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No.: ICC-01/04-01/06
Date: 30 January 2007

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public Document

**Urgent Defence Request for Extension of Time and Page Limits for Brief in
Support of Appeal Against the 'Décision sur la confirmation des charges'**

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
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1. On 29 January 2007, the Honourable Pre-Trial Chamber I acting in the Case of *The Prosecutor v Thomas Lubanga Dyilo* issued its ‘Décision sur la confirmation des charges’ (‘The Decision’).
2. In that Decision, the Honourable Pre-trial Chamber determined that:
 - i. “Au vu des éléments de preuve admis aux fins de l’audience de confirmation des charges, qu’il existe des preuves suffisantes donnant des motifs substantiels de croire que Thomas Lubanga Dyilo est responsable, en qualité de coauteur, des chefs d’enrôlement et de conscription d’enfants de moins de 15 ans dans les FPLC et du fait de les avoir fait participer activement à des hostilités, au sens des articles 8-2-b-xxvi et 25-3 du Statut, de début septembre 2002 au 2 juin 2003,”
 - ii. “Au vu des éléments de preuve admis aux fins de l’audience de confirmation des charges, qu’il existe des preuves suffisantes donnant des motifs substantiels de croire que Thomas Lubanga Dyilo est responsable, en qualité de coauteur, des chefs d’enrôlement et de conscription d’enfants de moins de 15 ans dans les RPLC et du fait de les avoir fait participer activement à des hostilités au sens des articles 8-2-e-vii et 25-3-a du Statut, du 2 juin au 13 août 2003,”¹
3. The Pre-Trial Chamber accordingly ordered that Thomas Lubanga Dyilo be brought before the Trial Chamber on the basis of the charges confirmed.
4. On 30 January 2007, the Defence filed ‘Notice of Defence Appeal Against the Pre-Trial Chamber I’s ‘Décision sur la confirmation des charges’ of 29 January 2007’ (Notice) that it would appeal the aforesaid decision pursuant to its right under Article 82(1)(b) to appeal any decision denying release of Mr Thomas Lubanga Dyilo.
5. Under Regulation 64(5), the Defence should file its document in support of the appeal within 7 days of the notification of the decision. The document should comply with the default page-limit of 20 pages established in Regulation 37. The Defence is herewith requesting a variation of both the applicable time and page limits.

Submissions

1. Request for extension of time

6. Pursuant to regulation 35(2) of the Regulations of the Court, a Chamber may extend a time limit if good cause is shown.

¹ At p.133 of the Decision.

7. The Separate opinion by Judge Pikis of the Appeals Chamber in its ‘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’ of 30 May 2006, elaborates on the requirements of ‘good cause’ as follows:

“To justify an extension of time for the filing of any document ‘good cause’ must be shown as laid down in regulation 35(2) of the Regulations of the Court. Good cause should be founded on the facts relevant to or interwoven with the presentation and articulation of the grounds and reasons in support of the appeal. Inability to file the document envisaged by regulation 64(2) of the Regulations of the Court must stem from lack of information bearing on the appealable issue or be associated with fact-specific difficulties or obstacles in the exposition of such grounds and reasons; deriving ordinarily from the complexity of the case or the magnitude of the research that has to be undertaken.”²
8. In its “Decision on the application by Counsel for Mr. Thomas Lubanga Dyilo to extend the time limit for the filing of the response to the Prosecutor's document in support” of 11 July 2006 the Appeals Chamber found that the defence had shown ‘good cause’ within the meaning of Regulation 35(2) to justify an extension of the time limit. The Appeals Chamber accepted that “the important and complex issues at stake necessitate proper preparation by Counsel for Mr Dyilo” and that alongside the burden of the preparation of other pending work, an extension of time for the filing of a response to the Prosecution document in support of the appeal was justified.³
9. The Defence submits that the Defence faces the same challenges that the Appeals Chamber found to justify granting an extension of time in its decision of 11 July 2006.

Legal Characterisation of the Confirmation Decision

10. The Defence is of the view that a decision to confirm the charges can properly be characterised as a decision as to release, which invokes an automatic entitlement to appeal under article 82(1)(b) of the Statute. Article 82(1)(b) refers to a “decision granting or denying release of the person being investigated or prosecuted”: the article thus speaks of the effect or remedy ensuing from a decision (release or non-release) as opposed to the particular grounds under which release is sought. As such, the article

² ‘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’ of 30 May 2006, Separate Opinion of Judge Pikis at Paragraph 7.

³ *Ibid.*, at p.4

has a broad scope (any decision which has the effect of granting or denying release), which is not limited to applications for release filed under a specific article or rule. Under article 61(10) of the Statute, “[a]ny warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor”. Accordingly, if the issues which were litigated at the confirmation hearing had resulted in the Pre-Trial Chamber refusing to confirm the charges, the ultimate remedy of the confirmation process would have been the release of Thomas Lubanga Dyilo. Conversely, the decision of 29 January 2007 confirms the charges brought against Thomas Lubanga Dyilo by the Prosecution and therefore has the effect of denying the release of the suspect.

