

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 9 November 2007

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public

Decision Regarding the Timing and Manner of Disclosure and the Date of Trial

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TRIAL CHAMBER I ("Trial Chamber") of the International Criminal Court ("Court"), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference of 1 and 2 October 2007, renders the following decisions based on the reasoning found herein, on the subjects of timing and manner of disclosure as well as the date upon which the trial will commence:

I. The timing and manner of disclosure of the evidence the prosecution seeks to rely on to the other party, any participants and to the Chamber, and all other disclosure issues

A. The relevant provisions from the Statute and the Rules of Procedure and Evidence

1. The Rome Statute framework contains the following relevant Articles and Rules:

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court...; and
 - (c) Fully respect the rights of persons arising under this Statute.
- ...
3. The Prosecutor may:
 - (a) Collect and examine evidence;
 - (b) Request the presence of and question persons being investigated, victims and witnesses;
 - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

- (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
- (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
- (f) Take necessary measures, or request that necessary measures be taken to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 64(3)

Functions and powers of the Trial Chamber

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

- (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
- (b) Determine the language or languages to be used at trial; and
- (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

Article 67

Rights of the accused

1 In the determination of any charge, the accused shall be entitled...to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality.

..

- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;

2 In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt

of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 77

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 121(10)

Proceedings before the confirmation hearing

The Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the person and victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

Rule 131(2)

Record of the proceedings transmitted by the Pre-Trial Chamber

Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

B. Submissions of the parties and participants

Prosecution

2. As of 1 October 2007, the prosecution submitted that there are currently 27,500 documents which comprise some 92,500 pages in its possession that relate to the Democratic Republic of Congo document collection.¹ Of those, the prosecution thinks it likely that a little under 20,000 documents (about 74,000 pages) require review within the framework of the case against Mr Thomas Lubanga Dyilo.² Of the document review for the present case, the prosecution asserted that there are some 5,200 documents (about 8,500 pages) which still require review and which the prosecution undertook to complete by mid October.³ The prosecution noted that it has disclosed 534 items, including 17 videos and their transcripts.⁴ As far as potentially exculpatory materials are concerned, the prosecution has disclosed 167 documents comprising approximately 1,700 pages.⁵ Additionally, it has disclosed excerpts from 70 witness statements and four summaries of witness statements. In total, the prosecution contended that it has disclosed 1,074 documents to the defence, 350 of which are not susceptible to electronic searching.⁶

3. In reviewing potentially relevant documents, the prosecution has employed various approaches, including keyword searching; it has reviewed the majority of the non-searchable items; and it has maintained as a particular focus of review the documents flagged by analysts and investigators.⁷ The prosecution is in the process of disclosing the incriminatory evidence on its list of evidence, as well as some exculpatory materials. However, since the Confirmation Hearing, although

¹ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 11, line 4.

² *Ibid.*, at page 11, line 7

³ *Ibid.*, at page 11, line 21

⁴ *Ibid.*, at page 12, line 5.

⁵ *Ibid.*, at page 12, lines 20-21

⁶ *Ibid.*, at page 62, lines 17-22.

⁷ *Ibid.*, at page 11, line 10 to page 11, line 17.

disclosure has been ongoing, the documents have not been filed with the Registry as the prosecution has been awaiting a decision from the Trial Chamber as to the procedure to be followed.⁸

4. The prosecution described in detail the difficulty regarding the 15,000 documents in its possession, which are not searchable by electronic means.⁹ They must be assessed individually and this has proved to be a time consuming process which the Trial Chamber was told would be completed by the end of October 2007.¹⁰
5. The prosecution explained its attempts to put electronically stored material into categories from which it could search, and submitted that keyword searching was an extremely important and efficient tool in light of the volume of material.¹¹ It further requested that the defence contribute to the search of materials by providing keywords or criteria which would assist the prosecution in searching the documents by eliminating items irrelevant to the defence position.¹² The prosecution also accepted its obligation to search for exculpatory materials irrespective of any defence input.¹³
6. Finally, the prosecution made submissions with regard to the confidentiality agreements into which it entered with information providers pursuant to Article 54(3)(e). The prosecution stated in oral submissions before the Chamber that approximately 50 percent of the Democratic Republic of Congo document collection has been obtained pursuant to agreements of confidentiality which do not allow for disclosure unless the information provider lifts the confidentiality requirement.¹⁴ The prosecution argued that all of these agreements were based

⁸ *Ibid*, at page 12, lines 10-16.

