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THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Erkki Kourula

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

Public Document

**Prosecution's Response to Observations of Participating Victims on
Appeal against Decision to Stay 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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Introduction

The Prosecution is appealing Trial Chamber I's Decision to Stay Proceedings in the case against Thomas Lubanga Dyilo ("the Accused"). The legal representatives of participating victims a/0001/06 to a/0003/06 ("the Victims") have filed observations presenting the views and concerns of the Victims regarding the issues raised on appeal. The Prosecution concurs with many of the observations made by the Victims, and hereby files its response.

Background

1. On 11 June 2008, the Trial Chamber orally announced that the trial date was vacated,¹ and on 13 June 2008, the Trial Chamber ordered that proceedings in the case be stayed.²
2. On 23 June 2008, the Prosecution sought leave to appeal against the Decision to Stay Proceedings.³
3. On 2 July 2008, the Trial Chamber granted the Prosecution leave to appeal the Decision to Stay Proceedings,⁴ in respect of two issues:

"Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in its characterization of the Prosecution's use of it as constituting 'a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances'" ("the First Issue").

¹ ICC-01/04-01/06-T-90-ENG. For further background to the vacating of the trial date and stay of proceedings, the Prosecution refers to the submissions cited in its Application for Leave to Appeal, para. 1.

² ICC-01/04-01/06-1401 ("Decision to Stay Proceedings"). The Decision to Stay Proceedings scheduled a hearing for 24 June 2008 to consider the release of the Accused (para. 94). The Prosecution subsequently filed submissions arguing that if the Trial Chamber granted leave to appeal the Decision to Stay Proceedings, then it should defer consideration of release pending resolution of the appeal (ICC-01/04-01/06-1407, 23 June 2008).

³ ICC-01/04-01/06-1407 ("Application for Leave to Appeal").

⁴ ICC-01/04-01/06-1417 ("Decision Granting Leave to Appeal").

“Whether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute; [...] and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings”⁵ (“the Second Issue”).

4. On 2 July 2008, the Trial Chamber also issued a separate decision in which it ordered the release of the Accused.⁶ The Prosecution has appealed the Decision on Release,⁷ noting that it was solely based on the Decision to Stay Proceedings and the appeals against the two decisions are thus inextricably linked.⁸ The Prosecution did not oppose the participation of victims in that appeal against the Decision on Release.⁹
5. On 14 July 2008, the Prosecution filed its document in support of this appeal against the Decision to Stay Proceedings,¹⁰ in which it submitted that the Trial Chamber made three errors in the decision:
 - (1) The Trial Chamber erred in law in its interpretation of the nature and scope of Article 54(3)(e);
 - (2) The Trial Chamber erred, in law and in fact, in its characterization of the Prosecution’s conduct pursuant to Article 54(3)(e); and
 - (3) The Trial Chamber erred in the exercise of its discretion, by imposing an excessive and premature remedy in the form of an indefinite stay of the proceedings.
6. On 16 July 2008, the legal representatives of the Victims filed an application to participate in this appeal.¹¹ The Prosecution did not object to the Victims’ request to participate in this appeal.¹²

⁵ The Trial Chamber went beyond the Application for Leave to Appeal, also granting leave to appeal “whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the prosecution disclosing any potentially exculpatory evidence to the defence under Article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt)”.

⁶ ICC-01/04-01/06-1418 (“Decision on Release”).

⁷ ICC-01/04-01/06-1419 OA12, 2 July 2008; ICC-01/04-01/06-1429 OA12, 10 July 2008. The Appeals Chamber has granted suspensive effect to that appeal (ICC-01/04-01/06-1423 OA12, 7 July 2008).

⁸ See ICC-01/04-01/06-1429 OA12, 10 July 2008, in particular paras. 11, 13-17, 21-23.

⁹ ICC-01/04-01/06-1442 OA12, 18 July 2008.

¹⁰ ICC-01/04-01/06-1434 OA13.

7. On 24 July 2008, pursuant to an order of the Appeals Chamber,¹³ the Prosecution re-filed its Document in Support of Appeal.¹⁴
8. On 25 July 2008, the Defence filed its response to the Prosecution's Document in Support of Appeal.¹⁵
9. On 6 August 2008, in a decision the Appeals Chamber granted the Victims "the right to participate in the present appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal".¹⁶
10. On 12 August 2008, the Victims filed the "*Observations des victimes sur l'appel du procureur contre la décision du 13 juin 2008 ordonnant l'arrêt de la procédure*" ("Victims' Observations").¹⁷
11. Pursuant to the same decision by the Appeals Chamber of 6 August 2008,¹⁸ the Prosecution hereby responds to the Victims' Observations.

Response to Victims' Observations on the First Issue: interpretation of Article 54(3)(e) and the characterization of the Prosecution's conduct (paras. 2-15)

12. The Prosecution concurs with many of the observations made by the Victims¹⁹ regarding the first issue in this appeal, such as the observations that the right of the Defence to the disclosure of potentially exculpatory material must be considered in the context of other obligations under the Statute and Rules;²⁰ and

¹¹ ICC-01/04-01/06-1439 OA13.

¹² ICC-01/04-01/06-1450 OA13, 29 July 2008.

¹³ ICC-01/04-01/06-1445 OA13, 22 July 2008.

¹⁴ ICC-01/04-01/06-1446 and annexes. The re-filed Document in Support of Appeal ("Appeal Brief") is ICC-01/04-01/06-1446-Anx1.

