

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 12 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

**Prosecution's Consolidated Motion for Determination of Issues prior to the
Commencement of Trial**

Source: [Office of the Prosecutor]

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

The Office of the Prosecutor

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Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Louis Gilissen

Mr Jean Chrysostome Mulamba

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Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Ms Paolina Massida

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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Prosecution submits a consolidated application for clarification and orders, prior to the commencement of trial, concerning the following issues:

- a) Request for order requiring the advance identification of documents/exhibits to be used or tendered through witnesses;
- b) Request for re-classification of victim applications of prosecution witnesses and for reclassification of the closed session confirmation hearing testimony of witness WWW-0046 ;
- c) Request for leave to use an additional visual aid during opening statement, and;
- d) Request for clarification of the Trial Chamber Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Familiarisation Decision).¹

A. Request for order requiring advance identification of documents/ exhibits to be used or tendered through witnesses.

1. On 20 March 2008 the Court issued its Decision on Disclosure by the Defence (Disclosure Decision).² Paragraph 40(1)(e) directed the defence to "Provide the Chamber, the prosecution and the participants with any evidence intended for use by the defence, other than the oral testimony of a witness, three days in advance of its presentation."
2. Consistent with this decision, the Prosecution requests an order further directing the Prosecution and the Defence to identify, three days in advance, any exhibits it intends to use with or tender through a witness it is calling.

¹ ICC-01/04-01/06-1049, 30 November 2007.

² ICC-01/04-01/06-1235, 20 March 2008.

3. Further, paragraph 34 of the Trial Chamber's Decision on various issues related to witness's testimony during trial³ (29 January 2008 Decision), does not require the Defence to identify which evidence it intends to tender through or use during the questioning of a prosecution witness⁴, rather it only requires the Defence to provide the evidence to the Registry.

4. Accordingly, the Prosecution also requests an order directing the party not calling the witness to identify to the opposing party any exhibits it intends to use with or tender through the witness. The Prosecution further requests that this notice be provided at the start of the witness's testimony.⁵

5. The requested procedures, the Prosecution submits, will serve the interest of fairness by enabling the parties to prepare adequately for examination, and the interest of efficiency of the court proceedings⁶. They are also consistent with practices of other international tribunals.⁷

³ ICC-01/04-01/06-1140, 29 January 2008.

⁴ This is deduced because the references are made in the section of the 29 January 2008 Decision entitled "Scope of examination by a party not calling a witness".

⁵ The Prosecution notes, however, that there may be circumstances where the party not calling the witness might not be in a position to anticipate the use of a specific document. Further, the Prosecution maintains that it should be permitted to use documents not on its list of incriminating materials for the questioning of Defence witnesses, should the Defence lead a case, provided they have been disclosed.

⁶ In particular, so that the parties are able to object in a timely and effective manner to the use of documents put to witnesses.

⁷ For example, in the ICTY, parties not calling witnesses are typically required to submit to the opposing party the list of exhibits they intended to use in "cross-examination" the moment the witness takes the oath. See Prosecutor v Dragomir Milošević, "Decision on Time-Limits for Disclosure of Documents to be Used During a Witness' Testimony", Case No: IT-98/29/1-T, 18 January 2007.

B. Request for re-classification of victim applications of Prosecution witnesses and closed session confirmation hearing testimony of WWW-0046.

6. Certain applications for victim participation have been made by prospective prosecution witnesses⁸. As such, the Prosecution views those applications as prior statements of the witnesses under Rule 76(1) of the Rules of Procedure and Evidence (Rules). Some information in the applications, including identity information, has been redacted. Accordingly, the Prosecution requests the Trial Chamber to direct the Registry to re-classify applications of victims who are also prosecution witnesses, to a level that affords the Defence sufficient access.⁹
7. Additionally, the Prosecution seeks an order directing the Registry to re-classify a closed session portion of the testimony of witness WWW-0046 so that the Legal Representatives may have access to it.¹⁰
8. This request is consistent with a decision by this Court. In para. 17 of its 13 December 2007 Decision on the Status [...] ¹¹, where the Court addressed the disclosure to the victims of WWW-0046's closed-session testimony.¹²

⁸ The applications with the registration numbers are contained in ICC-01/04-01/06-1517-Conf-Exp.,

⁹ See ICC-01/04-01/06/1517-Conf-Exp, 28 November 2008. Additionally, the Defence have also requested access to the unredacted copies of victim applications, see ICC-01/04-01/06-1393. See also Trial Chamber Decision ICC-01/04-01/06-1518.

