

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 15 December 2011

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 translation of the Article 74 Decision and related procedural issues**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean Marie Biju-Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carina Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Translation Section
Appeals Division

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 translation of the Article 74 Decision and related procedural issues:

I. **Background**

1. On 15 November 2011, the Chamber convened a status conference, pursuant to Rule 132(2) of the Rules of Procedure and Evidence (“Rules”) to discuss the translation of the Decision to be issued in accordance with Article 74 of the Rome Statute (“Statute” and “Article 74 Decision” or “judgment”).¹
2. The particular issue under consideration related to the date of delivery of the Article 74 Decision, in the context of whether it was necessary to deliver it simultaneously in French and English. The Chamber raised the possibility of avoiding a considerable delay by issuing the Decision in English, and providing the French translation thereafter, once available.²

Views at the Status Conference

3. In their submissions, the parties jointly submitted that in the event of an acquittal, “time” for the purposes of appellate proceedings brought by the prosecution would commence upon the release of the English-language version of the Article 74 Decision.³

¹ Scheduling order for a status conference on the translation of the judgment, 8 November 2011, ICC-01/04-01/06-2818.

² ICC-01/04-01/06-2818, paragraph 2.

³ Transcript of hearing on 15 November 2011, ICC-01/04-01/06-T-358-ENG, page 7, lines 12-18 and page 8, lines 21-23.

4. The Office of the Prosecutor (“prosecution”) contended that the Article 74 Decision should be released immediately after completion of the English-language version.⁴ In the event of a conviction, the prosecution accepted that the accused’s obligation to file a notice of appeal under Rule 144 of the Rules would only commence once French-language version is available.⁵ The prosecution emphasised that the English-language version would be authoritative.⁶
5. The defence argued that the English-language version of the Article 74 Decision would not be “notified” for the purposes of the Rules and the Regulations of the Court (“Regulations”).⁷ In this context, counsel for the defence made reference⁸ to Regulation 31(2) of the Regulations, which stipulates *inter alia*:

Unless *otherwise* provided in the Statute, Rules, these Regulations or *ordered by the Chamber*, a participant is deemed notified, informed of or to have had communicated to him or her, a document, a decision or order on the day it is effectively sent from the Court by the Registry. [Emphasis added]

6. Therefore, counsel for the defence effectively submitted that it was within the authority of the Chamber to determine the precise moment when the parties are formally notified for the purposes of sentencing and any appellate proceedings (in the event of a conviction) or immediate release (in the event of an acquittal).⁹

⁴ ICC-01/04-01/06-T-358-ENG, page 2, lines 21-23

⁵ ICC-01/04-01/06-T-358-ENG, page 3, lines 1-3 ; page 7 line 22 – page 9, line 7.

⁶ ICC-01/04-01/06-T-358-ENG, page 4, line 4.

⁷ ICC-01/04-01/06-T-358-ENG, page 5, line 25 to page 6, line 3.

⁸ ICC-01/04-01/06-T-358-ENG, page 5, lines 2-14.

⁹ ICC-01/04-01/06-T-358-ENG, page 4, line 20 – page 5, line 5.

7. In its submissions on 15 November 2011, the defence suggested that, in the event of a conviction, the process of sentencing under Article 76 of the Statute and any consideration of reparations under Article 75 of the Statute could not commence until the appellate proceedings are completed and a final decision under Article 74 of the Statute has been handed down by the Appeals Division.¹⁰
8. The prosecution, in contrast, argued that the Chamber is entitled to proceed to the sentencing stage in the event of a conviction of the accused, even if the French-language version of the judgment is unavailable.¹¹
9. The legal representatives of victims argued that notification only occurs when the French-language version of the judgment is available.¹² However, the representatives advanced that sentencing and reparations could be addressed in the absence of the French-language version (*viz.* upon publication of the English-language version of the judgment).¹³
10. Upon inquiry from the Bench, the Registry indicated that it was unable to give a precise estimate of the time necessary to translate the Article 74 Decision into French in advance of seeing the final document.¹⁴

Supplementary Submissions

11. On 18 November 2011, with leave of the Chamber, the defence varied its submissions in writing,¹⁵ and the prosecution and the legal

¹⁰ ICC-01/04-01/06-T-358-ENG, page 11, lines 5-13.

