

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-01/06
Date: 15 January 2009

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

**Decision on the prosecution's application for the admission of the prior recorded
statements of two witnesses**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Background and Submissions

1. On 4 April 2008 the Office of the Prosecutor (“prosecution”) applied to the Chamber for a general, preliminary ruling on the admission of prior recorded statements.¹ In the application, the prosecution submits that Article 69(2) of the Rome Statute (“Statute”) and Rule 68(b) of the Rules of Procedure and Evidence (“Rules”) provide for the introduction of evidence other than oral evidence and, in particular, by way of written statements taken in accordance with Rules 111 and 112 of the Rules. The prosecution suggests that the admission of written testimony, such as a witness statement, would be compatible with the Statute and the Rules in two situations: first, where the witness in question is present in Court and thus available for questioning by the parties and the Bench and, second, where the witness is not present but the parties have had the opportunity at some earlier stage to question the witness.²
2. The prosecution submits that this approach to introducing the witness’s original written evidence brings various advantages: it enables the Court to receive the testimony of vulnerable witnesses in the most appropriate way; it has the potential to save valuable Court time; and it permits the admission of exhibits referred to in the witness’s statement on the basis that they are an integral part of this evidence. The prosecution concedes the potential impact that this may have on the spontaneity of evidence, but submits that this consequence must necessarily be balanced against the advantages just mentioned.³
3. On 28 April 2008 the defence filed a response to the prosecution’s

¹ Prosecution’s Application for a Preliminary Ruling on the Admission of Prior Recorded Statements, 4 April 2008, ICC-01/04-01/06-1262.

² *Ibid.*, paragraphs 3-6.

³ *Ibid.*, paragraphs 18 – 22.

application.⁴ The defence submits that the question raised by the prosecution should not be dealt with *in abstracto* but rather on a case-by-case basis. It submits that Article 69(2) of the Statute enshrines the principle that witnesses should be heard in person as, *inter alia*, this enhances the Chamber's ability to assess the witness's credibility; it assists the spontaneity of the evidence; and it aids the Chamber in its ability to control the evidence, avoiding (for example) the use of leading questions. Additionally, this approach facilitates resolving questions of admissibility or relevance in advance.⁵

4. In its analysis of Rule 68, the defence submits that "prior recorded evidence" refers only to video- or audio-recorded evidence and not to evidence merely recorded in written form, such as in a witness statement. Furthermore, the defence argues that this evidential possibility (*viz.* admitting prior recorded material) should always be subject to the requirement that the defence has had the "opportunity to examine the witness during the recording"; moreover, it suggested that use of these provisions should be restricted to evidence that has been subject to a degree of judicial control, such as during a Court hearing.⁶

5. The defence submits that Rule 68 is not part of the mechanisms created in the Rome Statute framework for the protection of vulnerable witnesses, appearing as it does in Section I, rather than Section III, of Chapter 4 of the Rules (the latter Section containing the burden of the relevant protective measures). It submits that the advantage to the accused of being tried expeditiously must be weighed against the advantage of a public trial.⁷ Moreover, the defence argues that there would, in reality, be few if any

⁴ Réponse de la défense à la "Prosecution's application for a preliminary ruling on the admission of prior recorded statements" datée du 4 avril 2008, ICC-01/04-01/06-1297.

⁵ *Ibid.*, paragraphs 5 and 10

⁶ *Ibid.*, paragraphs 10 – 18.

⁷ *Ibid.*, paragraphs 19 – 23.

economies of time since the Chamber will need to read the testimony in advance, and the defence questioning that would be necessary in these circumstances would lead to delay.⁸

6. Finally, the defence submits that the admission of prior recorded testimony must not be used as a pretext for admitting *en bloc* items of evidence without proper consideration of their admissibility.⁹

7. On 6 May 2008 the Chamber directed the prosecution to file a written application, linking its general observations on prior recorded evidence to specific witnesses for whom this opportunity is proposed. The prosecution accordingly filed an application on 16 May 2008 for the admission of prior recorded statements of two witnesses in lieu of oral examination by the prosecution.¹⁰ It indicated that these statements had been taken in accordance with Rule 111 of the Rules; they contain evidence outwith the alleged acts and conduct of the accused as charged in the Document Containing the Charges or matters which are said to be particularly within his knowledge, and instead they contain background evidence. Alternatively, it is said this evidence is simply corroborative of other testimony that will be lead *viva voce*.¹¹

8. The prosecution advanced further submissions at a hearing on 28 May 2008. The prosecution conceded that the saving of time afforded by its application of 16 May – relating, as it does, to less than 20 pages of written statements – was limited but nevertheless it submitted this would advance the trial process. The prosecution further suggested that it may later apply for a similar procedure to be adopted in respect of other witnesses.¹²

⁸ *Ibid*, paragraphs 32 – 33.

