

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 21 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 Response to "observations de la Défense sur certaines questions
abordées dans le cadre de la Conférence de mise en état du 16 janvier 2009"**

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

Counsel for the Defence

Ms Catherine Mabile

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

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Ms Paoline Massidda

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

Mr Simo Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 20 March 2008, this Chamber directed that the accused shall, *inter alia*:

“a) Inform the Chamber at the same time as the prosecution if the accused intends to raise an alibi under Rule 79(I)(a) of the rules or a ground for excluding criminal responsibility under rule 79(1)(b) of the Rules;

b) Furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under rule 70 of the Rules);

c) Provide the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications he intends to advance as regards admissibility or relevance, or other substantive points of law that need to be resolved before the commencement of the trial;”

2. On 31 March 2008, the defence applied for leave to appeal, *inter alia*, paragraphs (b) and (c) of that order. On 8 May 2008, a majority of the Trial Chamber denied leave to appeal paragraph (b),¹ clarifying in that Order that the defence was only obligated to disclose information if the Accused decided to advance a positive case.² The Chamber rescinded paragraph (c) and denied leave to appeal that part of its earlier order as well. The Chamber added, however, that it might reopen the issue with the parties in advance of the trial “to ensure that the trial timetable operates efficiently, in the interests of

¹ ICC-1-01/04/01-06 -1313, at para. 18.

² *Id.* at para. 13.

justice”.³ The Chamber also suggested that if the defence decided prior to commencement of the trial that it would raise a particular legal issue regarding admissibility, relevance, or otherwise, “as a matter of courtesy and to promote efficiency the Court and the other party and the participants should be informed”.⁴

3. At a status conference on 12 January 2009, the prosecution noted that the defence failed to provide the document containing the lines of defence.⁵ Four days later, at a status conference on 16 January, the Court asked the defence to present “the factual or legal issues you intend to raise or the reasons we have not yet been furnished with that information”.⁶
4. On 19 January, the defence filed its “observations de la Défense sur certaines questions abordées dans le cadre de la Conférence de mise en état du 16 janvier 2009”.⁷

Prosecution’s Submissions in Response to the Defence Observations

5. The defence asserts that its general defence is to test the sufficiency of the Prosecution’s case. It further asserts that it is not required to present the document subject to the 20 March 2008 Order until it decides in fact to present an affirmative defence. Finally, it stresses that at this stage it is unable to make that decision because it is still receiving exculpatory and Rule 77 material from the prosecution.⁸
6. If in fact the defence does not intend to present a positive case, such as alibi or other grounds for excluding responsibility (see Article 31 (1) and Rule 79(a)),

³ Id. at paras. 24, 25.

⁴ Ibid.

⁵ ICC-01/04-01/06-T-101-Eng ET WT 12001-2009, at p. 47, lines 5-11.

⁶ ICC-01/04-01/06-T-104-Eng ET WT 16001-2009, at p. 56, lines 7-12.

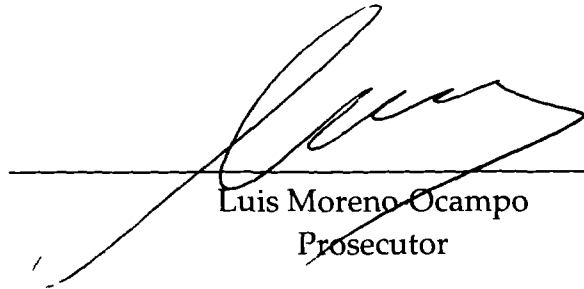
⁷ ICC-10/04-01/06-1626.

⁸ Id. at paras. 4, 5.

the Prosecution agrees that under the explanation provided by the Court in its 8 May 2008 Decision, the defence was not obligated to submit an outline of its lines of defence three weeks in advance of trial.

7. However, the defence's further statement -- that it is unable to determine yet whether it will raise a positive case, due to continuing prosecution disclosures of additional Rule 77 and exculpatory information -- is unfounded. The evidence that the Prosecution continues to disclose is primarily additional *tu quoque* information or information on the involvement of military forces of other States in the Democratic Republic of the Congo. These disclosures duplicate in substance that which has already been repeatedly disclosed. They also are unrelated to any potential positive defence case.
8. In addition, the availability of an affirmative defence is singularly within the Accused's knowledge and experience. The Accused should know, for example, if he has an alibi or suffered from a mental disease, a mental defect, or intoxication sufficient to negate criminal responsibility. Indeed, it is precisely because these facts are known to the Accused, not the Prosecution, that the burden of providing advance notice is placed on the defence.
9. Thus, the Accused cannot reasonably contend, now or in the future, that he failed to make timely disclosure of lines of defence because of continuing disclosures by the Prosecution.

10. Referring to Rule 134 of the Rules of Procedure and Evidence (Rules), the defence also states that it will not raise objections to the conduct of the proceedings before the beginning of trial.⁹ The Prosecution construes this as responsive to the Court's 16 January request and signifies that the defence does not intend to raise factual or legal issues.



Luis Moreno-Ocampo
Prosecutor

Dated this 21st day of January 2009
At The Hague, Netherlands

⁹ Id. at para. 9.