

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 A 5 A 6

Date: 11 April 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

Decision on Mr Thomas Lubanga's request for disclosure

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims V01
Mr Luc Walley
Mr Franck Mulenda

Legal Representatives of Victims V02
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Judgment pursuant to Article 74 of the Statute” of 14 March 2012 (ICC-01/04-01/06-2842), and against the decision of Trial Chamber I entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 10 July 2012 (ICC-01/04-01/06-2901),

Having before it the “Application by the Defence for Mr Thomas Lubanga for Prosecution disclosure of documents relating to cooperation request OTP/DRC/COD-190/JCCD-pt” of 27 February 2013 (ICC-01/04-01/06-2988-tENG);

Issues unanimously the following

DECISION

The Prosecutor shall, by 16h00 on 17 April 2013,

- 1) Disclose document “OTP/DRC/COD-190/JCCD-pt” to Mr Lubanga Dyilo, redacting any information contained in that document that, in the view of the Prosecutor, cannot be disclosed to Mr Lubanga Dyilo;
- 2) Communicate the redacted and unredacted versions of that document to the Appeals Chamber; and
- 3) Disclose any additional documents related to document “OTP/DRC/COD-190/JCCD-pt” to Mr Lubanga Dyilo and communicate them to the Appeals Chamber.

REASONS

I. PROCEDURAL HISTORY

1. On 14 March 2012, Trial Chamber I delivered the “Judgment pursuant to Article 74 of the Statute”¹ (hereinafter: “Conviction Decision”) and, on 10 July 2012, the

¹ ICC-01/04-01/06-2842.



“Decision on Sentence pursuant to Article 76 of the Statute”² (hereinafter: “Sentencing Decision”).

2. On 3 October 2012, Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) gave notice of his appeals against both the Conviction Decision³ and the Sentencing Decision.⁴

3. On 26 November 2012, Mr Lubanga filed an application to present additional evidence (hereinafter: “Request for Additional Evidence”).⁵

4. On 3 December 2012, Mr Lubanga filed his respective documents in support of his appeals against the Conviction Decision (A 5) and the Sentencing Decision (A 6).⁶

5. On 4 February 2013, the Prosecutor filed her responses to Mr Lubanga’s documents in support of the appeals.⁷ In her response to the document in support of the appeal against the Conviction Decision (A 5), she also addressed Mr Lubanga’s Request for Additional Evidence, adducing one item of evidence in response, namely a letter from the Democratic Republic of the Congo (hereinafter: “DRC”) authorities, pertaining to its domestic procedures relevant to obtaining election cards and whether they qualify as official identity documents⁸ (hereinafter: “Letter”).

² ICC-01/04-01/06-2901.

³ “Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I’s Judgment pursuant to Article 74 of the Statute of 14 March 2012”, 3 October 2012, ICC-01/04-01/06-2934-tENG (A 5).

⁴ “Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I’s Decision on sentence pursuant to Article 76 of the Statute of 10 July 2012”, 3 October 2012, ICC-01/04-01/06-2935-tENG (A 6).

⁵ “Defence application to present additional evidence in the appeals against the Judgment pursuant to Article 74 of the Statute and the Decision on sentence pursuant to Article 76 of the Statute”, ICC-01/04-01/06-2942-Conf-tENG (A 5 A 6) with a public redacted version in French ICC-01/04-01/06-2942-Red (A 5 A 6).

⁶ “Mr Thomas Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute”, ICC-01/04-01/06-2948-Conf-tENG (A 5) with a public redacted version in French ICC-01/04-01/06-2948-Red (A 5); “Mr Thomas Lubanga’s appellate brief against Trial Chamber I’s 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/04-01/06-2949-tENG (A 6).

⁷ “Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74”, ICC-01/04-01/06-2969-Conf (A 5) with a public redacted version ICC-01/04-01/06-2969-Red (A 5); “Prosecution’s Response to the ‘Mémoire de la Défense de M. Thomas Lubanga relative à l’appel à l’encontre de la ‘Décision relative à la peine, rendu [sic] en application de l’article 76 du Statute’ rendu [sic] par la Chambre de première instance I le 10 juillet 2012”, ICC-01/04-01/06-2968-Conf (A 6) with a public redacted version ICC-01/04-01/06-2968-Red (A 6).

⁸ Annex 2 to the “Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74”, ICC-01/04-01/06-2969-Conf-Anx2 with a public redacted version ICC-01/04-01/06-2969-Anx2-Red.

6. On 27 February 2013, Mr Lubanga filed the “Application by the Defence for Mr Thomas Lubanga for Prosecution disclosure of documents relating to cooperation request OTP/DRC/COD-190/JCCD-pt”⁹ (hereinafter: “Request”), by which he requests the disclosure of the confidential request for assistance, entitled “OTP/DRC/COD-190/JCCD-pt” (hereinafter: “RFA”), which was sent by the Prosecutor to the DRC authorities and to which the Letter responded, as well as any other documents related to the RFA.¹⁰ Mr Lubanga avers that the Letter was submitted by the Prosecutor in response to his Request for Additional Evidence,¹¹ and that, “[b]eyond 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”.¹² Mr Lubanga further avers that his defence has not received any “information corroborating or extenuating the evidence in respect of the ages of D-0040 and D-0041”, making the disclosure of the RFA “all the more necessary”.¹³ Mr Lubanga also annexed an exchange of correspondence between the Prosecutor and his defence team, in which the Prosecutor rejected his request for disclosure on the grounds that it lacked any “legitimate forensic purpose”.¹⁴

7. On 12 March 2013, following an order from the Appeals Chamber,¹⁵ the Prosecutor filed her response to the Request (hereinafter: “Response”).¹⁶ The Prosecutor submits that requests for assistance to States “are, in principle, confidential documents dealing with particular investigative steps, and are not intended as evidence themselves”.¹⁷ The Prosecutor notes that the jurisprudence of the *ad hoc* tribunals demonstrates “that a request for disclosure of confidential information must identify the precise legitimate forensic purpose that would justify disclosure”.¹⁸ She submits that Mr Lubanga has provided no information as to the legitimate forensic

⁹ ICC-01/04-01/06-2988-tENG.

