

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 OA 18

Date: 30 July 2010

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Erkki Kourula

Judge Anita Ušacka

Judge Daniel David Ntanda Nsereko

Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

**Decision on the “Observations de la Défense relatives à l’irrecevabilité du
«Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision
of 8 July to stay the proceedings for abuse of process», daté du 26 juillet 2010”**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of Victims

REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” of 8 July 2010 (ICC-01/04-01/06-2517-Conf),¹

Having before it the “Observations de la Défense relatives à l’irrecevabilité du «Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July to stay the proceedings for abuse of process», daté du 26 juillet 2010” of 28 July 2010 (ICC-01/04-01/06-2539),

After deliberation,

Renders unanimously the following

DECISION

- i) The “Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July 2010 to stay the proceedings for abuse of process” as filed is rejected. The Prosecutor is ordered to re-file by 16h00 today, 30 July 2010, a confidential and a public redacted version of a document in support of the appeal that does not exceed 40 pages in length and complies with the provisions of regulation 36 (3) of the Regulations of the Court; and
- 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 AND SUBMISSIONS

1. On 8 July 2010, Trial Chamber I rendered the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of

¹ A public redacted version was filed on the same day as ICC-01/04-01/06-2517-Red. All references will be to the redacted version.

Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” (hereinafter: “Impugned Decision”), staying the proceedings against Mr Lubanga Dyilo as an abuse of the process of the Court.²

2. On 14 July 2010, the Prosecutor sought leave of Trial Chamber I to appeal the Impugned Decision.³ On 15 July 2010, Trial Chamber I rendered an oral decision, granting the Prosecutor leave to appeal the Impugned Decision.⁴

3. On 19 July 2010, the Prosecutor filed an application requesting an extension of the page limit of his document in support of the appeal by 20 pages,⁵ citing the need to “fully present the context in which the impugned decision arose”⁶ as the basis for the request.

4. On 22 July 2010, the Appeals Chamber granted the request for an extension of the page limit, thereby extending the page limit for the document in support of the appeal to 40 pages.⁷

5. On 26 July 2010, the Prosecutor filed the “Prosecutor’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July 2010 to stay the proceedings for abuse of process”⁸ (hereinafter: “Document in Support of the Appeal”), which was 36 pages in length.

6. On 28 July 2010, Mr Lubanga Dyilo filed the “Observations de la Défense relatives à l’irrecevabilité du «*Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July to stay the proceedings for abuse of process*», daté du 26 juillet 2010”⁹ (hereinafter: “Request”), requesting that the Appeals Chamber declare the Document in Support of the Appeal inadmissible for violating

² *Ibid.*, para. 31.

³ “Urgent Prosecutor’s Application for Leave to Appeal the Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, ICC-01/04-01/06-2520-Conf. A public redacted version was filed on the same day as ICC-01/04-01/06-2520-Red.

⁴ ICC-01/04-01/06-T-314-ENG, p. 14, line 1 to p. 17, line 7.

⁵ “Prosecution’s Application for an extension of page limit for its document in support of appeal against Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, ICC-01/04-01/06-2523, para. 5.

⁶ *Ibid.*, para. 4.

⁷ “Decision on the Prosecutor’s application for an extension of page limit for his document in support of the appeal”, ICC-02/04-01/06-2532.

⁸ ICC-01/04-01/06-2538-Conf.

⁹ ICC-01/04-01/06-2539.

the page limits authorised by the Appeals Chamber. In his submission, Mr Lubanga Dyilo avers that, on average, the Document in Support of the Appeal contains approximately 383 words per page.¹⁰ He estimates that the document contains 13,800 words, which corresponds to “46 pages of text with an average of 300 words per page”.¹¹ He argues that the filing of a 46 page Document in Support of the Appeal is unfair to him since he “intends to abide by the decision of the Appeals Chamber of 22 July 2010”.¹² Mr Lubanga Dyilo also reminds the Appeals Chamber that this is not the first time that the Prosecutor has violated the formatting and page limit requirements in the Regulations of the Court.¹³ He therefore requests the Appeals Chamber to declare the Document in Support of the Appeal inadmissible.¹⁴

7. On the same day, the Prosecutor filed the “Prosecution’s Response to the Defence Observations and Request for an Extension of the Word Limit or Authorization to Re-file its Document in Support of Appeal”¹⁵ (hereinafter: “Response”). While conceding that the Document in Support of the Appeal contravenes regulation 36 (3) of the Regulations of the Court,¹⁶ the Prosecutor requests that, pursuant to regulation 37 (2) of the Regulations of the Court, the Appeals Chamber should “allow the filing of the Document notwithstanding the excess number of words, or alternatively grant the Prosecution leave to file, on an urgent basis, a reduced Document”.¹⁷

8. The Prosecutor points out that the Document in Support of the Appeal contains “extensive excerpts from several days’ transcripts and a critical email exchange”, which could have been referenced without being quoted.¹⁸ The Prosecutor states that these excerpts were included to facilitate the Appeals Chamber’s reading of the Document in Support of the Appeal and that had it been incorporated in an appendix, “the word count would have been substantially shorter, but the price would have been

¹⁰ Request, para. 12.

¹¹ Request, para. 13.

¹² Request, para. 14.

¹³ Request, para. 15; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the re-filing of the document in support of the appeal”, ICC-01/04-01/06-1445 (OA 13).

¹⁴ Request, para. 16.

¹⁵ ICC-01/04-01/06-2540.

