and one Screening Note related to the March and November 2005 attempts to commence the interview of witness DRC-OTP-WWWW-0055. The Defence agreed to receive these materials.

2. On 24 April 2008, the Prosecution disclosed to the Defence the translations of nine portions of the transcripts of the interview of witness DRC-OTP-WWWW-0187 as incriminating evidence. These transcripts, which appear as numbers 1 through 9 of the annexed "List of disclosed materials",¹ were disclosed with the prior agreement of the Defence, in the understanding that the video tapes² of the interview had already been disclosed to the Defence on 29 February 2008.

3. At the occasion of the 24 April 2008 disclosure meeting, the Prosecution sought to disclose a further seven items as incriminating evidence. Four of these seven items are listed as items 10-13 on the annexed "List of disclosed materials." The Defence refused to receive these four items, as well as three other items which the Prosecution sought to serve on the Defence that day.³

¹ The List of disclosed material is the Confidential Prosecution and Defence Only – Annex ("List of disclosed materials").

² See "Prosecution's communication of original versions of incriminatory evidence disclosed to the Defence on 29 February 2008", ICC-01/04-01/06-1205-Anx1, items 143-151.

The nine portions of the transcripts of these video tapes were disclosed to the Defence on 15 April 2008. See "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", ICC-01/04-01/06-1287-Anx, items 4-12.

³ Reference is made to paragraph 12, below.

Information

4. As required by Rule 112 of the Rules of Procedure and Evidence (Rules) for interviews conducted further to Article 55(2), an audio/video recording is made of the entire interview unless the witness objects. The interview is recorded onto a number of individual cassettes and discs respectively which are separately registered. Transcripts are then prepared that correspond to each of the cassettes of the audio/video recording. If the interview is originally conducted in a language that the accused does not fully understand and speak, the Office of the Prosecutor (OTP) prepares a translation of each section of the transcript corresponding to each section of the audio/video recording. In respect of the present application, as set out below, the Prosecution has discovered that it has not disclosed several individual sections of *either* the audio/video recording, the transcript or the translation of a given witness' interview taken pursuant to Article 55(2).

Application for authorization to add items to the evidence to be relied on at trial

5. The Prosecution seeks the Trial Chamber's authorisation to rely as incriminating evidence at trial on a number of items which, due to oversight, were not previously disclosed to the Defence:
 - a. For witness DRC-OTP-WWWW-0187, the Prosecution seeks authorisation to rely on the translations⁴ of nine of the full set of transcripts of the witness' interview which were disclosed to the Defence on 24 April 2008.

⁴ These items are listed at numbers 1-9 on the List of disclosed materials. These translations complement the translation of the single portion of the transcripts which was disclosed to the Defence on 15 April 2008, and for which the Prosecution has already sought the Chamber's authorisation to rely on it as incriminating evidence at trial. See ICC-01/04-01/06-1287, paras 3(b)(ii), 6, 7 and 9-12.

- b. For witness DRC-OTP-WWWW-0055, the Prosecution seeks authorisation to rely on (i) the four portions⁵ of the transcripts of the recording of the attempt to commence the interview of the witness in November 2005, and on (ii) the "statement of limited use" signed by the witness during his January 2008 interview.
- c. For witness DRC-OTP-WWWW-0017, the Prosecution seeks authorisation to rely on two audio tapes⁶ of the witness' 4 February 2006 interview.
- d. For witness DRC-OTP-WWWW-0038, the Prosecution seeks authorisation to rely on four audio tapes⁷ of the witness' 19 March 2006 interview.
- e. For witness DRC-OTP-WWWW-0294, the Prosecution seeks authorisation to rely on a one-paragraph note from an OTP staff member certifying the transmission of the witness' screening notes from the field to the seat of the Court and the circumstances of registration of the screening notes.
- f. For witness DRC-OTP-WWWW-0157, the Prosecution seeks authorisation to rely on the French translation of a two-page investigator's note which was disclosed to the Defence in English on 17 December 2007.
- g. For witness DRC-OTP-WWWW-0116, the Prosecution seeks authorisation to rely on the French translation of a two-page investigator's note which was disclosed to the Defence in English on 22 February 2008.

⁵ DRC-OTP-0192-0643, DRC-OTP-0192-0652, DRC-OTP-0192-0664 and DRC-OTP-0192-0680.

⁶ DRC-OTP-0141-0002 and DRC-OTP-0141-0003.

⁷ DRC-OTP-0149-0056, DRC-OTP-0149-0057, DRC-OTP-0149-0058 and DRC-OTP-0149-0059.

