

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 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**

**Decision on the defence request for leave to appeal the "Decision on disclosure by  
the defence"**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Ekkehard Withopf

**Counsel for the Defence**

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**Legal Representatives of the Victims**

Mr Luc Walley  
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**Legal Representatives of the Applicants**

[1 name per team maximum]

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

[2 names maximum]

**The Office of Public Counsel for the Defence**

[2 names maximum]

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber 1 (“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 defence Request for Leave to Appeal the Decision on disclosure by the defence:

## **I. Background**

1. On 20 March 2008 the Trial Chamber issued its “Decision on disclosure by the defence”.<sup>1</sup>
2. The Chamber ordered that the accused shall:
  - a) Inform the Chamber at the same time as the Office of the Prosecutor (“prosecution”) if the accused intends to raise an alibi under Rule 79(1)(a) of the Rules of Procedure and Evidence (“Rules”) or a ground for excluding criminal responsibility under Rule 79(1)(b) of the Rules;
  - b) Furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules);
  - c) Provide the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications he intends to advance as regards the admissibility or relevance, or other substantive points of law that need to be resolved before the commencement of the trial;

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<sup>1</sup> Decision on disclosure by the defence, 20 March, 2008, ICC-01/04-01/06-1235.

- d) Furnish the prosecution and the Chamber after the presentation of the evidence of the prosecution is completed with the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries;
- e) Provide the Chamber, the prosecution and the participants with any evidence intended for use by the defence, other than the oral testimony of a witness, three days in advance of its presentation.<sup>2</sup>
3. On 31 March 2008 the defence filed a request seeking leave to appeal Orders (b) (c) and (e), set out in the preceding paragraph,<sup>3</sup> along with the Chamber's indication that "[...] depending on the circumstances of any of the alleged former child soldiers, [it] may, on an exceptional basis, order advance disclosure of the questions or the lines of questioning to be advanced by the defence so as to fulfil its obligations under Article 68(1)".<sup>4</sup> In essence, the defence submitted that each of the three orders and the indication has an impact on the fair and efficient conduct of the proceedings.
4. On 4 April 2008 the prosecution filed its response.<sup>5</sup> The prosecution submitted that leave to appeal should be granted for orders (b) and (c). As regards (e), the prosecution submitted the defence had mischaracterised the order of the Chamber and that it was not an appealable issue. In the circumstances, it opposed the application for leave, unless the Chamber accepted that the issue as described by the defence did arise, in which case it did not maintain its opposition. Finally, the prosecution resisted the application for leave to

<sup>2</sup> Decision on disclosure by the defence, 20 March, 2008, ICC-01/04-01/06-1235, paragraph 41.

<sup>3</sup> Requête de la Défense sollicitant l'autorisation d'interjeter appel de la "Décision sur la communication de certains éléments par la Défense" datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251.

<sup>4</sup> Decision on disclosure by the defence, 20 March, 2008, ICC-01/04-01/06-1235, paragraph 37.

<sup>5</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008", 4 April 2008, ICC-01/04-01/06-1261.

appeal the Chamber's indication as regards a possible order for advance disclosure of questions to be put to certain child soldiers.

## II. Relevant provisions

5. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered Article 82(l)(d) of the Statute:

### 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. Submissions and analysis

### A. General remarks

6. In reaching its conclusions on the defence requests, 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"<sup>6</sup> and its "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008"<sup>7</sup> which, in turn, 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.<sup>8</sup>

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> ICC-01/04-168, paragraphs 9-14.

7. Accordingly, it has examined the individual applications for leave to appeal against the following criteria:
- a) Whether the matter is an "appealable issue";
  - 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.
8. The requirements a), b) and c) above are cumulative and therefore failure to fulfill one or more of them is fatal to an application for leave to appeal.
9. As has been emphasised elsewhere,<sup>9</sup> it is irrelevant for these purposes that the issue for which leave is sought is of general interest or that it may arise in future pre-trial or trial proceedings. Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings.<sup>10</sup> Interlocutory appeals should be regarded as exceptional, not least because they have the capacity significantly to delay the trial. As set out by Pre- Trial Chamber II, "[the] case-law shows that in striking the balance between the convenience of deciding certain issues at an early

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<sup>9</sup> 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, paragraph 11.

<sup>10</sup> 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, paragraph 12.

stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the *ad hoc* Tribunals, and in the ICC Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions."<sup>11</sup>

10. Applying its now established approach on applications for leave to appeal, where arguments have been raised by the parties which relate to the merits of a substantive issue rather than the test for leave to appeal, the substantive arguments have not been addressed but instead there has been focus solely on the submissions that are directed at the test to be applied for applications of this kind.<sup>12</sup>

## **B. The applications for leave to appeal**

### **i) The application to appeal Order (b), that the accused shall:**

*“Furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules).”*

11. The defence submits that this order infringes the accused’s right of silence,<sup>13</sup> and, in consequence, it directly affects the fair and expeditious conduct of the

<sup>11</sup> 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, paragraphs 11-13.

