

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 May 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 the Prosecutor's request for non-disclosure in relation to document
"OTP/DRC/COD-190/JCCD-pt"**

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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 Mabile
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
Mr Herman von Hebel

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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 “Prosecution’s Reasons for its Request for Non-Disclosure of Information in Document ‘OTP/DRC/COD-190/JCCD-pt’” of 2 May 2013 (ICC-01/04-01/06-3025-Conf-Exp),

Renders the following

DECISION

1. The Prosecutor’s request for non-disclosure in relation to document “OTP/DRC/COD-190/JCCD-pt” is rejected.
2. The Registrar shall reclassify document ICC-01/04-01/06-3019-Conf-Exp-Anx as confidential, *ex parte*, available to Mr Thomas Lubanga Dyilo and the Prosecutor and notify Mr Thomas Lubanga Dyilo of said document.

REASONS

I. BACKGROUND

1. On 11 April 2013, the Appeals Chamber rendered its “Decision on Mr Thomas Lubanga’s request for disclosure” (hereinafter: “Disclosure Decision”),¹ in which it ruled on the request of Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) for the disclosure of document “OTP/DRC/COD-190/JCCD-pt”, which is a confidential request for assistance sent by the Prosecutor to the Democratic Republic of the Congo (hereinafter: “DRC”) authorities² (hereinafter: “RFA”). The Prosecutor adduced the

¹ ICC-01/04-01/06-3017.

² See Disclosure Decision, para. 6.

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response from the DRC authorities (hereinafter: “DRC Response”)³ as rebuttal evidence to the additional evidence Mr Lubanga is seeking to present in the appeal proceedings of the present case (hereinafter: “Additional Evidence Request”).⁴

2. In the Disclosure Decision, the Appeals Chamber observed that the DRC Response “relates to the determination of the age of D-0040 and D-0041” and that this is “a key issue” in Mr Lubanga’s appeal against the “Judgment pursuant to Article 74 of the Statute”.⁵ As such, the Appeals Chamber considered the RFA to be “a document that is material to the preparation of the defence”⁶ and ordered its disclosure pursuant to article 83 (1) of the Statute and rules 77, 84 and 149 of the Rules of Procedure and Evidence.⁷

3. The Appeals Chamber, noting that the Prosecutor had made submissions⁸ in relation to redacting portions of the RFA should it ultimately be deemed disclosable, decided to treat these submissions as an application by the Prosecutor for non-disclosure under rule 81 (2) of the Rules of Evidence and Procedure.⁹ As such, the Appeals Chamber ordered the Prosecutor to communicate redacted and unredacted versions of the RFA to the Appeals Chamber to “allow it to determine whether the redactions may be maintained”.¹⁰ For reasons of expediency, the Appeals Chamber ordered the Prosecutor to disclose the RFA to Mr Lubanga in its proposed redacted form, pending a decision on the proposed redactions.¹¹

³ 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 (A 5) with a public redacted version ICC-01/04-01/06-2969-Anx2-Red (A 5).

⁴ See Disclosure Decision, paras 3, 5; see “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).

⁵ 14 March 2013, ICC-01/04-01/06-2842; see Disclosure Decision, para. 11.

⁶ Disclosure Decision, para. 11.

⁷ Disclosure Decision, paras 9, 11, p. 3. 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.

⁸ See Disclosure Decision, para. 8; “Prosecution’s Response to Thomas Lubanga’s Request for Disclosure”, 12 March 2013, ICC-01/04-01/06-2998 (A 5) (hereinafter: “Prosecutor’s Response”), para. 25.

⁹ Disclosure Decision, para. 12.

¹⁰ Disclosure Decision, para. 12.

¹¹ Disclosure Decision, para. 12.

4. On 17 April 2013, the Prosecutor communicated an unredacted version of the RFA to the Appeals Chamber¹² and, on that same day, disclosed the RFA to Mr Lubanga in redacted form.¹³

5. On 25 April 2013, the Appeals Chamber ordered the Prosecutor to provide, by 2 May 2013, reasons for its proposed redactions to the RFA in a filing available, to the extent possible, to Mr Lubanga, and invited Mr Lubanga to file a response thereto by 10 May 2013.¹⁴

6. On 2 May 2013, the Prosecutor filed the “Prosecution’s Reasons for its Request for Non-Disclosure of Information in Document ‘OTP/DRC/COD-190/JCCD-pt’”¹⁵ (hereinafter: “Prosecutor’s Reasons”) on a confidential and *ex parte* basis, with a public redacted version available to Mr Lubanga.¹⁶ The Prosecutor submits that disclosure of the information contained in the RFA “may prejudice its ongoing investigations” into the new evidence contained in Mr Lubanga’s Additional Evidence Request.¹⁷ She argues that some of the redacted portions of the RFA relate to questions posed to the DRC authorities, which, it is submitted, have not yet been answered.¹⁸ In addition, the Prosecutor requests the redaction of the electronic and telephonic contact information of certain individuals, which she argues is “irrelevant to known issues in the case” and the redaction of which is necessary to “protect the integrity of their work and further and ongoing investigations”.¹⁹ The Prosecutor submits that the requested redactions are “limited to the information that is strictly necessary to preserve the Prosecution’s ongoing investigations and there are no other means available to safeguard the continued investigation”.²⁰