⁹ *Ibid*, at page 19, line 18 to page 20, line 23.

¹⁰ *Ibid*

¹¹ *Ibid*, at page 23, line 20 to page 24, line 22.

¹² Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, ICC-01/04-01/06-951, 11 September 2007, paras 28 to 30.

¹³ ICC-01/04-01/06-T-52-ENG, page 87, lines 8-10.

¹⁴ *Ibid*. at page 13, lines 17-22.

on Article 54(3)(e) of the Statute. A review by the prosecution of the material protected under these agreements has indicated a need to disclose some 744 documents. To date, only 120 of these 744 documents have been disclosed.¹⁵ Significantly, the prosecution revealed that, as of 1 October 2007, information providers have refused to lift confidentiality restrictions on 46 documents.¹⁶ There are a further 562 documents in respect of which the prosecution is awaiting decisions from the information providers with regard to lifting the confidentiality agreements.¹⁷ The prosecution has indicated with respect to potentially exculpatory materials within documents which remain protected that a search has been conducted to find alternatives in the document collection that contain “the same or very similar information”.¹⁸ It has not, to date, provided the Chamber with the results of those searches.

7. In the context of the materials covered under these agreements, the prosecution contended that it has sent request letters to the various information providers, as well as having conducted meetings with them, in order to emphasise the urgency of the decisions.¹⁹ However, it remains up to the information providers as to when they make these decisions, and the prosecution submitted that this has been a very time consuming and difficult task thus far.²⁰ The prosecution also informed the Chamber that the relevant materials were not collected with use in a later trial as their main purpose (although it was admitted by the prosecution that when entering into these agreements it was aware that the materials were “very likely to be used as evidence”)²¹ and that the negotiation process to lift these confidentiality conditions is very time consuming.

¹⁵ *Ibid.*, at page 13, line 25 to page 14, line 3.

¹⁶ *Ibid.*, at page 14, lines 4-6.

¹⁷ *Ibid.*, at page 14, lines 7-11.

¹⁸ *Ibid.* at page 18, line 1.

¹⁹ *Ibid.*, at page 15, line 4 to page 19, line 13.

²⁰ *Ibid.*

²¹ Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-55-CONF-EXP-ENG, page 7, lines 9-12. While this was raised in an *ex parte* hearing, the Chamber is of the view that lifting the restriction on this particular quotation is not inconsistent with the *ex parte* nature of the submissions.

Defence

8. The defence submitted that it needs the entirety of the prosecution evidence, in a non-redacted form with the identities of the witnesses revealed, at least three months prior to the commencement of trial in order to enable proper preparation.²² Failing that, the defence requested that the witness statements are made available to it, even if served under false names.²³
9. With regard to the agreements which the prosecution has entered into under Article 54(3)(e), the defence suggested that the prosecution has made poor use of the article because it is now intending to rely on evidence covered by the agreements which should not be brought out in Court.²⁴ The defence further submitted that if the prosecution is not able to secure release from the confidentiality agreements entered into under Article 54(3)(e), it would need to forgo reliance on the evidence covered by those agreements.²⁵
10. With respect to disclosure to the victims, the defence contended that the disclosure obligations are fully covered by the Rules of Procedure and Evidence.²⁶

Victims

11. The victims' representatives submitted that the combined effect of Rules 121 and 131 mean that the record of proceedings must be maintained so that any document filed with the Court since the confirmation of charges should be added to the record and disclosed to the representatives of the victims. The victims further submitted that this approach should be applied rigorously, with careful

²² ICC-01/04-01/06-T-52-ENG, page 51, line 7 to page 52, line 12; *See also* Defence Submission on the Subjects that Require Early Determination: Trial Date, Languages to be Used in the Proceedings, Disclosure and E-court Protocol, ICC-01/04-01/06-960-tENG, 24 September 2007, para. 9.

