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**International
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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

Prosecution's Response to the "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"

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Introduction

1. On 20 March 2008, Trial Chamber I (“Trial Chamber”) issued the “Decision on the disclosure by the defence (“Decision”).¹
2. On 31 March 2008, the Defence of Thomas LUBANGA DYILO (“Defence”) filed the “*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*” (“Application”),² in which the Defence seeks leave to appeal the Decision on the following four issues:
 - *L’obligation faite à la Défense de révéler à la Chambre, au Procureur et aux participants, préalablement à l’ouverture du procès, ses moyens de défense et tout point substantiel de fait ou de droit qu’elle entend soulever (“First Issue”);³*
 - *L’obligation faite à la Défense de transmettre à la Chambre, au Procureur et aux participants, trois semaines avant l’ouverture du procès, des précisions sur les demandes qu’elle entend soumettre concernant l’admissibilité ou la pertinence des éléments de preuve, ou tout autre point de droit substantiel qui doit être tranché avant l’ouverture du procès (“Second Issue”);⁴*
 - *L’obligation faite à la Défense de communiquer à la Chambre, au Procureur et aux Participants, trois jours avant sa présentation, tout élément de preuve sur lequel elle entend se fonder (“Third Issue”);⁵*
 - *Le pouvoir reconnu à la Chambre d’ordonner à la Défense de divulguer, avant l’audition de certains témoins, ses questions ou le type de questions qu’elle lui posera (“Fourth Issue”);⁶*
3. Pursuant to Regulation 65(3), the Prosecution hereby responds to the Application.

¹ *Prosecutor v Lubanga*, ICC-01/04-01/06-1235, 20 March 2008.

² *Prosecutor v Lubanga*, ICC-01/04-01/06-1251, 31 March 2008.

³ Application paras. 4(I) and 5-18.

⁴ Application paras. 4(II) and 19-31.

⁵ Application paras. 4(III) and 32-44.

⁶ Application paras. 4(IV) and 45-51.

Submissions

4. The Prosecution submits that, although many of the arguments included in the Application pertain to the merits of the respective issues,⁷ the Defence has met the requirements for leave to be granted under Article 82(1)(d) in relation to some of the issues raised.⁸
5. In relation to the First and the Second Issue, the Prosecution does not oppose the Application. However, the Prosecution opposes the Application in relation to the Third Issue as, in the view of the Prosecution, it does not arise from the Decision. If the Trial Chamber determines that the Third Issue does arise from the Decision, then the Prosecution does not oppose the Application in relation to the Third Issue. Finally, the Prosecution opposes the Application in relation to the Fourth Issue.
6. The Prosecution takes this position on the basis of its independent examination of the issues raised in the Application in light of the requirements of Article 82(1)(d). These requirements do not involve consideration of, or in any way reflect the Prosecution's position on, the merits of the Decision.
 - a) *First Issue: L'obligation faite à la Défense de révéler à la Chambre, au Procureur et aux participants, préalablement à l'ouverture du procès, ses moyens de défense et tout point substantiel de fait ou de droit qu'elle entend soulever*
7. The First Issue arises from the Decision, as it requires the accused to "furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused

⁷ In relation to the First Issue, see paras. 6-18; in relation to the Second Issue, see paras. 19-24; in relation to the Third Issue, see paras. 33-35; in relation to the Fourth Issue, see paras. 45-47.

⁸ Under Article 82(1)(d), leave to appeal may be granted if the decision "involves an issue which affects the fair and expeditious conduct of the proceedings ... and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." The Appeals Chamber has stated that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination." (*Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168 OA3, 13 July 2006, para. 9 - emphasis added).

intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules)".⁹

8. The Prosecution submits that the First Issue satisfies the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.¹⁰ The interpretation given by the Trial Chamber to Rules 79 and 80 and Regulation 54 arguably affects the rights of the accused and thereby the fairness of the proceedings.¹¹ Moreover, a decision regulating the timing of disclosure by the Defence must necessarily affect the expeditiousness of the proceedings. Finally, an immediate resolution of the First Issue by the Appeals Chamber may materially advance the proceedings, either by preventing that the integrity of the proceedings be tainted by a defective decision that was not timely cured, or conversely by averting doubts as to the integrity of the proceedings if the decision is confirmed.¹²
9. The Prosecution therefore does not oppose that leave to appeal be granted for the First Issue.

b) Second Issue: L'obligation faite à la Défense de transmettre à la Chambre, au Procureur et aux participants, trois semaines avant l'ouverture du procès, des précisions sur les demandes qu'elle entend soumettre concernant l'admissibilité ou la pertinence des

⁹ Decision, para. 41(b).

