

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

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

Date: 6 March 2008

**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**

**Annex I - Public**

**Decision on the defence request for leave to appeal the Oral Decision on  
redactions and disclosure of 18 January 2008**

**Office of the Prosecutor**

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a/0001/06 to a/0003/06 and a/0105/06  
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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the defence Requests for Leave to Appeal the Oral Decision of the Trial Chamber issued on 18 January 2008:

## I. BACKGROUND

1. On 18 January 2008 the Trial Chamber issued an Oral Decision on certain issues related to redactions to material held by the Office of the Prosecutor (“prosecution”) and to disclosure of evidence (“impugned decision”).<sup>1</sup>
2. On 28 January 2008 the defence filed a request seeking leave to appeal (“defence request”)<sup>2</sup> the following issues:
  - a) Whether the Trial Chamber erred in imposing an obligation on the defence to disclose its lines of defence in advance.
  - b) Whether the Chamber was wrong to give precedence to the protection of prosecution witnesses over disclosure of their identities to the defence, and whether it erred in concluding this would not impair the fairness of the trial.
  - c) Whether the Chamber interpreted Rule 77 of the Rules of Procedure and Evidence (“Rules”) in an excessively restrictive manner in concluding that the prosecution is not under an obligation to provide the defence with the material in its possession relating to the general use of child soldiers in the Democratic Republic of the Congo.
3. The defence submitted that each of these questions has an impact on the fair and efficient conduct of the proceedings.<sup>3</sup>

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<sup>1</sup> ICC-01/04-01/06-T-71-ENG.

<sup>2</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008, ICC-01/04-01/06-1134.

4. On 1 February 2008 the prosecution filed its "Response to 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008'" ("prosecution response").<sup>4</sup> The prosecution submitted that the first two issues for which leave to appeal was sought by the defence did not arise out of the impugned decision and that accordingly leave should not be granted in respect thereof. It submitted that it did not oppose the granting of leave in relation to the third issue.<sup>5</sup>

## II. RELEVANT PROVISIONS

5. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered Article 82(1)(d) of the Statute:

### **Appeal against other decisions**

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

- (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, 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.

## III. SUBMISSIONS AND ANALYSIS

### **A. General remarks**

6. In reaching its conclusions on the defence request, the Trial Chamber has followed the approach set out in its "Decision on the Defence and Prosecution

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<sup>3</sup> *Ibid*, paragraphs 29-39.

<sup>4</sup> ICC-01/04-01/06-1153.

<sup>5</sup> *Ibid.*, paragraph 7.

Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008"<sup>6</sup> which, in turn, applied Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.<sup>7</sup>

7. Accordingly, it has examined the individual applications for leave to appeal against the following criteria:
- a) Whether the matter is an "appealable issue";
  - b) Whether the issue at hand could significantly affect:
    - i) the fair and expeditious conduct of the proceedings, **or**
    - ii) the outcome of the trial,

**and**
  - c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.
8. The requirements a), b) and c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.<sup>8</sup>

#### **B. Whether the requirements of Article 82(1)(d) of the Statute are met**

*First Issue: Whether the Trial Chamber erred in imposing an obligation on the defence to disclose its lines of defence in advance*

9. In its request, the defence submits that the impugned decision undermines the accused's fair-trial rights if he decides not to divulge in advance of the trial his defence or the issues that will arise, in full or in part, and that the Chamber has

<sup>6</sup> 26 February 2008, ICC-01/04-01/06-1191.

<sup>7</sup> ICC-01/04-168, paragraphs 9-14.

<sup>8</sup> ICC-01/04-01/06-1191, paragraph 10, referring to Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, a/0111/06 to a/0127/06, 20 December 2007, ICC-02/04-112, paragraph 17.

imposed on the defence a disclosure burden that rests only on the prosecution. The defence further submits that the prosecution alone can identify the material that tends to exculpate, or assist, the accused.<sup>9</sup>

10. The defence bases its argument principally on the following passage from the Chamber's decision:

[...] if the defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused.<sup>10</sup>

11. The prosecution submits in its response that the defence has misunderstood the decision of the Chamber, since it has not imposed a burden of disclosure on the defence or shifted that burden away from the prosecution. The prosecution argues that the Chamber's decision merely acknowledges the self-evident reality that the prosecution can only fulfil its obligation of disclosure of exculpatory materials on the basis of its best understanding of the likely defence case and the issues in the trial, and that a (late) revelation of the defence case and the issues in the trial, which the prosecution was not able reasonably to anticipate, may have an impact on the disclosure process.<sup>11</sup>
12. In the view of the Chamber, the defence appears to have misinterpreted the effect of the oral decision. The Chamber has not imposed a duty of disclosure on the accused in the sense suggested. Instead, the Chamber addressed the practical consequences **for prosecution disclosure** if the accused reveals, at an unnecessarily and unjustifiably late stage in proceedings, that particular material is potentially exculpatory, and especially if arrangements (which may take many weeks) for the protection of individuals have to be put in place in order to effect service. The issue, therefore, that was addressed in the relevant

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<sup>9</sup> ICC-01/04-01/06-1134, paragraphs 8-14.