¹⁰ The closed session transcript is ICC-01/04-01/06-T-40-CONF-EN, 21 November 2006.

¹¹ ICC-01/04-01/06-1084, 13 December 2007 at para.17, however the Prosecution submits that once the re-classification occurs the Registry can instantly transmit the testimony to the Legal Representatives.

¹² "Subject to any matters that may be disclosed, the representative agreed that prior to putting such questions as may be permitted by the Bench, the evidence of [WWW-0046] given at the Pre-Trial stage could be introduced in a way that would obviate the need for her to repeat areas of evidence orally that she has already provided to the Pre-Trial Chamber. The Bench directed that consideration should be given by the parties to providing the victims with disclosure of the closed-session testimony (which has been agreed) and the victims' representatives undertook to set out a detailed outline of the questions he wishes to advance, which was received on 30 November 2007."

C. Request for leave to use an additional item of evidence during the Prosecution's opening statement

9. On 2 December 2008 the Trial Chamber authorised the Prosecution's use of two visual aids in its opening statement.¹³ The Prosecution now seeks permission to use a third item in its opening statement¹⁴, to wit: an excerpt from video DRC-OTP-0120-0293.¹⁵ As required in the Court's 2 December 2008 order, the sources and other related evidence have been disclosed to the accused.¹⁶

D. Request for clarification regarding the Trial Chamber's Familiarisation Decision

10. The Prosecution seeks clarification from the Trial Chamber as to whether the Court's prohibition of "witness preparation/proofing" applies to expert witnesses.¹⁷ A key justification for the Familiarisation Decision was the desirability that witnesses' factual recitation be spontaneous and not rehearsed. That factor, the Prosecution submits, is not pertinent to expert witnesses. An expert witness is typically able to refer to his/her report during examination and that report is normally admitted into evidence as an exhibit (as opposed to a fact witness's prior statement). The credibility of expert testimony is not dependent upon recalling events and a resort to

¹³ ICC-01/04-01/06-1528, Decision on the Use of Visual Aids, 2 December 2008 (Visual Aid Decision), at para. 21.

¹⁴ The Prosecution notes that it does not consider this video excerpt to strictly be a visual aid as it is intended for introduction into evidence during the trial. However since the Prosecution wishes to use it in its opening statement, an application is being made pursuant to the Visual Aid Decision.

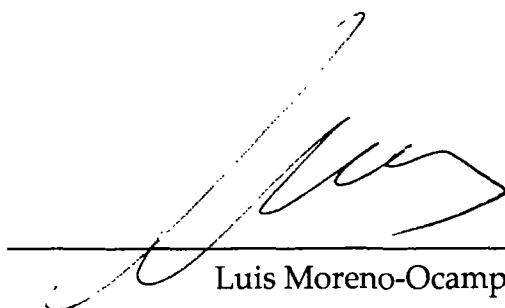
¹⁵ The Prosecution intends to tender the video in evidence during the trial.

¹⁶ See paragraph 21 of the Visual Aid Decision.

¹⁷ ICC-01/04-01/06-1049, 30 November 2007.

memory; nor is there a need for the witness to “provide the entirety or the true extent of his memory or knowledge...”¹⁸

11. Accordingly, the Prosecution seeks permission for it to conference with its expert witnesses in advance of their testimony¹⁹, in particular with the expert witnesses on age determination as the subject matter they contemplate involves scientific and technical issues. Conferencing on these issues will allow for a more coherent examination that will be of benefit to the court.



Luis Moreno-Ocampo
Prosecutor

Dated this 12th Day of January 2009
At The Hague, Netherlands

¹⁸ *Id.* at para. 51.

¹⁹ The same right would be conferred upon the Defence should they wish to call expert evidence during their case.