<sup>12</sup> 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, paragraph 19.

<sup>13</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraphs 6-7.

proceedings.<sup>14</sup> It is suggested that an interlocutory decision from the Appeal Chamber is necessary to prevent irreparable harm to the defence and the integrity of the process.<sup>15</sup>

12. The prosecution broadly accepts the defence submissions, and in particular it is submitted that this order arguably affects the rights of the defence and the fairness of the proceedings.<sup>16</sup> Furthermore, the prosecution suggests that “[...] a decision regulating the timing of disclosure by the Defence must necessarily affect the expeditiousness of the proceedings”.<sup>17</sup> Additionally, the prosecution suggests “[...] an immediate resolution of the First Issue by the Appeals Chamber may materially advance the proceedings, either by preventing that the integrity of the proceedings be tainted by a defective decision that was not timely cured, or conversely by averting doubts as to the integrity of the proceedings if the decision is confirmed.”<sup>18</sup>

13. The fundamental misunderstanding revealed in this application is that the order does not have any relevance to the accused’s right to silence. Instead, its ambit is limited to disclosure of information **only** if the accused decides to advance a positive case (thereby waiving his right to silence).

14. Addressing the test to be applied to interlocutory appeals, the suggestion that leave should be granted for reasons of expeditiousness is not made out. The purpose of the order, in part, is to ensure that the trial is conducted with the

<sup>14</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 16.

<sup>15</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 18.

<sup>16</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008" 4 April 2008, ICC-01/04-01/06-1261, paragraph 8.

<sup>17</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008" 4 April 2008, ICC-01/04-01/06-1261, paragraph 8.

<sup>18</sup> ICC-01/04-01/06-1261, paragraph 8.



minimum delay through advance disclosure of certain pieces of key information, so that preparatory work can be undertaken without seeking adjournments. The order will have a contrary effect to the one suggested, in that it will enhance rather than delay the expeditious nature of the proceedings, particularly given the general nature of the information requested which should not take a significant amount of time to prepare.

15. There is no basis for suggesting that the order could significantly affect the outcome of the trial: this is a case-management order, made to improve the efficient conduct of the proceedings, and its proper implementation will not influence the Chamber on the issue of the accused's guilt or innocence on the six charges confirmed by the Pre-Trial Chamber.
16. Similarly, an immediate resolution by the Appeals Chamber will not materially advance the proceedings, in that the order is itself designed to improve the efficient handling of the trial.
17. The argument that it is potentially a "defective decision"<sup>19</sup> is a matter for the Appeals Chamber, if applicable, in due course rather than at this interlocutory stage. The general suggestion that the order may undermine the integrity of the proceedings is an issue that can only be fully evaluated at the conclusion of the trial.
18. For these reasons, leave to appeal is refused.

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<sup>19</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008", 4 April 2008, ICC-01/04-01/06-1261, paragraph 8.

**ii) The application to appeal Order (c), that the accused shall:**

*“Provide the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications he intends to advance as regards the admissibility or relevance, or other substantive points of law that need to be resolved before the commencement of the trial.”*

19. The defence submits that it does not have sufficient knowledge of the issues of law and the matters of fact that will arise in the case to enable it to assess, in advance of the trial, whether legal challenges will be raised. The defence highlights the extent of the material disclosed by the prosecution which, it submits, prohibits a sufficiently comprehensive assessment in advance of the trial. Accordingly, the accused submits this order will adversely affect the efficient deployment of defence resources and it will lead to applications for additional time to meet the requirements of this order.<sup>20</sup>

20. The prosecution submits that “[... t]he Decision could impact on the level of information available to the Defence for the purposes of advancing submissions pertaining to admissibility or relevance, thus arguably impacting on the rights of the accused and the fairness of the proceedings.”<sup>21</sup> The prosecution, additionally, argues that the order could lead to delays and that an interlocutory decision by the Appeals Chamber “[...] will foster certainty of trial proceedings,” thereby materially advancing them.<sup>22</sup> It is to be stressed that this only relates to those matters which the accused has decided he will advance or raise.

<sup>20</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraphs 24-31.

<sup>21</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008", 4 April 2008, ICC-01/04-01/06-1261, paragraph 11.

<sup>22</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008", 4 April 2008, ICC-01/04-01/06-1261, paragraph 11.

