

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 March 2010**

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**

Confidential

**Prosecution Response to “Requête de la Défense sollicitant l’autorisation
d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le
dépôt en preuve de trois photographies”**

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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Background

1. On 4 March 2010, Trial Chamber I issued an oral decision allowing the Prosecution to show three photographs to Witness 26 ("Oral Ruling").¹ The Defence for Thomas Lubanga ("the Defence") seeks leave to appeal the Oral Ruling ("the Application").² For the reasons set out below, the Prosecution opposes the Application, on the ground that the issue raised by the Defence does not arise from the Oral Ruling.³
2. On 3 March 2010, the Prosecution notified the Defence and the Chamber that it would use three photographs, previously disclosed to the Defence in 2007 and 2008,⁴ during cross-examination of Defence Witness 26. The Prosecution explained that the photographs were relevant to the witness's evidence in chief that day, and that the evidence contained information not included in the summaries provided.⁵
3. On 4 March 2010 the Prosecution explained to the Chamber that the photographs showed Thomas Lubanga and other co-perpetrators and provided information on the location, context and date in which were taken.⁶ The Defence opposed the Prosecution's request to show the photographs to the witness, arguing that the Prosecution had failed to put them before other witnesses during the Prosecution case;⁷ that Witness 26 did not testify in chief to the events related to the photos;⁸ and that there is no limitation on the type of material that can be used in cross-examination but only for the purposes of testing the credibility of witnesses.⁹
4. The Chamber disagreed. It explained that "so long as the witness can give evidence about additional matters and [...] those matters are relevant to our inquiry in this trial, it is open to counsel to open up new issues."¹⁰ In its ruling, the Chamber indicated that the evidence revealed by the photos had come up

¹ ICC-01/04-01/06-T-252-CONF-ENG ET, p.31, lines 5-25 and p.32, lines 1-8 ("Oral Ruling").

² ICC-01/04-01/06-2337-Conf, 10 March 2010.

³ This Response is filed as Confidential following the level of confidentiality of the Application.

⁴ DRC-OTP-0137-0711 and DRC-OTP-0137-0713 disclosed on 11 October 2007 (Pre-Trial INCR package 14 11 October 2007) and DRC-OTP-0137-0715 disclosed on 16 May 2008 (Pre-Trial PEXO package 52 16 May 2008)

⁵ E-mail from Prosecution Counsel dated 3 March 2010, indicating that as a result of the evidence given by defence witness 0026 that day, the Prosecution may use the three additional photographs: DRC-OTP-0137-0711, DRC-OTP-0137-073, and DRC-OTP-0137-0715, disclosed to the defence in 2007 and 2008.

⁶ ICC-01/04-01/06-T-252-CONF-ENG ET, p.18, lines 19-24; pp. 2 and 22, lines 6-15.

⁷ ICC-01/04-01/06-T-252-CONF-ENG ET, p.25, lines 1-18.

⁸ ICC-01/04-01/06-T-252-CONF-ENG ET, p.26, lines 4-18

⁹ ICC-01/04-01/06-T-252-CONF-ENG ET, p.27, lines 4-16.

¹⁰ ICC-01/04-01/06-T-252-CONF-ENG ET, p. 27, 1-6. See also p.26, lines 19-25, and p. 27, lines 17-24.

during the course of the trial,¹¹ and that “the test is whether the evidence that the Prosecution seeks to adduce from the witness is relevant and admissible and, of course, whether it is fair to allow the Prosecution at this stage to elicit evidence based on the photographs.”¹² It then concluded that the Prosecution “can rely on the photographs essentially because they may add a fresh dimension to evidence or issues that have already been canvassed during the course of this trial.”¹³

5. The Prosecution responds herewith to the Application.

Argument

6. Although the Oral Ruling was confined to the discrete matter of three photographs, the Application raises a much broader issue. The Defence argues that the Prosecution should not be allowed to present new incriminatory evidence during the cross-examination of defence witnesses unless it seeks to test the witnesses’ credibility or refresh their memory, or the evidence was not previously in the Prosecution’s possession.¹⁴

The Issue does not arise from the Oral Ruling

7. The issue described in the Application does not arise from the Oral Ruling. The Defence misrepresents the Chamber’s decision and the principles governing the questioning by the party not calling the witness (or cross-examination).
8. In vein with the established principle that “witnesses are not attributable to parties, but rather are witnesses of the Court,”¹⁵ cross-examination is not limited to testing the credibility of a witness but also to elicit affirmative evidence by the party questioning. With regard to the Prosecution, cross-examination is guided by its obligation to establish the truth.¹⁶

¹¹ Oral Ruling, p.31, lines 12-21.

