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**International
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Court**



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

Date: **12 March 2013**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

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

Public Document

Prosecution's Response to Thomas Lubanga's Request for Disclosure

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

1. Thomas Lubanga (the “Appellant”) sought *inter partes* disclosure of correspondence related to a confidential request for assistance (“RFA”)¹ sent by the Prosecution to the authorities of the Democratic Republic of the Congo (“DRC”). He provided no explanation as to the basis for the request or the purpose for which the RFA was relevant other than a general assertion that the correspondence should be disclosed because it is referred to in the letter eventually provided by the Congolese authorities and tendered by the Prosecution as rebuttal evidence. Without more, the Prosecution explained that it would not disclose the document, but did indicate *twice* that it would reconsider the position if it was provided with a proper foundation for the request.
2. The jurisprudence of this Court and other international tribunals requires that a party requesting disclosure of confidential documents articulate “expressly and precisely” the legitimate forensic purpose for which access is sought, and demonstrate that disclosure is at least likely to assist his or her case. A party is not entitled to conduct a “fishing expedition” in order to inspect material to discover whether he has any case to make at all.
3. In his present request before the Appeals Chamber, the Appellant provides, for the first time, the basis upon which he is seeking the RFA. The Prosecution disagrees with his analogy that the letter from the DRC authorities is effectively a witness statement or that the RFA is equivalent to questions from an investigator to a witness and automatically disclosable in all cases where it leads to the production of evidence. Additionally, by failing to make his request to the Appeals Chamber in a timely manner, the Appellant has placed the Chamber in the position of having to decide an issue after his reply brief has been filed and where there does not appear to be any proper justification for a request to file supplementary submissions.

¹ ICC-01/04-01/06-2988-Anx1-Red.

4. Nonetheless, if in applying the relevant legal tests for disclosure of confidential material, the Appeals Chamber determines that the RFA is disclosable, the Prosecution does not oppose disclosure of the part of the RFA that relates to the letter generated by the DRC. While the Prosecution takes issue with general requests for disclosure of an entire category of documents (such as *all* correspondence), it also notes that the RFA is the only correspondence from the Prosecution to the DRC authorities on this issue.

Procedural History

5. On 14 March 2012, the Trial Chamber convicted the Appellant of three counts of war crimes.² On 10 July 2012, the Trial Chamber rendered a decision on sentence.³ Both parties filed notices of appeal.⁴
6. On 26 November 2012, the Appellant submitted a request to present additional evidence for the first time on appeal.⁵ On 3 December 2012, the Appellant filed documents in support of both his appeal against conviction⁶ and sentence⁷.
7. On 4 February 2013, the Prosecution filed its response to the Appellant's appeals against conviction⁸ and sentence⁹, and addressed his proffered new evidence including as rebuttal a letter from the DRC authorities on its procedures for obtaining election cards and whether they qualify as official identity documents.
8. It was only ten days later, on 14 February 2013, that the Appellant made an *inter partes* request to the Prosecution for disclosure of all correspondence related to the judicial request for cooperation referred to in the letter from the DRC

² ICC-01/04-01/06-2842.

³ ICC-01/04-01/06-2901.

⁴ ICC-01/04-01/06-2933 OA4; ICC-01/04-01/06-2934 OA5; ICC-01/04-01/06-2935 OA6.

⁵ ICC-01/04-01/06-2942-Red.

⁶ ICC-01/04-01/06-2948-Red.

⁷ Sentencing Appeal Brief.

⁸ ICC-01/04-01/06-2969-Red.

⁹ ICC-01/04-01/06-2968-Red.

authorities and filed by the Prosecution.¹⁰ No justification for this disclosure request was provided.

9. On the same day, the Prosecution responded that its consistent position in all cases is that RFAs and communications to third parties on investigative matters fall outside the scope of disclosure and that the Appellant provided no grounds for the request to disclose that would alter its assessment. The Prosecution indicated that it would consider the Appellant's request again should he wish to revert with more foundation for the request.¹¹
10. On 15 February 2013, the Appellant repeated his request for disclosure, reiterating only that the DRC letter tendered by the Prosecution is a direct response to the RFA and that he considers it necessary to obtain disclosure of this RFA.¹² He also asked whether the Prosecution had any objection to the transmission of the email exchanges to the Appeals Chamber. The Prosecution responded on the same day that (a) the Appellant continued to fail to explain how the RFA was relevant for disclosure, (b) the mere fact that the DRC letter was prepared further to the RFA cannot be a sufficient justification, otherwise all RFAs become instantly disclosable on that general basis alone, (c) the Prosecution would reconsider its decision if and when the Appellant provided a legitimate forensic purpose for his request, and (d) it had no objection to the transmission of the email correspondence to the Appeals Chamber.¹³ The Appellant did not respond further.

