

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 29 April 2010

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 “Requête de la Défense sollicitant l’autorisation
d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le
dépôt en preuve de trois photographies”**

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

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Section**

Other

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 “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve de trois photographies”.¹

I. Background and Submissions

1. On 3 March 2010, the Office of the Prosecutor (“prosecution”) notified the defence that it intended to use three photographs, which had been disclosed previously to the defence in 2007 and 2008 as incriminating evidence, during the cross examination of defence witness DRC-D01-WWWW-0026 (“W26”).²
2. In oral submissions during the hearing on 4 March 2010, the defence objected to the prosecution questioning W26 about the photographs on the basis that they should have been introduced during the presentation of the prosecution evidence.³ The defence contended that W26 did not give evidence about events connected to the photographs and it suggested that although there is no limitation on the fresh areas of evidence that can be raised during cross-examination, this is limited to testing the credibility of witnesses.⁴
3. The Chamber rejected the defence submission, and on 4 March 2010, during the course of the testimony of W26, it allowed the prosecution to introduce the three photographs.⁵ The Chamber observed that “[s]o long as the witness can give evidence about additional matters and [...] those matters are relevant to

¹ Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve de trois photographies, 10 March 2010, ICC-01/04-01/06-2337-Conf.

² Prosecution Response to “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve de trois photographies”, 15 March 2010, ICC-01/04-01/06-2344-Conf, paragraph 2.

³ Transcript of hearing on 4 March 2010, ICC-01/04-01/06-T-252-CONF-ENG CT, page 25, lines 1-18.

⁴ ICC-01/04-01/06-T-252-CONF-ENG CT, page 27, lines 4-16.

⁵ ICC-01/04-01/06-T-252-CONF-ENG CT, page 30, line 16 - page 32, line 14.

our inquiry in this trial, it is open to counsel to open up new issues”.⁶ The Chamber held that “[t]he test is whether the evidence that the prosecution seeks to adduce from the witness is relevant and admissible and, of course, whether it is fair to allow the prosecution at this stage to elicit evidence based on the photographs”.⁷ The Chamber decided that the prosecution “can rely on the photographs essentially because they may add a fresh dimension to evidence or issues that have already been canvassed during the course of this trial.”⁸

The defence submissions in support of the application for leave to appeal

4. The defence seeks leave to appeal the oral ruling on the basis that the prosecution is bound to submit all its incriminatory evidence during the presentation of its “case”, so that the accused is informed of the nature, cause and content of the charges against him and has sufficient time to prepare his defence.⁹
5. The defence further cites the approach followed by the Chamber in its decision of 27 October 2009 when it rejected the request to admit video extracts of an incriminatory nature into evidence, as their introduction after the close of the prosecution case would be prejudicial to the accused, and in particular to his right to adequate time and facilities to prepare his defence.¹⁰
6. The defence argues that the accused will be placed in a situation of uncertainty that will gravely prejudice his defence if, after the commencement of the defence case, the prosecution is allowed to introduce incriminatory evidence.¹¹

⁶ ICC-01/04-01/06-T-252-CONF-ENG CT, page 27, lines 4-6.

⁷ ICC-01/04-01/06-T-252-CONF-ENG CT, page 31, lines 8-11.

⁸ ICC-01/04-01/06-T-252-CONF-ENG CT, page 32, lines 4-6.

⁹ ICC-01/04-01/06-2337-Conf, paragraph 11.

¹⁰ ICC-01/04-01/06-2337-Conf, paragraph 12 (citing Decision on the Prosecution’s Application for Leave to Introduce Additional Video Excerpts, 27 October 2009, ICC-01/04-01/06-2174-Conf, paragraphs 35-37).

¹¹ ICC-01/04-01/06-2337-Conf, paragraph 13.

