



Original: **French**

No.: **ICC-01/04-01/06**
Date: **17 October 2008**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

**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
Decision on the Prosecution’s Application to Lift the Stay of Proceedings”**

Source: Defence Team of Thomas Lubanga Dyilo

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

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

BACKGROUND

1. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings against Mr Thomas Lubanga.¹
2. On 11 July 2008, the Prosecutor filed an application before the Trial Chamber requesting the lifting of the stay of proceedings ("the Application"), which was followed by three supplementary filings.²
3. On 3 September 2008, the Trial Chamber denied the Prosecutor's application of 11 July 2008³ ("the Decision").
4. On 9 September 2008, the Prosecutor filed an application seeking leave to appeal against the Decision.⁴ The Defence filed its response on 15 September 2008.⁵
5. On 24 September 2008, the Trial Chamber granted the Prosecutor leave to appeal against the decision after reformulating the issues raised by the Prosecutor.⁶
6. On 6 October 2008, the Prosecutor filed his brief in support of the appeal against the Decision ("the Appeal Brief").⁷

¹ ICC-01/04-01-06-1401.

² ICC-01/04-01/06-1431 + Anxs, ICC-01/04-01/06-1451, ICC-01/04-01/06-1454 and ICC-01/04-01/06-1462.

³ ICC-01/04-01/06-1467.

⁴ ICC-01/04-01/06-1468.

⁵ ICC-01/04-01/06-1469.

⁶ ICC-01/04-01-06-1473.

⁷ ICC-01/04-01-06-1474.

OBSERVATIONS

Preliminary remarks

- Reformulation of the issues on appeal

7. In his Appeal Brief, the Prosecutor completely reformulated the two issues submitted to the Appeals Chamber,⁸ going as far as eschewing part of the first issue for which leave had been granted by the Trial Chamber.⁹

8. The Defence submits that a party cannot reframe as it wishes issues for which leave to appeal has already been granted. The only issues that may be considered by the Appeals Chamber are those set forth by the Trial Chamber.¹⁰

- Using reformulations which alter the impugned decision

9. In its decision granting leave for this appeal, the Trial Chamber underscored the fact that some of the Prosecutor's formulations were confusing.¹¹

10. Amongst other things, it clearly rejected¹² a formulation that was likely to distort the meaning of the impugned Decision.¹³ Yet, the Prosecutor again uses this formulation almost word for word in his Appeal Brief.¹⁴

⁸ ICC-01/04-01/06-1468, p. 3.

⁹ ICC-01/04-01/06-1473, para. 40. Although the first question for which leave was granted by the Trial Chamber is composed of two parts, the Prosecutor only included one, completely eliminating the following part: "[w]hether the Chamber erred in ruling that the stay of proceedings will remain in place until it is able to consider all the Documents [...]".

¹⁰ *Idem*, para. 40.

¹¹ *Ibidem*, paras. 27 et seq.

¹² *Ibidem*, para. 28: "[...] that there was 'no assurance that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that the Documents should be provided to the defence' and that **as a result** 'it is necessary for the stay of proceedings to remain in place.'"

¹³ ICC-01/04-01/06-1468, p. 4.

¹⁴ ICC-01/04-01/06-1474, p.4: "[...] there was 'no [assurance] that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that Documents

11. Similarly, the Chamber also criticised¹⁵ the wording of paragraph 10 of the Application for the lifting of the stay of proceedings,¹⁶ holding that it was misleading. The Prosecutor, however, uses an equivalent formulation in his Appeal Brief.¹⁷

12. In so doing, the Prosecution distorts and alters the terms of the decision rendered.

1 – The first ground of appeal

13. To begin with, it should be stressed that the statement that “[o]n 13 June 2008, the Trial Chamber stayed this trial because the Prosecution could not provide the Art. 54(3)(e) documents to the Chamber to determine whether they contained exculpatory information or information material to the preparation of the accused’s defence” distorts the actual grounds for the stay of proceedings. This stay is fundamentally due to the non-disclosure of exculpatory evidence (and not just “information”), making it impossible for a fair trial to be held, and not to mere difficulties relating to the terms under which the Chamber would review the evidence in question.