¹⁰ ICC-01/04-01/06-2988-Anx1-Red, pp.3-4 (email from the Appellant to the Prosecution on 14 February 2013 at 10:30).

¹¹ ICC-01/04-01/06-2988-Anx1-Red, p.3 (email from the Prosecution to the Appellant on 14 February 2013 at 17:19).

¹² ICC-01/04-01/06-2988-Anx1-Red, pp.2-3. (email from the Appellant to the Prosecution on 15 February 2013 at 11:28).

¹³ ICC-01/04-01/06-2988-Anx1-Red, p.2 (email from the Prosecution to the Appellant on 15 February 2013 at 12:09).

11. On 15 February 2013, the Appellant requested permission to file a reply to the Prosecution's responses to his appeals,¹⁴ which the Chamber granted on 21 February 2013.¹⁵
12. On 27 February 2013, the day before his reply was due and 12 days after the last exchange with the Prosecution on disclosure, the Appellant requested that the Appeals Chamber order the Prosecution to disclose the RFA sent by the Prosecution to the DRC, along with any other document related to the cooperation request.¹⁶ On 28 February 2013, the Appellant filed his reply.¹⁷
13. On 1 March 2013, the Appeals Chamber ordered the Prosecution to respond to the Appellant's disclosure request by 12 March 2013.¹⁸

Prosecution's Submissions

(a) *There must be a legitimate forensic purpose for disclosure of confidential material*

14. RFAs to States Parties or any other communications between the Prosecution and third parties on investigative matters are not ordinarily disclosable. These are, in principle, confidential documents dealing with particular investigative steps, and are not intended as evidence themselves. As Article 87(3) of the Rome Statute mandates, even the requested State must keep a request for cooperation and any documents supporting the request *confidential*. If divulged, the disclosure could seriously undermine the investigative step in question. Further, States and other partners cooperating with the Prosecution would certainly cease assistance if the confidentiality of their communications with the Prosecution could not be guaranteed. Critically, the Prosecution has an express obligation under article

¹⁴ ICC-01/04-01/06-2979.

¹⁵ ICC-01/04-01/06-2982.

¹⁶ ICC-01/04-01/06-2988, para.6.

¹⁷ ICC-01/04-01/06-2989-Red.

¹⁸ ICC-01/04-01/06-2991.

54(3)(f) to take necessary measures to “ensure the confidentiality of information, the protection of any person or the preservation of evidence”.

15. The Prosecution recognizes that even confidential documents may contain information that becomes disclosable, either in whole or in part, as the matters at issue in the case evolve. But a general, unsubstantiated request for disclosure of a confidential document or class of confidential documents is insufficient to justify the request. Indeed, the Pre-Trial Chamber in this case rejected the Appellant’s request for access to the entire file of the DRC situation, noting the Prosecution’s submission that the request constituted a “fishing expedition” and did not identify the legitimate forensic purpose for the request.¹⁹ It is also well-established in the jurisprudence of the *ad hoc* tribunals that a request for disclosure of confidential information must identify the precise legitimate forensic purpose that would justify disclosure.²⁰ The same applies to motions seeking orders to produce material: a party cannot conduct a fishing expedition by seeking access to material in order to discover whether there is a case to make; rather, the asking

¹⁹ ICC-01/04-01/06-103, pp.2-3.

