

**Cour
Pénale
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**International
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Court**

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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

**Prosecution's Response to Defence Application for Leave to Appeal the
Decision on Disclosure Issues, Responsibilities for Protective Measures
and other Procedural Matters**

Source: Office of the Prosecutor

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Introduction

The Defence has sought leave to appeal the Trial Chamber's 24 April 2008 "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" ("Decision"). The Prosecution submits that in large part the Application for Leave to Appeal is premature and that, with the exception of the issue of whether an admission or concession by the Prosecution of the relevant potentially exculpatory facts contained in material can replace the need to disclose that material under Article 67(2) of the Statute, the majority of the purported issues identified in the Application do not arise from the Decision for the purposes of Article 82(1)(d).

Procedural background

1. On 24 April, the Trial Chamber issued the "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" ("Decision").¹ On 28 April 2008, Judge Blattmann issued his separate and dissenting opinion to the Decision.²
2. The Decision was originally issued Under Seal, *ex parte* only available to Prosecution and Registry. A redacted version of the Decision was notified to the Defence on 8 May 2008.³
3. On 14 May 2008, the Defence sought leave to appeal the Decision.⁴ The Prosecution hereby files its response to the Application for Leave to Appeal, pursuant to Regulation 65(3) of the Regulations of the Court..

Whether the issues for which leave is sought arise from the Decision

4. The Application for Leave to Appeal sets out two issues.⁵ The Prosecution submits that many aspects of the issues presented in the Application for Leave to

¹ ICC-01/04-01/06-1295-US-Exp. A detailed summary of the relevant procedural history is provided in the Decision (paras. 3-25).

² ICC-01/04-01/06-1295-US-Exp-Anx1, ("Judge Blattmann's Dissenting Opinion").

³ ICC-01/04-01/06-1311 and annexes.

⁴ ICC-01/04-01/06-1326 ("Application for Leave to Appeal").

⁵ Application for Leave to Appeal, para. 2.

Appeal do not arise out of the Decision, or are not ripe for appellate review at this stage as they remain the subject of an ongoing process before the Trial Chamber.

5. The First Issue alleges that the Decision contravenes the principle of full or complete disclosure of exculpatory evidence under Article 67(2).⁶ This Issue is presented in unclear and general terms. The Application for Leave to Appeal does not identify which part of the Decision this issue allegedly arises out of, nor does it define the term "*divulgarion intégrale*". The "*Moyens d'appel*"⁷ also fail to substantiate how this issue arises from the Decision.⁸
6. The Second Issue alleges that the alternative measures to the total disclosure of exculpatory evidence by the Prosecution proposed by the Trial Chamber do not fully respect the right enshrined in Article 67(2).⁹ The Application for Leave to Appeal identifies four purported alternative measures which it asserts arise from the Decision, and claims that such measures fail to respect the rights of the accused:
 - (a) The admission by the Prosecutor of facts which tend to exonerate the accused or affect the credibility of evidence against him cannot substitute for valid full disclosure of exculpatory evidence.¹⁰
 - (b) The redaction of disclosed exculpatory evidence does not permit its use by the Defence as part of its investigations or at trial.¹¹

⁶ Application for Leave to Appeal, para. 2(i) – "La Décision contrevient au principe de la divulgation intégrale des éléments de preuve à décharge énoncés à l'Article 67-2."

⁷ Application for Leave to Appeal, paras. 3-5. The Prosecution notes that this section of the Application for Leave to Appeal appears to raise alleged errors in the Decision, or the procedure which lead to the Decision. The Prosecution recalls that arguments relating to the merits of the decision are irrelevant to the question of whether the criteria for leave to appeal have been met – see e.g. ICC-01/04-01/06-1191, 26 February 2008, para. 19; ICC-01/04-01/06-1313, 8 May 2008, para. 10; *Prosecutor v Kony et al*, ICC-02/04-01/05-20, 19 August 2005, paras. 22-23.

⁸ In particular, the Prosecution submits that it is unclear whether the First Issue addresses a general principle that no redactions or other restrictions can ever be placed on disclosure provided under Article 67(2); or whether it is linked to Judge Blattmann's discussion of the manner in which at one point the Decision omits a reference to the third dimension of Article 67(2), namely information which mitigates the guilt of the accused (Application for Leave to Appeal, para. 4; citing Judge Blattmann's Dissenting Opinion, para. 11).

⁹ Application for Leave to Appeal, para. 2(ii) – "Les mesures alternatives proposées par la Chambre à la divulgation totale de la preuve à décharge par le Procureur ne permettent pas le respect intégral des droits de l'accusé, tels qu'énoncés à l'Article 67-2".

¹⁰ Application for Leave to Appeal, para. 2(ii)(a) – "L'admission, par le Procureur, de faits tendant à disculper l'accusé ou tendant à affecter la crédibilité des éléments de preuve à charge ne peut se substituer valablement à la divulgation intégrale des éléments de preuve à décharge."