11. In this regard, the Defence recalls that it expressly requested the unconditional release of Thomas Lubanga Dyilo in its ‘Brief on Matters Raised During the Confirmation Hearing –Legal Observations’.⁴ By confirming the charges against Thomas Lubanga Dyilo the Pre-Trial Chamber denies an explicit request by the Defence for the release of the suspect.

Importance and complexity of issues at stake

12. The Decision of the Pre-trial Chamber in which it denies the release of Mr Thomas Lubanga Dyilo is of fundamental importance, representing the culmination of nine months of pre-trial proceedings, and has serious implications for the Defence, as it determines whether the case will proceed to trial, defines the future contours of the trial proceedings, and mandates the continued deprivation of Thomas Lubanga Dyilo’s liberty.
13. The Decision of the Pre-Trial Chamber covers one hundred thirty-four pages, addressing twelve days of oral hearings, and over one hundred pages of written submissions from the participants. In addition to this, the Pre-Trial Chamber decision also addresses a number of separate motions.
14. The Decision also purports to address the issue of the admissibility of redacted documents and use of summary evidence pursuant to the orders of the Appeals Chamber of 14 December 2006.⁵

⁴ Filed on 7 December 2006, ICC-01/04-01/06-764, at paragraph 53

⁵ ‘Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’ of 14 December 2006. ‘Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-

15. In view of the volume and complexity of the material covered in the impugned Decision, a response adequate to address issues of such fundamental importance will require a considerable amount of work on behalf of the Defence.

Limited Resources of the Defence team

16. This heavy burden/workload comes at a time when the resources of the Defence are stretched to their limits. At present, the Defence team is caught between the juncture of the pre-trial payment scheme and the trial payment scheme. In this regard, the Defence was granted certain resources until the end of the confirmation process, but is not entitled to claim its trial allotment until the first Status Conference before the Trial Chamber. Accordingly, it is expected that as of early February, the Defence team will consist of two members, namely Counsel and Legal Assistant. In any case, unlike the Prosecution, the Defence does not dispose of a separate section, which is dedicated to and specialised in appellate litigation before the ICC. It is therefore disadvantaged *vis à vis* its ability to meet the more stringent deadlines set out under the Regulations of the Court.
17. Moreover, the Defence team must not only draft the work detailed above but, in parallel, will have to deal with all the other consequences, both legal and administrative, of the impugned Decision.
18. Under Regulation 64(5) of the Regulations of the Court, the Defence should file its document in support of the appeal within seven days of notification of the relevant decision. In light of the fact that the decision was issued on 29 January 2007, in accordance with the timetable provided for in Article 64(5), the Defence would only have five working days to prepare the first ever appeal brief on a confirmation decision before the ICC.

Fairness

19. In its appellate submissions concerning the Defence application for release and concerning the right and scope of victims' participation in relation to such appellate applications, the Defence expressed its view that the stringent time period set out in

Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 8' of 14 December 2006.

Regulation 64(5) is intended to facilitate the right of the person to have the legality of their initial detention or continued detention adjudicated in an expeditious manner.

20. In this regard, the Defence observes that in order to address novel issues of importance for the Court, the Appeals Chamber has permitted the victims' representatives to file their appellate submissions (manifestly) outside the time period for responses set out in the Regulations of the Court. The Appeals Chamber thus appeared to recognise that the interest in expediting release proceedings should be balanced by the need to ensure that novel and complex issues which be fully expounded and litigated. The Defence therefore submits that as the issues which form the subject of the present appeal application are also novel and of fundamental importance to the rights of the defence in this particular case, and future cases before the ICC, the Defence should be permitted to balance their right to an expeditious decision with their interest in ensuring that they have sufficient time to formulate and present their submissions before the Appeals Chamber.

2. Application for an extension of the Page-limit

21. In accordance with regulation 37(1), the page limit for an appeal on release is twenty pages. Pursuant to regulation 37(2) of the Regulations of the Court, this page limit may be extended in exceptional circumstances.
22. The impugned decision represents the culmination of ten months of pre-trial proceedings, twelve hearing days during the confirmation process, and an evaluation of the respective briefs of the Prosecutor, Victims Representatives, and Defence. Moreover, in the instant appeal, the Defence must address a number of complex legal and factual issues, and respond to number of separate motions in the consolidated decision of the Pre-Trial Chamber.
23. Accordingly, the Defence requests a small extension of the page-limit by twenty pages.

Relief sought:

24. In light of the afore-mentioned, the Defence respectfully requests the Appeals Chamber to:

- i. Extend to fourteen days the time limit for the Defence to file its brief in support of its Appeal against the Pre-Trial Chamber's 'Décision sur la confirmation des charges', to begin from the date on which the Appeals Chamber issues its Decision on this matter.
- ii. Grant an extension of the page-limit by twenty pages to enable the Defence to file a brief not exceeding forty pages.
- iii. Rule on this request as a matter of urgency due to the stringent deadline set forth in regulation 64(5).



Defence counsel

Jean FLAMME

Jean Flamme

Dated this 30th day of January, 2007

At The Hague