

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 1 February 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 vs. THOMAS LUBANGA DYILO***

Public

**Prosecution's 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"**

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Procedural Background

1. On 13 December 2007, the Trial Chamber issued an oral decision on a number of Prosecution applications for the lifting, retention and imposition of redactions.¹
2. Between 12 December 2007 and 14 January 2008 the Prosecution made a series of further applications to lift, make or maintain redactions, disclose certain material in summary form, and withhold certain information (in most cases on a temporary basis).²
3. On 18 January 2008, the Trial Chamber issued a further oral decision on these prosecution filings.³
4. On 28 January 2008, the Defence sought leave to appeal the Decision.⁴ The Application for Leave to Appeal is based in particular on the findings of the Chamber that:⁵

“The Defence declined an invitation from the Chamber to set out the defences the accused is likely to rely on, together with the anticipated issues in the case. At this stage his stance is that he relies on the right to silence, which is his undoubted entitlement. However, unreasonable decisions by the Defence to make late disclosure may have an effect on determinations by the Chamber as to what constitutes a fair trial.”⁶

“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.

¹ ICC-01/04-01/06-T-65-ENG. The principles from the 13 December 2007 decision which are relevant to the present Decision are summarised by the Trial Chamber in the Decision: ICC-01/04-01/06-T-71-ENG, 18 January 2007, p. 4, line 9 to p. 6, line 1.

² These applications are listed and summarised by the Trial Chamber in the Decision: ICC-01/04-01/06-T-71-ENG, 18 January 2007, p. 1, line 17 to p. 3, line 11.

³ ICC-01/04-01/06-T-71-ENG (“the Decision”).

⁴ ICC-01/04-01/06-1134 (“Defence Application for Leave to Appeal”).

⁵ Defence Application for Leave to Appeal, para. 6.

⁶ Decision, p. 9, lines 4 to 10.

Accordingly, 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.”⁷

“The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC.”⁸

5. Based on these findings, the Defence seeks leave to appeal the following three issues, which it argues arise from the Decision:

- i. The Trial Chamber imposed an obligation of disclosure on the Defence, which properly lies exclusively on the Prosecution;⁹
- ii. The Trial Chamber erroneously privileged the protection of potentially exculpatory witnesses over the interests of the Defence to know their identities;¹⁰ and
- iii. The Trial Chamber interpreted “material to the preparation of the defence” too narrowly in holding that the Prosecution had no obligation to serve material relating to the use of child soldiers by other armed groups.¹¹

The Defence also requested that the Trial Chamber suspend proceedings in the case during the appeal.¹²

6. The Prosecution hereby files its response to the Defence’s Application for Leave to Appeal.

⁷ Decision, p. 9, lines 12 to 21.

⁸ Decision, p. 10, lines 11 to 13.

⁹ Defence Application for Leave to Appeal, paras. 7(a), 8-14.

¹⁰ Defence Application for Leave to Appeal, paras. 7(b), 15-22.

¹¹ Defence Application for Leave to Appeal, paras. 7(c), 23-28.

¹² Defence Application for Leave to Appeal, para. 46.

Submissions

7. The Prosecution submits that the first and second issues identified by the Defence do not arise from the Decision, and that as such leave to appeal cannot be granted. In relation to the third issue, the Prosecution does not oppose leave to appeal being granted. However the Prosecution opposes the Defence's request that the Trial Chamber give suspensive effect to any grant of leave to appeal.
8. The Prosecution recalls that arguments relating to the merits of a decision are not relevant to an application for leave to appeal.¹³ The Prosecution therefore submits that the arguments raised by the Defence in the section of their Application for Leave entitled "Les motifs d'appel"¹⁴ are in principle not relevant at this stage of the proceedings, except to the extent that they either demonstrate that the issue arises from the Decision or are directly linked to the effect of the issue on the fair and expeditious conduct of the proceedings or the outcome of the trial.¹⁵

The First Issue – the Trial Chamber imposed on the Defence an obligation of disclosure which lies exclusively upon the Prosecution

9. The Prosecution submits that this issue does not arise from the Decision. The Defence has misinterpreted and/or mischaracterised the relevant sections of the Decision. As such, leave to appeal cannot be granted.
10. The Trial Chamber did not at any stage place a burden of disclosure on the Defence or shift any burden from the Prosecution. Quite to the contrary, the

¹³ See e.g. *Situation in the DRC*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tEN, 31 March 2006, paras. 29-30; *Situation in Uganda*, 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 and a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, para. 50.