(c) The fact that exculpatory evidence is contained in statements already disclosed to the defence cannot justify non-disclosure of other statements containing the same type of information.¹²

(d) Full disclosure of exculpatory evidence cannot be subject to the consent of witnesses to cooperate with the Court.¹³

7. The Prosecution submits that only the first of these alternative measures arises from the Decision and could be characterised as an issue for which leave to appeal could be granted. The Decision authorises the Prosecution to concede the potentially exculpatory elements of material where possible, sets out the principles applicable to such admissions, orders that such admissions be served on the Defence, and explains the basis on which such admissions imply that “the necessity to provide disclosure [under Article 67(2)] would have fallen away”.¹⁴ While the Defence has an ongoing opportunity to raise issues regarding the substance of the admissions,¹⁵ the Decision does appear to raise the issue of whether an admission or concession by the Prosecution of the relevant potentially exculpatory facts contained in material in the Prosecution’s possession or control can replace the need to disclose that material under Article 67(2).
8. The same does not hold true in relation to the other issues: the assertion that the redaction of exculpatory evidence denies the Defence the ability to use such evidence at trial (para. 2(ii)(b)) is speculative. The Decision does not authorise any redactions to potentially exculpatory evidence, but rather states the rule that such material shall be disclosed “in a suitably full and non-redacted form, and

¹¹ Application for Leave to Appeal, para. 2(ii)(b) – “L’expurgation des éléments de preuve à décharge divulgués ne permet pas leur utilisation par la Défense dans le cadre de ses enquêtes ou lors du procès.”

¹² Application for Leave to Appeal, para. 2(ii)(c) – “Le fait que des éléments à décharge figurent dans des dépositions déjà divulguées à la Défense ne peut justifier la non divulgation d’autres dépositions contenant des informations de même nature.”

¹³ Application for Leave to Appeal, para. 2(ii)(d) – “La divulgation complète des éléments de preuve à décharge ne peut être subordonnée au consentement des témoins à collaborer avec la Cour.”

¹⁴ Decision, paras. 90-91.

¹⁵ Decision, para. 90 (“Where this occurs and the relevant facts are admitted, unless substantive issues are raised hereafter by the defence, it is unnecessary to serve the underlying material or to reveal the identity of the witness or the information-provider”, emphasis added).

including by revealing the identity of the witness.”¹⁶ While the Decision contemplates the possibility of other redactions in certain limited circumstances, no such redactions have been authorised, and the question of how to proceed (including whether to authorise redactions) is to be considered at a later stage, once further information has been gathered and after a further opportunity to make submissions has been afforded.¹⁷

9. The Prosecution submits that the claim that exculpatory evidence contained in statements already disclosed to the defence cannot justify non-disclosure of other statements containing the same type of information (para. 2(ii)(c)) also does not arise from the Decision. As previously submitted, the general position is that material containing potentially exculpatory information will always be disclosed, and the Decision specifically rules that “[t]he fact that [...] there are other sources providing similar evidence [is] irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it, once protective measures, if relevant, have been implemented.”¹⁸ The fact that other witnesses may have dealt with the same potentially exculpatory material is merely mentioned as one factor to be considered in deciding whether to authorise disclosure of a redacted version of a statement (not non-disclosure).¹⁹ This will in any event be the subject of a future determination.²⁰

10. The Decision also does not make disclosure under Article 67(2) subject to the consent of a witness to cooperate with the Court (para. 2(ii)(d)). This is just one factor which the Trial Chamber advanced that it may take into consideration in determining how to proceed regarding a limited category of witnesses.²¹ That

¹⁶ Decision, para. 95. This recognises that “for the defence to evaluate and, if they wish, to call evidence of this kind, they need to know the identity of the individual so they can investigate or interview him or her, and assess the likely value of the evidence, having been informed of all relevant matters relating to the witness.”

¹⁷ Decision, para. 101 (while the Decision authorises the Prosecution to make certain limited redactions in para. 102, these are understood to be provisional, pending the Chamber’s further consideration of how to proceed as set out in para. 101).

¹⁸ Decision, para. 94.

¹⁹ Decision, para. 99.

²⁰ Decision, para. 101.

²¹ Decision, paras. 99-100.

determination will be made after consideration of further information and an opportunity to present further submissions at a status conference.²²

**Whether the issue raised in the Application for Leave to Appeal
satisfies the test under Article 82 (1) (d)**

11. As a result of the analysis above, the Prosecution submits that the only issue identified in the Application for Leave to Appeal which arises from the Decision is whether an admission or concession by the Prosecution of the relevant potentially exculpatory facts contained in material falling within the purview of Article 67 (2) can replace the need to disclose that material.
12. Contrary to the Defence's first argument,²³ the Prosecution submits that the issue does not affect the outcome of the trial, for the purposes of Article 82(1)(d). Not every decision relating to disclosure of evidence, or potentially exculpatory material, will necessarily affect the outcome of the trial.
13. The Prosecution also submits that the Application for Leave to Appeal does not demonstrate how this issue affects the expeditious conduct of the proceedings.²⁴ The only arguments presented appear to relate to the possible late discovery of potentially exculpatory *information*, and the fact that this allegedly prevents the Defence from formulating its lines of defence and properly questioning Prosecution witnesses based on such lines, thereby increasing the risk that the Trial Chamber will be required to re-call witnesses.²⁵ However, the Prosecution

²² Decision, para. 101.