²³ ICC-01-04-01-06-1-52-ENG, page 52, line 15.

²⁴ *Ibid*, at page 51, line 24 to page 49, line 18 to page 50, line 3.

²⁵ *Ibid*, at page 52, line 15.

²⁶ *Ibid*, at page 54, line 9 to page 55, line 18

consideration being given as to whether the victims should receive only the documents in their public form or whether they are entitled to the non-redacted versions.²⁷ The Trial Chamber indicates at this stage that the entitlement of the victims to disclosure of materials is an issue that it has reserved to a later decision in which the entirety of the circumstances of victims' participation will be addressed.

Registry

12. The Trial Chamber notes that all parties jointly submitted that there is no need for the Registrar to retain the original versions of the documents.²⁸ However, the Registry drew our attention to Regulations 16 and 53 of the Regulations of the Registry²⁹ which provide as follows:

Regulation 16

Access to the record and to the original form of evidence and audiovisual recordings of the proceedings

2 The original form of evidence and of audiovisual recordings of proceedings shall be stored in the Registry vault.

3. Chambers and participants may consult the original form of evidence or of audiovisual recordings of proceedings, depending on the level of confidentiality of the evidence or recording. Experts or other specified persons may consult the original form of evidence or of audiovisual recordings of proceedings, subject to an order of the Chamber.

²⁷ *Ibid*, at page 69, line 1 to page 71, line 11.

²⁸ Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, ICC-01/04-01/06-951, 11 September 2007, para. 37; Defence Submission on the Subjects that Require Early Determination: Trial Date, Languages to be Used in the Proceedings, Disclosure and E-court Protocol, ICC-01/04-01/06-960-tENG, 24 September 2007, para. 35.

²⁹ ICC-01/04-01/06-T-52-ENG, page 77, lines 1-5

Regulation 53**Handling of evidence during a hearing**

3. The original form of evidence, whether it is a paper document or an object shall be placed in the custody of the Registrar and may be consulted in accordance with regulation 16.

13. On the basis of the above regulations, the Registry argued that every original document and object must be filed with the Registry for their preservation.³⁰

C. Analysis

14. For the purposes of this decision, and pursuant to Article 64(3) of the Statute, the Trial Chamber is focusing its analysis and conclusion on the particular issues of timely disclosure to the parties and on the procedure to be employed for disclosure.

15. Thus, while the subject of the prosecution's use of Article 54(3)(e) is of interest to the Chamber, for the purposes of the present decision, and without more detailed and focused assistance from the parties and the participants on the particular issues surrounding these agreements, the Chamber has refrained from addressing the matter at present.

16. While the general nature of the case is already apparent from the proceedings up until this point, full disclosure is still necessary in order to gain a thorough understanding of the time required by the parties and participants in order to prepare for trial. Although some significant preparatory work has been possible for a considerable period of time, there is further preparation that the defence, and possibly the participants, must engage in and which can only be completed once there has been full disclosure on the part of the prosecution.