7. The defence argues that the only valid exceptions to this approach are when the prosecution intends to use the evidence in order to test the credibility of witnesses or to refresh their memory, or alternatively, if it is new evidence that the prosecution did not have in its possession before it closed its case.¹² The defence observes that the prosecution did not seek to submit evidence to test the credibility of W26,¹³ and it observes that the photographs have been in the possession of the prosecution since 22 November 2005, and thus it had the opportunity to tender them into evidence during the examination of the prosecution's witnesses, or alternatively, by requesting their admission from the bar table.¹⁴
8. The defence submits that rulings on the admissibility of incriminatory evidence in a case should be regarded as decisions that significantly affect the outcome of the trial.¹⁵
9. The defence suggests that this issue is of importance because the prosecution application supports an approach that it is able to introduce evidence at any stage of the trial, thereby adversely affecting the rights of the accused. Hence, it is argued an early resolution of this issue by the Appeals Chamber may materially advance the proceedings.¹⁶

The prosecution's response

10. On 15 March 2010, the prosecution filed its response to the defence application requesting leave to appeal.¹⁷ The prosecution submits that the issue as described in the application does not arise from the Chamber's oral ruling.¹⁸

¹² ICC-01/04-01/06-2337-Conf, paragraph 14.

¹³ ICC-01/04-01/06-2337-Conf, paragraph 16.

¹⁴ ICC-01/04-01/06-2337-Conf, paragraph 17.

¹⁵ ICC-01/04-01/06-2337-Conf, paragraph 23.

¹⁶ ICC-01/04-01/06-2337-Conf, paragraph 24.

¹⁷ ICC-01/04-01/06-2344-Conf.

¹⁸ ICC-01/04-01/06-2344-Conf, paragraph 7.

The prosecution suggests that the defence has misrepresented the Chamber's decision and the principles governing the questioning by the party not calling the witness, referred to otherwise as cross-examination.¹⁹ The application thus addresses substantially broader issues than the three photographs.

11. As regards the fair conduct of proceedings, the prosecution submits that the defence had the opportunity of re-examining the witness on all relevant matters.²⁰ It is argued that the evidence elicited by the prosecution was not new and the defence had notice that the prosecution sought to use the photographs during cross-examination.²¹ The prosecution submits that the photographs were disclosed in 2007 and 2008; thus the defence was in a position to address the evidence, and accordingly no unfairness has been occasioned.²² Finally, the prosecution argues that denying the prosecution the opportunity of eliciting this evidence during cross-examination would have the effect of undermining its statutory obligation to establish the truth, as well as violating the principle of the equality of arms.²³

12. The prosecution submits that an interlocutory appeal will not further the expeditiousness of the proceedings.²⁴ It is said to be the duty of the prosecution to ensure, first, that there is a basis for the suggested reliability of the evidence to be relied on, and, second, that the witnesses are able to authenticate the material to be introduced, or can reasonably testify about it. It is suggested that compelling the prosecution to introduce all the items in its list of evidence during the prosecution case will not only compromise its

¹⁹ ICC-01/04-01/06-2344-Conf, paragraph 7.

²⁰ ICC-01/04-01/06-2344-Conf, paragraph 9 (citing transcript of hearing on 16 January 2009, ICC-01/04-01/06-104-CONF-ENG ET, page 36, line 15 - page 38, line 3).

²¹ ICC-01/04-01/06-2344-Conf, paragraph 16.

²² ICC-01/04-01/06-2344-Conf, paragraph 16.

²³ ICC-01/04-01/06-2344-Conf, paragraph 16.

²⁴ ICC-01/04-01/06-2344-Conf, paragraph 17.

statutory duties but it will delay the proceedings with groundless and repetitive applications and subsequent defence objections.²⁵

13. As regards the effect of this issue on the outcome of the trial, although the prosecution accepts that evidence elicited following the introduction of these photographs could have an impact on the outcome of the trial,²⁶ it submits that it will not have a substantial affect for the purposes of Article 82(1)(d) of the Rome Statute ("Statute").²⁷

14. Finally, the prosecution submits that the ruling can be challenged by the defence in an appeal from the final judgement.²⁸ Hence, it is suggested the defence have failed to show that the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings.²⁹

II. Relevant provisions

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

²⁵ ICC-01/04-01/06-2344-Conf, paragraph 17.

