

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 July 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

**Public document
With public Annexes 1 and 3 and Confidential – *ex parte* – Prosecution only
Annexes 2 and 4**

**Prosecution's provision of information supplementing the "Prosecution's
application to lift the stay of proceedings"**

Source: Office of the Prosecutor

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

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Detention Section

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Other

Background

Decision on the stay of proceedings

1. On 13 June 2008, the Trial Chamber issued the “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”¹ (“Decision on the stay of proceedings”). In that decision, the Trial Chamber ordered a stay on the proceedings² and scheduled a hearing for 24 June 2008 in order to consider the release of the accused.³

2. On 23 June 2008, the Prosecution filed the “Prosecution’s Application for leave to Appeal ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”⁴ (“Prosecution’s Request”). The Legal Representatives for the Victims a/0001/06 to a/0003/06 on 24 June 2008 filed the “Réponse à la demande du procureur de faire appel contre la décision du 13 Juin 2008”, supporting the Prosecution’s Request.⁵ On 27 June 2008, the Defence submitted the “Réponse de la Défense à la Prosecution’s Application for leave to Appeal ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, date du 23 juin 2008”.⁶ The Defence made no substantive submissions on the Prosecution’s Request.

¹ ICC-01/04-01/06-1401.

² *Ibid.*, at para. 94

³ *Ibid.*, at para. 94.

⁴ ICC-01/04-01/06-1407.

⁵ ICC-01/04-01/06-1410.

⁶ ICC-01/04-01/06-1416.

3. On 2 July 2008, the Trial Chamber rendered the “Decision on the Prosecution’s Application for Leave to Appeal ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’”,⁷ granting the Prosecution’s Request.⁸

Order on the release of the accused

4. Following oral submissions on the release of the accused during the hearing of 24 June 2008 by the Defence,⁹ the Legal Representatives of the Victims,¹⁰ and the Prosecution,¹¹ the Prosecution on 27 June 2008 filed the “Prosecution’s Submission on the Effect of the Application for Leave to Appeal the Decision of the Trial Chamber to Stay the Proceedings on the Detention of Thomas Lubanga Dyilo”.¹² On the same day, the Defence submitted the “Observations de la Défense sur la mise en liberté de M Thomas Lubanga”,¹³ and the Legal Representatives for the Victims filed the “Observations communes des représentants légaux des victimes sur la demande de mise en liberté de L’Accusé”.¹⁴
5. On 2 July 2008, the Trial Chamber issued the “Decision on the release of Thomas Lubanga Dyilo”¹⁵.
6. The same day, the Prosecution filed the “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’”,¹⁶ and requested the Appeals Chamber to grant suspensive effect to the appeal.¹⁷

⁷ ICC-01/04-01/06-1417.

⁸ *Ibid.*, at para. 32.

⁹ Transcript of the hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, at pages 4 to 11, and 23 to 26.

¹⁰ *Ibid.*, at pages 12 to 19.

¹¹ *Ibid.*, at pages 12 to 22.

¹² ICC-01/04-01/06-1414.

¹³ ICC-01/04-01/06-1415.

¹⁴ ICC-01/04-01/06-1413.

¹⁵ ICC-01/04-01/06-1418.

7. On 7 July 2008, the Appeals Chamber granted the request for suspensive effect.¹⁸

The Trial Chamber's suggestions and observations in relation to any application seeking lifting of the stay of proceedings

8. During the hearing of 24 June 2008, the Trial Chamber proposed certain suggestions and observations in relation to any application that may be made in due course to lift the stay of the proceedings.¹⁹ In particular, the Trial Chamber stated that "...any application of this kind should occur and only occur when the Prosecution is in a position to address to the extent that is feasible the totality of the evidence that is covered by the Article 54(3)(e) agreements from all the information providers ...",²⁰ and outlined, *inter alia*, the following four observations:

- (i) that any application to lift the stay should be addressed comprehensively as part of a single application;²¹
- (ii) that the Trial Chamber is unlikely to approve a system on the review of the materials concerned that depends on its ability to memorise large quantities of information which it is unable to retain and study and thereby compare with the other evidence in the case;²²
- (iii) that any proposal that the Trial Chamber should view the materials that are protected by Article 54(3)(e) of the Rome Statute ("Statute") will need to include conditions which enable it to explain in a

¹⁶ ICC-01/04-01/06.

¹⁷ *Ibid.*, at para. 14.

¹⁸ ICC-01/04-01/06-1423.

¹⁹ Transcript of the hearing on 24 June 2008, ICC-01/04-01/06-T-91-ENG, at pages 30 to 33.

²⁰ *Ibid.*, at page 31, lines 2 to 4.

²¹ *Ibid.*, at page 31, lines 21 to 25, and page 32, line 1.