²⁰ ICTY: *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Decision on Defence Request for Access to Confidential Materials in the *Prosecutor v. Tolimir* Case, 2 June 2010; *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-A, Decision on Radovan Karadzic's Motion for Access to Confidential Material in the *Dragomir Milosevic* case, 19 May 2009, para. 7; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion by Jovica Stanisic for Access to Confidential Testimony and Exhibits in the Martić Case Pursuant to Rule 75(G)(i), 22 February 2008, para. 9; *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Decision on "Motion by Mico Stanisic for Access to All Confidential Materials in the Krajisnik Case", 21 February 2007, p. 4. *Prosecutor v. Karadić*, Case No. IT-95-5/18-PT, Decision on Jovica Stanisic's Motion for Access to Confidential Materials in the *Karadić* case, 20 May 2009, para. 4; *Prosecutor v. Stanisic and Zupljanin*, Case No. IT-08-91-PT, Decision on Stojan Zupljanin's Access to Confidential Material in the *Krajisnik, Mrda, Stakic and Brdanin* Cases, 24 April 2009, para. 11. *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the *Brdjanin and Talic* Case, 1 April 2003; *Prosecutor v. Kordic and Cerkez*, Case: IT-95-14/2-A, Decision on Motion by Pasko Ljubicic for Removal of Redactions (Appeals Chamber), 1 May 2003. **ICTR**: Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) v. The Prosecutor (Respondent), Case No. Ictr-99-52-A, Decision on “Joseph Nzirobera's Motion for Access to Appeal Briefs”, 9 September 2005; The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on Disclosure of Confidential Material Requested by Defence for Ntahobali, 24 September 2004, Para.7. **SCSL**: *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, Decision On Ex Parte And Confidential Prosecution Motion For An Order To Provide To The Prosecution Non-Privileged Documents Recently Obtained From The Accused’s Personal Archive, 5 November 2007, paras.11-14.

party must demonstrate that there will be a good chance that access will materially assist the case. As a Judge from the ICTY Appeals Chamber noted:

[a] party is not entitled to have an order made to produce material so that he may have access to it simply because he says that the material is relevant to an issue in the trial or appeal. He is not entitled to conduct a fishing expedition – in the sense that he wishes to inspect the material in order to discover whether he has any case at all to make. An order to produce is *not* the same as obtaining discovery against a party. Before obtaining an order for access to material where his right to such access is not conceded, the party must identify expressly and precisely the legitimate forensic purpose for which access is sought. It should be demonstrated that it is likely – or at least “on the cards”- that the material produced will materially assist the case of the party seeking access. Something is “on the cards” if there is a good chance that it will happen.²¹

16. Where there is a legitimate interest justifying access to a confidential document, the Prosecution will disclose the relevant part(s) of the document. This practice was endorsed by the Trial Chamber regarding internal work product. Although an RFA is not internal work product, it is a confidential communication between the Office of the Prosecutor and the authorities of a State to which the same principles regarding disclosure apply. The Trial Chamber confirmed that internal work product is ordinarily not disclosable, but disclosable information contained therein will be provided to the Defence “in a suitably usable and intelligible form, either by way of disclosure of redacted documents or in a separate document”.²²

(b) *The Appellant provided no basis for disclosure at the time of his request to the Prosecution*

17. The Appellant asserts in his request before the Appeals Chamber that it is “inconceivable” that the Prosecution could deprive him of the possibility of

²¹ *Prosecutor v. Delalic, MucicDelic and Landzo*, Case No. IT-96-21-T 22, Separate Opinion of Judge Hunt on Motion by Esad Landzo to Preserve and Provide Evidence, Appeals Chamber, April 1999, para.4.

²² ICC-01/04-01/06-2656-Red, paras.17-18.

seeing the RFA that prompted the DRC letter,²³ and argues that the refusal to disclose it bolsters his argument that the Prosecution has an erroneous concept of its disclosure obligations, even into the appeals stage.²⁴ This claim is unfounded and misconstrues the exchanges between the Appellant and the Prosecution.

18. When the Appellant first sought disclosure of the RFA, he summarily requested access, without any legal basis for the request or explanation as to how the document was relevant and would assist his case materially.²⁵ In its response the Prosecution did not oppose disclosure; rather, it noted that the Office's consistent practice was to preserve the confidentiality of RFAs and other communications made during the investigation, absent tangible reasons requiring disclosure and that the Appellant failed to provide any grounds for disclosure. The Prosecution added that it would reconsider if the Appellant supported his request.
19. The Appellant's second request was largely a mere repeat of the first, adding only that evidence tendered by the Prosecution -- the DRC letter -- was a direct response to the Prosecution's RFA.²⁶ Again, he provided no information as to the legitimate forensic purpose for accessing the RFA and all other communications, the issues to which the information could relate or how it could be material to his case. The Prosecution responded that the mere fact that the evidence was produced further to the RFA, without identifying the specific legitimate forensic purpose warranting disclosure, was not a sufficient justification; indeed, that would require the automatic disclosure of all RFAs that lead to the production of evidence. The Prosecution reiterated its invitation to provide a justifiable basis for his request.
20. Contrary to the Defence argument, the Prosecution's position is entirely reasonable and does not reflect a misguided appreciation of its disclosure obligations. Where there is a legitimate entitlement to withhold requested

²³ ICC-01/04-01/06-2988, para.9.

