



Original: English

No.: ICC-01/04-01/06
Date: 25 September 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 Document

**Prosecution's Request on the Manner of Questioning of Witness DRC-
OTP-WWWW-0015**

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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I. Introduction

1. During the status conference on 17 September 2009, the Trial Chamber ordered the Prosecution and the Defence to file written submissions on the manner of questioning of witness DRC-OTP-WWWW-0015 (Witness 15) should his testimony resume.¹
2. Witness 15 had been on the Prosecution's list of witnesses at trial. At the commencement of his examination by the Prosecution, Witness 15 testified that he had provided a false name to the Office of the Prosecutor (OTP) and that the first signed statement he had provided was substantially inaccurate.²
3. The Chamber instructed the Prosecution to take a further statement detailing the witness's true position and information.³ Thereafter, submissions were made on whether, and in what manner, Witness 15 would testify in the proceedings, as outlined herein.⁴
4. The Prosecution does not intend to call Witness 15 again to give testimony for the Prosecution. The witness now claims to have provided false information to the OTP. Because he has provided multiple versions, the Prosecution cannot rely on his evidence and none of his versions of events would serve the Prosecution's interests.
5. Should the Trial Chamber determine that it is appropriate for the witness to return to give testimony the Prosecution requests the right to examine the witness using leading questions to challenge the veracity of the new information provided by the witness.

¹ ICC-01/04-01/06-T-210-ENG ET, page 30, lines 1-25 and page 31, lines 1-2.

² ICC-01/04-01/06-T-192-CONF-ENG ET, 16 June 2009, page 10, lines 15-25 and page 11, lines 1-13.

³ ICC-01/04-01/06-T-192-CONF-ENG ET, 16 June 2009, page 7, lines 5-15.

⁴ ICC-01/04-01/06-T-203-CONF-ENG ET, pages 84-93 ; ICC-01/04-01/06-T-210-ENG ET, page 30, lines 1-25 and page 31, lines 1-2.

II. Relevant Provisions in the Rome Statute

6. The Trial Chamber is vested with broad powers to manage the trial. Within this framework, it is within the discretion of the Trial Chamber to establish the procedural mechanism by which Witness 15's evidence will be elicited.

7. Article 64 of the Rome Statute (Statute), and in particular subsections (2), (6)(f) and (8)(b) either direct or give the Trial Chamber the necessary discretion to ensure that the proceedings are conducted in a fair and expeditious manner. Article 69 governs the admission of evidence necessary for the determination of the truth and Rule 140 empowers the Trial Chamber to give directions for the conduct of the proceedings and testimony, namely the submission of evidence and the testimony and questioning of witnesses. Additionally, Regulation 43 of the Regulations of the Court (Regulations) requires the Trial Chamber to determine the mode and order of questioning of witnesses and the presentation of evidence in keeping with the principles outlined herein.

8. There is no provision expressly precluding a party, in the appropriate circumstances, from asking leading questions of a witness initially called by that party in order to challenge the credibility of the witness and the substance of his or her testimony.

III. Prosecution's Submissions

9. Witness 15 provided two signed statements to the OTP. The first signed statement was taken over seven days in October-November 2005 and consists of 30 pages. The second signed statement was taken over two days in May 2006 and consists of nine pages. In the second signed statement, Witness 15 had an opportunity to review

his first signed statement and make any corrections to it. The witness made only one correction, to his father's occupation. Otherwise he indicated that the information in the first signed statement was correct.

10. The OTP remained in contact with Witness 15. At no time did he indicate that any information in his two signed statements was incorrect.

11. On 16 June 2009, Witness 15 was called to testify as a Prosecution witness. In Court, he indicated that he had provided the OTP with a false name, that at least the first signed statement he gave was substantially inaccurate on important points and did not reflect the truth of what happened and is false.⁵ He further implicated a third party whom he claims was involved in the fabrication of the evidence.

12. Witness 15 now claims to have fabricated significant and important parts of the information he provided to the OTP and on which the Prosecution relied in deciding to call him as a witness. Significantly, during the new interview with the OTP in the presence of Defence counsel, the witness stated that he had falsified or concocted important areas of his initial statement.

13. First, the witness stated that he provided a false identity to the OTP, including his name, his wife's name and the names of his parents.