Materials related to witness DRC-OTP-WWWW-0187

6. With respect to the items which the Prosecution seeks to rely on for witness DRC-OTP-WWWW-0187, the Prosecution recalls that, as highlighted previously by the Prosecution,⁸ the tapes of this witness' interview, which was conducted in English/Lingala and subsequently translated into French/Lingala, were disclosed to the Defence on 29 February 2008. Furthermore, the transcripts of the tapes were disclosed on 29 February and 15 April 2008,⁹ with the consent of the Defence.

7. The Prosecution submits that any prejudice to the accused is limited. While the accused himself is not known to fully understand and speak English or Lingala, and in light of the fact that this would have prevented him from reviewing witness DRC-OTP-WWWW-0187's evidence, the Prosecution submits that his counsel are capable of preparing for trial on the basis of the disclosure of the tapes of the original English/Lingala interview, as disclosed on 29 February 2008. In addition, the Prosecution notes that the accused himself will have at least¹⁰ six weeks in which to review the translations of the witness' interview and prepare for trial.

8. Finally, the Prosecution notes that the Defence consented to the disclosure of these nine items as incriminating evidence.

⁸ ICC-01/04-01/06-1287, para 9.

⁹ ICC-01/04-01/06-1205-AnxI, items 158-164, and ICC-01/04-01/06-1287, para 3(b)(i) and Annex, items 4-12.

¹⁰ The accused will have over six weeks during which to review the evidence obtained from this witness prior to the commencement of the trial. In addition, the Prosecution anticipates that the accused will have more than 10 weeks to prepare prior to the appearance of this witness at trial, because the Prosecution does not anticipate calling this witness to testify during the first half of the trial.

Materials related to witness DRC-OTP-WWWW-0055

9. With respect to the items which the Prosecution seeks to rely on for witness DRC-OTP-WWWW-0055, the Prosecution recalls its submissions of 21 April 2008,¹¹ whereby it informed the Trial Chamber that the matters discussed during this early attempt of an interview are almost exclusively procedural rather than substantive. The substantive evidence provided by the witness which the Prosecution intends to rely on at trial is principally contained in the tapes and transcripts of his most recent interview in January and March 2008, which were disclosed to the Defence on 28 March 2008.¹²

10. The Prosecution also recalls that the four video tapes, one audio tape as well as the one Investigator's Note and one Screening Note from the attempts to commence the interview of this witness in March and November 2005 were disclosed on 15 April 2008,¹³ with the consent of the Defence. The Prosecution has applied to the Trial Chamber for authorisation to rely on these items as incriminating evidence at trial,¹⁴ and now seeks authorisation to rely on four transcripts that correspond to the audio/video recording of the attempt to commence the interview of the witness in November 2005.

11. In light of the fact that the complete audio/video recording and corresponding transcription of the substantive portion of witness DRC-OTP-WWWW-0055's interview were disclosed to the Defence on 28 March 2008, the Prosecution submits that the delayed disclosure of the record of the attempt to commence his interview in November 2005 does not cause prejudice to the accused.

¹¹ ICC-01/04-01/06-1287, para 8.

¹² ICC-01/04-01/06-1254-Conf-Anx2, items 1-33. The interview was conducted in English and Swahili.

¹³ ICC-01/04-01/06-1287-Anx, items 1, 2, 13-46, 51-54 and 56.

¹⁴ ICC-01/04-01/06-1287, paras 3(c)(ii) and (iii), 7-8 and 10-12.

12. Finally, the Prosecution notes that the Defence initially indicated preparedness to receive the disclosure of these four transcripts in the understanding that these would be disclosed by 25 April 2008. The Defence has since refused to receive the items in question, which were offered for disclosure on 24 April 2008.
13. The Prosecution also seeks to rely on the “statement of limited use” of witness DRC-OTP-WWWW-0055. The Prosecution informs the Trial Chamber that the text of this document was read out¹⁵ to the witness in Swahili during the witness’ interview in January 2008, and its contents are therefore already included in the materials which were disclosed to the Defence on 28 March 2008. The Prosecution submits that the document is nonetheless an integral part of the witness’ interview, and seeks to rely on it in its written and signed form.¹⁶ Given the fact that the full content of the document has been disclosed to the Defence since 28 March 2008, the Prosecution submits that delayed disclosure of the signed version of this document will cause no prejudice to the accused.

Materials related to witness DRC-OTP-WWWW-0017

14. In relation to witness DRC-OTP-WWWW-0017, the Prosecution seeks to rely on two audio tapes of the witness’ 4 February 2006 interview. The Prosecution notes that the original French transcripts of these audio tapes were disclosed to the Defence on 31 October 2007.¹⁷ In addition to these materials, the Prosecution had already disclosed to the Defence the tapes and transcripts for

¹⁵ ICC-01/04-01/06-1287-Conf-Anx, item 36, which bears the ERN DRC-OTP-0191-0807. The statement of limited use is read into the record of the interview at DRC-OTP-0191-0810 to DRC-OTP-0191-0813.

