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

Date: **14 May 2008**

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

**Defence Request for Leave to Appeal the *Decision on Disclosure Issues,
Responsibilities for Protective Measures and other Procedural Matters* issued on
8 May 2008
(Rule 155 of the *Rules of Procedure and Evidence*)**

Source: Mr Thomas Lubanga Dyilo's Defence Team

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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BACKGROUND

1. On 24 April 2008, Trial Chamber I issued its *Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters*,¹ including a separate and partially dissenting opinion by Judge Blattman.²
2. The Defence requests leave to appeal the Decision on the following grounds:
 - i. The Decision contravenes the principle of full disclosure of exculpatory evidence under article 67(2).
 - ii. The measures proposed by the Chamber as an alternative to full disclosure of exculpatory evidence by the Prosecutor do not allow full respect for the rights of the accused under article 67(2):
 - a. The admission by the Prosecutor of facts that tend to show the innocence of the accused or that tend to affect the credibility of the prosecution evidence cannot be a valid substitute for full disclosure of the exculpatory evidence.
 - b. Redactions to exculpatory evidence disclosed render the evidence useless for Defence investigations or for the Defence's use during the trial.
 - c. The fact that some exculpatory evidence appears in certain statements already disclosed to the Defence does not justify the non-disclosure of other statements containing similar material.³
 - d. The full disclosure of the exculpatory evidence cannot be made subject to the witnesses' consent to cooperate with the Court.

¹ ICC-01/04-01/06-1311-Anx1.

² ICC-01/04-01/06-1311-Anx3.

³ *Idem*, para. 14.

A) Grounds of appeal

3. Firstly, as noted by Judge Blattman, the issues resolved by the impugned decision, which directly affect the fundamental rights of the accused, could not be discussed in an *ex parte* hearing.⁴ Thus, the Decision resulted from a flawed process and is liable to reversal on this ground.

4. Secondly, the Defence concurs with the dissenting opinion of Judge Blattman according to which Trial Chamber I's interpretation of article 67(2) is restrictive in excess, in that it does not take account of the evidence tending to mitigate the guilt of the accused.⁵

5. Thirdly, the Defence concurs with the dissenting opinion of Judge Blattman according to which the disclosure of exculpatory evidence must be such as to allow the Defence to effectively conduct its investigations and prepare its defence, for which purpose full disclosure of all evidence is necessary.⁶

B) Application of the criteria of article 82(1)(d)

a) The issues involved affect the fairness and expeditiousness of the proceedings or the outcome of the trial

6. On the one hand, to deny the Defence access to the exculpatory evidence in its entirety and without redactions prevents the Defence from using this evidence at trial. This risks significantly affecting the outcome of the trial.

7. On the other hand, the impugned decision directly affects one of the fundamental rights of the accused (article 67(2)) and would prejudice the preparation of his defence, thereby affecting the fairness of the trial.

⁴ *Idem*, paras. 15, 17, 18, 20 and 22.

⁵ ICC-01/04-01/06-1311-Anx1, para. 91 and Anx3, para. 11.

⁶ ICC-01/04-01/06-1311-Anx3, para. 14 et seq.

8. Finally, the issues involved affect the expeditiousness of the proceedings. If the Defence was given full access to all exculpatory evidence forthwith, it would be able to more clearly define its lines of defence and limit its cross-examinations accordingly. Furthermore, given a scenario where the Defence might discover some of this exculpatory evidence at a later point in time, it could then be compelled to ask the Chamber to call back witnesses for further cross-examinations.

b) An immediate resolution by the Appeals Chamber would materially advance the proceedings

9. As all issues relating to the disclosure of evidence must be resolved before the start of trial, it is appropriate for the Appeals Chamber to resolve them immediately.

10. An immediate resolution is needed in order to avoid irreparable prejudice to the Defence, which would impair the integrity of the proceedings. The Defence must be able to use the evidence in question forthwith, in order to prepare for the Prosecutor's case scheduled to open on 23 June 2008.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO GRANT LEAVE to the Defence to appeal the *Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters* on the two issues set out in paragraph 2 hereof.

[signed]
Catherine D. Mabile, Counsel

Dated this 14 May 2008

At The Hague, The Netherlands