21. This order is a case-management tool, enabling the Chamber to resolve in advance of the trial matters of law which, if interposed into the process of presenting evidence, might impede the smooth-running of the case and cause significant inconvenience to witnesses called to testify. For instance, if the Chamber decides that a witness's evidence is inadmissible, a decision three weeks in advance of the trial may avoid him or her making a trip to The Hague from the Democratic Republic of Congo, which, apart from being disruptive, has the potential to increase the risk of harm to the witness, because of his or her sudden absence from his home.
22. Putting to one side for a moment the ability of the defence to comply with the order in these particular circumstances, considered objectively as a case-management tool it does not meet any of the requirements for an interlocutory appeal. Its underlying purpose is to advance the fair and expeditious conduct of the proceedings and it cannot have any effect on the outcome of the trial, since its application is irrelevant to the Chamber's decision on the guilt or innocence of the accused on the six charges confirmed by the Pre-Trial Chamber. Moreover, an immediate resolution by the Appeals Chamber will not materially advance the proceedings, particularly since interlocutory appeals should not be used – at least in these circumstances – to “foster certainty” in the trial process.
23. However, in light of the history of late disclosure to the accused,<sup>23</sup> the defence has a valid argument that the effect of this order, during the final preparatory phase prior to the trial (which is due to commence on 23 June 2008), may be unfair in that it should not be expected to have sufficient mastery of the totality of the evidence to enable it to effect informed compliance.

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<sup>23</sup> Decision suspending deadline for final disclosure, 30 January 2008, ICC-01/04-01/06-1141.

24. Given these particular new circumstances, the Chamber rescinds order (c). However, in advance of the trial the Bench may reopen the issue with the parties and the participants at a Status Conference, to ensure that the trial timetable operates efficiently, in the interests of justice. Additionally, if the defence decides prior to the commencement of the trial that a particular legal issue will be raised as regards admissibility, relevance or otherwise, pending any further order from the Chamber, as a matter of courtesy and to promote efficiency the Court and the other party and the participants should be informed.
25. For these reasons, leave to appeal is refused.

**iii) The application to appeal Order (e) that the accused shall:**

*“Provide the Chamber, the prosecution and the participants with any evidence intended for use by the defence, other than the oral testimony of a witness, three days in advance of its presentation.”*

26. The defence submits that this order impedes the right of the defence to question witnesses adequately.<sup>24</sup> Further, it is suggested that this provision will lead to delays because the accused can only decide which documents are to be used during the questioning of prosecution witnesses after each of them has reacted to the matters raised by the prosecution advocate.<sup>25</sup> It is suggested that there may be unnecessary disclosure, because of the need for the defence to anticipate the areas that will be addressed in the prosecution’s

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<sup>24</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraphs 40-42.

<sup>25</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 39.

questioning.<sup>26</sup> Finally, it is suggested an appeal is desirable to prevent prejudice to the accused.<sup>27</sup>

27. The prosecution has incorrectly suggested that this order does not refer to evidence that it is intended should be used during the examination of prosecution witnesses,<sup>28</sup> and instead relates only to evidence that is to be called during the part of the trial when the defence presents its own evidence. The order is, in part, based on Regulation 52(2) of the Regulations of the Registry, which stipulates that evidence which is capable of being put in electronic form and which is to be used should be submitted to the court officer at least three working days before the hearing. Therefore, the order relates to evidence, other than oral evidence, which is to be introduced, whatever the precise circumstances or stage of the trial. Regulation 52(2) is not limited in its effect to material introduced by a party during the presentation of its own evidence.
28. The prosecution's caveat therefore applies, and since this order relates to any evidence that may be introduced during the defence questioning of prosecution witnesses, it supports the defence application for leave to appeal.
29. This order is a further example of a case-management tool that is necessary to avoid delays and adjournments which are likely to be occasioned by the unanticipated introduction of documents or other evidence (other than oral testimony) during questioning. Once the defence has made a decision that particular material of this kind is to be used, in order for the Court, the court

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<sup>26</sup> Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 43.

<sup>27</sup> Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 44.

<sup>28</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008", 4 April 2008, ICC-01/04-01/06-1261, paragraph 13.

officer, the prosecution and the participants to prepare adequately, short advance notification has been ordered. It is to be noted the defence will have received notice of the prosecution's evidence sufficiently in advance of the trial, in order to assist it with decisions of this kind. However, the Chamber recognises that the questioning by a party not calling the witness is to some extent reactionary, and as such could entail, on occasion, the use of documents the relevance or necessity of which was unforeseeable in advance. The use of such documents will not be precluded by this order.

30. It follows, therefore, that this order does not meet the requirements for an interlocutory appeal. It will not significantly affect the fair and expeditious conduct of the proceedings, since the defence only has to reveal the material when a decision has been made that it will be used in any event, and the proper implementation of this order should reduce the possibility of delays or adjournments. Furthermore, particularly given that the order only relates to the disclosure of material shortly before it is used, it cannot have any effect on the outcome of the trial and the Chamber's decision on the six charges confirmed by the Pre-Trial Chamber. Finally, although an issue of this kind may form the basis of an appeal at the end of the case, an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

31. It is to be noted that the prosecution is not entitled to forewarn its witnesses of any evidence that it anticipates will be raised during questioning by the defence, particularly following disclosure of this kind, and accordingly the accused will not lose a tactical advantage (regardless of whether he is entitled to that advantage).

