



Original: English

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

Date: 15 January 2009

TRIAL CHAMBER I

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

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

Public
**Prosecution's Request to Use Additional Video Excerpts
As Visual Aids in Opening Statement, and Reply to Defence
Objections to the Use of Any Evidence During the Opening Statement**

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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Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States Representatives

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REGISTRY

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution requests leave of the Chamber to use brief excerpts from three additional videos as visual aids in its opening statement. It also replies briefly to the recent objection by the defence to the use of any “evidence” in its opening statement that has not been deemed admitted.
2. The videos for which additional leave is now sought are DRC-OTP-1008-0008, DRC-OTP-0127-006, and DRC-OTP-1001-0010. The first two were recorded by journalists who observed the accused at a meeting and reflect that child soldiers are present in a car that escorted the accused. The third is a video also taken by a journalist that reflects child soldiers escorting the accused while he gave a speech. Each was disclosed to the defence as incriminating evidence over a year ago, on October 26, October 31, November 23, and December 11, 2007.
3. The Prosecution’s request for leave to use as a visual aid another video, DRC-OTP-0120-0293, is currently pending. If accepted, the Prosecution would intend to use only brief excerpts of that and the other three videos.
4. The excerpts that the Prosecution anticipates playing at the opening are not extensive, overall less than four minutes. The Prosecution intends to identify only a few frames to assist the Court’s understanding of the case. The availability of the visual aids will allow the Prosecution to make the most effective use of its time.

5. The Prosecution recognizes that this application for leave to show these excerpts is filed three days out of time.¹ However, its previous request to use video clips as a visual aid was filed within the appropriate time period; this request is a refinement of that earlier application. Nor is the instant request likely to increase the burden on the Court, since the Prosecution also asks for leave to manage the presentation itself. And it will not increase the time spent using visual aids, since the Prosecution anticipates would shorten substantially the length of portions of the prior-identified video for presentation during the opening.

6. The Prosecution also requests that an information graphics analyst in the Office of the Prosecutor be permitted to attend and assist in the presentation, as has recently been allowed by the pre-trial chamber in the confirmation proceeding involving Jean-Pierre Bemba Gomba.

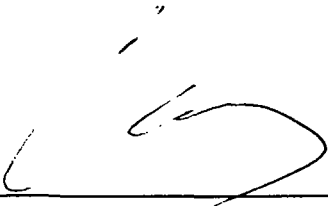
7. Finally, we note that the defence now argues that the use of visual aids should be prohibited during the opening statement because the Chamber has not yet determined that they will be admissible evidence at trial.² But opening statements are not evidence.³ An opening statement – made before the presentation of any evidence at the trial -- necessarily will include a description of a wide range of anticipated evidence

¹ See ICC-01/04-01/06-1528, Decision on the use of visual aids, 2 December 2008, para. 23.

² See Réponse de la Défense à la “Prosecution’s Consolidated Motion for Determination of Issues prior to the Commencement of Trial”, ICC-01/04-01/06-1601, 14 January 2009, at para. 4.

³ E.g., transcript of proceedings in D. MILOSEVIC (IT-98-29-1), 2007 WL 2077008 (ICTY, January 2007), at p. 312 (overruling a defence objection to the use of a video in opening statement, the Court explained: “The practice here is to allow some latitude in opening statements, which do not constitute evidence. Accordingly, the Prosecution can show the video.”).

that has not yet been admitted.⁴ The requirement instead is that the party making the opening statement has a good faith basis to believe that the materials it identifies will be admissible,⁵ which the Prosecution does.



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of January 2009

At The Hague, The Netherlands

⁴ E.g., *United States v. Burns*, 298 F.2d 523 (6th Cir. 2002) (affirming conviction over objection to the prosecutor's use of a power point presentation in opening, the court explained that the purpose of an opening statement is to give an objective overview of evidence intended to be introduced at trial).

⁵ E.g., *Kester v. Bruns*, 326 N.W. 2d 279 (Iowa 1982).