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

Date: **12 August 2008**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Georgios M. Pikis
Judge Philippe Kirsch
Judge Erkki Kourula
Judge Navi Pillay

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

Public Document

**Victims' Observations on the Prosecutor's Appeal of the Decision of 13 June 2008
Ordering a Stay of the Proceedings**

Source: Legal Representatives of Victims a/0001/06 to a/0003/06

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

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Detention Section

**Victims Participation and Reparations
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Other

Noting the decision of 13 June 2008 on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008;¹

Noting the decision of the Trial Chamber dated 2 July 2008 granting the Prosecutor leave to appeal that decision;²

Noting the "Prosecution's Document in Support of Appeal against Decision to Stay Proceedings" of 14 July 2008;³

Noting the decision of the Appeals Chamber dated 6 August granting the victims leave to participate in that appeal.⁴

1. The Trial Chamber granted leave on two issues:

a. Whether the Trial Chamber erred in the interpretation of the scope and nature of article 54(3)(e) of the Statute and in its characterization of the Prosecution's use of it as constituting "a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances".

b. Whether the Trial Chamber erred in the interpretation and exercise of its authority under article 64 of the Statute; whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the Prosecution disclosing any potentially exculpatory evidence to the defence under article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in

¹ ICC-01/04-01/06-1401.

² ICC-01/04-01/06-1417.

³ ICC-01/04-01/06-1434.

⁴ ICC-01/04-01/06-1453.

case of doubt); and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings.

a) Whether the Trial Chamber erred in the interpretation of the scope and nature of Article 54(3)(e) of the Statute and in its characterization of the Prosecution's use of it as constituting "a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances"

2. The victims share the Defence's and Trial Chamber's wish to be acquainted with both the incriminating and exculpatory evidence pertaining to the accused, and would wish that such evidence could be disclosed at trial – even to the public – provided that this does not put any persons in danger.

3. However, the Defence's right to obtain disclosure of any exculpatory evidence in the Prosecutor's possession is not an absolute right, and may conflict with other rights which must be protected, in particular, the rights of victims and witnesses as guaranteed by the Statute and other international human rights instruments. Article 54(3)(e) of the Statute takes those interests into account.

4. Contrary to what the Trial Chamber states, article 54(3)(e) in no way makes the possibility of the Prosecutor's receiving confidential information and documents contingent on the existence of exceptional circumstances. Furthermore, documents disclosed initially with the sole purpose of leading to other evidence may, themselves, become evidence at any time, subject to the consent of the provider of the documents.

5. A close reading of the article confirms that:

- the two conditions (the documents disclosed must remain confidential and may be used solely for the purpose of generating new evidence) do not concern the *possibility* (for the Prosecutor) to *enter into* a confidentiality agreement, but the *content of the agreement*;

- the Prosecutor may be released from his agreement by the provider of the documents since, if “the provider of the information consents”, the documents and information disclosed need not remain confidential and may be disclosed and become incriminating or exculpatory evidence.
- only the information provider may decide to lift the confidentiality restriction from documents disclosed in this context.

6. Rule 82 confirms this reading of article 54(3)(e) and permits the Prosecutor to introduce into evidence material and information in his possession which are covered by that article on two conditions: he must obtain the prior consent of the provider of the material or information and must have given adequate prior disclosure to the accused.

7. The victims therefore consider that the Prosecutor did not act wrongfully by accepting a large volume of documents covered by article 54(3)(e), nor by subsequently seeking the consent of the providers of the documents to use a part thereof as incriminating or exculpatory evidence, since he requested the authorisations not only for incriminating evidence pertaining to the accused, but also for exculpatory evidence.

8. The Prosecutor’s right to enter into an agreement on the basis of article 54(3)(e) appears only *prima facie* to conflict with the right of the accused enshrined in article 67(2). Indeed, the obligation to disclose exculpatory materials to the Defence relates only to *evidence*. Furthermore, it is restricted to the evidence “*in the Prosecutor’s possession or control*”. Documents or information obtained confidentially which may only be used to generate new evidence are not, by definition, “*evidence*”. Moreover, it is difficult to consider that they are in the Prosecutor’s “*possession*” or “*control*”, since he is not permitted to disclose them and may not use them as he likes.

9. In the event of a real or apparent conflict between a right of the Prosecutor guaranteed by the Statute and a right of the accused also guaranteed by the Statute, arbitration between those two rights need not necessarily give precedence to the right of the Defence, especially since, when it comes to the protection of confidential evidence, the “right” of the Prosecutor is in actual fact only an obligation designed to protect the right of others (victims, witnesses, other information providers, and so on) for whom failure to comply with a confidentiality agreement might endanger their safety, or even their lives.

10. National systems which require the Prosecution to disclose exculpatory evidence to the Defence also provide for exceptions. Such is the case in the United Kingdom, where the 1996 Criminal Procedure and Investigations Act provides that:

(1) The prosecutor must—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

...

(2) The prosecutor must—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused’s defence as disclosed by the defence statement given under section 5 or 6, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

11. However, disclosure obligations may be subject to exceptions, for example, in the public interest, the determination of which is left to the court:

(6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.⁵

Admittedly, within this system, it is the Chamber that decides which documents may not be disclosed to the Defence.

12. This issue was discussed during the *travaux préparatoires* of the Statute and the *Rules of Procedure and Evidence*.⁶ One working document states:

Consideration should be given to setting forth procedures which protect the accused's rights to disclosure of exculpatory evidence **without compromising the existing obligations as to confidentiality, and the safety of persons and the investigation** [...]. Furthermore, consideration should be given as to whether provisions on **consequences of the failure to disclose exculpatory evidence** are needed.⁷

However, the drafters considered that this very complex issue could be left to the discretion of the Chamber.