32. For these reasons, leave to appeal is refused.

**iv) The application to appeal the Chamber's indication that:**

*"[...] depending on the circumstances of any of the alleged former child soldiers, [it] may, on an exceptional basis, order advance disclosure of the questions or the lines of questioning to be advanced by the defence so as to fulfil its obligations under Article 68(1)."*

33. The defence submits that this may affect its ability to examine witnesses without improper impediments.<sup>29</sup> Furthermore, the defence contends that it may lead to delays and adjournments.<sup>30</sup>
34. The prosecution opposes this application as it does not relate to any order that has been made, and instead simply "foreshadows" something that may occur on an exceptional basis.<sup>31</sup>
35. The requirements for an interlocutory appeal are not made out. The Chamber has anticipated that it may have to take steps to protect the psychological well-being, dignity and privacy of witnesses pursuant to Article 68(1), but at this stage it has not made any order. Instead it has simply provided the parties and the participants with notice that an order may be made in due course. Given this eventuality may never arise, it cannot be sustainably argued that the "possibility" will significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. Therefore, an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

<sup>29</sup> Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 46.

<sup>30</sup> Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, 31 March 2008, ICC-01/04-01/06-1251, paragraph 50.

<sup>31</sup> Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Décision sur la communication de certains éléments par la Défense' datée du 20 mars 2008", 4 April 2008, ICC-01/04-01/06-1261, paragraph 16.

36. For these reasons, leave to appeal is refused.

37. The Trial Chamber has no jurisdiction to grant or refuse the requests by the parties to stay the proceedings since under Article 82(3) of the Statute and Rule 156(5) of the Rules the Appeals Chamber alone has the power to determine an application.

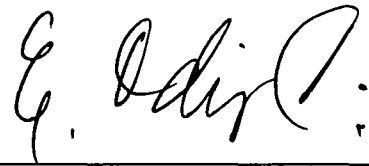
Judge René Blattmann appends a separate and dissenting opinion to this decision.

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



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**Judge Adrian Fulford**



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**Judge Elizabeth Odio Benito**

Dated this 8 May 2008

At The Hague, The Netherlands



### Dissenting Opinion of Judge René Blattmann

1. On 20 March 2008 the Trial Chamber issued the “Decision on the disclosure by the Defence” (“impugned decision”).<sup>32</sup>
2. On 31 March 2008 the defence filed a request seeking leave to appeal (“defence request”)<sup>33</sup> the following issues:
  - a) On the obligation brought upon the defence to reveal to the Chamber, the Prosecutor and the participants prior to the commencement of the trial, the means of defence and any substantive factual or legal issues that it intends to raise.
  - b) On the obligation brought upon the defence to transmit to the Chamber, the Prosecutor and the participants – three weeks prior to the commencement of the trial – details on the applications that it intends to submit as regards the admissibility or relevance of elements of proof, or all other substantive points of law that need to be resolved before the commencement of the trial.
  - c) On the obligation brought upon the defence to transmit to the Chamber, the Prosecutor and the participants, three days prior to their presentation, the elements of evidence which it intends to use.
  - d) On the recognised power of the Chamber to order the defence to disclose – prior to the examination of witnesses – its questions or the type of questions that it intends to pose to the witness.
3. The defence submitted that each of these questions has an impact on the fair and efficient conduct of the proceedings.<sup>34</sup>

<sup>32</sup> Decision on the disclosure by the defence, ICC-01/04-01/06-1235, 20 March 2008.

<sup>33</sup> Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008, ICC-01/04-01/06-1251, 31 March 2008.

<sup>34</sup> *Ibid*, paragraphs 16, 18, 25, 26, 43, 44, 49.

4. On 4 April 2008 the prosecution filed the "Prosecution's Response 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Décision sur la communication de certains éléments par la Défense » datée du 20 mars 2008'" ("prosecution response").<sup>35</sup>
5. The Majority Opinion denies leave to appeal on all four issues brought by the defence.
6. Though the Majority has intended to follow the approach set out in its previous decisions which, in turn, applied Article 82(1)(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,<sup>36</sup> I am concerned that the analysis has, at times, veered into discussions on the merits of the substantive issues.
7. In my application of Article 82(1)(d) below, I have endeavoured to examine the individual applications for leave to appeal strictly against the following criteria:
  - a) Whether the matter is an "appealable issue";
  - 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.

<sup>35</sup> Prosecution's Response to the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la communication de certains éléments par la Défense datée du 20 mars 2008', ICC-01/04-01/06-1261, 4 April 2008.

<sup>36</sup> Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006.

8. The requirements a), b) and c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.<sup>37</sup>
9. Ultimately, when applying the above criteria, I have found that my analysis of the issues would produce the opposite result of that of the Majority Opinion, in that I would grant leave to appeal on all four issues requested by the defence of Mr Thomas Lubanga Dyilo.