¹⁴ Decision, paras. 8-28.

¹⁵ As the assessment of whether an issue fulfils the criteria for leave to appeal is independent of the merits of the Decision, its position in this response on whether leave to appeal should be granted is similarly independent of, and without prejudice to, its position on the merits of the Decision. If leave to appeal is granted, the Prosecution will advance its arguments on the merits of each issue before the Appeals Chamber.

Decision explicitly recognises that the Defence was entitled not to set out the defences on which it is likely to rely or the anticipated issues.¹⁶

11. The Decision also did not relieve the Prosecution of any of its disclosure obligations or interpret any of those obligations in a restrictive manner. The obligation remains on the Prosecution to disclose any information which it believes to be exculpatory, and to provide inspection of any items which are material to the preparation of the Defence. The Prosecution acknowledges that disclosure and inspection are ongoing obligations, and nothing in the Decision detracts from this.¹⁷
12. Rather, the relevant portion of the Decision merely acknowledges the obvious: the Prosecution can only fulfill its obligations of disclosure and inspection based on its case and on its understanding of the Defence case or likely and reasonable lines of Defence; if an additional dimension of the Defence case is identified only at a late stage, this will necessarily have an impact on disclosure.
13. The Prosecution therefore submits that the issue as characterized by the Defence does not arise from the Decision, and that leave to appeal cannot be granted.

The Second Issue – the Trial Chamber privileged the rights of potentially exculpatory witnesses over the rights of the defence

14. The Prosecution submits that this issue does not arise from the Decision, and that as such leave to appeal cannot be granted.
15. The Decision does not authorise the Prosecution to withhold the identities of witnesses who have made statements containing exculpatory information.

¹⁶ Decision, p. 9, lines 4-7.

¹⁷ Indeed, the Decision does not state that exculpatory information which is only identified as such at a late stage would not be disclosed. Rather, the Prosecution interprets the Decision as merely observing that late identification by the Defence of its proposed lines of defence may impact on the Prosecution's ability to identify material to disclose or provide inspection of, and that this may in turn affect the manner of disclosure, and degree to which this manner (and indeed timing) of disclosure impacts on the fairness of the trial.

16. Rather, the Decision¹⁸ merely points out that where information is identified as exculpatory only at a late stage in proceedings due to a Defence tactical decision not to indicate its proposed lines of defence (which may itself be legitimate), this late notice by the Defence may prevent proper witness protection. Should such a situation arise, and if there was no justification for the late notice, then the Decision notes that this may affect the manner of the disclosure and its implications for the fairness of the trial, including the possibility of disclosing the information while withholding the identity of the witness.

17. The Prosecution submits that given the highly contingent manner in which the Trial Chamber mentioned this possibility, the issue as characterised by the Defence does not arise from the Decision, and that leave to appeal cannot be granted.¹⁹

The Third Issue – The Trial Chamber interpreted “material to the preparation of the defence” in too narrow a manner

18. The Defence argued that the Decision interpreted Rule 77 too restrictively in holding that the Prosecution did not have an obligation to provide to the Defence inspection of material relating to the use of child soldiers by other armed groups in the DRC.

19. The Trial Chamber found that, on the basis of the arguments before it, evidence relating to the use of child soldiers by other armed groups was not relevant to the charges; would not undermine the Prosecution case; would not support any

¹⁸ The Defence does not specifically identify the portion of the Decision on which it bases this issue in its identification of the issue (para. 7(b)) or its discussion of its ground of appeal (paras. 15-22). Based on the portions of the Decision which the Defence stated that it was challenging in particular (para. 6) and the nature of the arguments raised, the Prosecution understands that this issue relates primarily to p. 9, lines 12-18 of the Decision, which provides that “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.”

