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No.: ICC-01/04-01/06 OA12 OA13

Date: 15 September 2008

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
 Judge Philippe Kirsch
 Judge Georgios M. Pikis
 Judge Erkki Kourula
 Judge Daniel David Ntanda Nsereko

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

Public Document

**Prosecution's Application under Regulation 28 to provide Clarification or
 Additional Details
 which Impact on the Appeals against the Decisions to Stay Proceedings
 and Release the Accused**

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

The Prosecution has appealed Trial Chamber I's Decision to Stay Proceedings and the related Decision to Release Thomas Lubanga Dyilo ("the Accused"). It now requests leave to file supplementary information of relevance to the present proceedings, without making any additional submissions or requesting any relief from the Appeals Chamber, and merely with a view to providing to the Appeals Chamber an update on recent developments pertaining to the matters underlying the current appeals. The Prosecution submitted that the Trial Chamber erred in the exercise of its discretion, by imposing an excessive and premature remedy by indefinitely staying the proceedings ("the Third Ground") on the basis that there was "no prospect" of the material being viewed by the Chamber.¹ Since the filing of the Appeals, the factual situation underlying this ground has further changed and the Prosecution considers that the Appeal Chamber has to be apprised of those factual developments

The Prosecution accordingly requests that the Appeals Chamber exercise its authority under Regulation 28 of the Regulations of the Court to permit it "to clarify or to provide additional details".

Background

1. The Prosecution has appealed against two decisions of the Trial Chamber: the Decision to Stay the Proceedings² and the Decision on Release of the Accused.³ The Prosecution filed its Appeal Brief in relation to the release of the Accused on 10 July 2008,⁴ and its Appeal Brief in relation to the imposition of a stay of proceedings on 14 July 2008.⁵ The Defence filed its responses to the Appeal Briefs

¹ ICC-01/04-01/06-1434 OA13, 14 July 2008, paras. 25-28.

² ICC-01/04-01/06-1401, 13 June 2008 ("Decision to Stay Proceedings").

³ ICC-01/04-01/06-1418, 2 July 2008 ("Decision on Release").

⁴ ICC-01/04-01/06-1429 OA12. The Prosecution filed its notice of appeal on 2 July 2008 (ICC-01/04-01/06-1419 OA12), in which it also sought suspensive effect. The Appeals Chamber granted suspensive effect to the appeal against release on 7 July 2008 (ICC-01/04-01/06-1423 OA12).

⁵ ICC-01/04-01/06-1434 OA13. The Trial Chamber had granted leave to appeal on 2 July 2008 (ICC-01/04-01/06-1417). Pursuant to an order of the Appeals Chamber (ICC-01/04-01/06-1445 OA13, 22 July 2008), on 24 July the Prosecution re-filed its Document in Support of Appeal (ICC-01/04-01/06-1446-Anx1).

on 15 July 2008⁶ and 25 July 2008.⁷ The Prosecution refers to the more detailed procedural histories set out in those Appeal Briefs.

2. On 10 July 2008, the Prosecution filed before the Trial Chamber an Application to Lift the Stay of Proceedings,⁸ informing that “the Prosecution is in a position to *immediately* provide *all* UN documents that form part of the Undisclosed Evidence to the Trial Chamber”,⁹ as well as those from the other information providers, in unredacted form.¹⁰
3. The legal representatives of Victims filed applications to participate in the appeals on 9 July 2008¹¹ and 16 July 2008.¹²
4. On 6 August 2008, the Appeals Chamber granted the Victims “the right to participate in the present appeal[s] for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal”.¹³
5. The Prosecution continued to address this issue with the providers of the Undisclosed Materials, and in light of the progress which it made provided supplementary information to the Trial Chamber on 30 July 2008¹⁴ and 8 August 2008.¹⁵
6. The victims filed their observations in the appeals on 12 August 2008,¹⁶ which included observations on the manner in which the situation had changed, and that the Prosecution was now able to disclose to the Defence a number of the

⁶ ICC-01/04-01/06-1437 OA12.

⁷ ICC-01/04-01/06-1447 OA13.

⁸ ICC-01/04-01/06-1430-Conf-Exp. A public redacted version of this Application was filed the next day (ICC-01/04-01/06-1431). On 24 June 2008, the Trial Chamber had held a status conference in which it, *inter alia*, provided “suggestions and observations in relation to any application that may be made in due course to lift the stay” proceedings: ICC-01/04-01/06-T-91-ENG ET, 24 June 2008, p. 30, lines 22-24, and setting out those observations at pp. 31-33

⁹ *Ibid*, para. 23 (and outlining the conditions of such review in para. 22)

¹⁰ *Ibid*, paras. 28, 31, 33, 36, 39 and 42.

¹¹ ICC-01/04-01/06-1424 OA12 and ICC-01/04-01/06-1425 OA12.

¹² ICC-01/04-01/06-1439 OA13.

¹³ ICC-01/04-01/06-1452 OA12; ICC-01/04-01/06-1453 OA13.

¹⁴ ICC-01/04-01/06-1451.

¹⁵ ICC-01/04-01/06-1454. See also para. 7 below.

¹⁶ ICC-01/04-01/06-1455 OA12; ICC-01/04-01/06-1456 OA13; ICC-01/04-01/06-1457 OA13.

documents in question.¹⁷ The Prosecution¹⁸ and Defence¹⁹ each filed responses to the victims' observations in the two appeals on 18 August 2008.