## I. ANALYSIS

### Whether the requirements of Article 82(1)(d) of the Statute are met

*First Issue: On the obligation brought upon the defence to reveal to the Chamber, the Prosecutor and the participants prior to the commencement of the trial, the means of defence and any substantive factual or legal issues that it intends to raise.*

10. In its request, the defence submits that the impugned decision impacts the accused's right to silence and therefore directly affects the fair conduct of the procedures and the subject of the trial.<sup>38</sup> Further, it is considered necessary to obtain a definite and immediate ruling on this issue in order to prevent the defence being harmed irreparably and thereby disturbing the integrity of the process.<sup>39</sup>
11. The prosecution agrees with the defence that this issue satisfies the requirements of Article 82(1)(d) and does not oppose the defence application in this regard.<sup>40</sup> It submits that the interpretation which the Chamber has given to rules 79 and 80 and Regulation 54 of the Regulations of the Court arguably

<sup>37</sup> Decision Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, paragraph 10, referring to 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, a/0111/06 to a/0127/06, ICC-02/04-112, 20 December 2007, paragraph 17.

<sup>38</sup> ICC-01/04-01/06-1251, 31 March 2008, paragraph 16.

<sup>39</sup> *Ibid*, paragraph 18.

<sup>40</sup> ICC-01/04-01/06-1261, 4 April 2008, paragraphs 8 and 9.

affect the rights of the accused and thereby the fairness of the proceedings. As well, a decision which regulates the timing of disclosure necessarily affects the expeditiousness of the proceedings.<sup>41</sup> Finally, the prosecution argues that an immediate resolution by the Appeals Chamber may materially advance the proceedings by either preventing the integrity of the proceedings to be tainted by a faulty decision or averting any doubts as to the integrity of the proceedings.<sup>42</sup>

12. The Majority Opinion does not agree that the fairness of the proceedings may be affected by this order, stating that, “[t]he fundamental misunderstanding revealed in this application is that the order does not have any relevance to the accused’s right to silence. Instead, its ambit is limited to disclosure of information only if the accused decides to advance a positive case (thereby waiving his right to silence).”<sup>43</sup> I find this argument to be flawed in a number of ways. I first think that this has veered into a discussion on the merits of the substantive issues rather than strictly applying the test. Further, I do not agree that the accused waives his right to silence if choosing to advance a defence. Rather, an accused person’s right to silence is fundamental and it cannot be considered that an accused person has only two options; either to sit in silence throughout the entirety of the proceedings without advancing any sort of defence, or to waive their right to silence. This would be extremely disadvantageous to an accused person and could hardly be considered a fundamental protection to the accused. Therefore, I am not in agreement with the Majority that if an accused person should choose to defend him or herself, they have no right to silence throughout the proceedings. However, as this is not the subject on which the Trial Chamber may take its decision as to either grant or deny leave to appeal, it is inappropriate to consider during an analysis of the present application.

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<sup>41</sup> *Ibid*

<sup>42</sup> *Ibid*

<sup>43</sup> Majority Opinion, paragraph 13.

13. Rather, in my view, this first issue does meet the requirements pursuant to Article 82(1)(d). The requirement of disclosure by the defence is not explicitly given within the text of the Statute, nor is it expressly prohibited. As the prosecution rightly noted, the relevant legislative texts are interpreted broadly by the Trial Chamber's decision and as such, this interpretation may affect the fairness of the proceedings to the defence in asking that it go beyond what is required by the Statute and other legislative texts. Thus, the Trial Chamber's order requires the defence to give a greater amount of information than is explicitly required by the texts, which may affect the fairness to the defence in the proceedings.
14. With regard to the expeditiousness of the proceedings, while the Majority Opinion notes that the purpose behind the order is to increase the expeditiousness of the proceedings, this may not in practice have the desired effect. It is possible, as noted by the defence and prosecution that deadlines set in the context of the commencement of trial may affect the expeditiousness of the proceedings as the start of trial would be affected by any inability to adhere to the deadlines for disclosure set out in the Trial Chamber's order. As we have seen throughout the proceedings in this case up until the present moment, disclosure of information can be a very time consuming process which can lead to lengthy delays.
15. Finally, I agree with the prosecution submission that a resolution by the Appeals Chamber may materially advance the proceedings by giving certainty to the issue in order to ensure the integrity of the process.
16. Accordingly, I consider that the request for leave to appeal on this issue should be granted for the reasons laid out above.

