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Date: 21 April 2008

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 Document
with confidential Prosecution and Defence only annex**

**Prosecution's communication of original versions of 37 items disclosed to the
Defence on 15 April 2008 and application for authorisation to add 19 further items
of disclosed evidence to the evidence to be relied on at trial**

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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Other

Background

1. The Prosecution informs the Trial Chamber that it disclosed to the Defence 56 items as incriminating evidence on 15 April 2008. These items are listed in the annexed "List of disclosed material".¹ The disclosure of these materials as incriminating evidence took place with the prior agreement of the Defence.
2. The disclosed items were obtained from Prosecution witnesses DRC-OTP-WWWW-0297, DRC-OTP-WWWW-0187 and DRC-OTP-WWWW-0055, and are tapes, transcripts and translations, investigator's reports and notes of interviews with these witnesses. In the case of all three witnesses, the Prosecution had disclosed to the Defence the tapes of their substantive interviews by the 28 March 2008 disclosure deadline set by the Trial Chamber,² but had in some cases, due to oversight,³ not yet disclosed a limited number of materials related to portions of the interviews dealing largely with procedural matters, or the transcripts and/or translations of the witnesses' substantive interviews.
3. The following items were disclosed on 15 April 2008:
 - a. For witness DRC-OTP-WWWW-0297, the Prosecution disclosed the transcripts⁴ of his taped interview. The tapes for this interview, which was conducted in English and Swahili, had already been disclosed to the Defence on 20 March 2008.⁵

¹ The List of disclosed material is the Confidential Prosecution and Defence Only – Annex ("List of disclosed materials").

² ICC-01/04-01/06-T-79-ENG ET, page 10, lines 2-5.

³ See the items referred to at paragraphs 3(b)(i) and (ii), and 3(c)(ii) and (iii).

⁴ Items 47-50 on the List of disclosed materials.

⁵ ICC-01/04-01/06-1242-Conf-Anx1, items 55-58.

- b. For witness DRC-OTP-WWWW-0187, the Prosecution disclosed (i) portions of the transcripts⁶ of his taped interview and (ii) the translation⁷ of one portion of the transcripts. The tapes for this interview, which was conducted in English and Lingala, had already been disclosed to the Defence on 29 February 2008.⁸ Some portions of the transcripts and some translations for the interview with this witness had been disclosed to the Defence on 29 February⁹ and 28 March 2008.¹⁰ The Prosecution anticipates being in a position to disclose the remaining translations by 25 April 2008.¹¹
- c. For witness DRC-OTP-WWWW-0055, the Prosecution disclosed (i) the transcripts¹² of the substantive portion of the interview with the witness, which was conducted in January and March 2008. The tapes for this interview, which was conducted in English and Swahili, had been disclosed to the Defence on 28 March 2008.¹³ The Prosecution also disclosed items related to two previous attempts to commence the interview of this witness in March and November 2005. These items include (ii) one audio¹⁴ and four video¹⁵ tapes as well as (iii) an investigator's report¹⁶ and interview notes.¹⁷

⁶ Items 3-12 on the List of disclosed materials.

⁷ Item 55 on the List of disclosed materials.

⁸ ICC-01/04-01/06-1205-Conf-Anx1, items 142-151.

⁹ Seven portions of the transcript were disclosed on this date. ICC-01/04-01/06-1205-Conf-Anx1, items 158-164.

¹⁰ The translations of seven portions of the transcript were disclosed on this date. ICC-01/04-01/06-1254-Conf-Anx1, items 19-25.

¹¹ The Defence have agreed to the disclosure of these materials as incriminatory evidence by that date.

¹² Items 13-45 on the List of disclosed materials.

¹³ ICC-01/04-01/06-1254-Conf-Anx2, items 1-27.

¹⁴ Item 1 on the List of disclosed materials.

¹⁵ Items 51-54 on the List of disclosed materials.

¹⁶ Item 2 on the List of disclosed materials. This investigator's report provides an account of the meeting with the witness on 9 March 2005 during which the audio tape disclosed to the Defence (item 1 on the List of disclosed materials) was recorded.

Submission of originals of 37 items of disclosed evidence

4. The Prosecution submits original versions of 37 items.¹⁸ These items, referred to at paragraphs 3(a) and 3(c)(i) above, are transcripts of the tapes of witnesses DRC-OTP-WWWW-0297 and DRC-OTP-WWWW-0055's substantive interviews. In both cases, the tapes on which the interviews were recorded were disclosed to the Defence in a language which the accused fully understands and speaks¹⁹ pursuant to Rule 76(3), and by the 28 March 2008 disclosure deadline set by the Trial Chamber.
5. In the Prosecution's submission, only the disclosure of the tapes of these interviews was required to take place by the 28 March 2008 disclosure deadline. The Prosecution submits that the disclosure of the transcripts is a complement to that initial disclosure, which will enhance the Parties' ability to prepare for trial and will facilitate the handling of the tapes at trial if it becomes necessary, but is neither a requisite for adequate preparation, nor for the fulfilment of the Prosecution's disclosure obligations.

Application for authorisation to add 19 items to the evidence to be relied on at trial

6. With respect to the remaining 19 items of evidence which were disclosed to the Defence on 15 April 2008²⁰ and which are referred to at paragraphs 3(b)(i)

¹⁷ Item 46 on the List of disclosed materials. These interview notes provide an account of the interview which took place on 11 and 12 November 2005, during which the video tapes disclosed to the Defence (items 51-54 on the List of disclosed materials) were recorded.

