

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 13 June 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 Annex A**

**Prosecution's Submission pursuant to the Trial Chamber's Oral Order
on 10 June 2008**

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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Other

I. Background

1. During the Status Conference held on 10 June 2008, the Trial Chamber orally ordered the Prosecutor to file additional submissions on four issues.¹

II. Scope of the Present Submission

2. In its order, the Trial Chamber instructed the Prosecution to provide additional submissions by 13 June 2008 on the following issues:
 - (i) With respect to material that is protected under Article 54(3)(e) and for which lifting has not been approved ('Undisclosed Evidence'), the Prosecution is instructed to provide the number of items that contain potentially exonerating information as defined in Article 67(2) and that contain information that falls within the scope of Rule 77;
 - (ii) With respect to the disclosure of potentially exonerating information related to 26 witnesses, the Prosecution is instructed to provide the Trial Chamber with a schedule outlining the dates upon which the excerpts and/or summaries of exonerating information were provided to the Defence;²

¹ ICC-01/04-01/06-T-89-ENG, page 32, lines 13-20, page 33, lines 1-4 and page 43, lines 17-25.

² « Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters », 24 April 2008, ICC-01/04-01/06-1311.

- (iii) the Prosecution is instructed to provide information on any pending applications for redactions; and
- (iv) the Prosecution is instructed to provide its submissions in relation to the Defence filing of 3 June 2008³ in which the Defence has indicated that in the Annex to the 'Prosecution's Summary of Presentation of Evidence', a number of documents are being relied upon by the Prosecution when they had only been disclosed at that time under Rule 77 and no authorization to rely on these items as incriminating evidence at trial had been issued by the Trial Chamber.

III. Prosecution's Submissions

(i) *Potentially exonerating and Rule 77 information in Article 54(3)(e) protected documents*

3. In relation to the Undisclosed Evidence, the Prosecution informs the Trial Chamber that it is currently comprised of 206 items, of which 33 have been provided to the Trial Chamber *ex parte*.⁴ The total number of items comprising the Undisclosed Evidence has diminished since the Prosecution's last report to the Trial Chamber as a result of (i) the disclosure of two items for which the Article 54(3)(e) restrictions were recently lifted by the provider;⁵ (ii) corrections that the Prosecution has made to inaccurate meta-data which had previously indicated that one item was subject to Article

³ ICC-01/04-01/06-1375, at para 5.

⁴ ICC-01/04-01/06-1373 and ICC-01/04-01/06-1385.

⁵ These items were disclosed to the Defence on 9 June 2008. One of the items was disclosed as potentially exculpatory evidence and the other one pursuant to Rule 77.

54(3)(e) restrictions;⁶ and (iii) the identification of a copy of one of the items of undisclosed evidence which is not subject to Article 54(3)(e) and which had already been disclosed to the Defence.⁷

4. As requested by the Trial Chamber, the Prosecution provided statistics on the number of items of Undisclosed Evidence which in the Prosecution's assessment fall within the scope of Article 67(2) and Rule 77 respectively during the course of the 10 June 2008 Status Conference.⁸ As anticipated during the Status Conference, the Prosecution has verified these statistics and can now provide an accurate update to the Trial Chamber. The Undisclosed Evidence is comprised of 94 items which fall within the scope of Article 67(2), and of 112 items which fall within the scope of Rule 77. The Prosecution informs the Trial Chamber that 41 items contain information which in the Prosecution's view falls within the scope of both provisions. Finally, from the 112 items which fall within the scope of Rule 77, 46 of those contain solely information of a *tu quoque* nature.

(ii) Schedule of disclosure of potentially exonerating information from 26 witnesses

5. The Prosecution attaches a table⁹ containing the names of each of the twenty-six witnesses whose statements were disclosed because the statements contained information that is potentially exculpatory under Article 67(2). Prior to a decision by the Trial Chamber on the appropriate manner of disclosure of this information, the

⁶ This item, DRC-OTP-0017-0028, will be disclosed to the Defence at the next disclosure meeting, which is scheduled for 16 June 2008.

⁷ The item, DRC-OTP-0181-0509, was provided to the Defence for pre-inspection, pursuant to Rule 77, on 16 January 2008.

⁸ ICC-01/04-01/06-T-89-ENG ET, page 45, line 25 to page 46, line 7.

⁹ Confidential - Prosecution and Defence Only - Annex A.

Prosecution had disclosed the excerpts of potentially exculpatory information contained in these statements. In relation to eight of the twenty-six witnesses whose statements were either being relied upon at the confirmation hearing or who were initially going to testify at trial, a summary of their statements was provided to the Defence first, and relevant excerpts were later provided.

