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THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
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

**Defence submissions on the scope of the right to appeal within the meaning of
article 82(1)(b) of the Statute**

The Office of the Prosecutor

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Introduction

1. On 29 January 2007, the Honourable Pre-Trial Chamber acting in the case of *The Prosecutor v Thomas Lubanga Dyilo* issued its ‘Décision sur la confirmation des charges’ (‘The Confirmation 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 FPLC 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 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 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.²
5. On 1 February 2007 the Appeals Chamber issued ‘Directions and Decision of the Appeals Chamber’ in the appeal of Mr Thomas Lubanga Dyilo of 30 January 2007, in which it directed the Appellant to address the issue of whether the subject-matter of the appeal is an appealable decision within the meaning of article 82(1)(b) of the Statute in a separate document to be filed by Wednesday 7 February 2007 at 4pm.
6. The Defence hereby files its submissions in support of its right under article 82(1)(b) to appeal the Confirmation Decision.

Submissions

¹ At p.133 of the Decision.

² Defence Appeal Against the Pre-Trial Chamber I’s ‘Décision sur la confirmation des charges’ of 29 January 2007’

7. The Defence is of the view that a decision of the Pre-Trial Chamber to confirm charges pursuant to article 61(7)(a) constitutes an appealable decision within the meaning of article 82(1)(b), which provision confers an automatic entitlement to appeal. In support of this view, the Defence submits: firstly, that article 82(1)(b) of the Statute confers the automatic right to appeal any decision which has the effect of denying or granting release of a person being investigated or prosecuted; and secondly, that the Confirmation Decision falls within the ambit of article 81(2)(b), constituting a decision which has the effect of denying release of a person being investigated and prosecuted by the Court.

1. **The ambit of the application of article 82(1)(b)**

8. A determination of the parameters of the application of article 82(1)(b) requires interpretation of the provision.

- A. **The interpretation of article 82(1)(b) of the Statute**

9. The Appeals Chamber has ruled that interpretation of the Statute, and specifically article 82(1), should be made according to the principles for the interpretation of treaties established in the provisions of Part II, Section 3, and notably articles 31 and 32, of the Vienna Convention of the Law of Treaties.³
10. Article 31 provides the ‘general rule’ for the interpretation of treaties, which is as follows:
“(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
11. The Appeals Chamber has observed the following in respect of the application of this general rule of interpretation to the Rome Statute:
“The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its object may be gathered from the chapter of the law in which the particular section is included and its purposes

³ Appeals Chamber’s ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Denying Leave to Appeal’ of 13 July 2006 at pages 4-5. ICC-01/04

from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.⁴

12. According to article 32, recourse to supplementary means of interpretation, including the preparatory work of the treaty, may only be had where the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. The Appeals Chamber has confirmed that recourse should not be had to preparatory work in the ordinary course of interpretation of the Statute, and that preparatory work can only serve to confirm an interpretation accorded to a provision in accordance with the principles set out in article 31 of the Vienna Convention.⁵

13. Article 82(1)(b) of the Statute reads:

“Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) [...]; (b) A decision granting or denying release of the person being investigated or prosecuted.”

B. Interpretation of article 82(1)(b) in accordance with its wording read in context

14. There are two components of article 82(1)(b) of the Statute. The first concerns the meaning of a ‘decision granting or denying release of the person’ and the second the object of the decision, referred to in the provision as ‘the person being investigated or prosecuted’.

i. The first component

15. Only a ‘decision granting or denying release of the person’ may form the subject-matter of an appealable decision pursuant to article 82(1)(b). The scope of article 82(1)(b) must therefore be determined by reference to the meaning of the phrase ‘a decision granting or denying release’ when taken as a whole.

(a) Article 82(1)(b) delimits the subject-matter of an appealable decision by reference to the effect of a decision

⁴ Appeals Chamber’s ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Denying Leave to Appeal’ of 13 July 2006 at pages 13-14. ICC-01/04

⁵ Appeals Chamber’s ‘Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Denying Leave to Appeal’ of 13 July 2006 at pages 15. ICC-01/04.