14. With regard to these terms, the Prosecutor challenges the Chamber’s refusal to review the documents at issue and rule on the principle of their disclosure to the Defence as long as their availability, in an unredacted form, is not guaranteed for the Trial Chamber judges for the entirety of the trial, and for the Appeals Chamber judges in case of appeal.

15. The Appeals Chamber will find, on the contrary, that the Chamber could not agree to review the documents in question without satisfying itself beforehand, firstly, that the legality of this review and the merits of the resulting Decision could

[should] be provided to the defence”. As a result, the Chamber determined that “it [is] necessary for the stay of proceedings to remain in place.” (our emphasis).

¹⁵ ICC-01/04-01/06-1473, para. 27.

¹⁶ ICC-01/04-01/06-1468.

¹⁷ ICC-01/04-01/06-1474, para. 16.

be wholly submitted to the review of the Appeals Chamber and, secondly, that for the entirety of the trial, it would have the ability to immediately and effectively review the issue of their disclosure depending on developments in the proceedings.

- **The right to appeal**

16. The Chamber rightly recalls “*the fundamental principle that first instance decisions of this kind should be susceptible to appellate review*”.¹⁸

17. In the instant case, the effectiveness of this right requires all the more precautions and guarantees as:

- the difficulty faced by the Chamber affects one of the accused’s fundamental rights;
- the review of the documents must be carried out *ex parte* without affording the Defence the opportunity to submit its views;
- the nature of the documents at issue, their origin, the terms under which they were obtained and the secrecy in which they are shrouded would arouse, even amongst knowledgeable and informed observers, fears as to the fairness of the proceedings and the independence of the organs of the International Criminal Court, and even the impartiality of the judges;

18. The protection of the fundamental rights of the accused and the need to maintain the public perception of the justice rendered by the Court require the Appeals Chamber to fully exercise its review powers over the proceedings and the decisions of the Trial Chamber.

¹⁸ ICC-01/04-01/06-1473, para. 33.

19. And yet, in challenging the principle under which the Appeals Chamber will have to “conduct a *de novo* review and independently examine and assess the Art. 54(3)(e) protected documents”,¹⁹ the Prosecutor leaches the accused’s right to appeal of its substance and attempts to restrict to a mere formality the Appeals Chamber’s powers to review the Trial Chamber’s decisions.

20. The Chamber therefore acted lawfully in refusing to commit to a particularly sensitive and important phase of the proceedings without receiving the prior assurance that the Appeals Chamber would be in a position to fully exercise its review powers under the same conditions as the Trial Chamber.

- **The availability of documents for the entirety of the trial**

21. The Prosecutor acknowledges that he cannot guarantee that the documents at issue will remain available to the Chamber for the entirety of the trial and highlights the possibility of restrictions of access to the documents.²⁰

22. This notwithstanding, he takes issue with the Trial Chamber for considering that this situation would not allow for a fair trial.

23. The Appeals Chamber will find that on this point the Trial Chamber appropriately considered the fair trial requirements.

24. The determination of the exculpatory or mitigating nature of an undisclosed piece of evidence, or the scope of a piece of evidence that has been disclosed, but in redacted form, or indeed its admissibility, is closely linked to the material provided during the trial, and may evolve accordingly.

25. In order to preserve the conditions for a fair trial, in particular with regard to the provisions of article 67(2), the judges must be in a position to be able to review, at

¹⁹ ICC-01/04-01/06-1474, para. 27.

²⁰ *Idem*, paras. 31 to 34.

any time, their decision made *in limine litis* concerning the disclosure of article 54(3)(e) evidence. In general, they must be afforded the opportunity to determine advisedly all matters relating to these documents.