¹⁸ Items 13-45 and 47-50 on the List of disclosed materials.

¹⁹ These items were disclosed to the Defence in English and Swahili. Thomas LUBANGA DYILO fully understands and speaks Swahili. ICC-01/04-01/06-676, at page 3.

²⁰ Items 1-12, 46, and 51-56 on the List of disclosed materials.

and (ii) and 3(c)(ii) and (iii) above, the Prosecution seeks the Trial Chamber's authorisation to rely on them as incriminating evidence at trial.

7. Unlike the case of witnesses DRC-OTP-WWWW-0297 and DRC-OTP-WWWW-0055's substantive interviews, for which disclosure of the tapes is sufficient,²¹ in the Prosecution's view, the disclosure of the items deriving from the two attempts to commence the interview of witness DRC-OTP-WWWW-0055 in March and November 2005 is necessary in order to fully discharge the Prosecution's disclosure obligations. In addition, in the Prosecution's view, the disclosure of the translations of the transcripts of the taped interview of witness DRC-OTP-WWWW-0187 is necessary in order to satisfy the requirements of Rule 76(3).

8. With respect to witness DRC-OTP-WWWW-0055, the Prosecution submits that the incriminating evidence provided by the witness which the Prosecution intends to rely on at trial is principally contained in the tapes of his most recent interview in January and March 2008. During the attempts to commence the interview of this witness in March and November 2005, the issues discussed by the witness were almost²² exclusively procedural in nature. During the attempt to commence the substantive interview in March 2005 the witness was informed of his rights in accordance with Article 55(2) of the Rome Statute. During the attempt to commence the substantive interview in November 2005, the witness' security concerns were discussed, as were his views on the use of audio- and video-recording pursuant to Rule 112(1) of the Rules of Procedure and Evidence and the availability of protective measures.²³

²¹ Reference is made to paragraphs 4 and 5 above.

²² During the March 2005 portion of the interview, witness DRC-OTP-WWWW-0055 provided information on his professional and military career.

²³ If the Chamber so requests, the Prosecution will provide it with the items deriving from the two attempts to commence the interview of witness DRC-OTP-WWWW-0055 in March and November

In light of the fact that the record of the substantive portion of witness DRC-OTP-WWWW-0055's interview were disclosed to the Defence on 28 March 2008, the Prosecution submits that the delayed disclosure of the record of the earlier attempts to commence his interview does not cause prejudice to the accused.

9. With respect to witness DRC-OTP-WWWW-0187, the Prosecution recalls that the tapes of his interview were disclosed to the Defence on 29 February 2008.²⁴ While the accused himself is not known to fully understand and speak English or Lingala, and in light of the fact that this would have prevented him from reviewing witness DRC-OTP-WWWW-0187's evidence, the Prosecution submits that his counsel are capable of preparing for trial on the basis of the English interpretation of the evidence given by the witness, which is recorded in the tapes along with the Lingala portions. In addition, the Prosecution notes that the accused himself will have at least²⁵ ten weeks in which to review the translations of the witness' interview and prepare for trial. The Prosecution thus submits that the prejudice to the accused that might be caused by the delayed disclosure of the translations of the transcripts of the tapes is limited, in particular in light of the fact that his counsel understand English and are thus since the disclosure of the tapes in a position to commence their preparation.

2005. The Prosecution informs the Chamber that it anticipates disclosing the transcript of the March and November 2005 interviews to the Defence by 25 April 2008, and that it could also provide them to the Chamber at that time. The Prosecution also informs the Chamber of the fact that the Defence have agreed to the disclosure of the transcript as incriminatory evidence by that date.

²⁴ See above, at paragraph 3b..

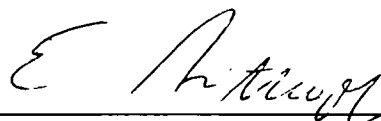
²⁵ The accused will have over ten weeks during which to review the evidence obtained from this witness prior to the commencement of the trial. In addition, the Prosecution anticipates that the accused will have more than 10 weeks to prepare prior to the appearance of this witness at trial, because the Prosecution does not anticipate calling this witness to testify during the first half of the trial.

10. The Prosecution informs the Trial Chamber that the testimony of witnesses DRC-OTP-WWWW-0055 and DRC-OTP-WWWW-0187, whose further evidence it is seeking to rely on through this application, is highly relevant to the Prosecution's case²⁶ and to the Trial Chamber's review of the charges against the accused.

11. The Prosecution notes, finally, that the Defence have given their consent to the disclosure of these items as incriminating evidence.

Request

12. In light of these submissions, the Prosecution seeks authorisation from the Trial Chamber to add items 1-12, 46, and 51-56 on the List of disclosed materials to its list of incriminating evidence. The Prosecution brings this application pursuant to Regulation 35 of the Regulations of the Court.



Ekkehard Withopf, Senior Trial Lawyer
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 21st day of April 2008

At The Hague, The Netherlands

²⁶ Reference is made to the ICC-01/04-01/06-1072-Conf-Exp, in particular at paragraphs 27, 32, 35 and 41.