¹⁶ The Prosecution envisages been able to disclose to the Defence the French translation of this item by about 15 May 2008.

¹⁷ ICC-01/04-01/06-1013-Conf-AnxI, items 50 and 51.

the witness' November 2006 interview on 9 November 2007 and 31 October 2007 respectively.¹⁸

15. In light of the fact that the Defence have had access since 31 October 2007 to the full transcript of the recording of the interview with the witness, the Prosecution submits that the delayed disclosure of the two audio tapes does not cause prejudice to the accused.

Materials related to witness DRC-OTP-WWWW-0038

16. In relation to witness DRC-OTP-WWWW-0038, the Prosecution seeks to rely on four audio tapes of the 19 March 2006 portion of the witness' interview, for which the complete set of the original French transcripts were disclosed to the Defence on 29 February 2008.¹⁹ In addition to these materials, the Prosecution had already disclosed to the Defence the video tapes and transcripts from the 20-23 March 2006 portions of the witness' interview on 29 February 2008.²⁰

17. In light of the fact that the Defence have had access since 29 February 2008 to the complete set of transcripts of the audio recording of the interview with the witness, the Prosecution submits that the delayed disclosure of the four audio tapes does not cause prejudice to the accused.

¹⁸ ICC-01/04-01/06-1013-Conf-Anx1, items 60-69.

¹⁹ ICC-01/04-01/06-1205-Conf-Anx1, items 112-116.

²⁰ ICC-01/04-01/06-1205-Conf-Anx1, items 94-107 and 111 and 117-130.

Materials related to witness DRC-OTP-WWWW-0294

18. For witness DRC-OTP-WWWW-0294, the Prosecution seeks to rely on a one-paragraph note certifying the transmission of the witness' screening notes from the field to the seat of the Court and the circumstances of registration of the screening notes. In this note, the Prosecution's Senior Investigator certifies having received the screening notes for the witness, which were sent from the field by the Prosecution's Field Officer who screened the witness. The Prosecution's Senior Investigator registered the screening note and is thus in a position to attest to the fact that the registered item corresponds to the item sent by the person who screened the witness.

19. The Prosecution seeks to disclose this document to the Defence as it makes part of the chain of custody information which the Defence is entitled to receive through the e-Court Protocol, but which would not actually be available through the mere provision of meta-data. The Prosecution submits that its contents in no way impact on the substance of the evidence given by witness DRC-OTP-WWWW-0294, and that there is therefore no prejudice to the Defence derived from the late disclosure of this item.

Materials related to witnesses DRC-OTP-WWWW-0157 and DRC-OTP-WWWW-0116

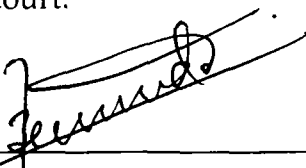
20. For witnesses DRC-OTP-WWWW-0116 and DRC-OTP-WWWW-0157, the Prosecution seeks authorisation to rely on the French translations of brief investigator's notes which were previously disclosed to the Defence in their

original English version on 22 February 2008²¹ and 17 December 2007,²² respectively.

21. The Prosecution submits that any prejudice to the accused is limited. While the Prosecution acknowledges that the accused himself is not known to fully understand and speak English, which would have prevented him from reviewing witnesses DRC-OTP-WWWW-0116 and DRC-OTP-WWWW-0157's investigator's notes, the Prosecution submits that his counsel are capable of preparing for trial on the basis of the English versions of the investigator's notes, which were disclosed on 17 December 2007 and 22 February 2008 respectively. In addition, the Prosecution notes that the accused himself will have at least²³ six weeks in which to review the translation of the investigator's notes and prepare for trial.

Request

22. In light of these submissions, the Prosecution seeks authorisation from the Trial Chamber to add the items listed at paragraph 5 to its list of incriminating evidence. The Prosecution brings this application pursuant to Regulation 35 of the Regulations of the Court.



 Fatou Bensouda, Deputy Prosecutor
 on behalf of
 Luis Moreno-Ocampo, Prosecutor

Dated this 8th day of May 2008
 At The Hague, The Netherlands

²¹ ICC-01/04-01/06-1190-Conf-Anx, item 1.

²² ICC-01/04-01/06-1096-Conf-Anx, item 106.

²³ The accused will have over six weeks during which to review the evidence obtained from this witness prior to the commencement of the trial. In addition, the Prosecution anticipates that the accused will have more than 10 weeks to prepare prior to the appearance of this witness at trial, because the Prosecution does not anticipate calling this witness to testify during the first half of the trial.