26. Accordingly, the Chamber was right to consider that it *“has an obligation to keep all potentially exculpatory, undisclosed Documents under review as the evidence and the issues in the case unfold, and it will, therefore, be necessary for the documentation to remain with the Chamber for the entirety of the trial.”*²¹

27. Noting that the Prosecutor cannot guarantee this outcome, the Chamber rightly considered that the requirements for a fair trial had not been met.

2 – The second ground of appeal

28. The Prosecution complains that the impugned Decision considered that *“before lifting the stay of proceedings, the Trial Chamber must be satisfied ... that there is some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory”*.

29. The Appeals Chamber will find that the Trial Chamber appropriately considered the fair trial requirements in this regard.

30. In deed, the impugned Decision makes it a point to observe:

- that only 53 of the 204 documents in question may be disclosed in full to the Defence without any conditions;²²
- that the Prosecutor provides no details on the suggested bases for, the nature and the extent of the redactions that may affect some of the exculpatory documents at issue;²³

²¹ ICC-01/04-01/06-1473, para. 31.

²² ICC-01/04-01/06-1467, para. 6a.

- that he fails to provide any details regarding the “means” other than the provision of summaries that may make up for the non-disclosure of certain documents;²⁴
- that “*only one of the six ([REDACTED], with 3 items) has indicated that, if the Trial Chamber deems it necessary, it will provide summaries or redacted versions of its Documents to the defence and the accused,*”²⁵ without providing any detail as to the nature and extent of these redactions.

31. The Chamber thus observes that for all the documents concerned, no assurance is offered to offset the failure to make full disclosure in conditions consistent with fair trial requirements, and in particular the provisions of article 67(2).²⁶

32. It follows that, contrary to what the Prosecutor is attempting to show, there is no effective remedy for the Prosecutor’s continued inability to fulfil his obligations pertaining to the disclosure of exculpatory evidence.

33. This inability is an insurmountable obstacle to the holding of a fair trial, as the Chamber held in its Decision of 13 June 2008,²⁷ which is currently under appeal before the Appeals Chamber.

34. Furthermore, contrary to the Prosecutor’s allegation, there is no proof that these restrictions on disclosure are dictated by security considerations or other particularly compelling legitimate grounds. On the contrary, it must be noted that none of the information providers concerned, and especially the United Nations, stated the precise grounds on which confidentiality is sought. Hence, these confidentiality

²³ ICC-01/04-01/06-1473, para. 34

²⁴ *Idem*, para. 35.

²⁵ *Ibidem*, para. 17.

²⁶ *Ibidem*, para. 38.

²⁷ ICC-01/04-01/06-1401.

agreements appear like undue privileges obtained on the basis of concerns unrelated to the protection of persons or the interests of justice.

35. Lastly, contrary to what the Prosecutor maintains, there can be no doubt that the documents concerned affect key aspects of the debate on the existence or the scope of the accused's individual responsibility,²⁸ or at the very least, "*are relevant for the preparation of the defence*".²⁹

36. Accordingly, the impugned Decision is right in noting that the Prosecutor's proposals "*infringe fundamental aspects of the accused's right to a fair trial*" and consequently rejects the Prosecutor's application for lifting the stay of proceedings.³⁰

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

REJECT the Prosecutor's appeal

UPHOLD the Trial Chamber's decision of 3 September 2008.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 17 October 2008

At The Hague

²⁸ ICC-01/04-01/06-1249, para. 9 *et seq.* The Trial Chamber further emphasises that the Prosecutor has always acknowledged the exculpatory nature of the documents (ICC-01/04-01/06-1401, para. 59).

²⁹ ICC-01/04-01/06-1433, para. 77. The Appeals Chamber states: "*The wording of rule 77 of the Rules of Procedure and Evidence does not suggest that the term 'material to the preparation of the defence' should be construed as narrowly as the Trial Chamber did. Rather, the term should be understood as referring to all objects that are relevant for the preparation of the defence.*"

³⁰ ICC-01/04-01/06-1467, para. 39.