7. On 22 August 2008, the Prosecution provided the Trial Chamber with further supplementary information,²⁰ including information that it was in a position "to disclose directly to the Defence 136 out of the 152 undisclosed UN documents; 53 documents with no redactions and 83 in redacted form".²¹
8. Pursuant to an order of the Trial Chamber,²² the Defence responded to the Application to Lift the Stay on 1 September 2008.²³
9. On 3 September 2008, the Trial Chamber rendered its "Decision on the Prosecution's Application to Lift the Stay of Proceedings",²⁴ in which it held that it would only be prepared to review the underlying material prior to lifting the stay "if the Appeals Chamber is able to consider in a similar non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue",²⁵ including requiring the agreement of the Appeals Chamber in advance to any conditions from the provider,²⁶ and that as a result "it is necessary for the stay of proceedings to remain in place."²⁷
10. On 9 September 2008, the Prosecution sought leave to appeal that decision.²⁸

Application to provide further details or clarification pursuant to Regulation 28

11. The Prosecution recalls that the Appeals Chamber has ruled that a party may request that the Chamber act pursuant to Regulation 28.²⁹ The Prosecution

¹⁷ ICC-01/04-01/06-1457 OA13, paras. 14-15.

¹⁸ ICC-01/04-01/06-1458 OA12; ICC-01/04-01/06-1459 OA13.

¹⁹ ICC-01/04-01/06-1460 OA12; ICC-01/04-01/06-1461 OA13

²⁰ ICC-01/04-01/06-1462.

²¹ See, *ibid*, para. 4.

²² ICC-01/04-01/06-1463, 26 August 2008.

²³ ICC-01/04-01/06-1464.

²⁴ ICC-01/04-01/06-1466-Conf-Exp (a public redacted version was filed the next day, ICC-01/04-01/06-1467).

²⁵ *Ibid.*, para. 40(v). See also paras. 33 and 40(iii).

²⁶ *Ibid.*, paras. 32-33.

²⁷ *Ibid.*, para. 39.

²⁸ ICC-01/04-01/06-1468.

²⁹ *Prosecutor v Katanga*, ICC-01/04-01/07-476 OA2, 13 May 2008, paras. 17-18.

hereby seeks the leave of the Appeals Chamber to present supplementary details and clarification regarding the factual situation underlying its appeal briefs of 10 and 14 July 2008, and in particular furnishing the Appeals Chamber with updated and comprehensive information regarding the positions taken by the relevant information providers. Since the Appeal Chamber has to rule, among other things, whether the Trial Chamber was correct when it concluded that there was “no prospect” of the material being viewed by it, it is necessary that the Appeals Chamber be provided with clarifications and additional details relevant to that determination, including information showing the current availability of all undisclosed documents in un-redacted form.

12. In presenting its additional details and clarification, if leave is granted, the Prosecution would not seek to introduce any additional arguments.³⁰ It would solely place before the Appeals Chamber in a consolidated and comprehensive fashion the relevant factual developments in this case. The Prosecution was not in a position to present these details at the time of filing its Appeal Briefs, as they have only occurred subsequent to those filings.
13. The Prosecution submits that the provision of these clarifications and additional details “may be of assistance to the Appeals Chamber in deciding on [these] appeal[s]”.³¹ First, the Prosecution submits that the Appeals Chamber must be in a position to examine the totality of the relevant circumstances underpinning the impugned decision and should therefore have before it the most complete and accurate picture of the factual situation underlying the current appellate proceedings. The subsequent developments regarding access of the Trial Chamber to the undisclosed materials, and the impact of this on the propriety and reasonableness of the original imposition of the stay, was raised by both the Prosecution³² and the victims in the appeals.³³ The Prosecution therefore seeks to

³⁰ See *Prosecutor v Katanga*, ICC-01/04-01/07-522 OA3, 27 May 2008, para. 16.

³¹ *Prosecutor v Katanga*, ICC-01/04-01/07-522 OA3, 27 May 2008, para. 16.

³² ICC-01/04-01/06-1446-Anx1 OA13, 24 July 2008, para. 37 (see also paras. 22, 27).

³³ ICC-01/04-01/06-1457 OA13, 13 August 2008, paras. 14-15; see also ICC-01/04-01/06-1458 OA12, 18 August 2008, para. 11.

provide the Appeals Chamber with the most recent and complete information in this regard.

14. The Prosecution also submits that the issues of a stay of proceedings and the release of the Accused are of the utmost importance in shaping the ongoing proceedings.³⁴ The Appeals Chamber has previously taken the importance of the issue into consideration when granting an application under Regulation 28.³⁵

Conclusion

15. The Prosecution respectfully requests that the Appeals Chamber grant it leave to clarify and provide additional details of its filings in these appeals by providing the Chamber with a factual update relevant to the issues in these appeals.



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Prosecutor

Dated this 15th day of September 2008
At The Hague, The Netherlands

³⁴ See e.g. ICC-01/04-01/06-772 OA4, 14 December 2006, paras. 30-31, and the importance of the interests being considered in para. 39; ICC-01/04-01/06-1401, 13 June 2008, para. 95.

³⁵ *Prosecutor v Katanga*, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 20(i).