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Pénale
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Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **25 July 2008**

THE APPEALS CHAMBER

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

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

Public Document

Defence Response to the Prosecution's Document in Support of Appeal against 13 June 2008 Decision to Stay Proceedings

Source: **Mr Thomas Lubanga Dyilo's Defence Team**

Document 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
Mr Ekkehard Withopf

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of Victims
Counsel for Victims a/0001/06 to a/0003/06 and a/0105/06
Mr Luc Walleyn
Mr Franck Mulenda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

BACKGROUND

1. On 28 March 2008, the Prosecutor filed the "Prosecution's submission on undisclosed documents containing potentially exculpatory information".[1]

2. On 22 April 2008, the Defence filed its Response.[2]

3. On 6 May 2008, Trial Chamber I ("the Chamber") convened a public status conference to hear the parties and participants, amongst others, on the issue addressed in the present submission.[3]

4. On 2 June 2008, the Defence submitted an application before the Chamber seeking a stay of the proceedings and the release of the accused.[4]

5. On 13 June 2008, the Chamber ordered a stay of proceedings and scheduled the consideration of the release of the accused for 24 June 2008.[5]

6. On 2 July 2008, the Chamber ordered the release of Mr Thomas Lubanga.[6]

7. That same day, the Chamber granted the Prosecutor leave to appeal the Decision of 13 June 2008 staying the proceedings.[7]

8. On 14 July 2008, the Prosecutor filed the "Prosecution's Document in Support of Appeal against Decision to Stay Proceedings".[8]

9. On 16 July 2008, the Defence filed its "*Observations de la Défense relatives à l'irrecevabilité du* 'Prosecution's Document in Support of Appeal against Decision to Stay Proceedings'".[9]

[1] ICC-01/04-01/06-1248.
[2] ICC-01/04-01/06-1291.
[3] ICC-01/04-01/06-T-85.
[4] ICC-01/04-01/06-1366.
[5] ICC-01/04-01/06-1401.
[6] ICC-01/04-01/06-1418.
[7] ICC-01/04-01/06-1417.
[8] ICC-01/04-01/06-1434 + Anx.

10. On 22 July 2008, the Appeals Chamber ordered the Prosecutor to file a new document in support of the appeal within two days.[10]

11. On 24 July 2008, the Prosecutor filed his "Re-filing of Prosecution's Document in Support of Appeal against Decision to Stay Proceedings".[11]

12. On the basis of these observations, the Defence submits that the Prosecutor's appeal should be dismissed.

OBSERVATIONS

13. The Defence concurs with most of the reasons which led the Chamber to order the stay of the proceedings. These reasons, having been perfectly set out by the trial judges, will not be reiterated herein.

14. Similarly, for the thrust of its argument, the Defence refers to its written observations in its response of 22 April 2008,[12] its application of 2 June 2008, and to its oral submissions made at the hearings concerning these proceedings.

15. In the present observations, the Defence intends to respond specifically as necessary to the grounds raised by the Prosecutor in his document in support of the appeal.

a. FIRST GROUND OF APPEAL: THE INTERPRETATION OF ARTICLE 54(3)(e)

16. The Prosecutor contends that the Chamber misinterpreted article 54(3)(e) when it considered that a confidentiality agreement authorised by this provision

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[9] ICC-01/04-01/06-1440.
[10] ICC-01/04-01/06-1445.
[11] ICC-01/04-01/06-1446 + Anxs 1 & 2.
[12] ICC-01/04-01/06-1291.

should only be resorted to "exceptionally, when particular, restrictive circumstances apply" and "solely for the purpose of generating new evidence".[13]

17. This complaint is unfounded.

The Chamber's interpretation is consistent with the Statute and the Rules

18. Under article 54(1)(a), the Prosecutor shall, "*[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally*".

19. Such incriminating and exonerating evidence, relevant to the determination of the truth, must be brought to the attention of the judges in order that they may assess whether there is criminal responsibility, after having been disclosed to the Defence as required by the Statute and the *Rules of Procedure and Evidence*. These are the fundamental duties of the Prosecutor.

20. All the provisions authorising the Prosecutor not to disclose to the Defence or the judges facts or evidence obtained during the course of his investigations must be regarded as creating <u>exceptions</u> which, as such, can only be resorted to "exceptionally, when particular, restrictive circumstances apply".[14] They are specifically characterised by the *Rules of Procedure and Evidence* as "restrictions on disclosure of material and information",[15] a wording which underlines their exceptional nature devoid of any generalisation.

