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

Date: **15 September 2008**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

**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 for Leave to Appeal against
Decision on Application to Lift the Stay of Proceedings" dated 9 September 2008**

Source: Defence Team of Mr Thomas Lubanga

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

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Other

BACKGROUND

1. On 2 June 2008, the Defence submitted to Trial Chamber I (“the Chamber”) an application for the discontinuance of the prosecution and the release of the accused.¹
2. On 13 June 2008, the Chamber ordered a stay of the proceedings.²
3. On 2 July 2008, the Chamber granted the Prosecutor leave to appeal against the Decision ordering the stay of proceedings.³
4. On 11 July 2008, the Prosecutor filed an application to lift the stay of proceedings.⁴ That application was followed by 3 additional filings.⁵
5. On 3 September 2008, the Chamber rejected the Prosecutor’s application to lift the stay of proceedings.⁶
6. On 9 September 2008, the Defence received the “Prosecution’s Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings”⁷ by which the Prosecutor sought leave to submit two issues to the Appeals Chamber for consideration.

¹ ICC-01/04-01/06-1366.

² ICC-01/04-01/06-1401.

³ ICC-01/04-01/06-1417.

⁴ ICC-01/04-01/06-1431.

⁵ ICC-01/04-01/06-1451, ICC-01/04-01/06-1454 and ICC-01/04-01/06-1462.

⁶ ICC-01/04-01/06-1467.

⁷ ICC-01/04-01/06-1468.

OBSERVATIONS

7. The Prosecutor's application for leave to appeal focuses only on the modalities for identification of disputed exculpatory evidence by the Chamber.
8. However, as reiterated by the Chamber, the resumption of proceedings will be envisaged only when "there is some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory".⁸
9. This position is currently submitted for consideration to the Appeals Chamber by way of appeal against the Chamber's decision of 13 June 2008; it is not dealt with again in the current application for leave to appeal.
10. In the instant case, the Chamber rightfully notes that in any event "[o]n the basis of the Application and Supplementary Information, there is a real prospect that the prosecution will not be in a position to effect adequate disclosure to the accused of a significant number of Documents if the Chamber so orders (...)".⁹
11. This observation has not been seriously challenged by the Prosecutor.
12. Hence, the resolution of the issues which the Prosecutor wishes to submit to the Appeals Chamber cannot in any event lead *in fine* to the resumption of proceedings.
13. It follows therefore that the appeal envisaged by the Prosecutor cannot in any manner be considered as an issue "that would significantly affect the fair and

⁸ ICC-01/04-01/06-1467, para. 30.

⁹ *Idem*, para. 40, v).

expeditious conduct of the proceedings or the outcome of the trial" or that would be useful "to materially advance the proceedings".

14. Consequently, the article 82(1)(d) criteria have not been fulfilled in the instant case.
15. Furthermore, most of the other conditions laid down by the Chamber¹⁰ for resumption of the proceedings have not been fulfilled.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO DISMISS the Prosecutor's application for leave to appeal Trial Chamber I's Decision of 3 September 2008.

[signed]

Catherine D. Mabile, Counsel

Dated this 15 September 2008

At The Hague, The Netherlands

¹⁰ ICC-01/04-01/06-T-91-ENG, 24 June 2008, pp. 31 and 32.