¹¹ ICC-01/04-01/06-T-358-ENG, page 13, lines 9 - 13

¹² ICC-01/04-01/06-T-358-ENG, page 15, lines 25 to page 16, line 3.

¹³ ICC-01/04-01/06-T-358-ENG, page 16, lines 4-6.

¹⁴ ICC-01/04-01/06-T-358-ENG, page 14, lines 6-9.

representatives similarly submitted additional observations on 23 November 2011.¹⁶

12. The defence maintained its argument that the Chamber should only notify the Article 74 Decision for the purposes of appellate proceedings in the event of a conviction when the French translation is available.¹⁷ However, the defence accepted that the sentencing stage (if the accused is convicted) can take place prior to the notification of the French version of the Article 74 Decision and prior to a final determination on the Chamber's judgment by the Appeals Division.¹⁸

13. The defence qualified this general submission with the caveat that sufficient time should be afforded to secure a proper understanding of the essential elements of the Article 74 Decision, and including, a translation into French of any important and necessary parts of the judgment (any suggested passages in this context will be identified by the defence once the English version is available).¹⁹

14. The prosecution maintained the submissions it had originally deployed orally,²⁰ save that it added that its approach to the Chamber's use of its

¹⁵ Observations supplémentaires de la Défense suite de l'audience tenue le 15 novembre 2011, 18 November 2011, ICC-01/04-01/06-2822.

¹⁶ Prosecution's Response to the Defence "Observations supplémentaires de la Défense suite de l'audience tenue le 15 novembre 2011", 23 November 2011, ICC-01/04-01/06-2826, Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 aux « Observations supplémentaires de la Défense a la suite de l'audience tenue le 15 novembre 2011 » datées du 18 novembre 2011, 23 November 2011, ICC-01/04-01/06-2824 and Réponse des représentants légaux des victimes a/0001/06, a/0002/06, a/0003/06, a/0007/08, a/404/08, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09 et a/0398/09 aux observations de la Défense suite a l'audience tenue le 15 novembre 2011, 23 November 2011, ICC-01/04-01/06-2825.

¹⁷ ICC-01/04-01/06-2822, paragraph 4.

¹⁸ ICC-01/04-01/06-2822, paragraph 6.

¹⁹ ICC-01/04-01/06-2822, paragraph 7.

²⁰ ICC-01/04-01/06-2826, paragraphs 1 – 7.

discretionary powers under Regulation 31 of the Regulations is limited to the circumstances of this case.²¹

15. The legal representatives similarly maintained the argument that the Chamber is not bound to furnish the Decision in French to the accused.²² The legal representatives do not argue against the Chamber exercising its authority under Article 64(6)(f) of the Statute.²³

II. Applicable law

16. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 50 of the Statute

[...] 2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages. [...]

Article 64 of the Statute

[...] 2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters

²¹ ICC-01/04-01/06-2826, paragraph 8.

²² Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 aux « Observations supplémentaires de la Défense a la suite de l'audience tenue le 15 novembre 2011 » datées du 18 novembre 2011, 23 November 2011, ICC-01/04-01/06-2824, paragraphs 7-10.

²³ ICC-01/04-01/06-2824, paragraph 13.

Article 67 of the Statute

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

[...]

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

[...]

Article 74 of the Statute

[...] 2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial. [...]

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75 of the Statute

[...] 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. [...]

Article 76 of the Statute

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence. [...]

Article 81 of the Statute

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence [...]
2. (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1(a) or (b), and may render a decision on conviction in accordance with article 83;
(c) The same procedure applies when the Court, on an appeal against conviction only considers that there are grounds to reduce the sentence under paragraph 2(a)
3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

Rule 40 of the Rules

1. For the purposes of article 50, paragraph 1, the following decisions shall be considered as resolving fundamental issues: [...]
(c) All decisions of a Trial Chamber on guilt or innocence, sentencing and reparations to victims pursuant to articles 74, 75 and 76 [...]