21. Moreover, any provision allowing a third party – be it a private individual, State, or organisation – in possession of information or material relevant to the determination of the truth, to make its transmission to the Prosecutor subject to a

[13] ICC-01/04-01/06-1401, para. 71 ff.
[14] This interpretation is also shared by Judge Steiner: *Katanga* case, Decision of 2 June 2008, para. 10.
[15] Rules 81 and 82.

confidentiality agreement prohibiting its disclosure to the Defence or the judges, should only be resorted to with the utmost caution, in exceptional circumstances and on specific grounds based on compelling need.

22. Such is the case in article 54(3)(e).

23. By its very nature, the confidentiality agreement authorised by this provision, which prohibits any use of the document concerned at trial, has as its first effect a restriction placed on the Prosecutor's means of publicly ascertaining the truth in a fair trial. As such, this agreement can be concluded only if the confidentiality requested is based on compelling grounds and if this agreement is the sole means of gaining access to further evidence of such importance that obtaining it justifies the "restrictions on disclosure" requested by the source.

24. Resorting to this override provision must be all the more exceptional where the confidentiality afforded risks affecting evidence under article 67(2) or rule 77, and thus being seriously prejudicial to the fundamental rights of the accused and the fairness of the trial.

25. It is with good reason therefore that the Chamber considered that article 54(3)(e) could only be resorted to "exceptionally, to allow the prosecution to receive information or documents which are not for use at trial but which are instead intended to 'lead' to new evidence".[16]

26. Conversely, the Prosecutor's interpretation has the effect of placing the Court, and singularly the Prosecutor himself, in an unacceptable position of dependency on information providers.

The interpretation proposed by the Prosecutor seriously undermines the conduct of the proceedings before the Court

[16] ICC-01/04-01/06-1401, para. 73.

27. The Prosecutor essentially contends that nothing prevents him from entering into systematic and wholesale confidentiality agreements, regardless of the information providers, the grounds for requesting confidentiality, and the volume and type of evidence in question. He even claims that this practice would enable him to fulfil his mandate effectively.

28. Such contention, which is patently erroneous and exemplified by the Prosecutor's conduct in all cases referred to the International Criminal Court under the DRC situation, is cause for concern.

29. Indeed, applying article 54(3)(e) to the evidence given to the Prosecutor by his main information providers has the effect of subjecting its disclosure to the lifting of the confidentiality agreement; that is, *in fine,* vesting the provider concerned with the discretionary power to determine the evidence that will be disclosed to the judges, the parties and the public.

30. It follows from this situation:

- that the Prosecutor is deprived of his independence to search for and uncover evidence relevant to the determination of the truth and the conduct of a fair trial, to the benefit of private individuals, States and national or international organisations;

- that evidence under article 67(2) or rule 77, which is material to the defence of the accused, may intentionally be kept secret for the simple reason that providers refuse to lift confidentiality restrictions imprudently agreed to by the Prosecutor;

- that the power of judges to ensure the fair conduct of the proceedings and, if necessary, "*order the production of evidence in addition to that already collected* *prior to the trial or presented during the trial by the parties*"[17] is seriously undermined and risks being neutralised by the prohibitions outlined in rule 82;

31. Hence, the interpretation favoured by the Prosecutor leads inevitably to the abandonment by the Prosecutor of an essential part of his fundamental mandate and his independence to the benefit of private individuals or organisations outside the Court, the concealment of evidentiary material necessary for the conduct of a fair trial and the impossibility for the judges to exercise control over the fair conduct of the proceedings.

32. Accordingly, it is with good reason that the Chamber rejected this erroneous interpretation of article 54(3)(e).

B. SECOND GROUND OF APPEAL: EXISTENCE OF "WHOLESALE AND SERIOUS ABUSE [BY THE PROSECUTOR], AND VIOLATION OF AN IMPORTANT PROVISION OF THE STATUTE".

33. The Prosecutor takes issue with the Chamber for describing his conduct as 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*".[18]

34. Essentially, he contends, on the one hand, that his use of article 54(3)(e) is justified by the exceptional constraints on his investigations and, on the other hand, that he has always complied with the provisions of the Statute and the Rules.

