



Original: **English**

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

Date: **05 October 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 Omnibus Application Concerning Disclosure by the Defence
and other procedural issues related to the Prosecution's preparation for the
Defence case**

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 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 Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Ms Paolina Massidda

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pursuant to Rule 79(4) of the Rules of Procedure and Evidence (Rules), Rule 78 and Regulation 54 of the Regulations of the Court (Regulations), and pursuant to the principle previously enunciated by this Chamber that obligations of disclosure on the Defence must be commensurate with the status of prosecution disclosure at the time and the proximity of the commencement of trial, the Prosecution herewith seeks an order from the Chamber for the disclosure by the Defence of the following categories of information:

- i) Further details regarding the evidence the Defence witnesses intend to give, whether in the form of statements, notes or other means of recording. Thus far, the Defence has identified {REDACTED} witnesses and provided very brief summaries of their anticipated evidence, which is consistent with disclosure ordered by the Chamber on 20 March 2008,¹ but nonetheless is inadequate to enable the Prosecution to prepare for the witnesses. The Prosecution thus suggests it may be appropriate to re-evaluate those conclusions at this stage of the trial.
- ii) Timely disclosure/inspection of Defence materials, as required under Rule 78, at least three weeks in advance of the commencement of the Defence's case in order to enable the Prosecution to prepare for the Defence case.²

¹ ICC-01/04-01/06-1235, para. 41(d).

² The Prosecution notes that the Defence have indicated that this information is forthcoming; the request thus is for an order directing disclosure within a reasonable time – at least three weeks in advance – sufficient to permit thorough enquiries.

Additionally, the Prosecution seeks leave of the Chamber to undertake the following:

- iii) to contact trial witnesses called by the Prosecution, when necessary to conduct further enquiries regarding the Defence case, specifically to assess the veracity of facts and allegations that may be raised by Defence witnesses and obtain contact information for persons who may be potential leads for the Prosecution investigation into the Defence case;³ and
- iv) [REDACTED].

A. Defence Disclosure in advance of the start of their case

1. The Prosecution recalls that the Chamber, in a pre-trial decision in March 2008, declined to require the Defence to provide advance information on its case. The Prosecution requests re-evaluation of that determination based on new facts and circumstances, including the inability of the Prosecution to adequately prepare for cross-examination of Defence witnesses or respond to the Defence case.
2. On 7 January 2008, in the “Prosecution’s Submissions for the Status Conference on 9 January 2008”,⁴ the Prosecution contended that “disclosure as contemplated by Rule 79(4) ought to extend to include summaries or anticipated evidence, when no statements are available”,

³ See ICC-01/04-01/06-T-104-ENG ET, 16 January 2009.

⁴ ICC-01/04-01/06-1109.

and that such disclosure should occur sufficiently in advance of the commencement of the Defence case.⁵

3. During the Status Conference on 9 January 2008, the Prosecution reiterated its submissions that the Defence should disclose the names of witnesses it intends to call and their statements in order to facilitate the Prosecution's "own enquiries in respect of the credibility of the Defence witnesses".⁶ The Defence responded that it was not required to disclose the statements of witnesses it intends to call and that Rule 79(4) must be read in the context of the entirety of Rule 79.⁷
4. On 20 March 2008, anticipating that trial would commence in June 2008, the Trial Chamber issued its "Decision on disclosure by the Defence" (Disclosure Decision). It ordered the Defence to "furnish the prosecution and the Chamber after the presentation of the evidence of the prosecution is completed with the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries".⁸
5. On 31 March 2008 the Defence sought leave to appeal various components of the Disclosure Decision.⁹ The Prosecution did not seek

⁵ *Ibid*, para. 12

⁶ ICC-01/04-01/06-T-67, page 36, lines 21 to 25 and page 37 lines 1 to 15.

⁷ ICC-01/04-01/06 -1110, paras. 19 – 20.

⁸ ICC-01/04-01/06-1235, para. 41 (d).

⁹ ICC-01/04-01/06-1251, « Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, » para. 4.

leave to appeal. The Chamber denied the Defence leave to appeal on all grounds.¹⁰

6. The trial began on 28 January 2009. The final Prosecution witness testified on 14 July 2009. The trial has been in recess since then and will remain in recess for at least another month.¹¹ It is anticipated that two expert witnesses called by the Chamber will testify, and then the Chamber will hear from three victim witnesses and possibly WWWW-0015. Following those appearances, the Defence will commence with the presentation of its case.

