

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06 OA 12 OA 13

Date: 13 October 2008

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Philippe Kirsch

Judge Georghios M. Pikis

Judge Erkki Kourula

Judge Daniel David Ntanda Nsereko

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

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

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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

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Luc Walley
Mr Franck Mulenda

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the release of Thomas Lubanga Dyilo” of Trial Chamber I of 2 July 2008 (ICC-01/04-01/06-1418), and

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 “Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused” of 15 September 2008 (ICC-01/04-01/06-1470),

Renders the following

DECISION

The “Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused” is rejected.

REASONS

1. On 15 September 2008, the Prosecutor filed the “Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused” (ICC-01/04-01/06-1470; hereinafter: “Application”). In relation to the appeals of the Prosecutor against the decision of Trial Chamber I of 13 June 2008 to stay the proceedings in respect of Mr. Lubanga Dyilo (ICC-01/04-01/06-1401) and against the decision of 2 July 2008 to release Mr. Lubanga Dyilo (ICC-01/04-01/06-1418), he requests the Appeals Chamber to allow him to “clarify and provide additional details of its filings in these appeals by

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providing the Chamber with a factual update relevant to the issues in these appeals” (Application, paragraph 15). He submits that the Appeals Chamber, acting under regulation 28 of the Regulations of the Court, should grant him leave to make such submissions because 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” (Application, paragraph 13). The Prosecutor argues that he was unable to present these facts in his documents in support of the appeals because they postdate these filings (Application, paragraph 12). He recalls that he and the victims participating in the appeals have raised in their submissions to the Appeals Chamber developments subsequent to the impugned decisions (Applications, paragraph 13).


2. On 17 September 2008, the Appeals Chamber gave Mr. Lubanga Dyilo an opportunity to reply to the Application by 19 September 2008 (ICC-01/04-01/06-1471). On the same day, Mr. Lubanga Dyilo filed the “Réponse de la Défense à la ‘Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused’, datée du 15 septembre 2008” (ICC-01/04-01/06-1472; hereinafter: “Response”). Mr. Lubanga Dyilo opposes the Application. He submits that in the present appeals the Appeals Chamber may only examine the facts that were considered by the Trial Chamber (Response, paragraph 8). Any subsequent developments must be assessed exclusively by the Trial Chamber (Response, paragraph 9). Mr. Lubanga Dyilo recalls that the Prosecutor had applied to the Trial Chamber for a lifting of the stay of the proceedings based on purported new developments, and that the Trial Chamber rejected the application on 3 September 2008; an application for leave to appeal is currently pending before that Chamber (Response, paragraphs 10 to 12). Mr. Lubanga Dyilo submits furthermore that neither regulation 28 nor regulation 62 of the Regulations of the Court provide a basis for the submission of facts that postdate the impugned decisions and of which the Appeals Chamber is not properly seized in the present appeals (Response, paragraphs 14 to 16). In his view, the Prosecutor attempts to bring before the Appeals Chamber facts that are currently only before the Trial Chamber, in order to

protect himself against a possible rejection by the Trial Chamber of his application for leave to appeal the decision of 3 September 2008 (Response, paragraph 17). This, in the submission of Mr. Lubanga, is contrary to the appellate procedure established in the relevant legal instruments of the Court (Response, paragraph 18).

3. As the Appeals Chamber explained at paragraph 18 of the “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” of 13 May 2008 (ICC-01/04-01/07-476), the Appeals Chamber may act pursuant to regulation 28 of the Regulations of the Court not only on its own motion, but also on request. For the following reasons, the Appeals Chamber nevertheless has decided to reject the Application. Regulation 28 (1) of the Regulations of the Court vests the Appeals Chamber with discretionary power to order the submission of clarifications or additional details on any document submitted by a participant. The Appeals Chamber notes that the Prosecutor in the present case is not seeking to “clarify or to provide additional details” of documents before the Appeals Chamber, but to provide information that postdates the impugned decisions and the filings in the present appeals. In any event the Appeals Chamber does not consider such further submissions to be necessary for the resolution of the issues on appeal.

Judge Georghios M. Pikis appends a separate opinion to this decision.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 13th day of October 2008

At The Hague, The Netherlands

No.: ICC-01/04-01/06 OA 12 OA 13 5/8

Separate Opinion of Judge Georghios M. Pikis

1. I join in the decision to dismiss the application of the Prosecutor. My reasons for coming to this conclusion are the following:

2. The Prosecutor invokes regulation 28 of the Regulations of the Court in support of his application¹ to be permitted to clarify his address in each one of the two appeals and provide further details in support thereof. Notwithstanding the legal foundation of the application, what the Prosecutor wants to do under the guise of clarification and detailing his position is to complement his addresses by the introduction of facts occurring after their submission.