35. These arguments are flawed in fact and in law. On the contrary, as the Chamber has noted, the manifestly improper use of article 54(3)(e) stems from the

[17] Article 64(6)(d).
[18] ICC-01/04-01/06-1401, para. 73.

systematic and wholesale manner in which it is used, the volume of evidence involved, and the delay in requesting the lifting of the confidentiality restrictions.

Systematic and wholesale use of article 54(3)(e) for the purpose of obtaining evidence to be used at trial.

36. The Prosecutor has stated, on several occasions, that he systematically used article 54(3)(e) to obtain evidentiary material without knowing whether such material would be used to generate new evidence or be put to general use.[19]

37. Hence, the Chamber rightly notes that "*the prosecution's general approach has been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information-provider's consent)*".[20]

38. The same observation was made by the Single Judge in the *Katanga* case, who noted that the Prosecution had disregarded its duty to act with due care by recklessly accepting documents pursuant to article 54(3)(e).[21]

39. As demonstrated above, such systematic and wholesale use of article 54(3)(e) is based on a misinterpretation of this provision and constitutes an abuse of the right to enter into confidentiality agreements.

40. In this regard, it should be noted that the Memorandum signed between the Prosecutor[22] and the United Nations, which expressly provides in article 10 that <u>all</u>

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[19] ICC-01/04-01/06-T-52-ENG, 1 October 2007; p. 101, lines 8 to 12; p. 86, lines 10 to 13; p. 93, lines 24 to p. 94, line 3; p. 94, lines 7 to 13; ICC-01/04-01/06-T-55-CONF-EXP-ENG, 2 October 2007, p. 4, lines 22 to 25, to p. 5, line 1; ICC-01/04-01/06-T-78-CONF-ENG, 12 March 2008, p. 91, lines 21 to 25; ICC-01/04-01/06-T-86-ENG, 6 May 2008, p. 23, lines 8 to 14; (cited in Decision ICC-01/04-01/06-ENG).
[20] ICC-01/04-01/06-1401-ENG, para. 73.
[21] ICC-01/04-01/07-621, para. 46.

documents transmitted by MONUC to the Prosecutor shall be subject to this confidentiality agreement, is clearly unlawful and cannot in any way justify the improper use of article 54(3)(e).

41. Lastly, the Prosecutor has not proven that entering into such agreements was the only way for him to conduct his investigations effectively. Moreover, he provides no indication of the efforts he had to make to convince the United Nations and his other information providers[23] to accept to cooperate without requiring the entering into extremely restrictive confidentiality agreements which could jeopardise the conduct of the proceedings. Hence, the argument that without such agreements, the Prosecutor would have been unable to obtain the documents in question has no serious basis. The truth is that the Prosecutor used article 54(3)(e) as a mere convenience, at best, to speed up the collection of evidence,[24] without giving any thought whatsoever to the serious procedural consequences of this approach.

Extent of evidence affected by the use of article 54(3)(e)

42. The Prosecutor does not deny that as a result of this inappropriate practice, most of the evidentiary material collected during his investigations is subject to confidentiality agreements:

- About 55% of the documents collected in the investigations carried out with respect to the situation in the DRC were obtained pursuant to article 54(3)(e).[25]

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[22] ICC-01/04-01/06-1267-Anx2, Memorandum of understanding between the United Nations and the International Criminal Court, Article 10. Although the Registrar of the Court is also involved in this agreement, it is clearly obvious that the main signatory, acting together with the UN representative, is the Prosecutor.
[23] With regard to the UN, the Prosecutor admits that he took no measures to that end, see ICC-01/04-01/06-1446-Anx 1, para. 16.
[24] ICC-01/04-01/06-1401-ENG, para. 72.
[25] ICC-01/04-01/06-T-52-ENG, pp.13 and 14.

- On 24 May 2006, the Prosecutor informed the Pre-Trial Chamber that he obtained some 8000 article 54(3)(e) documents in the course of his investigations in the *Thomas Lubanga* case.[26]

- In October 2007, the Prosecutor informed the Pre-Trial Chamber that he intended to review more than 750 documents[27] obtained from the United Nations, over 200 of which contained exculpatory information or information material to the preparation of the defence.[28]

43. This situation confirms the fact that the exception provided for in article 54(3)(e) has been *de jure* and *de facto* diverted from its legitimate purpose and inappropriately considered to be a routine means of collecting evidence. Thus, the principle of disclosure has been downgraded into an exception subject to the discretion of the information provider. Yet, as the Chamber has noted "(…) *it is manifest that the agreements should not be allowed to operate in a way that subverts the Statute*".[29]

44. Contrary to the Prosecutor's allegation, there is no proof that this inappropriate practice is dictated by security considerations or other particularly compelling legitimate reasons. On the contrary, it must be noted that none of the providers concerned, and particularly the United Nations, stated the precise grounds on which confidentiality is sought. Hence, these confidentiality agreements seem like undue privileges based on concerns unrelated to the protection of persons or the interests of justice.