³⁰ *Ibid*

17. The prosecution has indicated that it intends to rely on approximately 50 witnesses at trial and that it does not expect this number to increase significantly.³¹ Of the 37 witnesses currently available to the prosecution as part of its case, the identities of 11 have been revealed to the defence and it has received the complete statements of 7 witnesses.³² Additionally, the defence has been provided with summaries of statements or “transcripts” for eleven of the witnesses the prosecution proposes to rely on.³³
18. Further, these are grave crimes that allegedly occurred in an area of the Democratic Republic of the Congo where it has been suggested that there has been significant instability for a considerable period of time.³⁴ The fact that the accused remains in custody without unimpeded access to his legal counsel imposes limitations on preparation. He will need to give instructions on the evidence which is to be disclosed and he may wish to communicate his views on trial preparation in light of the prosecution’s disclosure.
19. The Trial Chamber is not persuaded by the prosecution’s argument, which arose in its submission on the confidentiality agreements, that it would be unfair and an obstacle to the search for truth to impose a cut-off date for incriminatory materials while not imposing a cut off-date for exculpatory materials.³⁵ The Trial Chamber believes that from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay. Generally, the late requests by the prosecution to lift the confidentiality agreements should not be allowed to endanger the accused’s

³¹ Prosecution’s submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, ICC-01/04-01/06-951, 11 September 2007, para. 16; ICC-01/04-01/06-T-52-ENG, page 26, line 25.

³² ICC-01/04-01/06-T-52-ENG, page 27, lines 2-12.

³³ *Ibid*

³⁴ *Ibid*, at page 31, line 17 to page 32, line 1.

³⁵ *Ibid*, at page 87, line 18 to page 88, line 12

right to be tried without undue delay and to adequate time and facilities for preparation.

20. Nor is the Trial Chamber persuaded by the prosecution's submission that it had difficulty in providing early disclosure because the procedure for assessing the witnesses and securing their protection is outside the prosecution's control.³⁶ The critical stage of making the initial referral of the witnesses to the Victims and Witness Unit for an assessment of the protection needs is the responsibility of the prosecution to determine. While 11 witnesses were referred in good time to the Victims and Witnesses Unit, the process for the outstanding 24 witnesses was commenced significantly and unjustifiably late.³⁷ This delay must similarly not be allowed to endanger the accused's right to a fair and expeditious trial.

21. Taking all the above factors into consideration, in the Trial Chamber's assessment a period of three months after the full disclosure of the prosecution case and before the commencement of trial, as requested by the defence, is reasonable. Further, while the Chamber has paid careful attention to the practices of other international bodies,³⁸ its decision must be taken in the context of the work of this Court and the requirements of this particular case, bearing in mind the Trial Chamber has an obligation to ensure a fair and expeditious trial of the accused. Finally, the Trial Chamber has no wish to impose unrealistic trial dates, for instance because it appears there would be later problems with disclosure.

³⁶ *Ibid.*, at page 26, line 18 to page 30, line 6, and page 43, lines 1-19.

³⁷ *Ibid.*, at page 26, line 18 to page 30 line 6; page 43, lines 1-19, and page 32, lines 18-21.

³⁸ See, Prosecutor v. Vojislav Seselj, ICTY, Case No. IT-03-67-PT, Decision on Provision of Previous Testimony in Audio Format, 22 November, at para 17; Prosecutor v. Blagoje Simic et al., ICTY, Case No. IT-95-9-T, Order for Disclosure of Identities of Protected Witnesses, 23 May 2001; Öcalan v. Turkey, ECtHR, App. No. 46221/99, Judgment, 12 May 2005, paras 138-148; G.B. v. France, ECtHR, App. No. 44069/98, Judgment, 2 October 2001, paras 60-70; Kremzow v. Austria, ECtHR, App. No. 12350/86, Judgment, 21 September 1993, paras 45-50; Campbell and Fell v. United Kingdom, ECtHR, App. Nos. 7819/77 and 7878/77, Judgment, 28 June 1984, para 98; Harward v. Norway, HRC, Comm. No. 451/1991, UN doc. CCPR/C/51/D/451/1991, 16 August 1994, para. 9.5, and International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 65 ter (E).