¹² Oral Ruling, p.31, lines 8-11. It further reiterated “the test is not whether or not this or these items could have been shown to other witnesses, but whether they have potential relevance and admissibility and whether it is fair for this course to be followed”. See Oral Ruling, p.32, lines 1-3.

¹³ Oral Ruling, p. 32, lines 1-3.

¹⁴ The Application, para. 14.

¹⁵ *Prosecutor v Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 34. See also *Prosecutor v Lubanga*, Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, ICC-01/04-01/06-2192-Conf, 19 November 2009, para. 49: “there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes [contact by the Prosecution with Defence witnesses]; neither party ‘owns’ the witnesses it intends to call [...]”

¹⁶ Article 54 (1)(a) of the Statute.

9. The Defence ignores the relevant statutory provisions¹⁷ as well as decisions issued by this Chamber setting out the rules that govern the conduct of proceedings, including the scope of cross-examination.¹⁸ What matters is that the evidence is relevant to the case, it has probative value and its use is not deemed unfair to the parties, especially to the Accused.¹⁹ In addition, this Trial Chamber has expressly regulated the possibility of raising new issues during cross-examination, and provided the party calling the witness with the opportunity to explore them afterwards.²⁰
10. Trial Chamber II has also stated that “cross-examination must also contribute to the ascertainment of the truth”.²¹ In this regard, parties questioning witnesses that they have not called may, *inter alia*, test the credibility of the witness but also, they may elicit evidence that could reasonably be expected to be known to the witness.²²
11. The Oral Ruling follows the principles of cross-examination and the statutory provisions and jurisprudence regulating the conduct of proceedings and admission of evidence.²³ In this instance the witness was in a position to comment on the photographs and the events related to them,²⁴ and the Chamber considered that the evidence was potentially relevant to the case and showing the photos to the witness was not unfair.²⁵ In fact, the Defence has pursued the same avenue in the course of the Prosecution case by cross-examining Prosecution witnesses on

¹⁷ See Article 69(3) and Rule 140(2)(a) and (b), and Articles 64(9) and 69 and Rules 63 and 64, *inter alia*.

¹⁸ See ICC-01/04-01/06-1140, para. 32, which was reiterated in the Trial Chamber I Oral Ruling on Rule 140. See ICC-01/04-01/06-T-104-CONF-ENG ET (“Trial Chamber I Rule 140 Decision”), 16 January 2009, p. 36, lines 15-25: “In line with Article 69(3) of the Statute, the Trial Chamber considers that a party may question a witness it has not called about matters which go beyond the scope of the witness's initial evidence. The concept of “other relevant matters” under Rule 140(2)(b) of the Rules, includes, *inter alia*, trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered). The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily.”

¹⁹ See Article 69(4) in particular. The Trial Chamber acknowledged the potentially relevance of this case and that its use would be fair. See Oral Ruling, p. 31, lines 12-21; p.32, lines 1-8.

²⁰ Trial Chamber I Rule 140 Decision, p. 37.

²¹ ICC-01/04-01/07-1665-Corr., 1 December 2009, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, para. 71. (Trial Chamber II Rule 140 Decision)

²² Trial Chamber II Rule 140 Decision, para. 71 (a).

²³ It should be noted however that at this stage the Prosecution had not sought to tender into evidence the photographs and the Oral Ruling only dealt with the Prosecution’s possibility to show the photographs to the witnesses and not the admission into evidence.

²⁴ The witness had indicated in his evidence in chief that he went to training to Uganda. See ICC-01/04-01/06-T-251, p. 21. See also his evidence in cross-examination to that regard: and ICC-01/04-01/06-T-252-CONF-ENG, p. 14 line 22 – p. 16 line 13, p. 42 line 9 – p. 44 line 3, and on the photos ICC-01/04-01/06-T-252-Conf-ENG, pp. 34-41.