3. The basis of the Prosecutor's application is, as noted above, regulation 28 of the Regulations of the Court and its interpretation by the Appeals Chamber in its decision of 24 January 2008², reasons given in the "Judgement on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'"³.

4. The Defence questions the acceptability of the application of the Prosecutor arguing that in no circumstances could regulation 28 provide ground for the supplementation of the addresses in support of the appeals by facts surfacing after the issuance of the impugned decisions.⁴

5. In the aforementioned decision of the Appeals Chamber, the majority acknowledged in essence authority to a party to the proceedings to move a Chamber to sanction the clarification of the document in support of the appeal at the instance of the party making it and detail his position further. In my dissenting opinion in the same case, I opined that the power to seek clarification under regulation 28 vests exclusively in the

¹ *Prosecutor v Lubanga Dyilo* "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" 15 September 2008 (ICC-01/04-01/06-1470).

² *Prosecutor v Katanga* "Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities" 24 January 2008 (ICC-01/04-01/07-164).

³ *Prosecutor v Katanga* 13 May 2008 (ICC-01/04-01/07-476), majority opinion at page 9, minority opinion at page 31

⁴ See *Prosecutor v Lubanga Dyilo* "Réponse de la Défense à la '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', date du 15 septembre 2008" 17 September 2008 (ICC-01/04-01/06-1472).



court. The regulation empowers, as explained therein, a Chamber to seek clarification of obscure or unclear arguments or the provision of further details exemplifying a given proposition. The previous decision of the Appeals Chamber in *Prosecutor v. Lubanga* “Decision on the Appellant’s application for an extension of the time limit for the filing of the document in support of the appeal and order pursuant to regulation 28 of the Regulations of the Court”⁵, instantiates the application of regulation 28. In that case, the Appeals Chamber directed a party to the proceedings to clarify and further detail the position advanced in his address.⁶ A reading of regulation 28 (1), the only section of it dealing with clarification and exemplification of a position of a party, leaves to my mind no doubt as to its purport and effect. Regulation 28 (1) reads:

A Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber.

6. The following passage from my dissenting opinion in the above case conveys the meaning, implications and range of application of regulation 28:

The right or authority to seek clarifications or further particulars of the grounds raised in support of the appeal lies with the Chamber. The word “clarification” denotes nothing other than what the word ordinarily signifies, namely shedding light on what is obscure, complex or, on the face of it, incomprehensible. The Chamber can seek clarification of nebulous propositions and arguments. “Detail” is also a word with a settled meaning, importing in the context of regulation 28 the notion of “particulars” exemplifying or illustrating the application of a statement or proposition. The Chamber may seek “additional” details, i.e. further particulars documenting the argument(s) advanced. The need for clarifications can only arise if the court considers it necessary to elicit an obscurity or a proposition of doubtful purport in the document itself. If not, no question of clarification could arise.⁷ [footnotes omitted]

7. Regulation 28 does not in terms or by necessary implication bestow directly or indirectly a right to a party to the proceedings to clarify or further detail the arguments advanced in his/her address; nor does it indirectly confer such a right by the fact that the court is possessed of power to seek clarification or further exemplification of the position

⁵ 30 May 2006 (ICC-01/04-01/06-129).

⁶ See also *Prosecutor v. Lubanga Dyilo* “Directions and Decision of the Appeals Chamber” 1 February 2007 (ICC-01/04-01/06-800).

⁷ *Supra* footnote 3, para. 9 of Judge Pikis’ dissenting opinion (page 34).



of a party. I addressed this issue in my aforesaid dissenting opinion. The following passage is suggestive of my position:

[...] no right can accrue to a party from the exercise of the power acknowledged to the Court under regulation 28 (1) either from a decision to seek or not to seek clarification or elaboration of the position of a party. Not seeking clarifications or exemplification of the position of a party does not involve or entail the issuance of an order or a decision of the Court. If the non-seeking of clarifications by the Court signifies anything, it is that the position of the party on the issues raised on appeal is well understood.⁸

8. I conclude that the application of the Prosecutor is doomed to failure; therefore, I subscribe to its dismissal.

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



Judge Georghios M. Pikis

Dated this 13th day of October 2008

At The Hague, The Netherlands

⁸ *Supra* footnote 3, para 11 of Judge Pikis' dissenting opinion.