14. Second, he stated that the information he provided to the OTP was a mixture of fact and fiction. For instance, contrary to the information he provided to the OTP, the witness stated that he had

⁵ ICC-01/04-01/06-T-192-CONF-ENG ET, 16 June 2009, page 10, lines 15-25 and page 11, lines 1-13 (Open session). ICC-01/04-01/06-T-192-CONF-ENG ET, 16 June 2009, pages 4-9 (Private session).

never trained at the UPC training centre in Mandro and did not in fact witness any of the activity at the camp as he had previously stated. He also denied, contrary to his earlier information, having seen certain individuals from the UPC at the Mandro training centre or witnessing daily reporting from Bosco Ntaganda in Mandro to Thomas Lubanga.

15. Third, he stated that he had lied about being involved in the move of the UPC headquarters to Bunia and about being a soldier in the UPC.

16. Fourth, he stated that he had lied about having undergone training in Rwanda for the UPC, and that contrary to what he had told the OTP he had never met certain individuals connected to the UPC. He stated that the information he provided on the role of one member of the UPC is not accurate, and that he was not tasked to provide food supplies for the UPC military as he had told the OTP investigators.⁶

17. For these reasons, the Prosecution is not interested in calling the witness. He adds nothing to the Prosecution's case, or to the establishment of the truth in Court. He claims to have lied to the Prosecution during the investigation but he neither supports nor refutes the critical subjects outlined above.

18. If the Chamber determines that the witness should testify, the Prosecution should be permitted to ask leading questions consistent with the jurisprudence of other international and national

⁶ Witness 15 has indicated that all of the information contained in his second signed statement is true (with the exception that the second signed statement expressly adopts as correct all but one piece of information from the first signed statement). The Prosecution notes, however, that in the 9-page second signed statement only 6 paragraphs (paragraphs 10-15) are directly relevant to the charges against Thomas Lubanga.

jurisdictions. While that jurisprudence is not binding on the ICC, to the extent that it may be considered of persuasive authority and in the absence of ICC jurisprudence or statutory provisions, the Prosecution outlines relevant decisions for the Chamber's consideration.⁷

19. The ICTY Appeals Chamber has confirmed that the Trial Chamber, upon application, must first determine whether to allow a party who initially called a witness to then ask leading questions of that witness.⁸ In some jurisdictions, this is referred to as a witness who is hostile to the party who called him or her. A hostile witness is generally regarded as a witness who has departed significantly from his or her anticipated evidence.⁹

20. The Trial Chamber in determining whether a witness should be declared hostile may consider various factors, including: the witness' demeanour, the terms of any inconsistent statement and extent of deviation by the witness from the evidence that the party had expected to elicit, a refusal to answer questions, or that the witness gave false testimony or withheld relevant information.¹⁰ Once the Trial Chamber accepts that a witness can be treated as hostile, the examining party can use leading questions to discredit or contradict the witness.

⁷ The Prosecution refers to Article 21 of the Statute.

⁸ *Prosecutor v. Vujadin Popovic*, Case No. IT-05-88-AR73.3 , Appeals Chamber, 1 February 2008.

⁹ See *Prosecutor v. Limaj et al.*, Case No. IT-03-66, transcript, 1 February 2005, pp. 2735-2743; *Prosecutor v. Limaj et al.*, Case No. IT-03-66, transcript, 18 January 2005, pp. 2143-2145; *Prosecutor v. Brdanin*, Case No. IT-99-36, transcript, 23 January 2002, p. 677 and 24 January, pp. 805-808; *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60, transcript, 20 October 2003, pp. 3099-3103 ; *Prosecutor v. Halilovic*, Case No. IT-01-48-T, T.Ch.I, Section A, 5 July 2005, pp. 4-5.

¹⁰ See footnote 8 and, *supra*, footnote 10, in particular : *Prosecutor v. Limaj et al.*, Case No. IT-03-66, transcript, 1 February 2005, pp. 2735-2743;; *Prosecutor v. Limaj et al.*, Case No. IT-03-66, transcript, 18 January 2005, pp. 2143-2145.

21. In particular, there are several facts in favour of permitting the Prosecution to ask leading questions of Witness 15 should he be called to testify: (i) the witness asserts that he lied to the OTP investigators, (ii) his new account deviates substantially from his earlier account, and (iii) he has made allegations against a third party, all of which run counter to the interests of the Prosecution. In the circumstances, the Prosecution cannot continue to treat the witness as credible or offer him in proof of its case. The Prosecution seeks to test the witness' new account and credibility.

IV. Relief Requested

22. The Prosecution respectfully informs the Chamber that it does not intend to call Witness 15 again at Trial. Should the Chamber determine that Witness 15 appear, the Prosecution would request Chamber authorisation to test the witness' new account and credibility by putting leading questions to him.



Luis Moreno-Ocampo
Prosecutor

Dated this 25th day of September 2009
At The Hague, The Netherlands