7. Between 26 August and 7 September 2009, almost two months after the Prosecution completed its case, the Defence disclosed the names and identities of [REDACTED] it intends to call, along with abbreviated summaries of their anticipated testimony. Most of the summaries consist of two or three sentences generally describing only the broad subject matter about which the witness will testify. In response to an *inter partes* request by the Prosecution, the Defence declined to provide further information and confirmed its position at the Status Conference on 17 September 2009.¹²

8. The Prosecution accepts that in providing summaries of the {REDACTED} witnesses, even if of limited nature, the Defence has given more information than the March 2008 Disclosure Decision requires. Nonetheless, that disclosure, coming several months after

¹⁰ ICC-01/04-01/06-1318, pages 7 to 16.

¹¹ ICC-01/04-01/06-2143, 2 October 2009.

¹² ICC-01/04-01/06 – T.210 pages 17 and 18.

the Prosecution rested its case, is inadequate to enable the Prosecution to engage in any meaningful preparation.

9. The Trial Chamber upheld the principle that it has the authority to require Defence disclosure of witness statements or summaries. In its Disclosure Decision, the Trial Chamber stated that Rule 79(4) and Regulation 54 authorize the Trial Chamber to make orders on disclosure, specifically in relation to the production of statements of witnesses the Accused intends to call,¹³ so long as it does not derogate from the rights of the accused. In applying that principle, the Trial Chamber considered that obligations of disclosure on the Defence must be commensurate with the status of prosecution disclosure at the time and the proximity of the commencement of trial.¹⁴

10. The Prosecution submits that the Chamber should exercise its discretion to require the Defence now to produce any existing statements of the witnesses or, at a minimum, more detailed summaries of their anticipated testimony.¹⁵ This Order would be appropriate in light of the significant difference in the stage of the proceedings compared to when the March 2008 Decision was rendered, and the disparity between the disclosure effected by the Prosecution and the information received thus far from the Defence.

11. For example, when the Chamber issued its Decision in March 2008, it took into account that the Prosecution had not disclosed the identity of

¹³ ICC-01/04-01/06-1235, paras. 30, 31, 32, 35.

¹⁴ ICC-01/04-01/06-1235, paras. 33 and 34.

¹⁵ *Id.*, at paras. 33, 34.

a third of its witnesses it intended to call and that disclosure had not been complete. The Chamber deemed that incomplete disclosure three months in advance of trial merited a proportionate (and in this case a more restrictive) disclosure obligation upon the Defence.

12. Subsequently, however, the Chamber stayed the trial for several months. Disclosure thus was substantially completed well in advance of the actual start of trial. The Prosecution is now in the situation where trial is due to resume in approximately five to six weeks and the Defence case will soon begin, yet the Prosecution is still not well informed about the witnesses who will testify. The information provided is inadequate to enable the Prosecution to prepare for its questioning of the witnesses.

13. In the interests of fairness and efficiency, to protect equality of arms, and to further the discovery of the truth, the Defence should provide such additional information as is set out below – whether as supplemental summaries or statements -- on the facts about which the Defence witnesses intend to testify¹⁶. This would enable the Prosecution to adequately prepare for its questioning of Defence witnesses and would also enable the Chamber to better assess the evidence and administer the trial expeditiously¹⁷.

¹⁶ It is noted that at the ad hoc tribunals (ICTY, ICTR and SCSL) the Rules of Procedure and Evidence require the Defence to provide witness summaries of witnesses they intend to call identifying which components of the indictment the prospective evidence pertains to. Although there is no corresponding requirement in the Rome Statute, the Chamber has the power to require comparable disclosure to promote the efficiency and fairness of the proceedings. For further information contained in summaries, see for example ICTY Case *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, “Decision on the Prosecution’s Motion for Defence Compliance with Rule 65 ter (g)”, 26 June 2007.

¹⁷ The Chamber had resort to prosecution witness statements during their testimony.