²⁵ Oral Ruling, p.31, lines 12-21; and p.32, lines 1-11.

issues not raised in the examination in chief and directly related to the defence case.²⁶

12. Moreover, the ICTY and ICTR authorities cited by the Defence are misrepresented and taken out of context thus effectively undermining the Defence's Application. The Chambers in those cases considered the probative value and the relevance of the evidence *vis-à-vis* the prejudice that it could cause to the Defence before deciding on its admissibility – the same process as Trial Chamber I followed.²⁷ In addition, the normative framework of ICTY and ICTR differs from this Court in this matter.²⁸

13. For the above reasons, the Prosecution submits that the issue presented by the Defence does not arise from the Oral Ruling. In the alternative, if the Chamber considers that the issue does arise,²⁹ the Prosecution submits that the Defence fails to show how the issue meets the appealable criteria under Article 82(1)(d) and thus requests the Trial Chamber to dismiss the Application.

²⁶ See ICC-01/04-01/06-T-252-CONF-ENG ET, p.26, 19-25 to p.27, 1-6. Judge Fulford notes that counsel for Defence had “investigated areas with witnesses which had not been touched on at all during the course of their evidence-in-chief”. Questions on intermediary Mbusa posed by the Defence to Prosecution witnesses clearly aimed at building up the defence case. See for instance, cross-examination of Witness 213 on 23 February 2009: ICC-01/04-01/06-T-133-CONF-ENG ET 23-02-2009, p. 41 line 19 to p. 43 line 6; p. 43, line 7 to p. 44, line 17; p.45 line 9 to p.45 line 25; or cross-examination of Witness 294, on 20 March 2009, p.42 line 9 to p.44 line 15, *inter alia*.

²⁷ See footnotes 10 and 11 of the Application. The present case shall be distinguished from the *Strugar* and *Lukic* decisions that refer to the introduction of evidence at the rebuttal stage. It also differs from the *Delic* decision, where the Prosecution disclosed for the first time the material shortly before the commencement of cross-examination and the trial had progressed to virtually the end of the defence case (para.10). However, the Chamber applied a similar balancing test as the one performed by this Chamber to assess the prejudice caused to the Defence. The same approach was adopted by the Chamber in the *Taylor* decision which did not forbid the tendering of evidence during the Prosecution case if the rights of the Accused are respected and remedies are provided if any prejudice. In *Hadzihasanovic*, the Chamber made a statement supporting the general proposition cited by the Defence but went on to permit the Prosecution to introduce evidence during the cross-examination of defence witnesses. See T.12524-12527, 29 November 2004. In *Karemera*, the Defence cites the case incompletely. Though the Chamber went on to say at para. 4 that “there is no absolute ban on the admission of fresh evidence by the Prosecution after the close of its case. The Chamber notes that it has the discretion to admit fresh evidence under Rule 89 (C) of the Rules, taking into account the relevance and probative value of that evidence and the need to ensure a fair trial.” The Chamber went on to allow the Prosecution to introduce nearly all of the new documents it wanted during cross-examination of Defence witnesses (see paras. 9 et seq.) by balancing the relevance and probative value of the evidence against its prejudicial effect.

²⁸ See Rules 85(A) and 90(H) of the Rules of Procedure and Evidence at the ICTY; and Rules 85(A) and 90(G) of the Rules of Procedure and Evidence at the ICTR.

²⁹ The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

The Issue does not affect the fair conduct of the proceedings

14. The Defence fails to demonstrate that the issue affects the fair conduct of the proceedings.³⁰ It argues that fairness and expeditiousness are affected as the Oral Ruling impacts the rights of the Accused to prepare his case, and places him in a situation of incertitude.³¹
15. The Oral Ruling did not deprive the Accused of a fair trial. The Chamber was mindful of the rights of the Accused when it issued the ruling and balanced the potential relevance and admissibility of the evidence against any unfairness that it might cause to the Defence allowing the Prosecution to elicit evidence based on the photographs.³² The provisions regulating the Trial Chamber's powers and admissibility of evidence afford the former the authority to consider all the interests at stake, including any possible prejudice to the Accused.³³ As the jurisprudence indicates, if any prejudice or unfairness to the Accused outweighs the relevance and probative value of a piece of evidence, the Chamber will not admit or consider the evidence, whether admitted during direct, cross-examination, or on rebuttal.³⁴
16. As stated above, the Defence had the possibility to re-examine the witness on these matters.³⁵ In addition, the evidence elicited by the Prosecution was not "new",³⁶ and the Defence had notice that it would be used during cross-examination. Moreover, the photographs had been disclosed in 2007 and 2008.