¹⁵ ICC-01/04-01/06-1447 OA13.

¹⁶ ICC-01/04-01/06-1453 OA13.

¹⁷ ICC-01/04-01/06-1456 OA13.

¹⁸ ICC-01/04-01/06-1453 OA13, p. 3.

¹⁹ In addition to those cited in detail, see e.g. Victims' Observations, paras. 4, 5 (second and third points), 6-7 and 13. The Prosecution in this response does not intend to address each and every submission made by the legal representatives of the victims, and does not concede or necessarily support those arguments to which it does not respond.

²⁰ Victims' Observations, para. 3.

that the protection of confidential information in the present circumstances is not a “right” of the Prosecution, but rather an obligation upon it.²¹

13. The Prosecution also agrees with the Victims to the extent that they argue that in assessing whether the right of the accused to disclosure of material has been respected, the Court must also consider alternative measures.²²
14. The Prosecution, however, disputes the suggestion by the Victims that it did not promptly negotiate with the respective information providers in order to allow the Trial Chamber to view the relevant material which had been gathered under Article 54(3)(e) and which may contain potentially exculpatory elements.²³ The Prosecution has taken a transparent approach to its disclosure obligations in this case: it constantly worked with providers of information to seek the lifting of restrictions on potentially exculpatory material; and has explained in detail its approach to disclosure, the efforts that it has undertaken, and any outstanding issues to be resolved.²⁴
15. The Prosecution agrees with the Victims that there is no legal obligation to obtain or secure such consent of the provider:²⁵ the failure to do so does not in itself demonstrate any abuse of the provision;²⁶ and other alternatives must be considered in assessing the impact on the fairness of the proceedings.²⁷

²¹ Victims’ Observations, para. 9.

²² Victims’ Observations, para. 15.

²³ Victims’ Observations, para. 14.

²⁴ Appeal Brief, para. 33, see also paras. 23, 29, 31-32, 34-37.

²⁵ Victims’ Observations, para. 15. Nor could there be, for as the legal representatives correctly pointed out, only the information provider may decide to lift the restrictions imposed on documents provided under Article 54(3)(e) (see Victims’ Observations, para. 5, third point). See further Appeal Brief, para. 17.

²⁶ Victims’ Observations, para. 14.

²⁷ Victims’ Observations, para. 15; see also Appeal Brief, paras. 17-18.

Response to Victims' Observations on the Second Issue: the imposition of an indefinite stay of proceedings (paras. 16-21)

16. The Prosecution again concurs with many of the observations made by the Victims, in particular that the position taken by the Trial Chamber was too absolute;²⁸ that the nature of the material in question would not justify the extreme measure taken by the Trial Chamber;²⁹ and emphasizing that the present situation is not one in which the Prosecution has attempted deliberately to withhold potentially exculpatory material from the Court, but is rather a situation imposed upon the Prosecution by third parties.³⁰
17. In relation to the point raised by the Victims over their inability to themselves verify the propriety of the Prosecution's conduct, due to their lack of access to the case file,³¹ the Prosecution recalls its previous public submissions regarding its diligent and transparent approach to disclosure in this case.³² In particular, the Prosecution recalls its submissions regarding the nature of the material at issue in this appeal,³³ and the detailed reasons provided for its assessment that none of it could materially impact on the Trial Chamber's determination of the guilt or innocence of the Accused.³⁴ As the Prosecution has made clear, this was therefore not a situation in which critical evidence, going to the heart of the Prosecution's case, was being withheld from the Accused.³⁵
18. While the Prosecution does not necessarily agree with the procedure proposed by the Victims,³⁶ especially in light of the restrictions imposed by some providers, the Prosecution agrees that any consideration of whether to stay proceedings requires

²⁸ Victims' Observations, para. 16. The example cited by the Victims, namely s. 10 of the UK *Criminal Procedure and Investigations Act 1996* (see Victims' Observations, para. 20) provides an illustration of this: the failure of the Prosecution to comply with disclosure obligations within the time frame prescribed does not in itself warrant a stay of proceedings; rather the question is whether failure in all the circumstances deprives the accused of a fair trial.

²⁹ Victims' Observations, para. 17.

³⁰ Victims' Observations, para. 19.

³¹ Victims' Observations, para. 17; also para. 19.

³² Appeal Brief, paras. 23-24, 32-33. See also para. 14, above.

³³ Appeal Brief, 29-30. Much of this detailed analysis was presented in public filings which were notified to the victims – see in particular ICC-01/04-01/06-1248, 28 March 2008.

³⁴ Appeal Brief, 29-30; also para. 31.

³⁵ Appeal Brief, para. 30.

³⁶ Victims' Observations, para. 19.

a thorough examination of all of the relevant factors: in particular the Prosecution's conduct and the nature of the material in question.³⁷ The Prosecution finally agrees that given the serious nature of a stay of proceedings, this should be a last resort: the Trial Chamber should continue proceedings if at all possible; and a stay should be imposed only after the exhaustion of all other options.³⁸

Conclusion

19. The Prosecution respectfully requests that the Appeals Chamber consider the submissions above in its resolution of this appeal.



Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of August 2008
At The Hague, The Netherlands

³⁷ Victims' Observations, para. 19; see also Appeal Brief, para. 23.

³⁸ Victims' Observations, para. 21; see further Appeal Brief, paras. 26-27, 34-39. The Prosecution understands the Victims' submission that such a decision should only be taken based on the entirety of the case file to mean that such a decision must be taken in context, on the basis of the totality of the proceedings and information before the Chamber.