²³ Application for Leave to Appeal, para. 6.

²⁴ The Prosecution has consistently maintained that once a party has demonstrated that either fairness or expeditiousness are affected, there is no need to also demonstrate the other, but that the Chamber should proceed to consider whether immediate resolution of the issue would materially advance the proceedings (see e.g. *Situation in the DRC*, ICC-01/04-141 OA3, 25 April 2006, paras. 49-52; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, 24 May 2006, footnote 30; *Prosecutor v Katanga*, ICC-01/04-01/07-107, 14 December 2007, para. 21 and arguments and authorities cited therein).

However the Prosecution notes that this Chamber has previously ruled that a party must demonstrate an impact on both the fair and the expeditious conduct of the proceedings (see e.g. ICC-01/04-01/06-1191, 26 February 2008, para. 48-49). Even in light of this ruling, the Prosecution considers that there may be situations in which the impact of an issue on the fair conduct of the proceedings is so egregious that it inherently also impacts on their expeditious conduct (or *visa versa*). However the Prosecution does not consider that the impact of the fair conduct on the proceedings in this instance rises to that level.

²⁵ Application for Leave to Appeal, para. 8.

recalls that the Defence has not been denied any potentially exculpatory information, as excerpts containing the potentially exculpatory material have previously been disclosed,²⁶ and all potentially exculpatory facts at issue were revealed to the Defence in the admissions:²⁷ the Defence merely has not received disclosure of the original material and of the identity of its source.

14. The Prosecution stresses that the Defence has not made any submissions regarding the specific impact of the issue *as it arises out of this Decision* on the fairness of the relevant proceedings, or clearly identified any prejudice suffered in this case; rather, such prejudice seems to simply be presumed.
15. The Defence has received the proposed admissions of fact reflecting the relevant potentially exculpatory material, in addition to the excerpts containing the potentially exculpatory information previously disclosed. Further, the Decision grants the Defence an opportunity to raise substantive concerns it has regarding the admissions in question.²⁸ However to the best of the Prosecution's knowledge, it has not done so.
16. Where a procedural avenue is open to a party to address an issue before the Trial Chamber, the Prosecution submits that a party should generally avail itself of that option prior to seeking leave to appeal. To the extent that such an avenue is adequate to address a given issue,²⁹ its immediate resolution by the Appeals Chamber is not likely to be required.³⁰

²⁶ See ICC-01/04-01/06-1181-Conf-Exp, 20 February 2008 and annex. Several excerpts as disclosed to the Defence contain a limited number of redactions, such as to the name of the witness who provided the information (these redactions are identified in the annex with square brackets and bold type). However these redactions are very confined, do not redact information that is relevant to the substance of the potentially exonerating information and therefore do not restrict the Defence's ability to comprehend or analyse the substance of the excerpt.

²⁷ Decision, para. 90 ("It will be necessary to ensure that the admissions fully reveal to the defence all the potentially exculpatory facts.")

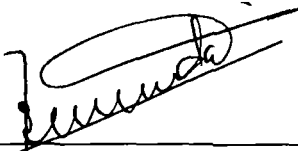
²⁸ See footnote 15, above.

²⁹ Insofar as the issue identified by the Defence in para. 2(ii)(a) relates to whether an admission by the Prosecution of potentially exculpatory facts contained in material falling within Article 67 (2) could, in principle, replace the need to disclose that material, then the ability of a the Defence to raise "substantive issues" regarding the agreed facts in this instance might not fully address such an issue. However the availability of such alternative remedies regarding the application of the principle in this instance does diminish any prejudice to the Defence, and thus affects the impact on the fair and expeditious conduct of the proceedings in this case.

³⁰ To the extent that the Chamber considers that other issues may arise out of the Decision, given that those issues relate to future determinations (for example those that may be required in the event that a witness

Relief sought

17. For the reasons set out above, the Prosecution requests that the Trial Chamber deny leave to appeal the issues set out in para. 2 (i) and (ii)(b), (c) and (d) of the Application for Leave to Appeal.



Fatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 19th day of May, 2008
At The Hague, The Netherlands

indicates a settled intent not to cooperate - Decision, paras. 99-101), the Prosecution submits that their immediate resolution by the Appeals Chamber at this stage would not materially advance the proceedings.