³⁰ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 11. The Appeals Chamber has ruled that "[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights".

³¹ Application, paras. 20-21.

³² Oral Ruling, p. 31, lines 8-11; 32, 1-3.

³³ See Articles 64(9) and 69; Rules 63 and 64.

³⁴ Trial Chamber I decision cited in footnote 12 of the Application (ICC-01/04-01/06-2174-Conf.) only reinforces the Prosecution's argument. In that case, the Trial Chamber followed the exact same approach but considered that the prejudice outweighed the relevance and probative value of the evidence for reasons other than its incriminatory nature. In particular because the Defence had not been able to question the relevant witnesses (the Prosecution was seeking to tender from the bar table video extracts after the closure of the Prosecution's case), and the Chamber did not want to entertain any recall of witnesses, inter alia. See para. 35. See also ICC-01/04-01/06-1399, paras. 19-14, 27-31.

³⁵ Trial Chamber I Decision on Rule 140, p. 37.

³⁶ The Presiding Judge indicated so; see Oral Ruling, p. 31, lines 19-21: "this is an issue which has been touched upon during the course of the evidence that has been given by a number of Prosecution witnesses." See in particular: ICC-01/04-01/06-T-170-Eng, p. 37 line 15 – p. 46 line 1 (testimony of witness 24); ICC-01/04-01/06-T-203-Conf-Eng, p. 29 line 22 – p. 33 line 7, p. 42 line 14 – p. 49 line 21 (testimony of witness 116); ICC-01/04-01/06-T-208-Conf-Eng, p. 77 line 2 – p. 79 line 8, p. 82 line 3 – p. 85 line 15 (testimony of witness 116). The Prosecution Pre-Trial Brief even touches upon this issue I paras. 50, 51 and 53. *Prosecutor v Lubanga*, Submission of the Prosecution's Updated Summary of Presentation of Evidence, ICC-01/04-01/06-1363, 30 May 2008.

The Defence was in an informed position to contest the evidence so there is no unfairness. Finally, depriving the Prosecution from eliciting evidence during the cross-examination of witnesses would compromise its statutory obligation to establish the truth and violate the principle of equality of arms.

The Issue does not affect the expeditious conduct of the proceedings

17. The Prosecution submits that an appeal on this issue will not serve the expeditious conduct of the proceedings. To the contrary, the Prosecution in exercising its duty to establish the truth has to choose the adequate witness and stage of the proceedings to elicit and tender relevant evidence taking into account the principles underlying Article 69. The Prosecution has to ensure that there are basis to establish the reliability of the evidence and that a particular witness can authenticate the material or can reasonably testify about it. Forcing the Prosecution to introduce all the items in its list of evidence during the Prosecution case will not only compromise its statutory duties but also will delay the proceedings with groundless and repetitive applications and subsequent defence objections.

*The Issue does not affect the outcome of the trial*³⁷

18. The Prosecution acknowledges that the evidence elicited through the photographs could have an impact on the outcome of the trial. However, the Defence fails to consider the extent of such effect, including whether the evidence ultimately is cumulative to other evidence already admitted in this case. Indeed, as Trial Chamber II has recently stated “it does not suffice for an issue to have merely a hypothetical impact on the outcome of the trial; [n]or does a minor or inconsequential effect on the proceedings or their outcome meet the requirements of article 82(1)(d) of the statute.”³⁸

³⁷ This requirement is an alternative basis for granting under Article 82(1)(d) to the issue impacting on the fair and expeditious conduct of the proceedings. *Situation in Uganda*, ICC-02/04-112, 20 December 2007, para. 17; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1417, 2 July 2008, paras. 17-18; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1473, 24 September 2008, paras. 21-22.

³⁸ ICC-01/04-01/07-1958, para. 20.

*An immediate resolution of the Issue will not materially advance the proceedings*³⁹

19. The Defence fails to show that the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings. To the contrary, this issue can better be argued in an appeal from a final judgment, when the complete record can provide an educated basis for determining whether the admission of the evidence at this stage was error and, if so, whether it had an effect on the outcome of the trial. An appeal on the issue at this stage will unduly delay the proceedings.

Relief sought

20. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 15th day of March 2010

At The Hague, The Netherlands

³⁹ This requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward' by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings." See *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15,18.