²⁶ ICC-01/04-01/06-2344-Conf, paragraph 18.

²⁸ ICC-01/04-01/06-2344-Conf, paragraph 18.

²⁸ ICC-01/04-01/06-2344-Conf, paragraph 19.

²⁹ ICC-01/04-01/06-2344-Conf, paragraph 19.

III. Analysis

16. In reaching its conclusions on the application 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",³⁰ as well as the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008".³¹ Both of these decisions applied Article 82(l)(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 2006.³²

17. Accordingly, the Chamber has examined the individual application 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.

³⁰ 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.

³¹ 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.

³² 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-01/04-168.

18. The requirements set out above are cumulative; therefore, failure to fulfil one or more requirement 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.

19. 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, the Chamber will focus solely on the submissions directed towards satisfying the criteria of the test for leave to appeal. This is the approach applied by this Decision, and thus the substantive arguments of the parties have not been considered by the Chamber.

Is the matter is an "appealable issue" arising from the impugned decision?

20. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal, factual or a mix of both."³³

21. The Chamber's earlier Decision of 27 October 2009 on the admission of video excerpts following the hearing on 14 July 2009, is relevant to whether the present matter is an "appealable" issue.³⁴

³³ ICC-01/04-168, 13 July 2006, paragraph 9.

³⁴ ICC-01/04-01/06-2174-Conf.

22. On 14 July 2009, the prosecution indicated that it had concluded its "live" evidence, although it submitted it wished to reserve the opportunity of introducing additional evidence from the bar table. The defence opposed this application on the basis that the prosecution had concluded its case. The defence submitted that its preparation and investigations should not have to encompass evidence going beyond that presented during the prosecution case. In this context, the following exchange occurred:

MS. BENSOUA: Thank you, Mr. President. Just to say that with this last witness, this is the end of the oral presentation of evidence for the Prosecution, and probably to just add that we wish to retain the ability to make written submissions for the pending documentary evidence.

PRESIDING JUDGE FULFORD: Does it amount to any more, Ms. Bensouda, than the right, in an appropriate way, for you to explain how the Prosecution argues its case in relation to the written material that has been introduced from the bar table?

MS. BENSOUA: Yes, Mr. President. There are some pending, I believe, NGO documents and some video material which have still some of them yet to be decided by the Chamber, I believe, but also for the Prosecution to make written applications to submit them.

PRESIDING JUDGE FULFORD: Thank you, Ms. Bensouda. I'd -- maybe I'm in error. I thought we dealt with all of the applications currently before us, although we were aware that there may be some additional applications from the Prosecution. Now, if we've overlooked some, Ms. Bensouda, we need to know that, because otherwise they'll fall through the cracks in the floorboards.

MS. BENSOUA: In fact, Mr. President, there will be new applications.

PRESIDING JUDGE FULFORD: Well, we'll address those as and when we receive them, Ms. Bensouda. Thank you very much indeed.

MS. BENSOUA: Thank you.

PRESIDING JUDGE FULFORD: That's very helpful. You're looking anxious, Mr. Biju-Duval.

MR. BIJU-DUVAL (interpretation): Well, "anxious" is not the word, your Honour. It couldn't be the word "anxious," no, but I'm surprised, because I believe I understood that the OTP wants to enter into evidence new evidence. I think I understood that the presentation of their evidence is not actually concluded today, and that is contrary to what we had been told. And I think this is going to raise issues, because at the point in time when the OTP closes its case, we have to have a very clear idea of that point in time so that the Defence can adjust both its thinking and also its investigations of the case. Therefore, the position of the Defence on that matter today is that we have an objection to new evidence or new submissions regarding new evidence be allowed before the Chamber, your Honour. Thank you.

PRESIDING JUDGE FULFORD: I think we need some clarity on this, Ms. Bensouda. What's the area of documentation, and what's the time-frame that we're talking about?

MS. BENSOUA: Mr. President, Manoj will provide an answer.

