



Original: **French**

No.: ICC-01/04-01/06
Date: 27 February 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

With Annex 1 in confidential and public redacted versions

Application by the Defence for Mr Thomas Lubanga for Prosecution disclosure of documents relating to cooperation request OTP/DRC/COD-190/JCCD-pt

Source: Defence team for Mr Thomas Lubanga Dyilo

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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BACKGROUND

1. On 4 February 2013, the Prosecutor filed the “Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74”¹ with two annexes.
2. Annex 2 to the filing is a letter dated 30 June 2013 from the Minister of the Interior, Security, Decentralisation and Customary Affairs of the DRC to the Court’s Prosecutor, Ms Fatou Bensouda.²
3. It would appear that the letter was transmitted by the Congolese authorities in response to a cooperation request from the Office of the Prosecutor (OTP/DRC/COD-190/JCCD-pt) pertaining specifically to two Defence witnesses, D-0040 and D-0041.
4. The Defence e-mailed the Prosecution seeking disclosure of the Prosecutor’s cooperation request, reference OTP/DRC/COD-190/JCCD-pt, as well as any other documents relating to the request made by the Office of the Prosecutor to the Congolese authorities in this regard.
5. The Office of the Prosecutor denied the request and stated its reasons during an e-mail exchange between the parties, which is annexed hereto in full.³
6. The Defence requests the Appeals Chamber to order the Prosecution to disclose to the Defence the cooperation request OTP/DRC/COD-190/JCCD-pt from the Office of the Prosecutor to the Congolese authorities, as well as any other document relating to the said cooperation request, for the reasons set out below.

¹ ICC-01/04-01/06-2969-Conf.

² ICC-01/04-01/06-2969-Conf-Anx2.

³ Annex 1.

OBSERVATIONS

7. The Prosecution has sought the admission into evidence of the 30 January 2013⁴ letter from the Congolese authorities in support of its allegations as to the probative value of the evidence pertaining to the ages of Defence Witnesses D-0040 and D-0041.⁵
8. It can be seen clearly from this letter that the Congolese authorities are responding therein to specific questions put by the Office of the Prosecutor, particularly with regard to Witnesses D-0040 and D-0041. This letter thus constitutes a written statement by the Congolese authorities.
9. However, it is entirely inconceivable that the Prosecutor should deny the Defence an opportunity to become apprised of the questions which gave rise to these responses. Beyond the issues regarding the admissibility of the letter, the reliability of the information is dependent, amongst other things, upon the manner in which the Office of the Prosecutor formulated the request. The Defence must therefore be in a position to consult any document which led to the response provided by the Congolese authorities.
10. As the Appeals Chamber has already stated, the disclosure obligation under rule 77 must be interpreted broadly and refers to all objects that are material to the preparation of the defence.⁶ The Appeals Chamber further noted that as rule 77 was based on article 66(B) of the Rules of Procedure and Evidence of the ICTY, pertinent case law of the ICTY and ICTR should be taken into account.⁷
11. Thus, in *Niyitegeka*, the Appeals Chamber noted that the questions put to a witness by the Office of the Prosecutor when taking his or her written testimony were an integral part of the witness statement and were important

⁴ ICC-01/04-01/06-2969-Conf-Anx2.

⁵ ICC-01/04-01/06-2969-Conf, para. 70.

⁶ ICC-01/04-01/06-1433, para. 77.

⁷ ICC-01/04-01/06-1433, para. 78.

to making it intelligible.⁸ Once the questions have been asked, they cannot be considered internal documents and must be disclosed.⁹

12. In the case at bar, there is no well-founded argument to justify the Prosecution's refusal to grant the Defence access to the letter and, as appropriate, any other document relating to the request made to the Congolese authorities, and this refusal therefore serves as further demonstration of the Office of the Prosecutor's misconception of its disclosure obligations, which continue to apply even at the appeals stage.¹⁰
13. This situation is even more concerning in view of the fact that the Defence has consistently highlighted the investigative failings of the Office of the Prosecutor and the Congolese authorities' interference in the Court's activities.¹¹ The fact that no information corroborating or extenuating the evidence in respect of the ages of D-0040 and D-0041, apart from Annex 2 to filing ICC-01/04-01/06-2969, has been disclosed to the Defence suggests that the request issued to the Congolese authorities is the only investigation which the Office of the Prosecutor has carried out in this regard, thereby rendering its disclosure to the Defence all the more necessary.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

GRANT this application;

and

ORDER the Prosecution to disclose to the Defence the letter to the Congolese authorities referenced OTP/DRC/COD-190/JCCD-pt, as well as any other document relating to the request for assistance made by the Office of the

⁸ *Niyitegeka v. Prosecutor*, Judgement, 9 July 2004, para. 33.

⁹ *Niyitegeka v. Prosecutor*, Judgement, 9 July 2004, para. 34.

¹⁰ ICC-01/04-01/06-2948, paras. 40-75.

¹¹ ICC-01/04-01/06-2948, paras. 21-123.

Prosecutor to the Congolese authorities in connection with the information in
Annex 2 to filing ICC-01/04-01/06-2969-Red.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 27 February 2013, at The Hague