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[26] ICC-01/04-01/06-T-8-Conf-ENG, p. 26, line 8.
[27] ICC-01/04-01/06-T-52-ENG, pp. 13 and 14.
[28] ICC-01/04-01/06-1401-ENG, para. 63.
[29] *Idem*, para. 75.

Late requests for lifting of confidentiality restrictions

45. The Prosecutor's inappropriate use of article 54(3)(e) is further compounded by his lack of diligence in getting information providers to waive the confidentiality agreements.

46. According to the Prosecutor, the article 54(3)(e) material was in his possession prior to the commencement of the case against Mr Thomas Lubanga.[30] The issue of their disclosure was raised before the Pre-Trial Chamber at the hearing of 26 April 2006.[31] On 28 September 2006, the Single Judge issued a decision requesting the Prosecutor to obtain the consent of the providers to disclose to the Defence in an unredacted form all article 54(3)(e) documents which are exculpatory or material to the preparation of the defence.[32]

47. The Chamber has helpfully stated that the Prosecutor has been regularly reminded of this vital concern since September 2007.[33]

48. Yet, the Prosecutor has provided no proof of adequate and timely steps taken to secure the lifting of the confidentiality restrictions.

C. THIRD GROUND OF APPEAL: APPROPRIATENESS OF THE STAY OF PROCEEDINGS

49. The Prosecutor has challenged neither the accused's fundamental right to disclosure of exculpatory material in his possession, nor the Chamber's authority to

[30] ICC-01/04-01/06-1407, p. 5: "As this material was collected before and for the purpose of selecting cases, the Prosecution was not in a position at the time of collection to assess the evidentiary value, either incriminatory or exculpatory, of the material."
[31] ICC-01/04-01/06-T-4, p. 6.
[32] ICC-01/04-01/06-490.
[33] ICC-01/04-01/06-1401, para. 3 ff.

order a stay of proceedings when the rights of the accused are violated such that it becomes impossible for him to defend himself on the basis of his recognized rights.[34]

50. He implicitly acknowledges that at this stage of the proceedings, the trial cannot be held due to the non-disclosure of article 67(2) material falling under article 54(3)(e), but contends that the Chamber could have simply ordered a confined postponement of the trial pending a suitable solution, instead of an indefinite stay of proceedings.[35]

51. However, none of the arguments advanced in support of this contention withstand analysis.

Nature of the material in question

52. The Prosecutor contends that the Chamber should have considered the fact that none of the documents in question could impact on the Chamber's determination of the accused's guilt or innocence.[36]

53. Three observations can be made in response to this argument:

54. First of all, the accused's right to disclosure of exculpatory material concerns not only material which shows or tends to show the innocence of the accused, but also material which mitigates his guilt, or which may affect the credibility of prosecution evidence. The Appeals Chamber has also strongly reiterated the accused's right to receive any object that is material to the preparation of his defence (Rule 77).[37]

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[34] ICC-01/04-01/06-1446 -Anx 1, para. 26.
[35] *Idem*, para. 39.
[36] *Idem*, Para. 29.
[37] ICC-01/04-01/06-1433, para. 77. The Appeals Chamber ruled that the Prosecutor's obligation to disclose the necessary material to the Defence has to be interpreted broadly. The Prosecutor had

55. Secondly, the Prosecutor's statement is wholly inconsistent with his description of the same material in his submission of 28 March 2008.[38] This summary description shows beyond any shadow of a doubt that this material goes to the core of the arguments concerning the existence or scope of the accused's individual responsibility and are such as to support his defence.

56. Thirdly, as the Chamber rightly stated,[39] only judges are empowered to determine the effectively exculpatory nature of evidence. In fulfilling his disclosure obligations, the Prosecutor has to limit himself to the potentially exculpatory nature of the evidence in question. This is obviously so in the instant case.