(iii) Pending applications for redactions

6. In relation to these twenty-six witnesses who have provided information of a potentially exonerating nature, the Trial Chamber ordered the Prosecution to disclose the statements of eight of the twenty-six witnesses with redactions to protect their identity.¹⁰ The Trial Chamber directed that should the Prosecution determine that additional redactions were necessary, it must file an application.¹¹
7. On 7 May 2008, the Prosecution filed the 'Prosecution's Application for Non-Disclosure of Information' in which it requested limited permanent redactions to the statements of four of the eight witnesses.¹² The Prosecution submitted that it would disclose the documents with the requested redactions pending a decision of the Trial Chamber in order to abide by the terms of the 24 April 2008 decision.¹³
8. On 9 May 2008, the Trial Chamber rendered the "Order on 'Prosecution's Application for Non-Disclosure of Information' in which it authorized the interim non-disclosure of information as requested by the Prosecution in order to permit immediate

¹⁰ ICC-01/04-01/06-1295-US-Exp at page 53.

¹¹ ICC-01/04-01/06-1295-US-Exp at pages 53-54.

¹² ICC-01/04-01/06-1309-Exp and public redacted version at ICC-01/04-01/06-1324.

¹³ ICC-01/04-01/06-1309-Exp at para 34.

disclosure of the information and to permit the Defence to respond to the application.¹⁴ Submissions were heard by the Defence at the Status Conference on 28 May 2008. The decision on this application is pending.

9. The Trial Chamber also ordered the Prosecution to disclose the statements of the remaining eighteen of the twenty-six witnesses in full, without redactions to their identity.¹⁵ The Trial Chamber directed that should the Prosecution determine that additional redactions were necessary, it must file an application.¹⁶
10. On 14 May 2008, the Prosecution filed the 'Prosecution's Application for Non-Disclosure of Information' in which it sought limited redactions to the statements of four of the eighteen witnesses.¹⁷ The Prosecution submitted that it would disclose the documents with the requested redactions pending a decision of the Trial Chamber in order to abide by the terms of the 24 April 2008 decision.¹⁸ The decision on this application is pending.

(iv) Submissions related to Defence filing dated 3 June 2008

11. In relation to the 'Observations complémentaires de la Défense à la suite des observations présentées à la Chambre lors de l'audience du 28 mai 2008'¹⁹ filed by the Defence on 3 June 2008, the Prosecution confirms that fifteen items originally provided to the Defence for pre-inspection pursuant to Rule 77 on 16 May 2008 were included in Annex 1 to the 'Prosecution's Updated Summary

¹⁴ ICC-01/04-01/06-1316 at page 4.

¹⁵ ICC-01/04-01/06-1295-US-Exp at pages 49-50 and Annex C.

¹⁶ ICC-01/04-01/06-1295-US-Exp at page 50.

¹⁷ ICC-01/04-01/06-1330- Conf-Exp

¹⁸ ICC-01/04-01/06-1330- Conf-Exp, para 25.

¹⁹ ICC-01/04-01/06-1375.

of Presentation of Evidence and Annexes'. In this regard, the Prosecution submits that on 8 and 21 May 2008 it filed applications for authorisation to add these fifteen items to the evidence which the Prosecution will rely on at trial²⁰ and that, therefore, by the time the 'Prosecution's Updated Summary of Presentation of Evidence and Annexes' was filed on 23 May 2008, the Prosecution had made known its intention of relying on these fifteen items as incriminating evidence at trial, subject to the Trial Chamber's decisions. Consequently, in order to give the Defence proper notice of the fact that it considered these fifteen items to be part of 'the principal evidence the Prosecution intends to offer at trial'²¹ the Prosecution listed the fifteen items in Annex 1 to the 'Prosecution's Updated Summary of Presentation of Evidence and Annexes'.

12. In relation to nine of the fifteen items, the Trial Chamber has now granted the Prosecution's application,²² and the items have subsequently been disclosed to the Defence as incriminating evidence.²³

13. In relation to the remaining six items, on which the Prosecution is not presently authorised to rely at trial, the Prosecution submits that its applications are pending decision by the Trial Chamber. For five of these six items, the Trial Chamber provisionally rejected the Prosecution's application, but instructed²⁴ the Prosecution to make submissions regarding the reasons for late disclosure of the items, their relevance to the Prosecution's presentation of evidence, and the manner in which it is proposed they will be entered into

²⁰ ICC-01/04-01/06-1312 and ICC-01/04-01/06-1344.

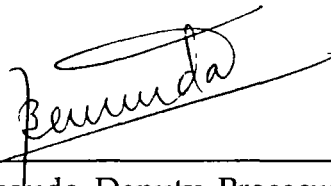
²¹ ICC-01/04-01/06-1354-Conf, at para 5.

²² ICC-01/04-01/06-1377, at para 33(c)-(f).

²³ ICC-01/04-01/06-1395.

²⁴ ICC-01/04-01/06-1377, at para 33(b).

evidence. These submissions have been filed by the Prosecution.²⁵ For the sixth item for which the Prosecution is not presently authorised to rely on at trial, and which is closely related to the five items that have just been referred to,²⁶ the Prosecution's application²⁷ is pending a decision by the Trial Chamber.



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

Dated this 13th day of June 2008
At The Hague, The Netherlands

²⁵ ICC-01/04-01/06-1390, at paras 14-18 and 19(iii).

²⁶ The item in question is the French translation of one of the five items on which the Trial Chamber instructed the Prosecution to make further submissions.

²⁷ ICC-01/04-01/06-1344. at paras 5-9.