²² *Ibid.*, at page 32, lines 2 to 8.

written decision by reference to the detail of the evidence it has seen, an analysis of why it has reached any relevant conclusions, and that any material shown to the Trial Chamber must be available, if necessary, for review by the Appeals Chamber;²³ and

- (iv) that it should not be assumed that the Trial Chamber will approve summaries of the materials concerned.²⁴

9. On 10 July 2008, the Prosecution filed the "Prosecution's application to lift the stay of proceedings"²⁵ ("10 July 2008 Application"). In the 10 July 2008 Application, the Prosecution informed the Chamber of the arrangements the various information providers consented to in order to effectively comply with the conditions set by the Trial Chamber to lift the stay of proceedings.²⁶ Accordingly, the Prosecution requested the Trial Chamber to lift the stay of the proceedings and to revoke the release of the accused.²⁷

Additional information

10. As foreshadowed in the 10 July 2008 Application,²⁸ the Office of the Prosecutor (OTP) continued its consultations with the United Nations (UN) in order to secure the lifting of confidentiality restrictions under article 54(3)(e). These consultations have resulted in two further letters of the UN, dated 18 and 28 July 2008 respectively.²⁹

²³ *Ibid.*, at page 32, lines 9 to 22.

²⁴ *Ibid.*, at page 32, lines 23 to 25 and page 33, line 1.

²⁵ ICC-01/04-01/06-1430 Conf-Exp; the Prosecution filed the public redacted version (ICC-01/04-01/06-1431) on 11 July 2008.

²⁶ *Ibid.*, at paragraphs 20 to 44.

²⁷ The Response of the Defence is due on 4 August 2008. As a matter of professional courtesy, the Prosecution has informed the Defence by e-mails of 21 and 24 July 2008 that it intends to file the present supplementary information to the 10 July 2008 Application.

²⁸ See footnote 37 of the 10 July 2008 Application, which in its relevant part reads as follows: 'Finally, the Prosecution is continuing consultations with the UN, with a view to enabling disclosure of all documents directly to the Defence. The Prosecution will keep the Trial Chamber informed of any further developments in this regard.'

²⁹ The 18 July 2008 UN letter with its Annexes I and II is attached as Annex 1. The further attachments to the 18 July 2008 UN letter, to the extent that they are relevant, were attached to the 10 July 2008 Application; reference

11. These letters provide for the lifting of Article 54(3)(e) confidentiality restrictions for 63 of the 152 undisclosed UN documents.³⁰ Accordingly, the Prosecution is now in a position to disclose directly to the Defence these 63 documents; 50 documents can be disclosed without redactions, and 13 documents with redactions.

18 July 2008 UN letter

12. As detailed in the 18 July 2008 letter and its Annexes I and II, the UN has consented to lift the Article 54(3)(e) restrictions in respect of 49 documents. Annex I to the letter details the 37 documents that can be disclosed without redactions; Annex II details the 12 documents that can be disclosed with redactions.

13. On 23 July, the Prosecution informed the Defence by way of e-mail about its preparedness to disclose the documents concerned and suggested a disclosure meeting. Consistent with its position already expressed on 16 June 2008, the Defence on 24 July 2008 informed the Prosecution that it is not prepared to accept any disclosure materials so long as the Decision on the stay of proceedings has not been lifted.

28 July 2008 UN letter

14. As detailed in the 28 July 2008 letter, the UN has furthermore consented to lift the Article 54(3)(e) restrictions in respect of another 14 documents. Annex I to

is made to footnote 47 of the 10 July 2008 Application and the respective Annexes 2 to 4. The Annexes III and IV to the 18 July 2008 UN letter are attached as Confidential - *ex parte* - Prosecution only Annex 2. The 28 July 2008 UN letter with its Annexes I and II is attached as Annex 3. The Annex III to the 28 July 2008 UN letter is attached as Confidential - *ex parte* - Prosecution only Annex 4.

³⁰ Reference is made to paragraph 13 of the 10 July 2008 Application.

the letter details the 13 documents that can be disclosed without redactions; Annex II details the one document that can be disclosed with redactions.

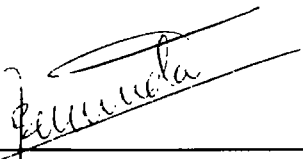
15. In light of the Defence's clearly re-iterated position to not accept any disclosure materials so long as the Decision on the stay of proceedings has not been lifted,³¹ the Prosecution has not offered these additional documents to the Defence.

Remaining documents

16. The UN has informed the Prosecution that in order to fully assist the Court it continues the review of the remaining items that are not covered by the 18 and 28 July 2008 letters, with a view to lifting Article 54(3)(e) confidentiality restrictions. It is anticipated that in the coming days, and in any case before 9 August 2008, the UN will inform the Prosecution of the result of this review.³²

Request

17. The Prosecution reiterates its request that the Trial Chamber lifts the stay of the proceedings and revokes the decision on the release of the accused.



 Fatou Bensouda, Deputy Prosecutor
 on behalf of
 Luis Moreno-Ocampo, Prosecutor

Dated this 30th day of July 2008
 At The Hague, The Netherlands

³¹ See paragraph 13 above.

³² Reference is made to page 2, second last paragraph, of the 28 July 2008 UN letter.