¹⁹ The Prosecution submits that this would not preclude the Defence from seeking leave to appeal if in due course the Chamber authorises non-disclosure of the identity of a witness who had provided exculpatory information, without prejudice to the Prosecution’s position on any such future application for leave to appeal.

defence line of argument; did not relate to any live issue in the case;²⁰ and would not materially assist the defence.²¹

20. The Prosecution therefore considers that this issue does arise from the Decision,²² and does not oppose leave being granted to appeal this issue as it may meet the requirements of Article 82 (1) (d).²³

The Defence's Request for Suspensive Effect

21. Suspensive effect can be granted only by the Appeals Chamber.²⁴ Nonetheless, there will be situations in which it is appropriate to stay the implementation of a decision, or possibly even the conduct of the proceedings, pending an application for leave to appeal.²⁵ However in the present case, the Prosecution submits that even if the Trial Chamber grants the Application for Leave in whole or in part, there is no cause to stay the proceedings as requested by the Defence.²⁶

22. The Defence will not suffer any prejudice by the implementation of the Decision and receiving the disclosure under it, nor will the object of any eventual appeal be compromised. The Prosecution submits that it would be inappropriate to stay all judicial activity in this case based on the possibility that the Appeals Chamber might uphold a ground of appeal, should leave be granted.

²⁰ The Prosecution recalls that it has previously accepted that other groups were also using child soldiers in the relevant area and at the relevant time – see ICC-01/04-01/06-T-69-ENG, 10 January 2008, p. 62, line 24 to p. 63, line 3.

²¹ Decision, p. 8, line 13 to p. 9, line 3. As a result, the Trial Chamber ordered that “The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC” (Decision, p. 10 lines 11 to 13).

²² The Defence also made submissions in its Application for Leave to support the arguable, as opposed to frivolous, nature of the issue in these circumstances – see e.g. Application for Leave, paras. 24, 26 and 28.

²³ The Prosecution does not necessarily agree with all arguments advanced by the Defence in support of its Application, and notes that many are very general in nature. However in respect of this issue, the Prosecution considers that the Defence has advanced sufficient arguments to demonstrate that it is capable of affecting the fair and expeditious conduct of the proceedings.

²⁴ See Article 82(3) and Rule 156(5).

²⁵ Such situations are likely to be characterised by urgency, irreparable prejudice to a party, or the risk that the object of any subsequent appeal may be rendered moot.

²⁶ The Defence appears to have sought suspension of all proceedings in preparation for trial until the outcome of the appeal, referring to “la suspension de l’instance” and “le procès” – Decision, para. 46.

23. If leave is granted, then the Defence may apply for suspensive effect from the Appeals Chamber, and may also make submissions on any prejudice that they have suffered. Should any aspect of an eventual appeal succeed, the Appeals Chamber will be in a position to make consequential orders to address any prejudice which may have been caused by the delayed disclosure of any additional evidence as a result of the appeal.²⁷ The Prosecution submits that, especially as such an order could be tailored to the specific nature of any resulting prejudice, this would be preferable to imposing a blanket stay or suspension of all proceedings on a hypothetical basis.

Conclusion

24. The Prosecution therefore requests that the Trial Chamber reject:

- i. the Defence's Application for Leave to Appeal the first and second issues; and
- ii. the Defence's request for suspensive effect.



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Prosecutor

Dated this 1st day of February, 2008
At The Hague, The Netherlands

²⁷ In this context, the Prosecution notes that there is still approximately two months before the commencement of the trial. The Prosecution further notes that the Trial Chamber recently scheduled a hearing for 12 February 2008, which will include the impacts on preparation for and date of the trial as a result of other delays to disclosure (ICC-01/04-01/06-1141, 30 January 2008).