14. The summaries of the [REDACTED] witnesses provided thus far lack details that would enable the Prosecution to conduct appropriate enquiries in preparation of the Defence case. Specific illustrations of the lack of detail are as follows¹⁸:
15. [REDACTED]. The summary does not identify the person who allegedly asked him to do so. The Prosecution cannot investigate in preparation for this evidence unless it knows the identity and affiliation of that person.
16. [REDACTED] No place or time period are provided as to when [REDACTED] purportedly [REDACTED] with [REDACTED].
17. [REDACTED]. The same absence of details as to dates and location applies to this witness.
18. [REDACTED] The Prosecution submits that, *inter alia*, more information is required as to the time period [REDACTED] who was involved [REDACTED] and where in Ituri [REDACTED]. Further, the summary states the witness will testify about “events” that took place in Ituri but provides no information as to what these events were or when they occurred. Without further information the Prosecution would be unable to conduct relevant enquiries in anticipation of the

¹⁸ These are by way of illustration and are not meant to be exhaustive.

witness's testimony and to prepare for cross-examination of the witness in any meaningful way.

19. [REDACTED]. No details are provided as to time, place, character and manner of such {REDACTED}, or their frequency. Based on this information alone, the Prosecution is unable to conduct appropriate enquiries in advance of the witness's testimony.

B. Rule 78 inspection/disclosure

20. The Prosecution seeks an order requiring the Defence to disclose or permit inspection of materials it intends to use at trial at least three weeks in advance of their case¹⁹. The Prosecution also seeks an order requiring the Defence to notify the Prosecution seven days prior to the testimony of a witness of the evidence that is to be used or tendered through that witness.

21. Rule 78 provides that "[t]he defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the [...] trial". It is a direct corollary to the obligation on the Prosecution in Rule 77, pursuant to which the Prosecution provided advance access to its intended evidence months in advance of trial. Just as Rule 77 is

¹⁹ It is noted that the Defence have indicated to the Prosecution that when they have determined the evidence they intend to use at trial they will provide it; the Prosecution's application is thus for that disclosure to be timely, well in advance of the commencement of the Defence case.

designed to facilitate the Defence ability to prepare, Rule 78 is designed to facilitate the Prosecution's preparation for the Defence case, which cannot be done adequately if the material is withheld until the last moment. Rule 78 access to Defence evidence, moreover, is mandatory – the use of the word “shall” reflects that this is not subject to discretionary assessments by the Defence.

22. Rule 78 disclosure has been the subject of prior litigation, but no final decision.²⁰ In the March 2008 Disclosure Decision, the Chamber required only that the Defence provide the prosecution and participants with evidence it intended to use three days in advance of its presentation.²¹ In its denial of the Defence application for leave to appeal²², the Chamber clarified that this order related to evidence “...which is to be introduced whatever the precise circumstances or stage of the trial”. The rationale for the imposition of the three day limit was based, in part, on Regulation 52(2) of the Regulations of the Registry.²³

23. Ten months later, shortly before trial began, the Trial Chamber ordered the Prosecution to provide one week advance notification of the sequence of witnesses, exhibits to be used or tendered through them, and exhibits to be tendered from the bar table.²⁴

²⁰ ICC-01/04-01/06-1109; ICC-01/04-01/06-1110; ICC-01/04-01/06-T-67.

²¹ ICC-01/04-01/06 – 1235, para. 41(e). The three day limit was reiterated by the Trial Chamber at 16 January 2009 hearing; ICC-01/04-01/06-T-104-ENG ET of 16 January 2009 - Page 38 lines 13 to 20

²² ICC-01/04-01/06-1313, 08 May 2008, para.27.

²³ *Ibid*, para.27. The three day limit required by Regulation 52(2) is not intended to regulate disclosure obligations, it is instead designed to ensure that the court officer has adequate advance time to take care of the administrative tasks involving admission of evidence.

²⁴ ICC-01/04-01/06-T-104-ENG ET of 16 January 2009, page 38 and 39.

24. The Chamber's order directing each party to inform the other a few days in advance of the admission of evidence was not intended to provide the required advance access to the opposing party's evidence, but merely to alert the parties to the sequence of the other party's case. Just as advance notification of the sequence of witnesses was not intended to be the primary vehicle through which the Prosecutor's Rule 77 obligations would be fulfilled, the provision of such notification by the Defence should not be regarded as satisfying its obligations under Rule 78 to provide for inspection of its evidence.