Rule 41 of the Rules

1. For the purposes of article 50, paragraph 2, the Presidency shall authorize the use of an official language of the Court as a working language when:

- (a) That language is understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests.
- (b) The Prosecutor and the defence so request.

Rule 144 of the Rules

1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.
2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:
 - (a) All those who participated in the proceedings, in a working language of the Court;
 - (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1(f)

Rule 150 of the Rules

1. Subject to sub-rule 2, an appeal against a decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75 may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision, the sentence or the reparation order.
2. The Appeals Chamber may extend the time limit set out in sub-rule 1, for good cause, upon the application of the party seeking to file the appeal.

Regulation 31 of the Regulations of the Court

1. Subject to the Statute, Rules, these Regulations or any order of a Chamber, all participants in the relevant proceedings shall be notified of any document

registered by the Registry or any decision or order, unless, with regard to a document, the participant submitting that document requests otherwise. [...]

2. Unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, a participant is deemed notified, informed of or to have had communicated to him or her, a document, decision or order on the day it is effectively sent from the Court by the Registry. [...]

Regulation 32 of the Regulations of the Court

[...] 3. A participant represented by counsel shall be deemed notified when his or her counsel has been notified of a document, decision or order at the electronic, facsimile or postal address which that counsel has indicated to the Registry in accordance with regulation 31, sub-regulation 1, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.

III. Analysis and Conclusions

17. Given the Article 74 Decision is being drafted in English, the issue before the Chamber is whether it is necessary for the English version and the French translation to be handed down simultaneously. Two central questions need to be focussed on in determining this issue. First, is it permissible and fair to move to the sentencing and reparations phase of the proceedings (in the event of a conviction) or the release of the accused (in the event of an acquittal) if the parties and the participants have not been provided with the French translation? Second, what are the implications for any appellate phase of the proceedings if the Chamber decides to release the English version of the judgment before the French translation is available?

18. Article 50(2) of the Statute establishes English and French as the working languages of this Court and for these purposes they rank equally. Although Article 74 of the Statute sets out various requirements as regards

the judgment, the Rome Statute framework does not contain any provision to the effect that it is necessary for the English and French versions to be issued together. Instead, Article 67(1)(f) entitles the accused to such translations as are necessary to meet the requirements of fairness, if any documents are not in a language he fully understands and speaks. Rule 144(2)(b) of the Rules indicates that the Chamber's Article 74 Decision on criminal responsibility shall be provided as soon as possible to "[t]he accused in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1(f)". For Mr Lubanga and his defence team the relevant official language of the Court is French.

19. It follows that the essential requirement is for the Chamber to ensure that the accused is provided with a translation of the Article 74 Decision in circumstances that protect the fairness of the proceedings.

20. Against this background, the Chamber moves to the first question, namely whether is it permissible and fair to move to the sentencing and reparations phase (in the event of a conviction) or the release of the accused (in the event of an acquittal) if the parties and the participants have not been provided with a complete French translation. Given the conclusions set out above and the submissions of the parties and participants, the Chamber can deal shortly with this particular question. It is clear that this course is undoubtedly "permissible" within the Rome Statute framework, and bearing in mind the support of the parties and participants for this approach, there are no concerns as to fairness. It is generally accepted that the Chamber would need to move to the next phase whatever the result, avoiding the delay that would be caused by waiting for the complete French translation.