¹² “Prosecution’s Communication of Document ‘OTP/DRC/COD-190/JCCD-pt’ to the Appeals Chamber in compliance with Decision ICC-01/04-01/06-3017”, ICC-01/04-01/06-3019 (A 5 A 6). The unredacted version of the RFA is contained in ICC-01/04-01/06-3019-Conf-Exp-Anx1, which is currently available to the Prosecutor only.

¹³ See ICC-01/04-01/06-3019, para. 7.

¹⁴ “Order in relation to the ‘Prosecution’s Communication of Document ‘OTP/DRC/COD-190/JCCD-pt’ to the Appeals Chamber in compliance with Decision ICC-01/04-01/06-3017’”, ICC-01/04-01/06-3022 (A 5 A 6).

¹⁵ ICC-01/04-01/06-3025-Conf-Exp (A 5 A 6) with public redacted version ICC-01/04-01/06-3025-Red (A 5 A 6).

¹⁶ See Prosecutor’s Reasons, para. 9.

¹⁷ Prosecutor’s Reasons, paras 10-11.

¹⁸ Prosecutor’s Reasons, para. 13.

¹⁹ Prosecutor’s Reasons, para. 14.

²⁰ Prosecutor’s Reasons, para. 15.

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7. On 10 May 2013, Mr Lubanga filed his response to the Prosecutor's Reasons²¹ (hereinafter: "Response to the Prosecutor's Reasons"). Mr Lubanga submits that, due to the redactions in the public redacted version made available to him, he is unable to make any useful observations regarding the adequacy of the Prosecutor's reasons for the proposed redactions.²² Mr Lubanga therefore defers to the Appeals Chamber on this issue.²³ However, he notes that: 1) he originally requested disclosure of the RFA so as to be able to make arguments in relation to the reliability and probative value of the DRC Response, which the Prosecutor has adduced as rebuttal evidence to Mr Lubanga's Additional Evidence Request, and 2) once the Prosecutor receives a response from the DRC authorities in relation to the matters asserted to be still pending by the Prosecutor, the Prosecutor will have to disclose an unredacted version of the questions posed to the DRC authorities and the responses thereto.²⁴ In respect of the second point, Mr Lubanga argues that, if no response is forthcoming from the DRC authorities within a time deemed reasonable by the Appeals Chamber, he should then be informed of the redacted portions of the RFA.²⁵

II. MERITS

8. The Appeals Chamber recalls that, in the Disclosure Decision, it held that the RFA is material to the preparation of Mr Lubanga's defence and must therefore be disclosed.²⁶ At the time of the Disclosure Decision, the RFA had not yet been provided to the Appeals Chamber and thus the Appeals Chamber, when ordering disclosure of the RFA to Mr Lubanga and the communication of redacted and unredacted versions to the Appeals Chamber, relied upon the Prosecutor's characterisation of the RFA. Specifically, it relied on the Prosecutor's submission that: "Those portions of the [RFA] relate to other pending investigative matters that are unrelated to the document offered by the Prosecution in rebuttal".²⁷ On that basis, the Appeals Chamber decided to treat this request for redactions as a request for non-disclosure pursuant to rule 81 (2) of the Rules of Procedure and Evidence and allowed

²¹ "Réponse de la Défense aux 'Prosecution's Reasons for its Request for Non-Disclosure of Information in Document OTP/DRC/COD-190/JCCD-pt'", ICC-01/04-01/06-3027 (A 5 A 6).

²² Response to the Prosecutor's Reasons, paras 2-3.

²³ Response to the Prosecutor's Reasons, para. 4.

²⁴ Response to the Prosecutor's Reasons, paras 4-6.

²⁵ Response to the Prosecutor's Reasons, para. 7.

²⁶ *Supra* para. 2, citing Disclosure Decision, para. 11.

²⁷ Prosecutor's Response, para. 25.

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the Prosecutor to redact, on a preliminary basis, parts of the RFA.²⁸ Having now received the RFA, the Appeals Chamber considers that the Prosecutor's characterisation of the RFA's redacted content was, at the least, ambiguous. The Appeals Chamber strongly encourages the Prosecutor to exercise more diligence in her future filings before this Chamber so as to ensure that the arguments put forward are clear and fully reflect the content and nature of any documents or information referred to therein.

