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

Date: 8 September 2009

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

**Decision on the defence application for leave to appeal the Trial Chamber's
"Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express
their views and concerns in person and to present evidence during the trial"**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Unrepresented Victims

Legal Representatives of the Applicants

**Unrepresented Applicants for
Participation/Reparation**

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Section**

Ms Fiona McKay

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 request for leave to appeal the "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial" filed by the defence:

I. Background and Submissions

1. On 26 June 2009, the Trial Chamber issued its "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial" ("Decision").¹ A public redacted version of the Decision was issued on 9 July 2009.²
2. The Decision granted the application, on behalf of victims a/0225/06, a/0229/06 and a/0270/07, to give evidence; adjourned the application to present their views and concerns in person; required the three victims, with the assistance of the Victims and Witnesses Unit ("VWU"), to file their final proposals as regards lifting anonymity vis-à-vis the parties and the participants confidentially by 10 August 2009; and required the witness statement or other comprehensive summary of the evidence that is to be given by each victim, together with their application forms (in full or with necessary redactions), to be filed confidentially by 10 August 2009.³

¹ Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2002-Conf.

² Order issuing public redacted version of the "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial", 9 July 2009, ICC-01/04-01/06-2032 and Annex.

³ ICC-01/04-01/06-2002-Conf and ICC-01/04-01/06-2032-Anx, paragraph 45.

3. On 6 July 2009, the defence filed a request⁴ seeking leave to appeal as regards two issues, as follows:

First Issue

Whether the Decision contravenes the defendant's right to be informed promptly and in detail of the nature, cause and content of the charges, as set out in Article 67(1)(a) of the Rome Statute ("Statute");⁵ and

Second Issue

Whether the Decision breaches the right of the accused to be provided with the names and the statements of the witnesses called to testify during trial, as set out in Rules 76 and 111 of the Rules of Procedure and Evidence ("Rules").⁶

4. As regards the first issue, in support of its application the defence submits that prior to the commencement of the trial the accused must be fully informed of the charges brought against him, and this information should include such details as the relevant time-frame and locations. The identities of the witnesses who support the charges should be established precisely, to enable the defence properly to investigate the underlying facts, and to question the relevant witnesses. In this context it is suggested that the defence should receive the relevant statements sufficiently in advance to permit adequate preparation.⁷

⁴ Requête de la Défense sollicitant l'autorisation d'interjeter appel de la «Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial», rendue le 26 juin 2009, 6 July 2009, ICC-01/04-01/06-2026-Conf. A public redacted version of the application was filed on 27 August, ICC-01/04-01/06-2092.

⁵ *Ibid.*, paragraph 7.

⁶ *Ibid.*, paragraph 12.

⁷ *Ibid.*, paragraphs 7-10.

5. In particular, the defence argues that the description of the facts attributed to the accused, (i.e. "committed in the Ituri district") is lacking the precision that is necessary for proper notification of the charges.⁸
6. The defence further contends that the "Résumé des éléments de preuve de l'Accusation" cannot replace the Decision on the confirmation of the charges, by way of notification of the charges.⁹
7. Finally, the defence submits generally that the accused will not have adequate time properly to prepare his defence on the evidence that will be given by the participating victims.¹⁰
8. In relation to the second issue, the defence submits that the Chamber, by granting the victims' applications prior to disclosure of their identities to the defence, has thereby: (i) diminished the right of the defence to receive the relevant witness statements sufficiently in advance to facilitate adequate preparation; and (ii) contravened the principle that witnesses should not be anonymous. Moreover, it is submitted that disclosure of summaries, instead of signed witness statements, undermines the ability of the defence to challenge the witnesses against the accused.¹¹
9. On 9 July 2009, the legal representative of victims a/0225/06, a/0229/06 and a/0270/07 filed observations on the defence application for leave to appeal.¹² The Chamber interpolates to note that these were filed on a confidential basis because the Decision was initially issued confidentially; however, since a public redacted version of the Decision has now been issued, the

⁸ *Ibid.*, paragraph 11.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*, paragraphs 12 and 13.

¹² Corrigendum - Réponse du représentant légal de victimes sur la demande de la défense d'être autorisé à interjeter appel sur la « Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial » rendue le 26 juin 2009, 9 July 2009, ICC-01/04-01/06-2036-Conf-Corr.

legal representatives are instructed to file a public redacted version of their observations forthwith. The legal representative submits that the defence request does not meet the criteria of Article 82(1)(d) of the Statute, for the reasons set out hereafter.¹³

10. First, the representative contends that the defence has not raised an "appealable issue". It is submitted that the arguments advanced by the defence, although they challenge the approach of the Trial Chamber, do not constitute matters that can properly form the subject-matter of an interlocutory appeal.¹⁴

11. Second, the representative argues that the defence has not indicated how the "issues" raised will significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and why an immediate resolution by the Appeals Chamber may materially advance proceedings. The representative points out that any possible delay resulting from the evidence of these three new witnesses has already been weighed by the Chamber against its obligation to determine the truth. It further submits that the accused has been afforded sufficient time to prepare for this evidence.¹⁵

12. In the alternative, the legal representative submits that the interpretation of Article 67(1) of the Statute and Rules 76 and 111 of the Rules proposed by the defence is erroneous. It is suggested that those provisions grant the defence various rights without prejudice to the rights of participating victims, as contained in Article 68(3). Further, the legal representative submits that in any event: (i) the accused will be given adequate time to prepare his defence; (ii) the defence has been provided with the victims' applications for participation, and as a result it is aware of the general

¹³ *Ibid.*, paragraph 12.

