



Original: **French**

No.: **ICC-01/04-01/06**
Date: **17 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

**Defence Response to the "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" dated 15 September
2008**

Source: Mr Thomas Lubanga Dyilo's Defence Team

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

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BACKGROUND

1. On 13 June 2008, the Trial Chamber ordered a stay of the proceedings.¹ On 2 July 2008, it ordered Mr Thomas Lubanga's release.²
2. On 2 July 2008, the Chamber granted the Prosecutor leave to appeal the decision of 13 June 2008 ordering the stay of the proceedings.³ On 10 July 2008, the Prosecutor filed an appeal against the Decision of 2 July 2008 ordering Mr Thomas Lubanga's release.⁴ On 25 July 2008, the Prosecutor filed his observations in support of his appeal against the Decision to stay the proceedings.⁵
3. On 15 and 24 July 2008, the Defence opposed the Prosecution appeals.⁶
4. On 15 September 2008, the Prosecutor submitted an application to the Appeals Chamber seeking leave to provide clarification or additional details to the Appeals Chamber on the appeal against the decisions to stay proceedings and release the accused (hereinafter "the Application").⁷
5. The Defence objects to the Prosecution Application for the following reasons:

OBSERVATIONS

6. The Prosecutor essentially maintains that regulation 28 of the *Regulations of the Court* confers upon the Appeals Chamber the power to consider facts which occurred subsequently to the impugned decisions and is requesting leave to submit factual material to the Appeals Chamber which did not exist on the date of the impugned decisions.

¹ ICC-01/04-01/06-1401.

² ICC-01/04-01/06-1418.

³ ICC-01/04-01/06-1417.

⁴ ICC-01/04-01/06-1429 OA 12.

⁵ ICC-01/04-01/06-1446 OA 13.

⁶ ICC-01/04-01-06-1437 OA 12-tENG and ICC-01/04-01/06-1447-tENG OA 13.

⁷ ICC-01/04-01-06-1470 OA 12 OA 13.

7. The Application is without merit.

1- The Appeals Chamber cannot consider facts which were not properly brought before it in the appeal against the decisions of 13 June and 2 July 2008

8. The jurisdiction of the Appeals Chamber, derived from the decisions appealed thereto, is strictly confined to those facts considered by the Trial Chamber in the impugned decisions and to matters of law therein adjudicated.

9. Consideration of facts subsequent to impugned decisions falls within the exclusive jurisdiction of the Trial Chamber.

10. That is why, by application of 10 July 2008 supplemented by several additional briefs, the Prosecutor submitted to the Trial Chamber facts which were subsequent to the decisions of 13 June and 2 July 2008 and which could, in the Prosecution's view, enable the proceedings to recommence.

11. That application was dismissed on 3 September 2008 in a decision which considered in detail all of the facts subsequent to 13 June 2008 which the Prosecutor now wishes to lay before the Appeals Chamber.

12. The Prosecutor's application for leave to appeal this decision is currently before the Trial Chamber.

13. Should the occasion arise, these facts would only be properly before the Appeals Chamber in the context of this appeal subject to the requirements of article 82(1)(d). As matters now stand, it cannot consider facts which were not referred to it in a properly lodged appeal.

2- Regulation 28 of the *Regulations of the Court* does not confer upon the Appeals Chamber the power to consider new facts which were not considered in the impugned decisions

14. No provision confers upon the Appeals Chamber the power to consider facts which were not considered by the Trial Chamber in the impugned decisions.

15. Regulation 62 of the *Regulations of the Court* only contemplates the presentation of new evidence. In this case, the “*updated and comprehensive information regarding the positions taken by the relevant information providers*”⁸ which the Prosecutor wishes to submit to the Appeals Chamber does not constitute new evidence for the purpose of establishing facts prior to 13 June 2008, but seeks to introduce into the proceedings new facts which arose afterwards.

16. Regulation 28 of the *Regulations of the Court* only provides for additional explanations to be sought from participants for the purpose of supplementing their submissions. Under no circumstances does it empower the Appeals Chamber to consider facts not properly brought before it in an appeal.

3- The Prosecutor’s Application seeks to circumvent the mandatory provisions of the Statute

17. Through his Application, the Prosecutor is attempting to submit factual material directly to the Appeals Chamber which initially falls within the Trial Chamber’s jurisdiction, and to thereby protect himself against the possible dismissal of his application for leave to appeal the decision rendered on 3 September 2008 by the Trial Chamber.

⁸ ICC-01/04-01/06-1470 OA 12 OA 13, para. 11.

18. The rules governing proceedings on appeals are clearly set out in the texts.⁹ The Prosecutor cannot circumvent them by seeking to submit facts or points of law directly to the Appeals Chamber which, as is the case here, can only be brought before the Appeals Chamber in accordance with the provisions of article 82(1)(d) and rule 155.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

DISMISS the Prosecutor's Application.

[signed]

Ms Catherine Mabilie, Lead Counsel

Done at The Hague, this 17 September 2008.

⁹ Article 82 and rule 155.