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Pénale
Internationale**



**International
Criminal
Court**

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

Date: 18 July 2008

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Erkki Kourula

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

Public Document

**Prosecution's Response to Defence Challenge to the Admissibility of the
Document in Support of Appeal against Decision to Stay Proceedings**

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 Defence has filed a motion challenging the admissibility of the Prosecution's Document in Support of the Appeal against the Trial Chamber's Decision to Stay Proceedings.¹ The Prosecution opposes the Defence motion, and submits that its Document in Support of Appeal complies with the Regulations of the Court regarding the format and length of documents.

Background

1. On 11 June 2008, the Trial Chamber orally announced that the trial date was vacated,² and on 13 June 2008, the Trial Chamber ordered that proceedings in the case be stayed.³
2. On 23 June 2008, the Prosecution sought leave to appeal against the Decision in respect of two issues, namely the Trial Chamber's interpretation of Article 54(3)(e) and characterisation of the Prosecution's conduct; and the Trial Chamber's decision to issue an indefinite stay of proceedings at that stage.⁴ The Trial Chamber granted the Application for Leave to Appeal on 2 July 2008.⁵
3. On 14 July 2008, the Prosecution filed its Document in Support of its appeal against the Decision to Stay Proceedings, pursuant to Regulation 65(4) ("Appeal Brief"),⁶ in which it alleged that the Trial Chamber had committed three separate errors, namely that it had:
 - erred in law in its interpretation of the nature and scope of Article 54(3)(e);
 - erred, in law and in fact, in its characterization of the Prosecution's conduct pursuant to Article 54(3)(e); and
 - erred in the exercise of its discretion, by imposing an excessive and premature remedy in the form of an indefinite stay of the proceedings.

¹ "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", ICC-01/04-01/06-1401, 13 June 2008.

² ICC-01/04-01/06-T-90-ENG. The trial had been scheduled to commence on 23 June 2008. For further background to the vacating of the trial date and stay of proceedings, the Prosecution refers to the submissions cited in its Application for Leave to Appeal, para. 1.

³ ICC-01/04-01/06-1401 ("Decision to Stay Proceedings"). The Decision to Stay Proceedings scheduled a hearing for 24 June 2008 to consider the release of the Accused (para. 94). The Prosecution subsequently filed submissions arguing that if the Trial Chamber granted leave to appeal the Decision to Stay Proceedings, then it should defer consideration of release pending resolution of the appeal (ICC-01/04-01/06-1407, 23 June 2008).

⁴ ICC-01/04-01/06-1407 ("Application for Leave to Appeal").

⁵ ICC-01/04-01/06-1417 ("Decision Granting Leave to Appeal"). On the same day the Trial Chamber also issued another decision in which it ordered the release of the Accused (ICC-01/04-01/06-1418). The Prosecution has separately appealed that Decision on Release (ICC-01/04-01/06-1419 OA12, 2 July 2008; ICC-01/04-01/06-1429 OA12, 10 July 2008).

⁶ ICC-01/04-01/06-1434 OA13.

4. On 16 July 2008, the Defence filed a motion before the Appeals Chamber in which it challenged the admissibility of the Prosecution's Appeal Brief,⁷ alleging that the Prosecution had exceeded the page limit and had failed to comply with Regulation 36(4) of the Regulations of the Court regarding the format of the Appeal Brief. The Defence requested that the Appeals Chamber either declare the Appeal Brief inadmissible, or order the Prosecution to file an Appeal Brief in compliance with the Regulations.
5. The Prosecution hereby responds to the Defence Challenge to Admissibility.

The Appeal Brief complies with the Regulations of the Court

The Appeal Brief complies with the page limit prescribed by Regulation 37

6. The Defence firstly argues that the Appeal Brief exceeds the page limit by a single page.⁸ The Prosecution submits that the Appeal Brief does not exceed the page limit prescribed by Regulation 37 of the Regulations of the Court. The Prosecution submits that the cover page does not constitute part of the substantive submissions of a party.⁹ While Regulation 36(1) makes it explicit that headings, footnotes and quotations are to be counted in calculating the page limit, there is no mention of the cover page.
7. The Prosecution submits that similar considerations apply to the additional page which was included in the template for filings as of 1 April 2008, in which the party or participant filing a document is required to set out the other participants to whom a document shall be notified, and which also does not constitute part of the substantive submissions of a party. Furthermore, this new template was issued by an administrative act of the Presidency.¹⁰ The Prosecution submits that such an administrative act could not reduce the number of pages which the Regulations of the Court prescribe that a party has available to present their submissions, and that accordingly this additional notification page should not count towards the page limit established by Regulation 37.