¹⁰ Application paras. 16-18. The Prosecution notes that the Application does not appear to include any argument pertaining to the expeditious conduct of the proceedings. The argument referred to in para. 17 of the Application relates to the second component of Article 82(1)(d), namely whether an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings (see *Situation in the DRC*, Judgement on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, paras. 14-19. See in particular para. 16). The Prosecution nonetheless does not oppose leave to be granted for the First Issue as it goes to the core of the fairness of the proceedings. The Prosecution has previously taken the position that once a party has demonstrated that an issue significantly affects either the fair conduct of the proceedings or the expeditious conduct of the proceedings, the proceedings may no longer be "fair and expeditious", and the Chamber should proceed to consider whether immediate resolution by the Appeal Chamber would materially advance the proceedings (see e.g. *Situation in the DRC*, ICC-01/04-141, 25 April 2006, paras. 49-52; *Prosecutor v Katanga*, ICC-01/04-01/07-107, 14 December 2007, para. 21). Secondly, a decision regulating the timing of disclosure by the defence must necessarily have consequences for the expeditiousness of the proceedings. Finally, the Prosecution notes that the Appeals Chamber has ruled that a Trial Chamber may certify leave to appeal on its own accord (see *Situation in the DRC*, Judgement on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 20).

¹¹ Application, paras. 15-16.

¹² Application, paras. 17-18.

éléments de preuve, ou tout autre point de droit substantiel qui doit être tranché avant l'ouverture du procès

10. The Second Issue also arises from the Decision, as it requires the accused to “provide the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications he intends to advance as regards admissibility or relevance, or other substantive points of law that need to be resolved before the commencement of the trial”.¹³

11. The Prosecution submits that the Second Issue satisfies the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.¹⁴ The Decision could impact on the level of information available to the Defence for the purposes of advancing submissions pertaining to admissibility or relevance, thus arguably impacting on the rights of the accused and the fairness of the proceedings.¹⁵ The Decision could also lead to potential delays, thereby affecting the expeditiousness of the proceedings.¹⁶ Finally, immediate resolution of the Second Issue by the Appeals Chamber, either confirming or overturning the Decision, will foster certainty of trial proceedings, and in this sense “materially advance” such proceedings.

12. The Prosecution therefore does not oppose that leave to appeal be granted for the Second Issue.

c) Third Issue: L'obligation faite à la Défense de communiquer à la Chambre, au Procureur et aux Participants, trois jours avant sa présentation, tout élément de preuve sur lequel elle entend se fonder

13. In the view of the Prosecution, the Defence Application does not characterise correctly the ruling of the Trial Chamber that the accused shall “provide the Chamber, the prosecution and the participants with any evidence intended for

¹³ Decision, paras. 36 and 41(c).

¹⁴ Application paras. 25-31.

¹⁵ Application, para. 25.

¹⁶ Application, paras. 26-30.

use by the defence, other than the oral testimony of a witness, three days in advance of its presentation".¹⁷ Contrary to the contention of the Defence,¹⁸ the Prosecution submits that the Decision does not require the Defence to disclose three days in advance the evidence it intends to use for the purposes of examining, pursuant to Rule 140(2)(b), witnesses called by the Prosecution. Rather, when read in the context of the Decision as a whole, the above ruling only requires the Defence to disclose three days in advance the evidence that it intends to use during the presentation of its own evidence.¹⁹

14. The Prosecution submits that the Third Issue does not constitute "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination",²⁰ and therefore does not arise from the Decision. Rather, the relevant ruling simply reiterates an applicable provision which is that included in Regulation 52(2) of the Regulations of the Registry and extends its application to the Chamber and the other participants.²¹

15. However if, on the other hand, the Decision effectively requires the Defence to disclose three days in advance also any evidence that it intends to use for the purposes of examining, pursuant to Rule 140(2)(b) witnesses called by the Prosecution, then the Prosecution submits that the Third issue does arise from the Decision and that it satisfies the requirements of Article 82(1)(d).²²

¹⁷ Decision, para. and 41(e).

¹⁸ Application, paras. 38 and 42-44.