***Second Issue: On the obligation brought upon the defence to transmit to the Chamber, the Prosecutor and the participants – three weeks prior to the commencement of the trial – details on the applications that it intends to submit as regards the admissibility or relevance of elements of proof, or all other substantive points of law that need to be resolved before the commencement of the trial.***

17. In its submission the defence contends that, as it is not informed with regard to the details of fact and law that would allow a useful assessment of the admissibility and relevance of evidence, it is impossible to bring forward potential challenges prior to the commencement of trial.<sup>44</sup> Therefore, the impugned decision would seriously affect the rights of the defence and the fairness of the proceedings. Further, the defence refers to the large number of documents disclosed thus far by the prosecution and suggests that human and material resources of the defence do not allow for a serious and thorough examination of all evidence prior to the commencement of trial.<sup>45</sup> Thus, there would be an inevitable effect of forcing requests for additional delays from the defence in order to fulfil the order of the Chamber.<sup>46</sup> Finally, the defence states that an immediate ruling concerning this issue would materially advance the proceedings by preventing the defence from using resources unnecessarily prior to the commencement of trial.<sup>47</sup>
18. The prosecution agrees with the defence that this second issue also satisfies the requirements found in Article 82(1)(d) and should be granted leave to appeal. It is submitted that the impugned decision could have an impact on the information available to the Defence and thus, may impact the rights of the accused and the fairness of the proceedings.<sup>48</sup> The prosecution also agrees with the defence that the decision may lead to delays and thereby affect the expeditiousness of the proceedings.<sup>49</sup> Finally, the certainty provided by the

<sup>44</sup> ICC-01/04-01/06-1251, 31 March 2008, paragraph 25

<sup>45</sup> *Ibid*, paragraphs 27 and 28.

<sup>46</sup> *Ibid*, paragraph 29.

<sup>47</sup> *Ibid*, paragraph 31.

<sup>48</sup> ICC-01/04-01/06-1261, 4 April 2008, paragraph 11.

<sup>49</sup> *Ibid*

immediate resolution of this issue will foster certainty in the trial proceedings and materially advance such proceedings.<sup>50</sup>

19. The Majority states that this issue does not meet the requirements to grant leave to appeal because the underlying purpose of the impugned decision is to advance the fair and expeditious conduct of the proceedings and it will not materially advance the proceedings because interlocutory appeals should not be used in these circumstances to foster certainty in the process.<sup>51</sup>
  
20. I disagree with this stance. The purpose of the impugned decision was, indeed, to advance the expeditiousness of the proceedings through effective case management. However, whether that is the effective outcome is not certain. In fact, it is possible that the effect may be the opposite of that intended as illustrated by the submissions of both the defence and prosecution.<sup>52</sup> Further, I am uncertain as to what circumstances make this issue one which is inappropriate to use in order to find certainty in the trial process. In fact, I believe that the issue of the level of disclosure which the defence must put forth is one which is important to find certainty in, both to maintain integrity in the current proceedings as well as to provide the Court a common procedural practice moving forward.
  
21. Thus, I accept the arguments put forth by both the defence and prosecution. The difficulty in ascertaining, previous to the trial, whether there will be challenges with regard to admissibility or relevance and the amount of time and resources entailed to thoroughly make this assessment may affect both the fairness and expeditiousness of the proceedings. Further, the certainty that an Appeals Chamber decision will provide on this matter will help to advance the

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<sup>50</sup> *Ibid*

<sup>51</sup> Majority Opinion, paragraph 22.

<sup>52</sup> ICC-01/04-01/06-1251, 31 March 2008, paragraph 29; ICC-01/04-01/06-1261, 4 April 2008, paragraph 11.

proceedings and give clarity to the defence regarding their obligations in the consideration of this issue.

22. The Majority Opinion does, however, recognize that the impugned order may be unfair due to the late disclosure of evidence to the defence. Thus, the Majority rescinds the order. However, it leaves open the possibility that the Trial Chamber may reopen the issue in advance of trial.<sup>53</sup> In my opinion this is an inappropriate way in which to deal with the matter. I do not find that it is proper to rescind an order in a decision denying or granting leave to appeal. Rather, I think that a separate order to rescind would be a more appropriate procedural mechanism to utilize in this instance. Further, the caveat which the Majority Opinion gives provides little certainty for the parties and furthers the difficulty rather than allowing the Appeals Chamber to provide certainty on the issue.
23. For all of the above reasons, I dissent from the Majority Opinion on this issue and believe that leave to appeal should be accordingly granted.

***Third Issue: On the obligation brought upon the defence to transmit to the Chamber, the Prosecutor and the participants, three days prior to their presentation, the elements of evidence which it intends to use.***

24. The defence states in its submission that the obligation imposed on the defence to disclose three days in advance any evidence intended for use during the examination of witnesses called by the prosecution heavily affects the right of the defence to adequately interrogate the witness.<sup>54</sup> With respect to the expeditiousness of the proceedings, the defence conveys that the application of this order will oblige the Chamber to postpone the examination by the defence

<sup>53</sup> Majority Opinion, paragraph 24, which states, “Given these particular new circumstances, the Chamber rescinds order (c). However, in advance of the trial the Bench may reopen the issue with the parties and the participants at a Status Conference, to ensure that the trial timetable operates efficiently, in the interest of justice. ...”.