PRESIDING JUDGE FULFORD: Yes, certainly. Yes, Mr. Sachdeva.

MR. SACHDEVA: Thank you, Mr. President. As was alluded to, it relates to some NGO reports, perhaps some video materials that have already been communicated to the Defence and disclosed to the Defence, and that upon reflection of the evidence given by the last two witnesses in particular, it may -- it may be deemed necessary for the Prosecution to make

those submissions and tender those documents into evidence from the bar table given the answers that have been given by the last two witnesses in particular.

PRESIDING JUDGE FULFORD: Well, you're obviously going to have to do this by way of written application [...].³⁵

23. Having received submissions, the Chamber rejected the application to introduce the additional material (particular excerpts from the videos EVD-OTP-00487, EVD-OTP-00488 and EVD-OTP-00461, to be played with the relevant audio track).³⁶ The Chamber applied the criteria established in the "Decision on the admissibility of four documents" of 13 June 2008,³⁷ namely that the court will focus, first, on the relevance of the material (viz. whether it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); second, on whether or not it has probative value (bearing in mind, for instance, "the indicia of reliability"); and third, on the probative value of the evidence as against its prejudicial effect.

24. The Chamber concluded that the video excerpts were relevant³⁸ and that they had probative value,³⁹ but it determined that the introduction of the footage would result in prejudice to the accused, in particular his right to adequate time and facilities to prepare his defence.⁴⁰ Notably, at that stage the defence was undertaking preparatory work in the Democratic Republic of the Congo ("DRC") ahead of the commencement of the presentation of its evidence. Hence, the Chamber determined that in all likelihood the defence would not have the resources and opportunity properly to investigate and analyse this evidence. Furthermore, it would be unable to question the relevant witnesses in the videos. The Court was of the view that it was of high importance at that

³⁵ Transcript of hearing on 14 July 2009, ICC-01/04-01/06-T-209-CONF-ENG ET, page 80, line 5 - page 82, line 7.

³⁶ ICC-01/04-01/06-2174-Conf, paragraph 38.

³⁷ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 27 to 31.

³⁸ ICC-01/04-01/06-2174-Conf, paragraphs 26 and 27.

³⁹ ICC-01/04-01/06-2174-Conf, paragraphs 28 and 29.

⁴⁰ ICC-01/04-01/06-2174-Conf, paragraph 37.

stage in the proceedings that the defence was able to focus on the witnesses that had been expected to give evidence during the second half of the trial.⁴¹

25. Against that background, the defence argues that there is a general principle which is to be applied in this situation, namely that after the close of the prosecution case no new incriminating evidence can be tendered by the Prosecutor. In its submission, this approach underpinned the decision of the Chamber of 27 October 2009. The defence suggests that the sole exception to this principle is that the prosecution may be entitled to rely on incriminating evidence that it did not have in its possession at the close of its case. It is argued that this restricted category of evidence, along with material designed to test or challenge the credibility of a witness or to refresh his memory, are the only new evidential materials that the prosecution is permitted to introduce when questioning defence witnesses.

26. The defence has misunderstood the effect of the decision of 27 October 2009. The Chamber expressly focussed therein on the particular stage of the proceedings when the application was made, and determined that in the context of the defence investigations then taking place in the DRC, allowing the prosecution to rely on additional video excerpts would cause unfairness to the accused. The Chamber did not determine that as a matter of general policy, no additional incriminating evidence is to be permitted following the close of the "prosecution case". It is to be noted that the expressions the "prosecution case" and "defence case" are not to be found in the relevant provisions. The Rome Statute framework does not apply fixed stages for the presentation of evidence during the trial, and in this the ICC differs from the position in some other courts or tribunals (see, for instance, Rule 85 of the Rules of Procedure and Evidence of the ICTY).⁴² Article 64(8)(b) of the Statute

⁴¹ ICC-01/04-01/06-2174-Conf, paragraph 35.