25. Thus, the March Disclosure Decision did not resolve the issue of the Defence obligation under Rule 78.

26. Even if the Rule 78 inspection obligation were to be satisfied by disclosure shortly before the evidence is introduced, it is not reasonable to set different time limits for the Prosecution and Defence, requiring the Prosecution to inform the Defence seven days in advance of its intended evidence while allowing the Defence to withhold such information until three days before the evidence is offered. At a minimum, the two disclosure obligations should be harmonised: the Defence should be required to provide the evidence it intends to use and tender through its witnesses (or from the bar table) seven days in advance of that witness's testimony, consistent with the Prosecution's practice during its case-in-chief.

27. Given the above, the Prosecution requests the Chamber to order the Defence to permit inspection or to disclose to the Prosecution the totality of evidence it intends to use at least three weeks in advance of the commencement of its case. In addition, the Prosecution requests the Chamber to order the Defence to identify the exhibits it intends to use through witnesses it calls or from the bar table seven days in advance.

C. Contact with Prosecution witnesses

28. In a pre-trial order relating to contact between the Prosecution and its witnesses, the Chamber ruled: "Discussions with a witness about his or her testimony should be delayed until the close of the evidence in the case unless the Chamber has made an order on an application for this to happen earlier"²⁵.

29. Accordingly, the Prosecution applies for an Order authorising it to contact relevant prosecution witnesses where necessary to conduct further enquiries regarding the Defence case, including to establish the veracity of facts and allegations to be raised by Defence witnesses, and to obtain contact information of persons that could assist the

²⁵ ICC-01/04-01/06-T-104-ENG ET, 16 January 2009 (16 January 2009 Order). The Prosecution notes that in its Decision on 23 May 2008, the Chamber lifted the prohibition on discussions between the party introducing the evidence and the witness once testimony had been completed, unless it directed otherwise - ICC-01/04-01/06-1351, para.42- however, pursuant to Defence submissions at the Status Conference on 12 January 2009 (ICC-01/04-01/06-T.101, page 25) the Chamber revised the order and prohibited contact until the end of the case.

Prosecution in its enquiries and investigations to respond to the Defence case.²⁶

30. Given the absence of detailed information concerning the prospective testimony of Defence witnesses, it is impossible to identify with precision all the witnesses that the Prosecution might need to contact to prepare for the Defence case. There are, however, some clear examples. As noted above, Defence witnesses [REDACTED] are [REDACTED] and will directly contradict that witness's evidence by testifying that the witness was not under the age of 15 during the relevant time periods. [REDACTED].

31. The Prosecution submits that denying it the ability to interview to [REDACTED] to learn where and with whom the witness [REDACTED], would prevent the Prosecution from conducting further appropriate enquiries to prepare for cross-examination and would deprive the Chamber of potentially relevant [REDACTED].

32. Further, the Prosecution notes that in cross-examination the Defence did not question [REDACTED] about [REDACTED], and therefore did not afford [REDACTED] the opportunity to respond to the assertions. Similarly, although the Defence did ask [REDACTED]²⁷ -- [REDACTED].

²⁶ The Prosecution will only seek to contact its trial witness as long as it does not constitute a re-traumatisation and does not have any negative repercussions on any current protection regime.

²⁷ ICC-01/04-01/06 -T.145, line 6, 6 March 2009.

33. The same argument applies for [REDACTED] [REDACTED]. Again, [REDACTED] identity was not suggested to either of the witnesses during cross-examination²⁸.

34. In both instances, the Prosecution would need to contact its witnesses to determine the veracity of the Defence assertions²⁹ and to obtain contact information for other persons to assist the Prosecution's investigation into the Defence case.

35. The inquiries the Prosecution needs to undertake are simply to inquire into facts and circumstances in anticipation of Defence evidence and to provide the Prosecution with sufficient reliable information to prepare for cross-examination.

36. Additionally, these enquiries do not fall within the Chamber's 16 January 2009 Order, see para.28, because the enquiries are not intended to be discussions with the witnesses about their testimony. Rather, the Prosecution seeks only to investigate into issues that have recently arisen. If the Chamber considers that the enquiries do fall under the 16 January 2009 Order, the Prosecution asks for leave to contact such witnesses on an exceptional basis as contemplated by that Order. The Defence have asserted facts in relation to witnesses that the Prosecution had no reason to anticipate at an earlier stage. Thus, unless

²⁸ The Defence did ask [REDACTED] - ICC-01/04-01/06 – T.137, page 13 lines 4 to 8, 26 February 2009. Additionally, the Defence did ask [REDACTED].- see ICC-01/04-01/06-T.149, pages 49 to 50.