The Appeal Brief also complies with the formatting requirements of Regulation 36

8. The Defence recalls the formatting requirements prescribed in Regulation 36(4),¹¹ and asserts that it seems that the Prosecution has used a different format,¹² without identifying

⁷ ICC-01/04-01/06-1440 OA13 ("Defence Challenge to Admissibility").

⁸ Challenge to Admissibility, para. 7. The Defence also states that it would not have considered the confined transgression of a single extra page to be worth bringing to the attention of the Appeals Chamber (para. 12).

⁹ While the Prosecution does not consider that the cover sheet counts towards the page limit as a matter of law, as a matter of practice it has not filed documents of more than 20 pages inclusive of the cover sheet.

¹⁰ Email from Court Management entitled "New template for participants / Nouveau modèle de document pour participants", sent on 31 March 2008 at 12:00.

¹¹ Challenge to Admissibility, para. 9.

the alleged deviation or providing any details or substantiation. The Prosecution submits that this assertion is unfounded. The Appeal Brief is, in compliance with Regulation 36(4), drafted in 12 point font and spaced at 1.5 spacing; and the footnotes are drafted in 10 point, single spaced.

9. The sole exception to this is one substantial quotation from the Decision Granting Leave to Appeal, reproduced in the Procedural Background.¹³ For clarity and precision (and in conformity with standard drafting practices)¹⁴ the Prosecution quoted the decision verbatim, and presented this quotation indented on both sides, single spaced, and with a slightly smaller font (11 point). The presentation of the quotation in this manner did not affect the length or content of the Appeal Brief. The Prosecution submits that any confined departure from the Regulations in relation to the presentation of this quote, for reasons of clarity, could not warrant the rejection of the Appeal Brief.
10. The Defence also claims that the Prosecution has misused the footnotes, in order to include important submissions,¹⁵ again without identifying the footnotes in issue or substantiating its allegation. The Prosecution submits that the Appeal Brief uses footnotes appropriately,¹⁶ in particular to provide the necessary basis and detail for the arguments presented, and in light of the obligations in Regulation 64(2).¹⁷ The use of footnotes to substantiate the factual and legal reasoning presented, and where necessary provide illustration and to link those arguments to the challenged decision or other parts of the record, further assists the other party in properly responding to the Appeal Brief and provides adequate support for argument which it presents. The Prosecution submits that participants should not be forced to address arguments in the abstract, or to reconstruct or guess at the factual basis for general submissions.

¹² Challenge to Admissibility, para. 10.

¹³ Appeal Brief, para. 3.

¹⁴ See e.g. *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-572 OA4, 9 June 2008, paras. 11, 17, 21; ICC-01/04-01/07-573 OA6, 9 June 2008, para. 5.

¹⁵ Challenge to Admissibility, para. 10.

¹⁶ For example, footnotes have been used in the Appeal Brief to provide citations to relevant decisions (e.g. footnotes 1-4, 13, 20, 23, 34, 37) the drafting history of the Statute (e.g. footnotes 26, 28), and relevant commentaries (e.g. footnotes 18, 22, 24, 25, 28); to identify relevant portions of the record, including quotations where appropriate, or relevant authorities which support a given proposition (e.g. footnotes 17, 19, 29-33, 44-48, 78-80, 82-87); to identify the article or rule in support of a proposition (e.g. footnotes 15, 47, 50, 62, 70), or other analogous provisions (e.g. footnotes 16, 22, 35); to provide examples or specific details of a general or principled submission (e.g. footnotes 27, 35-39, 68, 84-85, 88-89); to acknowledge where an exception exists to a general proposition or submission (e.g. footnote 46); and to provide cross-references within the Appeal Brief in order to avoid repetition (e.g. footnotes 14, 21, 24, 36).

¹⁷ "Reference shall be made to the relevant part of the record or any other document or source of information as regards any factual issue. Each legal reason shall be set out together with reference to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof. The document in support of the appeal shall, where applicable, identify the finding or ruling challenged in the decision, with specific reference to the page and paragraph number."