13. The Trial Chamber's view was not that all the exculpatory material should have been disclosed as such to the Defence, but rather that the Chamber was unable to exercise its powers of jurisdiction.

14. It is regrettable that from the outset, the Office of the Prosecutor failed to negotiate an agreement with the providers of confidential information which would allow the Trial Chamber (and possibly the Appeals Chamber) to be apprised of any document containing potentially exculpatory information. However, this is not a legal obligation, and the failure to have secured such access is not a "wholesale abuse".

15. The victims are of the opinion that if the Prosecutor finds it impossible to disclose certain exculpatory materials as evidence, he can and must ensure that both the Chamber and the Defence are apprised of the contents of such materials while

⁵ Criminal Procedure and Investigations Act 1996, Chapter 25, Part 1.

⁶ See especially Helen Brady, *Disclosure of Evidence*, in "The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence", edited by Roy S. Lee, page 403 *et seq.*

⁷ *Op.cit.*, page 413.

keeping confidential those materials that must so remain. This may be done through the production of alternative evidence consonant with the provisions of article 54(3)(e), and through the agreement that certain facts have been established as part of an agreement provided for in rule 69, or through the submission of summaries.

b) Whether the Trial Chamber erred in the interpretation and exercise of its authority under Article 64 of the Statute; whether the Chamber correctly determined that its obligation to ensure the accused receives a fair trial is dependent on the prosecution disclosing any potentially exculpatory evidence to the defence under Article 67(2) of the Statute (having first delivered the evidence in full to the Chamber for review and decision in case of doubt); and whether it imposed a premature and erroneous remedy in the form of a stay of the proceedings.

16. The Chamber's position is too absolute. The principle of fair trial does not exclude the possibility that protection of victims and witnesses may argue against the disclosure of some material, exculpatory though it may be, to the Defence, although the Prosecution must play the game by the rules, especially by endeavouring to avoid such a situation and by admitting the existence of the exculpatory information that it finds in documents it is not in a position to disclose.

17. Not having access to the entire case file, the victims' representatives are not in a position to ascertain whether, upon discovering the presence of exculpatory material among the documents provided, the Office of the Prosecutor failed to request authorisation to disclose these materials to the Defence, or whether it concealed from the Defence and/or to the Chamber the existence of exculpatory materials which it cannot produce. Nor do the victims' representatives know whether the summaries produced before the Chamber suggest the existence of materials that might prove the innocence of the accused, or in themselves justify the discontinuance of proceedings. They note, however, that neither the Prosecution nor the Defence contend that the material in question is of this nature, and consider that even if the Office of the Prosecutor had been negligent, this would not justify the extreme measure taken by the Chamber on 13 June 2008.

18. In her commentary on the *travaux préparatoires*, Helen Brady writes:

A deliberate failure by the Prosecutor to disclose evidence that is clearly exculpatory could invoke the Court's sanction under article 71 for 'misconduct'. Such a failure could also amount to a breach of the Code of Professional Conduct for counsel, to be adopted pursuant to Rule 8.⁸

At no point does she write that that this should lead to the discontinuance of proceedings and the release of the accused.

19. At first glance, the Prosecutor's attitude is not the result of a deliberate intention to conceal the existence of certain exculpatory materials from the Chamber, but of a situation imposed upon him by third parties. The victims' representatives consider such a situation to require a thorough analysis of the various interests at stake, and a weighing of the gravity of any misconduct on the part of the Prosecutor against the relevance of the undisclosed information and the importance of the available incriminating evidence. This should occur at an *inter partes* hearing during which all participants are informed of the subject of the discussion (particularly on the basis of the summaries prepared by the Prosecutor and submitted for the Chamber's control). Indeed, this issue is so fundamental that all the participants must be able to participate under the same conditions, if necessary in closed session.

20. Here too, the practice in the United Kingdom may be of assistance, where the Criminal Procedure and Investigations Act provides that:

(2) Subject to subsection (3), the failure to act during the period concerned does not on its own constitute grounds for staying the proceedings for abuse of process.

(3) Subsection (2) does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the accused is denied a fair trial.⁹

21. The Legal Representatives of the Victims reiterate their submissions made at the hearing of 10 June 2008,¹⁰ and submit that, on the basis of the decision

⁸ *Op.cit.* page 413.

⁹ Criminal Procedure and Investigations Act 1996, Chapter 25, Part 1.

on the confirmation of charges from the Pre-Trial Chamber, the first obligation of the Trial Chamber hearing the case is to hold the trial unless an issue of inadmissibility or lack of jurisdiction exists. While the Chamber may, and indeed must, issue an order to the Office of the Prosecutor if it fails to comply with its obligations and, if applicable, postpone the trial to enable it to do so, the decision to discontinue the proceedings, even temporarily, may be taken only after an examination of the entire case file.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER

To grant this appeal.

¹⁰ Decision of 13 June, para. 55. It should be noted that the sentence on page 39, lines 3-18 of the transcript of the hearing of 10 June 2008, referenced in footnote 109 of the Decision, refers in fact to another issue, namely whether the Chamber can discontinue other ongoing investigations.

[signed]

Luc Walley and Franck Mulenda (absent at signature)

Legal Representatives of Victims a/0001/06 to a/0003/06

Dated this 12 August 2008,

At Brussels