

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06 OA 13

Date: 22 July 2008

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Philippe Kirsch

Judge Georghios M. Pikis

Judge Navanethem Pillay

Judge Erkki Kourula

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Decision on the re-filing of the document in support of the appeal

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor pursuant to the decision of Trial Chamber I of 2 July 2008 entitled “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision 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’” (ICC-01/04-01/06-1417),

Having before it the “Observations de la Défense relatives à l’irrecevabilité du ‘Prosecution’s Document in Support of Appeal against Decision to Stay Proceedings’” of 16 July 2008 (ICC-01/04-01/06-1440) and the “Prosecution’s Response to Defence Challenge to the Admissibility of the Document in Support of the Appeal against Decision to Stay Proceedings” dated 18 July 2008 (ICC-01/04-01/06-1443),

Renders the following

DECISION

- i) The “Prosecution’s Document in Support of Appeal against Decision to Stay Proceedings” is rejected; the Prosecutor is ordered to re-file, within two days of notification of the present decision, a document in support of the appeal that complies with the provisions of the Regulations of the Court.
- ii) Mr. Lubanga Dyilo may file a response to the re-filed document in support of the appeal within ten days of its notification.

REASONS

I. PROCEDURAL HISTORY

1. On 14 July 2008, the Prosecutor filed the “Prosecution’s Document in Support of Appeal against Decision to Stay Proceedings” (ICC-01/04-01/06-1434; hereinafter: “Document in Support of the Appeal”), setting out his grounds of appeal against the

“Decision 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” of Trial Chamber I (ICC-01/04-01/06-1401).

2. On 16 July 2008, Mr. Thomas Lubanga Dyilo filed the “Observations de la Défense relatives à l’irrecevabilité du ‘Prosecution’s Document in Support of Appeal against Decision to Stay Proceedings” (ICC-01/04-01/06-1440; hereinafter: “Defence Observations”). Mr. Lubanga Dyilo notes that the Document in Support of the Appeal is 21 pages long and therefore *prima facie* one page longer than the page limit provided for in regulation 37 of the Regulations of the Court. Mr. Lubanga Dyilo recalls the formatting requirements of regulation 36 of the Regulations of the Court and submits that the formatting of the Document in Support of the Appeal does not appear to comply with these requirements. He notes that many of the arguments raised in the Document in Support of the Appeal are contained in the footnotes, which leads to an average number of words per page that is double the average number of words prescribed in regulation 36 (3) of the Regulations of the Court.¹ Mr. Lubanga Dyilo submits that had the Prosecutor raised all of his arguments in the main body of the text, and not in the footnotes, the Document in Support of the Appeal would be approximately 30 pages long (Observations, paragraphs 6 to 12). Mr. Lubanga Dyilo requests the Appeals Chamber to declare the Document in Support of the Appeal inadmissible or, alternatively, to order the Prosecutor to file a new document in support of the appeal, which respects the requirements of the Regulations of the Court (Observations, page 5).

3. By order dated 17 July 2008, the Appeals Chamber gave the Prosecutor until 11 a.m. on 21 July 2008 to respond to the Observations (ICC-01/04-01/06-1441).

4. In the “Prosecution’s Response to Defence Challenge to the Admissibility of the Document in Support of the Appeal against Decision to Stay Proceedings” dated 18 July 2008 (ICC-01/04-01/06-1443; hereinafter: “Response”), the Prosecutor submits that the

¹ In the Observations, reference is made to regulation 36 (4) of the Regulations of the Court. With the amendment of the Regulations of the Court of 14 June 2007, former sub-regulation (4) has been re-numbered as sub-regulation (3).

Document in Support of the Appeal was not in breach of the Regulations of the Court. He requests the Appeals Chamber to reject the challenge to the admissibility of the Document in Support of the Appeal, or, in the alternative, to vary the formatting requirements or to give the Prosecutor an opportunity to re-submit the Document in Support of the Appeal (Response, paragraphs 14 and 15). He submits that the cover page and the notification page should not be counted for the calculation of the page limit, as they do not contain substantive submissions and are not mentioned in regulation 36 of the Regulations of the Court (Response, paragraphs 6 and 7). He submits that, save for one instance, which does not have any impact on the length of the document, the formatting of the Document in Support of the Appeal is in full compliance with regulation 36 (Response, paragraph 9). The Prosecutor refutes the argument that he has misused footnotes for presenting substantive arguments. He submits that he has used the footnotes appropriately and that footnotes may be used “to substantiate the factual and legal reasoning presented, and where necessary to provide illustration and to link those arguments to the challenged decision or other parts of the record” and that “participants should not be forced to address arguments in the abstract, or to reconstruct or guess at the factual basis for general submissions” (Response, paragraph 10). As to the average number of words per page, the Prosecutor submits that the Regulations of the Court provide for page limits rather than for word limits and that it is unclear whether footnotes even count for the calculation of the word limit. Furthermore, the word limit should not be strictly applied, “but must be applied in the context of the filing” (Response, paragraph 11). In footnote 21 of the Response, the Prosecutor explains that:

In the present case, that context includes the legal requirement to provide detailed references to the record and to all sources of applicable law and authorities in support of the arguments presented: Regulation 64(2), see para. 10 and footnote 17, above. Because of the nature of the references, a strict application of this Regulation in the context of the present appeal would result in modest footnotes containing references to the record, without any quotations, containing 40-70 words: i.e. potentially over 20% of the permitted words in a single, simple footnote (footnote 54, 49 words; footnote 65, 40 words; footnote 96, 70 words)

5. In the alternative, the Prosecutor requests the Appeals Chamber to vary the relevant formatting requirement and “take the Appeal Brief as validly filed” (Response, paragraph 12). Should the Appeals Chamber consider that the formatting requirements cannot be

varied retroactively, the Prosecutor requests to be provided “with an opportunity to solve the formal problem and file a corrected version of its Brief” (*ibid.*). He submits at paragraph 13 of the Response that the “complexity and scope, both factual and legal, of the issues involved in this appeal constitute exceptional circumstances, and would warrant a modest extension of the page limit”. In footnote 23 of the Response, it is further stated that:

For example, the Appeals Chamber may consider it necessary to grant the Prosecution a modest extension of the page limit and/or a brief extension of time in which to file a version of the Appeal Brief which corrects any such errors. In such circumstances, the Prosecution would not oppose a similar extension for the Defence's response to the Appeal Brief. While applications for extension of the page or time limits would ordinarily be made prior to the filing of a document (Situation in the DRC, ICC-01/04-01/06-168, 13 July 2006, para. 4; Regulation 35(2)), the Prosecution submits that in this case it was not in a position to make such an application prior to the filing of the Appeal Brief: the Prosecution filed the Appeal Brief in good faith and unaware of any non-compliance with the Regulations or need for an extension, based on its reasonable interpretation of the Regulations and in light of the practice of the Court to date.

II. DETERMINATION BY THE APPEALS CHAMBER

6. The Document in Support of the Appeal does not comply with regulation 36 (3), fifth sentence, of the Regulations of the Court. This provision stipulates that an average page of a document filed by a participant “shall not exceed 300 words.” The 19 pages of the Document in Support of the Appeal containing the submissions of the Prosecutor contain approximately 11000 words, leading to an average of approximately 580 words per page. Thus, the Prosecutor effectively circumvented the page limit for documents in support of an appeal, as well as the procedure for variations of page limits under regulation 37 (2) of the Regulations of the Court. The Appeals Chamber disapproves of the practice of the Prosecutor to place substantial submissions in the footnotes of the documents filed before this Chamber. This practice can lead to contraventions of regulation 36 (3) of the Regulations of the Court; it also makes the structure of the arguments put forward potentially unclear.

7. The Appeals Chamber is not persuaded by the argument that footnotes should not be taken into account for the calculation of the average number of words. Not counting

the words contained in the footnotes would open the door to abuses by the participants, who could, in order to circumvent page limits, place a substantial part of their submissions in the footnotes. The fact that the fourth sentence of regulation 36 (3) of the Regulations of the Court addresses the formatting of both the main text and footnotes is another indication that the average number of words stipulated in the following sentence of the same sub-regulation includes footnotes. Nor is the Appeals Chamber persuaded by the argument that the average number of words “must be applied in the context of the filing”. There is no indication that the requirements in regulation 64 (2) of the Regulations of the Court regarding the content of documents in support of appeal implicitly vary the average number of words provided for in the fifth sentence of regulation 36 (3) of the Regulations of the Court.

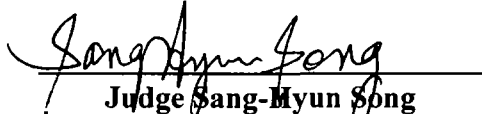
8. The non-compliance of the Document in Support of the Appeal with regulation 36 (3) of the Regulations of the Court cannot be corrected by retroactively granting an extension of the page limit. As the Appeals Chamber explained at paragraph 4 of its “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” of 13 July 2006 (ICC-01/04-168), “[a]n application for an extension of the page limit envisaged by the Regulations of the Court and its approval by a Chamber are prerequisites for the submission of an extended document.” Unlike regulation 35 (2), second sentence, of the Regulations of the Court in respect of time limits, the Regulations of the Court do not provide for a retroactive extension of page limits. Therefore, the Document in Support of the Appeal must be considered as being in breach of the Regulations of the Court.

9. Pursuant to regulation 29 (1) of the Regulations of the Court, “[i]n the event of non-compliance by a participant with the provisions of any regulation ... the Chamber may issue any order that is deemed necessary in the interests of justice.” In the present case, the Appeals Chamber has decided to order the Prosecutor to re-file a document in support of the appeal that complies with the Regulations of the Court, in particular with regulations 36 (3) and 37 (1). The Appeals Chamber is not persuaded that the Prosecutor should be granted an extension of the page limit for his document in support of the appeal, as requested in paragraph 13 and footnote 23 of his Response (see paragraph 5,

above). In the circumstances of the present case, the granting of an extension of the page limit for the re-filed document in support of the appeal would be inappropriate.

10. The time limit for the filing of a response by Mr. Lubanga Dyilo pursuant to regulation 65 (5) of the Regulations of the Court will start with the notification of the re-filed document in support of the appeal.

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


Judge Sang-Myun Song
Presiding Judge

Dated this 22nd day of July 2008

At The Hague, The Netherlands