²⁴ ICC-01/04-01/06-2988, para.12.

²⁵ See ICC-01/04-01/06-2988-Anx1-Red.

²⁶ ICC-01/04-01/06-2988-Anx1-Red.

materials, the party seeking their disclosure must do more than reiterate its desire to have them. A general assertion unconnected to any specific legitimate forensic purpose cannot entitle a party to disclosure of confidential diplomatic communications or of documents such as RFAs and all documents associated with the RFA, as originally requested by the Appellant and reiterated now in his motion.

(c) The Appellant's request does not set out an adequate forensic purpose sufficient to overcome the presumption of confidentiality attached to the Prosecution's diplomatic communications with the DRC

21. The Appellant did not previously justify his *inter partes* request for disclosure of the confidential communication. However, in the pending application before this Chamber he claims that the letter from the DRC authorities is disclosable as, essentially, a witness statement made in response to the Prosecution's RFA (which, for these purposes, he inaptly analogizes to an investigator's questioning of a witness).²⁷ He cites one case from the ICTR in support of disclosure of Prosecution questioning when it drafts a narrative witness statement.²⁸ Lastly, he claims that the reliability of the DRC letter depends on the manner in which the request was formulated by the Prosecution,²⁹ and that the issue is relevant to its argument that the Congolese authorities influenced the activities of the Court.³⁰

22. While the Prosecution would have preferred, as a matter of orderly process, that the request made to it contained an explanation to support the Appellant's demand for production, the explanation now given to the Appeals Chamber does not persuade the Prosecution that the communications should be disclosed. To the contrary, the Prosecution considers that the newly-articulated rationale for the Appellant's request is flawed. The DRC is not a witness in the case, its letter is not

²⁷ ICC-01/04-01/06-2988, paras.8-9.

²⁸ ICC-01/04-01/06-2988, para.11.

²⁹ ICC-01/04-01/06-2988, para.9.

³⁰ ICC-01/04-01/06-2988, para.13.

a witness statement, it was not drafted by the Prosecution, and the national procedures of the DRC are what they are irrespective of any request by the Prosecution to explain those procedures in writing. The situation is completely different than that of a Prosecution investigator drafting a narrative witness statement and having to disclose its posed questions in that context, particularly because the rules of procedure and evidence mandate the disclosure of witness statements but do not do so for RFAs.

23. The ICTR case cited by the Appellant is equally inapt. That case relates explicitly to witness statements and the Prosecution's corresponding obligation to disclose them under the ICTR rules of procedure and evidence. That case does not create a general disclosure category for RFAs nor does the Rome Statute contain any such obligatory disclosure category.
24. Finally, the Prosecution notes that disclosure at this stage – after the reply has been filed – does not appear to serve any meaningful practical purpose. The Appellant received the Prosecution's rebuttal evidence on 4 February 2013, yet his request to the Prosecution for disclosure occurred a full 10 days later, on 14 February, repeated on 15 February. The Prosecution replied to each of the requests on the same day as they were made. Thereafter, the Appellant waited until 27 February - the day before his reply brief was due - to request the Appeals Chamber to order disclosure. He filed his reply on 28 February. Thus, the Appellant's procedural opportunity to make use of the RFA is effectively gone. While the Prosecution recognizes that the Appellant could still seek authorization from the Appeals Chamber to make supplementary submissions, it also notes that by making his request on the eve of his reply with no apparent reason for doing so, there would be no compelling justification for the late request.
25. If, upon consideration of the legal principles set out herein governing disclosure of confidential information and the Prosecution's submissions on the request, the Appeals Chamber is of the view that the Appellant has articulated a legitimate

forensic purpose for accessing the RFA, the Prosecution will disclose that part of the RFA that is relevant to the letter from the DRC authorities. The Prosecution opposes the disclosure of other parts of the RFA that go beyond the written response by the DRC offered in rebuttal. Those portions of the RFA relate to other pending investigative matters that are unrelated to the document offered by the Prosecution in rebuttal. If the Chamber wishes to assess whether that is the case, the Prosecution is ready to file a full copy of the RFA on a confidential, *ex parte* basis.



Fatou Bensouda
Prosecutor

Dated this 12th day of March 2013
At The Hague, The Netherlands