¹⁰ Request, para. 6.

¹¹ Request, para. 9.

¹² Request, para. 9.

¹³ Request, para. 13.

¹⁴ Annex to “Application by the Defence for Mr Thomas Lubanga for Prosecution disclosure of documents relating to cooperation request OTP/DRC/COD-190/JCCD-pt”, ICC-01/04-01/06-2988-Conf-Anx1-tENG, p. 1.

¹⁵ “Order on the filing of a response”, 1 March 2013, ICC-01/04-01/06-2991.

¹⁶ “Prosecution’s Response to Thomas Lubanga’s Request for Disclosure”, ICC-01/04-01/06-2998.

¹⁷ Response, para. 14.

¹⁸ Response, para. 15.

purpose for accessing the RFA, nor has he shown how such information was material to his case.¹⁹ As such, the Prosecutor opines that the presumption of confidentiality attached to her diplomatic communications with the Democratic Republic of the Congo (hereinafter: “DRC”) has not been overcome.²⁰ Furthermore, the Prosecutor stresses that Mr Lubanga is not entitled “to conduct a ‘fishing expedition’ in order to inspect material to discover whether he has any case to make at all”.²¹ The Prosecutor, however, submits that she twice indicated to Mr Lubanga’s defence team that she “would reconsider the position if [she] was provided with a proper foundation for the request”.²²

8. Finally, the Prosecutor submits that “[i]f [...] 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”.²³ The Prosecution, however, opposes the disclosure of “other parts of the RFA that go beyond the written response by the DRC offered in rebuttal”.²⁴ The Prosecutor avers that “[t]hose portions of the RFA relate to other pending investigative matters that are unrelated to the document offered by the Prosecution in rebuttal”.²⁵

II. MERITS

9. Rule 77 of the Rules of Procedure and Evidence provides, *inter alia*, that the Prosecutor “shall [...] permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence”. Rule 84 of the Rules of Procedure and Evidence provides for orders by the Chamber for the disclosure of documents or information that have not been previously disclosed. Rules 77 and 84 of the Rules of Procedure and Evidence apply to the appeals phase by virtue of article 83 (1) of the Statute and rule 149 (1) of the Rules of Procedure and Evidence.

¹⁹ Response, para. 19.

²⁰ Response, p. 10.

²¹ Response, para. 2.

²² Response, para. 1.

²³ Response, para. 25.

²⁴ Response, para. 25.

²⁵ Response, para. 25.

10. As regards the scope of rule 77 of the Rules of Procedure and Evidence, the Appeals Chamber recalls that the applicable jurisprudence regarding rule 77 of the Rules of Procedure and Evidence requires that the term “material to the preparation of the defence” be construed broadly, referring to all objects relevant for the preparation of the defence.²⁶

11. The Appeals Chamber notes that the RFA is a request for assistance from the Prosecutor to the DRC authorities, the response to which was provided in the Letter.²⁷ The Appeals Chamber further observes that the Letter relates to the determination of the age of D-0040 and D-0041, which is a key issue in dispute in the pending appeal against the Conviction Decision. Therefore, the Appeals Chamber considers that the RFA is a document that is material to the preparation of the defence and falls under rule 77 of the Rules of Procedure and Evidence.²⁸ The same applies to any other document in the possession or control of the Prosecutor in relation to the Letter, excluding reports, memoranda or other internal documents prepared by the Prosecutor falling under rule 81 (1) of the Rules of Procedure and Evidence.

12. However, the Appeals Chamber notes that, according to the Prosecutor, parts of the RFA relate to pending investigative matters that are unrelated to the Letter, and that those parts should therefore be redacted. The Appeals Chamber recalls that, pursuant to rule 81 (2) of the Rules of Procedure and Evidence, the Prosecutor may apply for the non-disclosure of material if such disclosure may prejudice further or ongoing investigations; therefore, in the present case, the Appeals Chamber treats the Prosecutor’s submissions with respect to redactions as an application under rule 81 (2) of the Rules of Procedure and Evidence. Furthermore, the Appeals Chamber considers that, in the circumstances, it is most expedient to order the Prosecutor to disclose document “OTP/DRC/COD-190/JCCD-pt” to Mr Lubanga with any redactions that she considers necessary. The Prosecutor shall communicate both the redacted and

²⁶ “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1433 (OA 11), paras 77-78.

²⁷ Annex 2 to the “Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74”, ICC-01/04-01/06-2969-Conf-Anx2 with a public redacted version ICC-01/04-01/06-2969-Anx2-Red.

²⁸ See also ICTY, Appeals Chamber, *Elizézer Niyitegeka v. Prosecutor*, “Judgement”, 9 July 2004, ICTR-96-14-A, paras 30-34, on how questions put to a witness are an integral part of a witness statement and thus subject to disclosure.



unredacted versions of that document to the Appeals Chamber, so as to allow it to determine whether the redactions may be maintained.

13. The Prosecutor shall also disclose to Mr Lubanga, and communicate to the Appeals Chamber, any additional documents related to the RFA that are in her possession or control.

Done in both English and French, the English version being authoritative.



Judge Erkki Kourula
Presiding Judge

Dated this 11th day of April 2013

At The Hague, The Netherlands