



Original: **French**

No.: **ICC-01/04-01/06 OA13**

Date: **18 August 2008**

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

**Defence Response to the Observations of Victims a/0001/06 to a/0003/06
on the Prosecutor's Appeal Against the Decision of 13 June 2008
Ordering a Stay of the 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 Mabilie
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 Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

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

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

BACKGROUND

1. On 2 June 2008, the Defence submitted to Trial Chamber I (“the Chamber”) an application for the discontinuance of the prosecution and the release of the accused.¹
2. On 13 June 2008, the Chamber ordered a stay of the proceedings and postponed to 24 June 2008 its consideration of the release of the accused.²
3. On 2 July 2008, the Chamber ordered the release of Mr Thomas Lubanga.³
4. On 2 July 2008, the Chamber granted the Prosecutor leave to appeal the Decision of 13 June 2008 ordering the stay of the proceedings.⁴ The Chamber granted the Prosecutor leave to appeal on the following issues:⁵
 - a. Whether the Trial Chamber erred in the interpretation of the scope and nature of article 54(3)(e) of the Statute and in its characterisation 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”.
 - b. Whether the Trial Chamber erred in the interpretation and exercise of its authority under article 64 of the Statute; 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 within the meaning of article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt); and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings.

¹ ICC-01/04-01/06-1366.

² ICC-01/04-01/06-1401.

³ ICC-01/04-01/06-1418.

⁴ ICC-01/04-01/06-1417.

⁵ ICC-01/04-01/06-1417, para. 32.

5. On 14 July 2008, the Prosecutor filed his observations in support of his appeal against the Decision of 13 June 2008 ordering the stay of the proceedings,⁶ and filed an amended version thereof on 24 July 2008.⁷

6. On 25 July 2008, the Defence filed its response to the submissions of the Prosecutor's appeal.⁸

7. On 6 August 2008, the Appeals Chamber granted Victims a/0001/06 to a/0003/06 and a/0105/06 leave to participate in the Prosecutor's appeal; all observations had to be filed before 12 August 2008. The Appeals Chamber ordered the Prosecutor and the Defence to file a response no later than 18 August 2008.⁹

8. On 12 August 2008, Victims a/0001/06 to a/0003/06 ("the Victims") filed their observations on the Prosecutor's appeal against the Decision of 13 June 2008 ordering the stay of the proceedings.¹⁰

9. The Defence wishes to submit for the attention of the Appeals Chamber the following observations on the Victims' filing of 12 August 2008.

OBSERVATIONS

10. The principal arguments of the Defence's submissions on the issue of the appeal against the Decision ordering the stay of the proceedings appear in its response of 25 July 2008. Accordingly, the Defence will respond here only to certain specific points raised by the Victims.

⁶ ICC-01/04-01/06-1434.

⁷ ICC-01/04-01/06-1146.

⁸ ICC-01/04-01/06-1447-tENG.

⁹ ICC-01/04-01/06-1452 OA12.

¹⁰ ICC-01/04-01/06-1456-tENG.

Protection of victims and witnesses

11. The Victims submit that the right of the accused to obtain disclosure of evidence is restricted by the need to protect victims and witnesses and that this reasoning is consonant with article 54(3)(e).¹¹

12. However, the procedure which led to the stay of the proceedings did not concern the requirements of victim and witness protection, but the specific issue of the confidentiality agreements entered into by the Prosecutor and his sources.

13. As the Trial Chamber pointed out,¹² the Prosecutor clearly indicated that he had relied on article 54(3)(e) to facilitate his investigations and obtain his evidence as quickly as possible. The Prosecutor even stated that 55% of the evidence in the situation in the DRC¹³ – that is, more than eight thousand documents¹⁴ relating to this case – was obtained under cover of confidentiality.

14. The Prosecutor has never shown that the confidentiality agreements were entered into in order to protect victims or witnesses, or to protect the public interest.

15. Hence, the Victims cannot make these arguments after the fact in order to support the Prosecutor's almost systematic reliance on confidentiality agreements to obtain evidence here.

Nature of the documents

16. The Victims indicate that neither the Prosecutor nor the Defence submits that the evidence under discussion might prove the innocence of the accused. However,

¹¹ ICC-01/04-01/06-1456, paras. 2, 3, 9 and 16.

¹² ICC-01/04-01/06-1417, para. 12.

¹³ ICC-01/04-01/06-T-52-ENG, pp. 13-14.

¹⁴ ICC-01/04-01/06-T-8-Conf-ENG, p.26, line 8.

article 67(2) is not restricted to evidence proving the innocence of the accused; its scope is much broader.¹⁵

17. On many occasions, the Prosecutor has indicated that this evidence is, at the very least, potentially exculpatory.¹⁶

18. Obviously, the Defence cannot comment on the nature of the documents, since the very fact of its having been denied any access to this evidence is what led the Chamber to find that the proceedings were unfair.

19. As the Victims themselves state, the Defence must be apprised of the contents of exculpatory materials¹⁷ in order to assess their exact nature.

Exceptional nature of the use of article 54(3)(e)

20. The Victims initially suggest that the Trial Chamber erred in considering that the use of article 54(3)(e) constituted an exception to the disclosure obligation.¹⁸ The Victims then refer to examples in national systems which serve only to illustrate the exceptional nature of non-disclosure of exculpatory evidence.¹⁹

¹⁵ Article 67(2): [...] 2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

¹⁶ See, for example, ICC-01/04-01/06-1411, para. 4; ICC-01/04-01/06-T-89-ENG, p. 13 lines 10 ff; ICC-01/04-01/06-T-89-ENG, p. 14, lines 7 and 8; ICC-01/04-01/06-T-89-ENG, p. 14, lines 23 ff; ICC-01/04-01/06-T-89-ENG, p. 42, lines 24 ff; ICC-01/04-01/06-1248, 28 March 2008, paras. 9 to 17; ICC-01/04-01/06-T-78-CONF-FRA RT, p. 57, lines 13-16; ICC-01/04-01/06-T-69-ENG, pp. 14 and 15. See also: ICC-01/04-01/06-T-89-ENG, p. 7, lines 34 ff, where the Prosecutor confirms having already disclosed identical information under article 67(2) or rule 77.

¹⁷ *Idem*, para. 15.

¹⁸ *Idem*, para. 4.

¹⁹ *Ibidem*, paras. 10 and 11.

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

TAKE FORMAL NOTE of the observations herein;

DISMISS the Prosecutor's Appeal;

UPHOLD the Trial Chamber's Decision ordering the stay of proceedings against Mr Thomas Lubanga.

[signed]

Ms Catherine Mabilie, Principal Counsel

Dated this 18 August 2008, at The Hague