<sup>10</sup> ICC-01/04-01/06-T-71-ENG, page 9, lines 18-21, referred to in ICC-01/04-01/06-1134, paragraph 7(a).

<sup>11</sup> ICC-01/04-01/06-1153, paragraphs 9-13.

part of the impugned decision is whether the prosecution has an inflexible obligation to disclose material, irrespective of whether or not the defence has acted unreasonably in revealing relevant aspects of the defence or the issues to be raised late in the case.

13. Accordingly, the request for leave to appeal on the basis requested is refused.
14. The Chamber, however, is of the view that the issue of prosecution disclosure in this context (viz. whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure) could significantly affect the fair and expeditious conduct of the proceedings, and the outcome of the trial, and furthermore an immediate resolution of this issue by the Appeals Chamber could materially advance the proceedings.
15. It follows that leave to appeal the First Issue, which is inextricably linked to the Second Issue, is granted for these reasons.

*Second Issue: Whether the Chamber was wrong in giving preference to the protection of witnesses for the prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial*

16. In its submission the defence contends that any limitation on its access to the identity of potentially exculpatory witnesses, regardless of the fact that such limitation may be necessary for the protection of witnesses due to the late disclosure by the defence of relevant aspects of the accused's case or the issues in the case, constitutes an unjustified erosion of its right to exculpatory evidence under Article 67(2) of the Statute. Furthermore, the defence submits that an order withholding the identities of witnesses would contravene the provisions of Article 68(1) of the Statute which, in relation to the protective measures for

witnesses, provides: "These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".<sup>12</sup>

17. The prosecution submits that the decision of the Chamber does not generally authorise withholding information but merely anticipates, depending on the circumstances, that there may be occasions in which this course may be justified. The prosecution accordingly submits that the issue in respect of which leave for appeal is sought by the defence does not arise out of the impugned decision.<sup>13</sup>

18. In its decision the Chamber stated as follows:

If the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused.<sup>14</sup>

19. Although the impugned decision does not provide for the non-disclosure of the identity of any specific witnesses, and while it remains possible that the issue may not arise at all in the course of the proceedings, this aspect of the decision may nonetheless have a significant impact on the trial because if applied to individual witnesses, it could have far-reaching implications on the extent of disclosure or the right to be tried without undue delay. Therefore, this concerns the fairness of the proceedings and their expeditiousness: a late referral to the Court's protection programme during the course of a trial could significantly delay the proceedings, and if the Chamber orders the non-disclosure of the identity of a witness, this could be said to have an impact on the fairness of the proceedings. Given the potential importance of these issues, an immediate

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<sup>12</sup> ICC-01/04-01/06-1134, paragraphs 15-22.

<sup>13</sup> ICC-01/04-01/06-1153, paragraphs 14-17.

<sup>14</sup> ICC-01/04-01/06-T-71-ENG, page 9, lines 12-18.

resolution of them by the Appeals Chamber could materially advance the proceedings.

20. Leave to appeal the Second Issue is accordingly granted.

*Third Issue: The interpretation of Rule 77 of the Rules of Procedure and Evidence*

21. The defence submits in its request that the Chamber's conclusion that the prosecution is not under an obligation to "serve material that relates the general use of child soldiers" because it does not constitute exculpatory material contravenes Rule 77 of the Rules, which provides for defence inspection of "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 [...] at trial [...] or were obtained from or belonged to the person".<sup>15</sup>
22. The prosecution, whilst not conceding the arguments of the defence, submitted that an issue meriting immediate attention arises in this regard from the Chamber's decision and in the circumstances it did not oppose the grant of leave.<sup>16</sup>
23. Whether or not Rule 77 is a part of the mechanism which controls the prosecution's obligation to disclose potentially exculpatory evidence, there is no doubt that the Chamber's decision has a direct impact on a substantial body of material concerning the general use of child soldiers. The Chamber's decision in this regard could significantly affect the fair and expeditious conduct of the proceedings, because if this broad area of evidence is relevant and merits research and thereafter introduction into the trial, this could affect the length of

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<sup>15</sup> ICC-01/04-01/06-1134, paragraphs 23-28.

<sup>16</sup> ICC-01/04-01/06-1153, paragraphs 18-20.



the trial and its fairness. For those reasons an immediate resolution of this issue by the Appeals Chamber could materially advance the proceedings.

24. Accordingly, the Chamber grants leave to appeal on this issue; however, given the absence of argument, the Chamber does not express a view as to whether Rule 77 bears the significance contended for.

#### IV. CONCLUSIONS

25. The Chamber grants leave to appeal on the Three Issues, on the bases and for the reasons identified heretofore.
26. The Trial Chamber has no jurisdiction to grant or refuse the requests by the parties to stay the proceedings since under Article 82(3) of the Statute and Rule 156(5) of the Rules the Appeals Chamber alone has the power to determine an application.

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

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**Judge Adrian Fulford**

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**Judge Elizabeth Odio Benito**

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**Judge René Blattmann**

Dated this 6 March 2008

At The Hague, The Netherlands