⁹ *Ibid*, paragraph 34.

¹⁰ Prosecution's application for admission of prior recorded statements of two witnesses, 16 May 2008, ICC-01/04-01/06-1334-Conf, concerning witnesses DRC-OTP-WWWW-0043 and DRC-OTP-WWWW-0293.

¹¹ *Ibid.*, paragraph 5.

¹² Transcript of hearing on 28 May 2008, ICC-01/04-01/06-T-88-ENG, page 19, lines 6 – 24.

9. In its oral argument, the defence reiterated its submission that Rule 68(b) referred to recorded evidence and not to written statements. Addressing the witness statements specifically relied on by the prosecution, the defence submitted that the evidence was wide-ranging in nature and, if admitted in this way, would result in the defence addressing all the facts and events covered by the statement, regardless of their relevance to the trial. Accordingly, it was suggested that there would be a net cost rather than benefit as regards saving time.¹³
10. Finally, in its response, the prosecution submitted that Rule 68(b) should be read in light of Article 69 of the Statute which permits the introduction of evidence in documentary form, as distinct from video- or audio-taped material. Furthermore, it was submitted that this interpretation is supported by the wording of Rule 68 as it appears in French, in that whilst there is reference in the chapeau to “*enregistré sur support audio ou vidéo*” the word “*enregistré*” is only repeated in sub paragraph (b), thus suggesting that the latter sub paragraph refers to something wider than only audio- and video-recordings. Finally, the prosecution submitted that while the material contained in the statements was not, in its view, “critical”, it was nonetheless relevant to the case and that the prosecution would lead any evidence *viva voce* from the statements which, in the estimation of the Chamber, is critical.¹⁴
11. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings.¹⁵ Following the resolution of the issues that had necessitated the imposition of the stay, the Chamber lifted the stay at the status conference on 18 November 2008.¹⁶ At this status conference, the Chamber provisionally set the date for

¹³ *Ibid.*, page 20, line 7 – page 23 line 1.

¹⁴ *Ibid.*, page 23, line 5 – page 24 line 18.

¹⁵ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

¹⁶ Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, lines 22-25, page 4, line 1.

the commencement of the trial to 26 January 2009.¹⁷

Relevant Provisions

12. The following provisions of the Statute and Rules are relevant to a consideration of the application.

13. Article 68(2), entitled “protection of the victims and witnesses and their participation in the proceeding” provides:

As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

14. Article 69(2) of the Statute provides that:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence. The Court may also permit the [...] introduction of documents or written transcripts [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused

15. Rule 68 of the Rules provides that

[...] the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony provided that:

¹⁷ *Ibid*, page 7, lines 23-25.

- a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- b) If the witness who gave previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

16. Rule 111 of the Rules provides:

1. A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefore.

2. When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record.

Analysis and Conclusions

17. Whilst the prosecution and the defence filed their submissions confidentially due to the sensitive nature of the information contained therein, the Trial Chamber's decision does not refer to the confidential information and it is therefore issued publicly. Article 68(2) of the Statute facilitates a departure from the usual course of "public hearings" in order to protect victims and witnesses or an accused, in that the Court may conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic **or other special means**. In the judgment of the Chamber this provision enables the Court, when it is necessary to provide protection to victims, witnesses or

the accused, to use any appropriate "*special means*", which will include reading part, or all, of a witness's statement in open Court or in private, so long as these steps do not detract from the fairness of the proceedings.