¹⁹ The Prosecution bases its interpretation on the order in which the Trial Chamber's rulings are set out in paragraph 41 of the Decision and on a combined reading of the rulings included in paragraph 41. Each of these rulings refer to disclosure obligations during consecutive stages in the trial proceedings. While the rulings in paragraphs 41(b) and (c) refer to the period of "three weeks in advance of the trial", the ruling in paragraph 41(d) refers to the period "after the presentation of the evidence of the prosecution". On the Prosecution's interpretation, it follows that the ruling in paragraph 41(e) refers to the period during the presentation of the evidence of the Defence.

In deciding on the present Application, the Trial Chamber has the opportunity to determine the interpretation to be given to the above ruling and to clarify any existing ambiguities.

²⁰ *Situation in the DRC*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9 (emphasis added).

²¹ The Prosecution further notes that the Defence itself recognizes that a disclosure obligation confined to the presentation of its own evidence would not prejudice the rights of the Defence. See Application, para. 37.

²² See Application paras. 36-44.

Consequently, in that case, the Prosecution would not oppose that leave to appeal be granted for the Third Issue.²³

d) Fourth Issue: Le pouvoir reconnu à la Chambre d'ordonner à la Défense de divulguer, avant l'audition de certains témoins, ses questions ou le type de questions qu'elle lui posera

16. The Prosecution submits that the Fourth Issue does not arise from the Decision. The Decision does not order the Defence to disclose in advance any questions or the lines of questioning.²⁴ It merely foreshadows that the Trial Chamber may, "on an exceptional basis", issue such orders in the future so as to fulfil its obligations under Article 68(1).²⁵

17. Further, the Decision does not set out the exceptional circumstances in which the Trial Chamber may issue such future orders or the modalities, including the timing of disclosure, which would apply if it ordered the advance disclosure of Defence questions or lines of questioning. Hence, the Defence's arguments in relation to the requirements of Article 82(1)(d) do not set out how these requirements are met.²⁶

18. The Prosecution therefore opposes that leave to appeal be granted for the Fourth Issue.

e) The Defence's request to stay the proceedings

²³ The Prosecution will deal with the merits of the decision on this point if and when leave to appeal is granted by the Trial Chamber. It does advance, however, that it considers that some form of prior disclosure to the opposing party of the material a party intends to use during cross-examination of a witness is necessary for the purposes of ensuring an efficient and fair conduct of the proceedings.

²⁴ Application, paras. 45-51. In particular, contrary to the contention of the Defence, the Decision does not create an additional disclosure obligation on the Defence (Application, para. 50).

²⁵ Decision, para. 37.

²⁶ Application, paras. 48-51. In particular, the Prosecution submits that as the Trial Chamber recognises that compelling advance disclosure of lines of questioning would only be on an exceptional basis, even if the issue could be characterised as arising out of the Decision, it does not significantly affect the fair and expeditious conduct of the proceedings. Further, the Prosecution notes that denying leave to appeal this issue at this stage does not preclude the Defence from seeking leave to appeal in due course should the Trial Chamber subsequently require the Defence to disclose its questions or lines of questioning in circumstances which do significantly affect the fair and expeditious conduct of the proceedings.

19. The Defence requests the Trial Chamber to suspend the proceedings for the duration of the appeal.²⁷ The Prosecution firstly submits that suspensive effect can only be granted by the Appeals Chamber.²⁸ Secondly, the Prosecution submits that while there may be situations in which it may be appropriate to stay the implementation of a decision pending an application for leave to appeal, in the present case there is no cause to stay the proceedings, nor is there such urgency that a stay of the implementation of the Decision must be granted by this Chamber. Rather, the matter can be brought before the Appeals Chamber through a request for suspensive effect if, and to the extent that, leave to appeal is granted.

²⁷ Application, paras. 52-53.

²⁸ See Article 82(3) and Rule 156(5).

Conclusion

20. For the reasons referred to above, the Prosecution:

- a. Does not oppose leave being granted with respect to the First Issue and the Second Issue, as well as with respect to the Third Issue to the extent that the Third Issues arises from the Decision; and
- b. Opposes the Application for leave to appeal with respect to the Fourth Issue, as well as the Third Issue if the Trial Chamber determines that it does not arise from the Decision, and consequently requests the Chamber to deny the Application in respect of those issues.



Luis Moreno-Ocampo,
Prosecutor

Dated this 4th day of April, 2008

At The Hague, The Netherlands