9. Upon review of the RFA, the Appeals Chamber considers that it is questionable whether or not the information at issue falls within the ambit of rule 81 (2) of the Rules of Procedure and Evidence, which, it is recalled, permits the Prosecutor to apply to the relevant Chamber for the non-disclosure of material or information, which otherwise "must be disclosed in accordance with the Statute", if such disclosure may prejudice further or ongoing investigations. The Appeals Chamber recalls that it recently held that the Prosecutor's investigations should be "largely completed" by the time of the confirmation hearing.²⁹ The Appeals Chamber notes that, in the normal course of events, there would not be ongoing prosecutorial investigations pursuant to article 54 (1) (a) of the Statute at the appellate stage of proceedings and thus rule 81 (2) of the Rules of Procedure and Evidence's non-disclosure provision would not normally be applicable either. However, the Appeals Chamber notes the specific circumstances of the present case, i.e. that the Prosecutor's investigation at the appellate stage of proceedings was triggered by Mr Lubanga's Additional Evidence Request.

10. Without further exploring the scope of application of rule 81 (2) of the Rules of Procedure and Evidence at the appellate stage, the Appeals Chamber finds in the instant case that the Prosecutor's request for non-disclosure has to be denied because she did not establish any prejudice to her inquiries with the DRC authorities by disclosing the entire unredacted RFA to Mr Lubanga. The Appeals Chamber reiterates that "[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the

²⁸ Disclosure Decision, para. 12.

²⁹ *Prosecutor v. Callixte Mbarushimana* "Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the Confirmation of Charges'", 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 44.

exception to this general rule”.³⁰ In this respect, the Appeals Chamber recalls its jurisprudence that it is for the Prosecutor who is seeking redactions “to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought ‘may prejudice further or ongoing investigations’”³¹ and that, in order to demonstrate this, the Prosecutor has to “establish that the potential prejudice to investigations is objectively justifiable” and “would result from disclosure to the Defence”.³² Furthermore, when the Prosecutor has met this initial burden, a Chamber then needs to assess whether the proposed redactions are “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.³³

11. In respect of the request to redact in part the questions that the Prosecutor posed to the DRC authorities, the Appeals Chamber notes that these questions are immediately relevant to the age determination of D-0040 and D-0041 and therefore to the Additional Evidence Request. The Appeals Chamber notes in this context that the Prosecutor has adopted a very narrow reading as to whether these questions “relate” to information that should be disclosed by limiting its analysis directly to the DRC Response.³⁴ The Prosecutor submits that she is still expecting an answer from the DRC authorities to these questions and that she is currently conducting inquiries into the age of these two witnesses, triggered by the Additional Evidence Request. The Prosecutor has, however, not established any objective justifiable risk of prejudice that would result from the disclosure of this information to Mr Lubanga nor is any such prejudice apparent to the Appeals Chamber in reviewing the proposed redactions at issue. Therefore, the Appeals Chamber is not persuaded that the disclosure of the questions in the RFA would prejudice the Prosecutor’s inquiries. As such, the Appeals Chamber rejects this aspect of the Prosecutor’s request for redactions.

³⁰ “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475 (hereinafter: *Katanga OA Judgment*), para. 70.

³¹ *Katanga OA Judgment*, para. 97.

³² *Katanga OA Judgment*, para. 98.

³³ See “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, ICC-01/04-01/06-773 (OA 5), 14 December 2006, paras 21, 33-34.

³⁴ See Prosecutor’s Response, para. 25, which reads: “Those portions of the RFA relate to other pending investigative matters that are unrelated to the document offered by the Prosecution in rebuttal”.

12. In respect of the request to redact contact information, the Appeals Chamber notes that the Prosecutor has not requested to redact the names and titles of the affected individuals, but only their respective email addresses and telephone numbers.³⁵ In respect of the Prosecutor's argument that this information is "irrelevant to known issues in the case", the Appeals Chamber points out that, once it is established that a document is material to the preparation of the defence, pursuant to rule 77 of the Rules of Procedure and Evidence, the disclosure obligation extends to the entire document and not only to the "relevant" portions of information contained within such a document. The Appeals Chamber considers that the Prosecutor has not demonstrated that the disclosure of this information to Mr Lubanga has a sufficient and objectively justifiable risk of prejudicing her ongoing and further investigations. The reasons mentioned by the Prosecutor may convince the Appeals Chamber to find that such information should not be accessible to the public, but at issue is whether any ongoing and further investigations of the Prosecutor could be prejudiced by Mr Lubanga having access to such contact information.³⁶ Accordingly, the Appeals Chamber rejects the request for redactions.

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


 Judge Sang-Hyun Song
 on behalf of the Presiding Judge

Dated this 27th day of May 2013

At The Hague, The Netherlands

³⁵ See Prosecutor's Reasons, para. 14.

³⁶ See, in this respect, *Katanga OA Judgment*, para. 71, wherein the Appeals Chamber clarified that "the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large" [emphasis in original]. See also *ibid.*, para. 98, holding that "[...] the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the general public)".