18. Turning to Article 69(2) and Rule 68, in the judgment of the Chamber the latter provision is directed at the "testimony of a witness" in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts or **other documented evidence** of "such" testimony (namely, the testimony of a witness). The Chamber highlights, particularly, that the "*other documented evidence*" (of the testimony of the witness) is referred to separately, and in addition to, the audio- or video- records in the opening paragraph of Rule 68; moreover, in sub-rules a) and b) "*previously recorded testimony*" is referred to without limiting its scope to video or audio evidence. Against that background, the Chamber is persuaded that the ambit of Rule 68 permits the introduction of written statements, in addition to video- or audio-taped records or transcripts, of a witness's testimony because these are all clear examples of the "documented evidence" of a witness's testimony.

19. Therefore, applying the straightforward language of Rule 68, its correct interpretation is that the Chamber has the discretion to order that written statements (viz. "*the transcript or other documented evidence of [...] the testimony*") are to replace "live" evidence if, but only if, one of the two following conditions are met: either that the defence and the prosecution have had the opportunity to question the witness if he or she is not present before the Court, or, for a witness before the Court, the witness – who gives consent to the introduction of the evidence – is available for examination by the prosecution and the defence.

20. In consequence, in the right circumstances, Article 68(2) of the Statute and

Rule 68(b) of the Rules create separate routes whereby prior recorded testimony can replace, in full or in part, live testimony. However, these provisions, although potentially overlapping, are clearly different in scope, since the focus of Article 68(2) is specifically directed at protecting victims and witnesses whilst Rule 68 is a general provision for the introduction of prior recorded testimony, subject to specific safeguards. This application is not founded on a suggested need to protect prosecution witnesses and therefore Article 68(2) does not require further examination.

21. Rule 68(b) is the provision relied on by the prosecution, and the Chamber is of the view that fact-specific decisions will need to be taken in resolving applications under this Rule. Depending on the circumstances, there can be material advantages in testimony being given in its entirety *viva voce* before the Court, particularly when evidence of significance is challenged or requires comprehensive investigation. The live questioning of a witness in open court on all aspects of his or her evidence can have a material impact on the Chamber's overall assessment of the evidence, since oral testimony is, for obvious reasons, of a different nature to a written statement: most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness.

22. However, there can be equal material advantages in having evidence read, in whole or in part. In the context of this application, relevant examples are that it avoids witnesses unnecessarily repeating their evidence once it has been recorded. Furthermore, there is a real potential for war crimes trials to last an excessive period of time and the court is entitled to bear this issue in mind when weighing the possibility of receiving non-oral evidence. On occasion there will be little, if any advantage, to evidence being given *in toto* orally, for instance when there is likely to be limited challenge or where the testimony is

not of central significance.

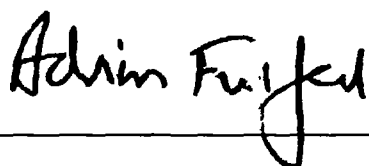
23. However, the right of the accused to a fair trial must not be undermined by decisions of this kind, and the Chamber must ensure that the accused's rights are appropriately protected. For instance, if, as here, Article 69 is relied on, any measures which the Chamber implements "shall not be prejudicial to or inconsistent with the rights of the accused" (Article 69(2) of the Statute).

24. In the present application, although the defence did not participate in the process by which the written records were produced, under Rule 68(b) the witnesses will be present in Court for any examination by the defence and the Chamber which is necessary; there is nothing to indicate that the background evidence they provide is materially in dispute; and their testimony is not central to the core issues in the case – instead it adds relevant background detail or it is supportive of other evidence. In the result, there are likely to be some real "savings" in court time by introducing these written statements in place of the initial examination of the witnesses by the prosecution. The proposal made by the prosecution, therefore, is the most efficient means of receiving this evidence, without prejudicing the rights of the defence. In this regard, the Chamber indicates that the defence will not be permitted to address in their questions "all the facts and events covered by the statements, regardless of their relevance to the trial" (see paragraph 9 above). Questioning is to be focussed on the issues in the case and the Chamber will not permit topics to be addressed which are irrelevant.

25. Therefore, on these facts, pursuant to Article 69(2) and Rule 68(b) the evidence of the two witnesses is to be presented by way of written statements, supplemented by any necessary questioning.

26. This application is granted.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 15 January 2009

At The Hague, The Netherlands