<sup>54</sup> ICC-01/04-01/06-1251, 31 March 2008, paragraph 38.



of prosecution witnesses in order to permit the defence to disclose documents it will use in reaction to the respective examination.<sup>55</sup> Further, the defence submits that its workload would increase as it may be required to disclose documents previous to its examination of prosecution witnesses which may, in fact, be unnecessary depending on the respective examination by the prosecution.<sup>56</sup> Finally, the defence submits that a ruling on this issue by the Appeals Chamber would be of immediate value by preventing prejudice of the defence which may arise at each examination of prosecution witnesses.<sup>57</sup>

25. The prosecution does not agree with the interpretation of the defence request.<sup>58</sup> Rather, the prosecution submits that the impugned decision does not require disclosure of its evidence by the defence three days in advance of its examination of witnesses called by the prosecution.<sup>59</sup> Further, the prosecution determines that the order of the Trial Chamber only relates to evidence which the defence intends to use during the presentation of its own evidence, and as such merely reiterates an applicable provision included in Regulation 52(2) of the Regulations of the Registry and extends its application to the Chamber and the other participants.<sup>60</sup> However, the prosecution does note that clarification on this issue would be beneficial and states that "...if, on the other hand, the Decision effectively requires the Defence to disclose three days in advance also any evidence that it intends to use for the purposes of examining, pursuant to Rule 140(2)(b) witnesses called by the Prosecution, then the Prosecution submits that the Third issue does arise from the Decision and that it satisfies the requirements of Article 82(1)(d)."<sup>61</sup> Thus, in those circumstances, the prosecution would not oppose the defence request for leave to appeal on this issue.

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<sup>55</sup> *Ibid*, paragraph 43.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*, paragraph 44.

<sup>58</sup> ICC-01/04-01/06-1261, 4 April 2008, paragraph 13.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*. at paragraph 14.

<sup>61</sup> *Ibid* at paragraph 15.

26. In order to properly analyze whether this issue meets the requirements of Article 82(1)(d) it is incumbent upon the Trial Chamber to first clarify the order itself, given the apparent confusion by the parties concerning its application and the Majority Opinion has done so. Stating that the order is based, in part, on Regulation 52(2) of the Regulations of the Registry, the Majority Opinion explains that the order relates to evidence, other than oral evidence, which is to be introduced, whatever the precise circumstances or stage of trial and is therefore, not limited to material introduced by the defence during the presentation of its own evidence.<sup>62</sup>
27. In light of the above clarification, the Majority Opinion assesses whether the requirement of the defence to disclose, three days prior to examination of prosecution witnesses, any materials which it intends to rely upon during examination would affect the fair and expeditious proceedings or the outcome of the trial and which may materially advance the proceedings.
28. The Majority Opinion does not find that the elements required by Article 82(1)(d) have been met with regard to this issue and specifically notes again the purpose behind this order being for effective case-management and efficiency of proceedings. As well, the Majority Opinion appears to clarify or give further instructions in relation to the order. It recognises that occasional use of documentary evidence in the context of reactionary questioning would be allowed, even if the material had not been disclosed. It further noted that the prosecution may not forewarn witnesses of anticipatory evidence which may be raised, thus assuring that the defence not lose any tactical advantage.<sup>63</sup> However, the analysis and reasoning of the Majority Opinion seems to, once

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<sup>62</sup> Majority Opinion, paragraph 27.

<sup>63</sup> Majority Opinion, paragraphs 29-31.

again, stray into that of substantive discussions on the merits of the issue, rather than focusing on the requirements to be met under Article 82(1)(d).

29. I disagree with the Majority's reasoning and upon a strict application of Article 82(1)(d) am convinced that both fairness and expeditiousness may be affected by this issue. The requirement that three days prior to examination of witnesses the defence should provide any materials that will be used could create a situation whereby delays may be necessary between the examination by the prosecution and then subsequently by the defence for a particular witness while the defence has the necessary time to disclose materials upon taking a final decision as to the parameters of their examination. This would certainly affect the expeditiousness of the proceedings and encompassed in that, the fairness of those proceedings as the accused's right to be tried without undue delay, as enshrined in Article 67(1)(c) could be affected. Further, the fairness is likely to be affected by the order of an expansion of Regulation 52(2) of the Regulations of the Registry<sup>64</sup> to be applied to only one of the parties, putting the prosecution at a distinct advantage. Finally, as noted by the defence, an immediate ruling on this subject may materially advance the proceedings by preventing any prejudice to the defence, safeguarding the integrity of the proceedings and avoiding the possibility that an erroneous conclusion might later taint the proceedings.
30. Accordingly, I dissent from the Majority Opinion in that I believe leave to appeal should be granted on this issue.

***Fourth Issue: On the recognised power of the Chamber to order the defence to disclose – prior to the examination of witnesses – its questions or the type of questions that it intends to pose to the witness.***

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<sup>64</sup> While Regulation 52(2) states that, "...participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing", the Trial Chamber order request full disclosure to the parties, participants and Trial Chamber.