57. It follows therefore that there can be no fair trial so long as the material in question has not been disclosed to the Defence.

Proposal of alternative solutions

58. The Prosecutor argues that the Chamber should have considered alternative solutions to the issue of non-disclosure: disclosure of similar material, disclosure of summaries of the information contained in the documents, agreement on the facts presented in the documents.

59. Contrary to the Prosecutor's claim, the Trial Chamber considered the alternatives presented by the Prosecution.[40] Yet, none of these alternatives enable the Chamber to exercise its review powers usefully. Similarly, none of them is consistent

informed the Appeals Chamber that some of the documents withheld from the Defence were material relating to the presence of child soldiers in other armed groups in the DRC. On this point, the Appeals Chamber reversed the Trial Chamber decision and ruled that material relating to the general use of child soldiers in the DRC was necessary for the accused to prepare his defence and should therefore be immediately disclosed to him.

[38] ICC-01/04-01/06-1248, particularly para. 24; also see ICC-01/04-01/06-1291, paras. 14 to 19.

[39] ICC-01/04-01/06-1401, para. 87

[40] *Idem*, para. 64, 67, 76, 81,

with the accused's fundamental right to disclosure of exculpatory evidence or evidence that is material to his defence[41] in a form which allows for its effective use.[42]

Prosecutor's conduct

60. The Prosecutor pleads his good faith and contends that the Chamber should have taken it into consideration.[43]

61. Without rehashing the Prosecutor's significant responsibility for creating the situation which has made it impossible to hold a fair trial, the decision to stay the proceedings would be wholly justified if such impossibility is found to exist.[44]

62. Hence, this argument is wholly irrelevant.

United Nations offer to continue discussions

63. It is up to the Appeals Chamber to rule on the appeal pending before it with regard to the situation which existed as of the date of the impugned decision. The Appeals Chamber cannot take the place of the Trial Chamber and entertain a new situation that falls within the exclusive jurisdiction of the Trial Chamber.

64. However, the fact remains that as of the date of the impugned decision, the United Nations had clearly confirmed its refusal to waive the confidentiality

[41] *Idem.*
[42] *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, *Joint Decision on Motions Related to Production of Evidence*, 12 December 2002, para. 24; *Prosecutor v. Brdjanin*, Case No. IT- 99-36-T, *Decision on motion for relief from rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to Rule 68* bis *and motion for adjournment while matters affecting justice and a fair trial can be resolved*, 30 October 2002, para. 26; *Prosecutor v. Radoslav Brdjanin and Talic*, Case No. IT-99-36-T, *Decision on Second Motion by Prosecution for Protective Measures*, 27 October 2000, note 62; *Prosecutor v. Blastic*, Case No. IT-95-14-A, *Decision on the Defence motion for sanctions for Prosecutor's repeated violations of Rule 68 of the Rules of Procedure and Evidence*, 29 April 1998, para. 19; *Prosecutor v. Bagosora*, Case No. ICTR-99-42-T, *Decision on disclosure of Identity of Prosecution Informant*, 24 May 2006, para. 5; *Prosecutor vs. Sesay, Kallon and Gbao*, SCSL-04-15-T-189, *Decision on Defence motion for disclosure pursuant to Rules 66 and 68 of the Rules*, 9 July 2004, para. 34.
[43] ICC-01/04-01/06-1446 -Anx 1, paras. 32-33.
[44] ICC-01/04-01/06-1401, para. 90 *in fine.*

agreements binding on the Prosecutor. Similarly, none of the other information providers concerned had reconsidered its refusal to allow disclosure. Hence, the Chamber had no other choice than to rule that "(…) *the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process* (…)".[45]

65. The fact that the impugned decision has apparently encouraged the United Nations to continue its thinking on the subject has no bearing on the consideration of its merits. Moerover, the suggestions submitted by the Prosecutor to the Chamber to date do not hold out any serious hope for a resumption of proceedings.

66. Consequently, it is with good reason that the Chamber stayed the proceedings *sine die*.

FOR THE ABOVE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

- DISMISS the Prosecutor's appeal;

- UPHOLD the Trial Chamber decision staying the proceedings against Mr Thomas Lubanga;

- ORDER the immediate release of Mr Thomas Lubanga.

[signed]

Ms Catherine Mabille, Principal Counsel

Dated this 25 July 2008 at The Hague

[45] *Idem* para. 91.