⁴² Rule 85 ("Presentation of Evidence"): (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the

and Rule 140(1) of the Rules of Procedure and Evidence essentially leave it to the Chamber to determine the model to be followed instead of applying a mechanistic formula.

27. The Chamber considers that the defence has identified an appealable issue, in that whether or not the prosecution is confined, save with one exception, to introducing all of its incriminating evidence during the "prosecution case" is an issue that is "essential for the determination of matters arising in the judicial cause under examination".⁴³ The Chamber accepted in its oral decision that the three photographs were potentially of an incriminatory nature, to be introduced after the close of the "prosecution case". Therefore, the Chamber is of the view that this is an appealable issue, arising out of the impugned decision.

Could the issue at hand significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial?

28. Under Article 82(1)(d) of the Statute the issue raised in the application for leave to appeal must be one that significantly affects either: a) "the fair and expeditious conduct of the proceedings"; or b) "the outcome of the trial".⁴⁴ The Chamber notes that these requirements are put in the alternative.

29. As regards the criterion that "the decision may significantly affect the outcome of the trial", the Appeal Chamber indicated:

The outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber,

following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment. (B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness. (C) If the accused so desires, the accused may appear as a witness in his or her own defence.

⁴³ ICC-01/04-168, paragraph 9.

⁴⁴ ICC-01/04-168, paragraph 10.

where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon. The Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.⁴⁵

30. The prosecution argues that the defence has failed to demonstrate the extent of the impact of the three photographs, including whether they will have a cumulative effect on other evidence.⁴⁶ In the Chamber's view it is unrealistic to expect the defence to undertake an analysis of this kind, which potentially may involve an examination of the entirety of the evidence in the case. Instead, it will usually suffice simply to analyse the potential impact of the disputed evidence and in this instance the Chamber is of the view that introducing these particular pieces of incriminating evidence into the trial may have an impact on its outcome.

May an immediate resolution by the Appeals Chamber materially advance the proceedings?

31. The Appeals Chamber has held that "[p]ut in a nutshell, the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of proceedings or the outcome of the trial".⁴⁷ Moreover, the Appeals Chamber outlined that "[t]he meaning conveyed by 'advance' [...] is move forward; by ensuring that the proceedings follow the right course".⁴⁸

32. Critically, on this application the defence has failed to demonstrate how the resolution of the issue by the Appeals Chamber may materially advance the proceedings. Essentially, the defence has argued that the issue is important because similar situations are likely to recur throughout the trial. This hypothetical risk is insufficient for the purposes of addressing the final element of the test.

⁴⁵ ICC-01/04-168, paragraph 13.

⁴⁶ ICC-01/04-01/06-2344-Conf, paragraph 18.

⁴⁷ ICC-01/04-168, paragraph 19.

⁴⁸ ICC-01/04-168, paragraph 15.

33. This was a discrete decision concerning the admissibility of three photographs which in turn concern a relatively confined area of evidence in the case. In those circumstances therefore, an interlocutory appeal will not materially advance the proceedings at this stage of the trial, in the sense of ensuring that the proceedings follow the right course.

34. The oral decision of the Chamber was delivered in closed session and as a result, the submissions of the defence and prosecution were filed confidentially. Having reviewed the position and satisfied itself that the basis for this classification no longer exists, pursuant to Regulation 23*bis*(3) of the Regulations of the Court, the Chamber instructs the Registry to reclassify as public the portion of the transcript with the oral ruling⁴⁹ and the parties' submissions.⁵⁰

IV. Conclusions

35. For these reasons, the Chamber refuses the defence application for leave to appeal.

⁴⁹ ICC-01/04-01/06-T-252-CONF-ENG CT, page 30, line 16 - page 32, line 14.

⁵⁰ ICC-01/04-01/06-2337-Conf and ICC-01/04-01/06-2344-Conf.

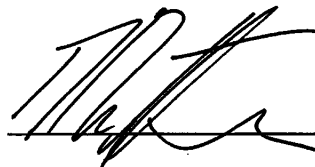
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 29 April 2010

At The Hague, The Netherlands