21. Nevertheless, certain minimum safeguards need to be in place to ensure that the accused and his counsel are able adequately to prepare for this next phase if the accused is convicted. In particular, the Chamber agrees with the defence that the timing of the next phase, in these circumstances, will depend on the translation into French of those parts of the judgment (as identified by the defence) which the Chamber considers essential for these purposes. This will not apply if the accused is acquitted.
22. The Chamber turns next to the implications for any appellate phase of the proceedings if the Chamber decides to release the English version of the judgment before the French translation is available. It is agreed by the parties and participants that in the event of an acquittal, the prosecution's obligations as regards Rule 150(1) (*viz.* an appeal against a conviction or an acquittal may not be filed later than thirty days "from the date on which the party filing the appeal is notified of the decision, the sentence or reparation order") should commence as soon as the English version of the judgment is notified, in accordance with Regulation 31(2) of the Regulations (*viz.* the participant is deemed notified of a decision on the day it is effectively sent from the Court by the Registry, unless otherwise ordered by the Chamber). Given the consensus on this issue, it is unnecessary to make any alternative order and the Chamber determines that the prosecution will be "notified" for the purposes of Rule 150(1) of the Rules and Regulation 31(2) of the Regulations when the Article 74 Decision is effectively sent from the Court by the Registry if the accused is acquitted.
23. Different considerations would apply in the event of a conviction. As far as the Chamber is aware the accused has either no, or limited, ability as

regards reading English. If he is convicted, he will need to prepare for the appellate stage of the case and if he is deemed “notified” of the Article 74 Decision when the English version is available, he will be obliged to file his appeal within 30 days. In this trial, whatever the overall conclusion, the judgment will run to many hundreds of pages, and it will involve detailed consideration of a large number of complex legal and factual issues. The Chamber is of the view that it would be unfair on the accused, and it would constitute a breach of Article 67(1)(f) of the Statute (his entitlement to translations in order to secure fairness), as well as contravening the objective of Rule 144(2)(b) of the Rules, to require the accused to prepare for this particular stage of the proceedings when he is effectively unable to read the judgment in English.

24. Accordingly, under Rule 144(2)(b) of the Rules, the Chamber determines that the accused will have been “notified” of the Article 74 Decision in the event of a conviction (particularly in the context of any appeal), when the French translation is effectively sent from the Court by the Registry. The Chamber notes that this is consistent with the approach of Pre-Trial Chamber II when it determined that the five-day period to file an application for leave to appeal only commenced on the date of notification of the French translation of the relevant decision.²⁴ Pre-Trial Chamber I made a similar decision as regards notification of the Arabic translation of a decision originally delivered in English.²⁵ This Chamber has also earlier ruled that “[n]o provision exists which entitles a party or a participant to stipulate that time limits should only apply when the decision is provided to it in the working language of the Court of their choice. Instead, the

²⁴ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, page 185.

²⁵ Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, page 98.

guiding provision is Article 67(f) and the provision of translations should be consistent with the requirements of fairness”.²⁶

25. In the event of a conviction, the Chamber considers it fair for the prosecution also to be “notified” of the Article 74 Decision at the same time as the defence. This is potentially relevant to the timing of the transmission of the trial record to the Appeals Chamber, pursuant to Rule 151 of the Rules.

26. The Chamber therefore concludes that:

In the event of a conviction the Chamber will

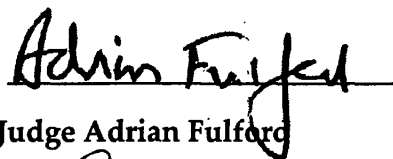
- a. proceed to the sentencing and the reparations phase of the case once the English version of the Article 74 Decision is notified, having first ordered that any sections (identified by the defence) which it considers essential have been translated;
- b. order that the accused and the prosecution are notified of the Article 74 Decision (particularly for the purposes of an appeal) when the French translation is effectively notified from the Court by the Registry;

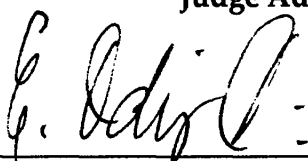
In the event of an acquittal the Chamber will

- c. consider the accused’s release once the English version of the Article 74 Decision is notified;
- d. order that the prosecution is notified of the Article 74 (particularly for the purposes of an appeal) when the English version of the Article 74 Decision is notified.

²⁶ Decision on defence request for extension of time, 22 January 2008, ICC-01/04-01/06-1125, paragraph 14.

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


Judge Adrian Fulford


Judge Elizabeth Odio Benito


Judge René Blattmann

Dated this 15 December 2011

At The Hague, The Netherlands