¹⁶ Response, para. 6.

¹⁷ *Ibid.*

¹⁸ Response, para. 7.

a greater burden on the Chamber's ability to understand the events."¹⁹ The Prosecutor acknowledges that based on the Appeals Chamber's previous decisions on the extension of page limits, his request is out of time.²⁰ He however maintains that because of the circumstances of this case, "it would be well within the discretion of the Chamber to accept the Document as filed".²¹ The Prosecutor contends that "a fully articulated argument will facilitate the Chamber's ultimate ability to adjudicate the case".²²

II. MERITS

9. Regulation 36 (3) of the Regulations of the Court provides:

All documents shall be submitted on A4 format. Margins shall be at least 2.5 centimetres on all four sides. All documents that are filed shall be paginated, including the cover sheet. The typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. An average page shall not exceed 300 words.

10. The Appeals Chamber agrees with Mr Lubanga Dyilo that the Document in Support of the Appeal does not comply with the requirements of regulation of 36 (3) of the Regulations of the Court. Although that document is 36 pages in length, the 34 pages of the Prosecutor's submissions contain approximately 15,000 words, which corresponds to an average of 440 words per page. Even if the number of pages were extended to 40, the maximum authorised by the Appeals Chamber, it would still exceed the word limit per page as each page would contain an average of 395 words. Thus, if the Prosecutor had complied with the formatting requirements and the required maximum number of words permitted by regulation 36 (3) of the Regulations of the Court, the Document in Support of the Appeal would be approximately 50 pages in length.

11. The Prosecutor submits that the Appeals Chamber should accept the filing of the Document in Support of the Appeal despite the violation of regulation 36 (3) of the Regulations of the Court and that the Appeals Chamber should exercise its discretion and grant his "extraordinary request" for an additional extension of the time

¹⁹ Response, para. 8.

²⁰ Response, para. 9.

²¹ Response, para. 9.

²² Response, para. 9.

limit.²³ The Appeals Chamber is not persuaded by this argument. As the Appeals Chamber has held previously “[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”²⁴ and a violation of regulation 36 (3) of the Regulations of the Court “cannot be corrected by retroactively granting an extension of the page limit”.²⁵

12. The Appeals Chamber further notes that regulation 29 (1) of the Regulations of the Court provides that “[i]n the event of a non-compliance with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice”. The Appeals Chamber recalls that the Prosecutor requested, and was granted, an extension of 20 pages to file his Document in Support of the Appeal. In that request, he asserted that the “[a]dditional pages [were] necessary for [him] to fully present the context in which the impugned decision arose”,²⁶ as a result of which he requested the “submission of a brief not to exceed 40 pages”.²⁷ Contrary to his assurances that he would “endeavour to streamline the submission and that [his] brief will be shorter than the requested 40 pages”, the Prosecutor has filed the Document in Support of the Appeal in a manner that contravenes regulation 36 (3) of the Regulations of the Court, circumventing the page limit authorised by the Appeals Chamber.

13. The Appeals Chamber further recalls that this is not the first time that the Prosecutor has violated regulation 36 (3) of the Regulations of the Court.²⁸ In that situation, the Appeals Chamber expressed its disapproval with formatting practices that tend to circumvent page limits and the procedure for the variation of page limits under regulation 37 (2) of the Regulations of the Court,²⁹ and reiterates its disapproval

²³ Response, para. 9.

²⁴ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 4.

²⁵ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the re-filing of the document in support of the appeal”, 22 July 2008, ICC-01/04-01/06-1445, para. 8.

²⁶ “Prosecution’s Application for an extension of page limit for its document in support of appeal against Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, 19 July 2010, ICC-01/04-01/06-2523, para. 4.

²⁷ *Ibid.*

²⁸ *See Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the re-filing of the document in support of the appeal”, 22 July 2008, ICC-01/04-01/06-1445.

²⁹ *Ibid.*, para. 6.

of this practice. In the present case, the Prosecutor has not provided any satisfactory reasons for not complying with the Regulations of the Court. In the view of the Appeals Chamber, his actions serve only to impede and delay the proceedings. Thus, the Appeals Chamber finds that granting the Prosecutor's "extraordinary" request for a retroactive extension of the page limit for the Document in Support of the Appeal would not be in the interests of justice. The Appeals Chamber therefore denies the request.

14. The Appeals Chamber strongly reminds the Prosecutor to comply with the relevant regulations in his filings in the future, and in particular reserves its discretion to reject any filing for which the page limit has been exceeded but leave has not been granted in advance. The Appeals Chamber considers that breaches by a party or participant of regulation 36 (3) of the Regulations of the Court could result in the rejection of the document in its entirety. However, under the present circumstances, and in particular, in view of the extraordinary nature of a stay of proceedings and the significance of the Prosecutor's appeal, the Appeals Chamber determines that it is in the interests of justice to order the Prosecutor to re-file by 16h00 today, 30 July 2010, a document in support of the appeal, and a public redacted version, formatted in accordance with regulation 36 (3) of the Regulations of the Court and within the 40 page limit authorised by the Appeals Chamber.

15. In light of the above, the time limit for Mr Lubanga Dyilo to file a response to the document in support of the appeal under regulation 65 (5) of the Regulations of the Court will start running from the day of the notification of the re-filed document in support of the appeal.

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



Judge Anita Ušacka
For the Presiding Judge

Dated this 30th day of July 2010

At The Hague, The Netherlands