²⁹ On the importance of affording witnesses the opportunity to respond to specific assertions by the Defence, reference is made to the Trial Chamber's pronouncements at ICC-01/04-01/06 -T.122, pages 42 to 44, 09 February 2009.

the Prosecution is permitted to enquire into the veracity of these facts with the relevant witnesses in its cross-examination of Defence witnesses the Prosecution would be unable address these aspects of the case in any meaningful way.

37. The Prosecution also seeks to contact witnesses it has called for the purpose of obtaining contact information of persons who may be potential leads for the Prosecution's investigation into the Defence case.

38. Due to the precarious security situation in the DRC, particularly in Bunia, the Prosecution submits that the most efficient and safest way to obtain such contact information is from the witnesses themselves, who are expected to have that information. This would, moreover, minimise the risks associated with conducting new enquiries with other persons in an area that remains highly volatile.

Contact with Potential Court Witnesses

39. Lastly, the Prosecution seeks leave of the Trial Chamber to be able to contact witnesses WWWW-0003, 0005, and 0020 from the list of potential Court witnesses in furtherance of its investigations for cross-examination and the Defence case.

40. Direct access to these witnesses by the OTP was precluded following an investigation by the Registry into whether they would agree to

appear as neutral witnesses of the Court, if required.³⁰ Should this still be the case, the Prosecution seeks leave to contact them through the Victims and Witnesses Unit.

41. By way of background, the Prosecution had intended to call these three witnesses as part of its case, but they decided not to testify. As they also provided potentially exculpatory information the Prosecution disclosed their statements. The Chamber determined that they would have been at risk if their identity and co-operation with the Court were revealed. The Chamber instructed the Registry to ascertain whether they would be willing to give testimony as neutral witnesses of the Court. As a result of the investigation, the Chamber confirmed that the witnesses consented to the disclosure of their identity to the Accused and expressed a willingness to cooperate if required.³¹

42. On 7 July 2009, the Trial Chamber made a preliminary ruling that these three witnesses (and one other) may be called as Court witnesses if the circumstances necessitate their appearance at trial.³² Given their backgrounds and roles, including during the time relevant to the charges, the Prosecution has determined that further interviews with WWWWs-0003, 0005 and 0020 would be required to enable it to prepare for the Defence case.

³⁰ Although it is noted that in ICC-01/04-01/06-2033-Anx2, the Chamber has stated that these individuals are available to the Prosecution and Defence – see para. 33 for instance.

³¹ ICC-01/04-01/06-2033-Anx 2.

³² ICC-01/04-01/06-2033-Anx 2, WWWWs-0020, 0005, 0034 and 0003.

43. In addition, the Prosecution seeks leave of the Chamber to interview WWW-0005, 0020 and 0021 in relation to [REDACTED].³³ The Prosecution notes that WWW-0021 is not identified as a potential Court witness because he is not willing to appear as a witness. Nonetheless, WWW-0021 had only been previously accessible through the Registry, and, as such, the Prosecution seeks the Chamber's authorisation to contact him for the limited purpose outlined herein.

Relief Sought

44. The Prosecution seeks the Chamber to order the Defence to:

- (a) Provide further information on the evidence the Defence witnesses intend to give, whether in the form of statements, notes or more detailed summaries.
- (b) Provide timely disclosure of Rule 78 material three weeks in advance of the commencement of the Defence case in order to assist the Prosecution in its preparation and enquiries.³⁴

45. Additionally, the Prosecution seeks leave of the Chamber to contact Prosecution witnesses to assist the Prosecution to prepare for the Defence case, and to interview three potential court witnesses.

³³[REDACTED].

³⁴ The Prosecution notes that the Defence have indicated that this information is forthcoming.

46. Given the urgency of the request and the need for the Prosecution to continue its investigation as rapidly as possible and given that the trial is due to resume, the Prosecution requests for an abridgment of the time allotted for any response.



Luis Moreno-Ocampo

Prosecutor

Dated this 05 day of October 2009
At The Hague, The Netherlands