22. While the Trial Chamber is sympathetic to the administrative difficulties caused by the Registry keeping the evidence in its original form, having heard submissions from both the victims' representatives and the Registry on the issue, the Trial Chamber has concluded that the arguments are not sufficiently strong to justify departure from the clear terms of the Rules of Procedure and Evidence and the Regulations of the Registry. The Regulations of the Registry are unequivocal in their requirement that the originals should be filed and stored in the Registry vault. The prosecution advanced an argument to suggest that the word "original" in Regulation 53(3) of the Regulations of the Registry should be read to mean the electronic copies which are used in Court.³⁹ However, the Trial Chamber is unconvinced by this argument as the language of the regulation clearly indicates otherwise. Therefore, the Trial Chamber orders that the evidence in its original form shall be filed with the Registry and kept in their vault.

II. Date of Trial

23. During the status conference of 1 October 2007 a "tentative proposal" was advanced by the bench for the trial to commence in mid-February 2008.⁴⁰ Through the submissions of the parties and the participants, it became clear to the Trial Chamber that the trial date would be dependent on the timing of full disclosure to the defence and victims' representatives, in order to ensure there is a fair and expeditious trial. To that end, the defence argued that it will need not less than three months to prepare once they are informed of the case against the accused.⁴¹ The representatives of the victims were unable to advance a particular timeframe and sought to have disclosure of all relevant documents to them in order to assess their position.⁴² However, the victims' representatives did submit

³⁹ ICC-01/04-01/06-I-52-ENG, page 80, line 24 to page 81, line 12.

⁴⁰ *Ibid*, at page 5, line 16

⁴¹ *Supra* at note 24.

⁴² Submissions of the Legal Representative of Victim a/0105/06 in Response to the Order Setting out Schedule for Submissions and Hearings Regarding the Subjects that Require Early Determination, ICC-01/04-01/06-961-tENG, 1 October 2007, paras 4 to 14; Submissions on Preliminary Issues, ICC-01/04-01/06-957-tENG, 17 October 2007, para. 3.

that if their preparation involved travel to the Democratic Republic of Congo, several months would be required for trial preparation.⁴³ Based on these submissions, the Trial Chamber has determined that the trial will commence no earlier than 12 weeks following the date of full disclosure, as set out below.

24. The Trial Chamber has taken into consideration when determining the date of trial the Court calendar and any recess periods which fall on or near a potential trial date.

III. Decision of the Trial Chamber

25. The Trial Chamber therefore orders the prosecution to serve the entirety of their evidence by 16.00 on 14 December 2007. This is to include the incriminatory material in the form of witness statements and any other material which the prosecution intends to rely upon at trial, and any exculpatory material. Each item should be listed in a separate document.
26. Simultaneously, the prosecution shall serve a document which explains its case by reference to the witnesses it intends to call and the other evidence it intends to rely upon. Furthermore, this document shall explain how the evidence relates to the charges. This document will be referred to as the "summary of presentation of evidence".
27. If the prosecution wishes to serve any of this material in a redacted form, each proposed redaction must be explained and justified to the bench.
28. If the prosecution has in its possession any exculpatory material which it is unable to disclose and which may materially impact on the Court's determination

⁴³ Submissions of the Legal Representative of Victim a/0105/06 in Response to the Order Setting out Schedule for Submissions and Hearings Regarding the Subjects that Require Early Determination, ICC-01/04-01/06-961-tENG, 1 October 2007, para 10.

of guilt or innocence, it will be under an obligation to withdraw any charges which the non-disclosed exculpatory material impacts upon. If the prosecution is in doubt as to whether or not the material falls into this category, it should be put before the bench for the Trial Chamber's determination. Finally, it is to be noted that the prosecution remains under its obligation to disclose potentially exculpatory material as soon as is practicable throughout the trial period, as is required by Article 67(2) of the Statute.

29. In order to allow the defence and the victims' representatives 12 weeks to prepare, following full disclosure and taking into account the Court recess which falls in mid March, the trial will commence on 31 March 2008.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 November 2007

At The Hague, The Netherlands