31. The defence requests leave to appeal on this issue with similar reasoning to that given in the previous third issue. Specifically, the defence states that the Chambers exercise of this power could damage the efficiency of the right of the accused to examine prosecution witnesses freely.<sup>65</sup> Further, they determine that the expeditiousness would also be damaged by requiring the defence to request the suspension of the hearing in order to elaborate on those questions and continue with their correspondence.<sup>66</sup>
32. The prosecution opposes that leave to appeal be granted on this issue because it is maintained that the issue does not arise from the impugned decision and “merely foreshadows that the Trial Chamber may, ‘on an exceptional basis’, issue such orders in the future so as to fulfil its obligations under Article 68(1).”<sup>67</sup> The prosecution further argues that because the impugned decision does not set out the circumstances under which the Chamber may issue orders of this nature in future proceedings, the defence therefore, does not set out the way in which the requirements of Article 82(1)(d) are met.<sup>68</sup>
33. The Majority Opinion does not believe that this issue meets the requirements for an interlocutory appeal given that the eventuality may never arise.<sup>69</sup>
34. However, I am not persuaded by either the Majority Opinion or the prosecution argument that because the circumstances under which the Chamber may request further disclosure by the defence concerning the questioning of specific witnesses, it is impossible to meet the requirements of Article 82(1)(d). Rather, it is the Trial Chamber’s duty when applying the requirements of Article 82(1)(d) to forecast the possibilities which might arise from the issue

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<sup>65</sup> ICC-01/04-01/06-1251, 31 March 2008, paragraph 49.

<sup>66</sup> *Ibid.*, paragraph 50.

<sup>67</sup> ICC-01/04-01/06-1261, 4 April 2008, paragraph 16.

<sup>68</sup> *Ibid.*, at paragraph 17.

<sup>69</sup> Majority Opinion, paragraph 35.

considered.<sup>70</sup> A situation could arise in which the Trial Chamber may require such information from the defence in order to meet its obligation to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, pursuant to Article 68(1) and in doing so would be required to balance this duty with the duty to withhold, in absolute terms, the rights of the accused as enshrined in Article 67. In this instance, where the rights of the accused could be affected, the fairness of the proceedings could necessarily be affected.

35. With regard to the expeditiousness of the proceedings, it is clear that should the defence be required to submit lines of questioning for examination of witnesses called by the prosecution, it may affect the expeditiousness of the proceedings as the defence would need time between the examination by the prosecution and their examination of witnesses to provide the relevant material to the Chamber. Thus, both expeditiousness and fairness may be affected should the Trial Chamber make an order of this nature in the future.
36. Therefore, on this final issue, I once again, dissent from the Majority Opinion and believe that leave should be granted.

## II. CONCLUSIONS

37. In coming to my conclusions, I have also taken into account that the issues which arise in this decision with regard to the level of disclosure which may be expected by the defence and the fundamental rights of the defence which must be maintained in their complete form are of critical importance to the Court. These issues and the implementation of the Rome Statute in accordance with the principles have not been adjudicated fully through the Court's judicial

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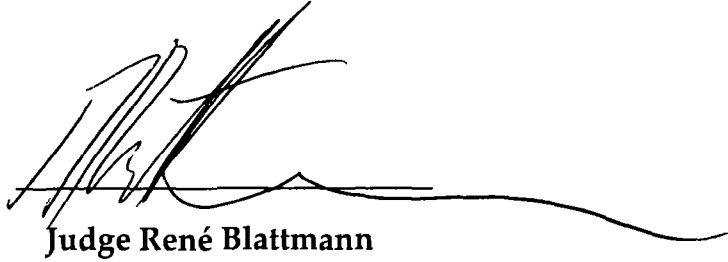
<sup>70</sup> Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006.

processes. Therefore, a resolution of these issues by the Appeals Chamber may well be of use both to the certainty and integrity of the current proceedings as well as to future proceedings.

38. For the reasons identified heretofore, I dissent from the Majority on all four grounds and believe that leave to appeal should be granted on the following four issues encompassed in the defence application for leave to appeal.

- a) *Whether the Trial Chamber erred in imposing an obligation on the defence to furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defence intended to be relied upon.*
- b) *Whether the Chamber erred in imposing an obligation on the defence to furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications intended to be advanced regarding admissibility or relevance or other substantive points of law which require resolution before the start of trial.*
- c) *Whether the Chamber erred in ordering the defence to provide the Chamber, the prosecution and the participants with any evidence intended for use by the defence, other than the oral testimony of a witness, three days in advance of its presentation.*
- d) *Whether the Chamber may, in exceptional circumstances, order advance disclosure of the questions or the lines of questioning to be advanced by the defence.*

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



**Judge René Blattmann**

Dated this 8 May 2008

At The Hague, The Netherlands