¹⁴ *Ibid.*, paragraph 13-16.

¹⁵ *Ibid.*, paragraphs 17-21.

circumstances of the applications of victims' a/0225/06, a/0229/06 and a/0270/07; (iii) the new testimony will provide corroborative, rather than fresh evidence, in support of the charges; and (iv) the defence will be provided with the relevant witness statements and, subject to the VWU's observations, the names of the witnesses.¹⁶

II. Relevant provisions

13. In accordance with Article 21(1) of the Statute which sets out the applicable law, the Trial Chamber has considered Article 82(l)(d):

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. Analysis and Conclusions

A. General remarks

14. In reaching its conclusions on the applications for leave to appeal, the Trial Chamber has followed the approach set out in its "Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008",¹⁷ as well as the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008".¹⁸ Both of these decisions applied Article 82(l)(d) of the

¹⁶ *Ibid.*, paragraphs 22-28.

¹⁷ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210.

¹⁸ Decision on the defence and prosecution requests for leave to appeal the Decision on victims participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191.

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 2006.¹⁹

15. Accordingly, the Chamber has examined the individual applications for leave to appeal against the following criteria:

a) Whether the matter is an "appealable issue" arising from the impugned decision;

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.

16. The requirements set out above are cumulative and therefore failure to fulfil one or more is fatal to an application for leave to appeal. The cumulative nature of this test means that if one criterion is not satisfied it is unnecessary for the Chamber to consider whether the other criteria for granting leave are met.

17. The established approach on applications for leave to appeal where the arguments raised by the parties relate to the merits of a substantive issue rather than the test for leave to appeal is that the substantive arguments will not be addressed; instead, focus will be placed by the Chamber solely on the

¹⁹ Judgment on the Prosecutor's application for extraordinary review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-01/06-168, paragraphs 9-15.

submissions directed towards satisfying the criteria of the test. This is the approach applied by this Decision and thus the substantive arguments have not been considered by the Chamber.

B. The application for leave to appeal

First Issue

Whether the Decision contravenes the defendant's right to be informed promptly and in detail of the nature, cause and content of the charges, as set out in Article 67(1)(a) of the Statute.

18. The submission by the defence that the Decision contravenes the defendant's right to be informed promptly and in detail of the nature, cause and content of the charges does not, in the judgment of the Chamber, constitute an "appealable issue". Article 82(1)(d) of the Statute requires that the impugned decision contains an issue which, if resolved immediately, may materially advance the proceedings. The charges were framed by the Pre-Trial Chamber, and the accused was given their particulars in the Decision on the confirmation of charges. However, the Decision under consideration relates solely to the introduction of further evidence in the case, which is irrelevant to the issue of whether the accused has received appropriate notification of the details of the charges. Therefore, the defence request for leave to appeal fails to satisfy a necessary element of the test.

19. Furthermore, in the judgment of the Chamber the contention that a suggested imprecise description of facts has made it impossible for the accused properly to prepare his defence as regards events in one of the relevant geographical areas does not constitute an appealable issue. It will only be at the point when the evidence is called that it will be possible to assess whether or not the defence has been provided with an adequate

opportunity to research this aspect of the case. This issue, at this stage, is wholly speculative. It follows that an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings.

20. The further submission that the "Résumé des éléments de preuve de l'Accusation" cannot replace the Decision on the confirmation of charges, to the extent that it provides notification of the detail of the charges, is misconceived. As set out above, the present issue relates solely to the introduction of further evidence in the case, which is irrelevant to the issue of notification of the details of the charges. Therefore, this further element of the request for leave to appeal fails to satisfy a necessary element of the test.

21. For the reasons set out above, leave to appeal on the first issue is refused.

Second Issue

Whether the Decision breaches the right of the accused to be provided with the names and the statements of the witnesses called to testify during trial, as set out in Rules 76 and 111 of the Rules.

22. On the general defence submission that the accused will not have adequate time properly to prepare for the evidence of the participating victims, as to an extent already indicated above, it will only be at the point when the evidence is called that it will be possible to assess whether or not the defence has been provided with a proper opportunity to meet this evidence. Any suggested unfairness, at this stage, is wholly speculative. It follows that an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings.

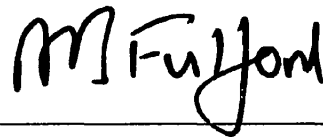
23. The same reasoning applies to the names of the participating victims and whether or not summaries of evidence are an adequate alternative to

witness statements: it is only when the witnesses are called that a proper assessment can be made of whether or not the defence has received sufficient notice of their identities and details of their anticipated evidence.

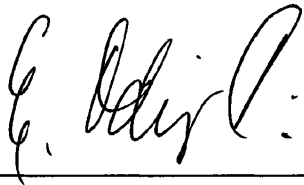
24. Therefore, an immediate resolution of these issues by the Appeals Chamber will not materially advance the proceedings.

25. For the reasons set out above, leave to appeal on the second issue is also refused.

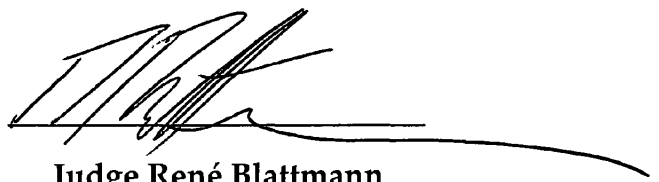
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 8 September 2009

At The Hague, The Netherlands