11. The Prosecution thus submits that it has complied with the Regulations regarding the format of documents to be filed before the Court. The Defence makes additional reference to the fact that Regulation 36(4) states that an “average page shall not exceed 300 words.” The Prosecution notes that the Regulations impose a page limit on documents to be filed, rather than imposing a formal word limit.¹⁸ In this regard, the Prosecution notes that while the Regulation 36 specifies that items such as headings and footnotes are to be included in the page limit,¹⁹ it does not specify whether they are to be included for the purposes of the number of words on an average page.²⁰ Further, regardless of its scope, the Prosecution submits that this element does not mandate the strict application of word limit, applicable to the document as a whole, but must be applied in the context of the filing.²¹

In the alternative, request for variation of the formatting requirements in the Regulations or opportunity to correct the Appeal Brief

12. The Prosecution submits that the Appeal Brief complies with the relevant Regulations: it was filed within the time limit, in compliance with the page limit and on a good-faith assessment that it complied with the formatting requirements in Regulation 36(4).²² However if the Appeals Chamber considers that the Appeal Brief fails to comply with any material requirement of the Regulations regarding the format of documents, then for the reasons set out below, the Prosecution respectfully requests that the Appeals Chamber vary the application of the relevant requirement, to the extent necessary, and take the Appeal Brief as validly filed. Finally, if the Appeals Chamber considers that it cannot retroactively vary the application of the formatting requirements, then the Prosecution

¹⁸ Indeed, Regulation 36 is entitled “Format of documents and calculation of page limits” (emphasis added).

¹⁹ Regulation 36(1).

²⁰ Regulation 36(4).

²¹ 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 (footnotes 54, 49 words; footnote 65, 40 words; footnote 96, 70 words)

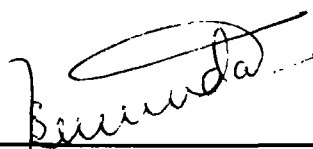
²² The Prosecution notes that to date no Chamber has suggested that documents filed in a format similar to that of the Appeal Brief raised any issues of non-compliance with the Regulations: see e.g. *Situation in the DRC*, ICC-01/04-141 OA3, 25 April 2006; *Prosecutor v Katanga*, ICC-01/04-01/07-215-Anx OA, 20 February 2008; *Prosecutor v Lubanga*, ICC-01/04-01/06-1219 OA9, 10 March 2008; see also *Situation in the DRC*, 01/04-455 OA5, 18 February 2008; *Situation in the DRC*, ICC-01/04-507 OA4-OA5-OA6, 8 July 2008. In contrast, the Prosecution recalls that Chambers have raised issues of compliance with the time limit *proprio motu* – see e.g. *Prosecutor v Katanga*, ICC-01/04-01/07-522 OA3, 27 May 2008, paras. 11-13.

requests that the Appeals Chamber provide it with an opportunity to solve the formal problem and file a corrected version of its Brief.²³

13. The Prosecution has sought to present its arguments relating to the errors in the Decision in a concise and structured manner, while also providing the Appeals Chamber with sufficient detail to properly assess the record in relation to this Decision.²⁴ The Prosecution submits 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 order to allow a proper presentation of the case.²⁵

Relief Sought

14. For the reasons set out above, the Prosecution requests that the Appeals Chamber reject the Defence Challenge to Admissibility.
15. In the alternative, to the extent that the Appeals Chamber considers that the Appeal Brief may fail to comply with the Regulations of the Court, then the Prosecution respectfully requests that the Appeals Chamber vary the formatting requirements to the extent necessary and accept the Prosecution's Appeal Brief as properly filed, or provide an opportunity to file a corrected version of its Brief.



Fatou Bensouda, Deputy-Prosecutor
on behalf of

Luis Moreno-Ocampo, Prosecutor

Dated this 18th day of July 2008

At The Hague, The Netherlands

²³ 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.

²⁴ This record includes at least six status conferences or other hearings and a series of filings, extending over eight and a half months (from the beginning of October 2007, ICC-01/04-01/06-T-52-ENG, 1 October 2007; until the middle of June 2008, ICC-01/04-01/06-1391-Conf, 11 June 2008); see further Application for Leave to Appeal, para. 1 and footnote 72.

²⁵ "The Appeals Chamber is persuaded that the complexity of the case warrants the extension of the page limit. Moreover, the enlargement sought is adjusted to the necessity for the proper presentation of the case" – *Prosecutor v Lubanga*, ICC-01/04-01/06-177 OA3, 3 July 2006, para. 6.