16. The Defence submits that article 82(1)(b) delimits the subject-matter of an appealable decision by reference to the effect of a decision: any decision which has the effect of granting or denying release of ‘the person’ falls within the ambit of this provision. That the right of appeal provided by article 82(1)(b) is triggered by the effect of a decision as opposed to the nature of a decision *per se* distinguishes it from other rights of interlocutory appeal provided for by article 82(1). Article 82(1)(a) refers to a decision, which is by its nature a decision concerning issues of jurisdiction or admissibility; determinative of the scope of this paragraph is the characterisation of issues raised in a decision. The scope of Article 82(1)(c) is more narrowly confined to decisions taken under the specific provision mentioned therein.
17. Concretely, under the analysis outlined above, the following decisions of the Pre-Trial Chamber can fall within the scope of article 82(1)(b), for the reason that all constitute decisions which have the effect of denying or granting release of a person ‘being investigated or prosecuted’:
- i. A decision of the Pre-Trial Chamber pursuant to article 60(2), 60(3), and 60(4) to grant or deny interim release of the person;
 - ii. A decision of the Pre-Trial Chamber pursuant to article 61(7);
 - iii. A decision of the Court that it does not have jurisdiction
 - iv. A decision of the Court that the case is inadmissible under article 17(1)(b), (c) or (d);
 - v. A decision on acquittal at trial or on appeal.
18. By providing that any decision that has the effect of ‘release’ *simpliciter* falls within the ambit of article 82(1)(b), the provision must be understood to provide a *lex generalis* for the appeal of any decision granting or denying release within the statutory framework. To the extent that the appellate provisions for appeals against jurisdiction, admissibility, convictions or acquittal provide for more favourable procedural provisions⁶ for the appellate parties, articles 81 and 82(1)(a) should be understood as the *lex specialis* of the general right to appeal decisions granting or denying release.
19. The Defence submits that article 82(1)(b) is not limited to applications for release filed under a specific article or rule. This interpretation of article 82(1)(b) is supported by a comparison with articles 82(1)(c), 82(2), 82(4) and article 81(1) which provide a right of appeal against decisions issued pursuant to particular provisions. If the right of

⁶ For example the time-limits and page-limits are substantially greater for such appeals.

appeal under article 82(1)(b) was limited to applications for release filed under a specific article or rule, the article would have expressly so provided. As such, under its own terms, the article has a broad scope, covering any decision which has the effect of granting or denying release.

20. Whilst it is the view of the Defence that the right to appeal under article 82(1)(b) is triggered by the effects of a decision rather than the substantive content of issues appealed, in the alternative, and if the Appeals Chamber so directs, the Defence would limit its appealable issues to those that, if the Pre-Trial Chamber's findings were reversed on appeal, would result in a reversal of the confirmation of charges and the consequent release of Thomas Lubanga Dyilo.⁷

(b) A decision of the Court having the effect of 'granting or denying release of the person' for the purposes of article 82(1)(b) of the Statute

21. Article 82(1)(b) refers to 'a decision of the Court having the effect of granting or denying release'. In the view of the Defence, in order to ascertain the scope of the term 'release' under article 82(1)(b), it is instructive to read article 82(1)(b) in connection with Rule 185 of the Rules,⁸ which sets out in a comprehensive manner those decisions issued under the Statute and Rules which fall within the category of decisions having the effect of granting or denying release. Rule 185 of the Rules provides for release 'as soon as possible' from the custody of the Court where: the court lacks jurisdiction; the case is inadmissible under article 17(1)(b),(c) or (d); the charges have not been confirmed under article 61; or, the person has been acquitted at trial or on appeal.

22. The Defence submits that 'release' within the meaning of article 82(1)(b) corresponds to the broad meaning accorded to 'release' under Rule 185.

23. This interpretation of article 82(1)(b) is supported by a comparison with other provisions of the Statute and the Rules, which explicitly qualify the term 'release' in order to indicate that a particular form of release or a specific cause of release is referred to exclusively. Article 60, rule 117(5) and rule 118(1) refer to 'interim

⁷ The Defence would be willing to provide forthwith further elaboration of appealable issues that would have the consequences referred to herein if the list would be of assistance to the Appeals Chamber. The Defence refrains from listing the issues which are of a confidential nature in this public filing.

⁸ In this regard article 21(a) of the Statute makes it clear that primary reference should be had to the Rules of Procedure and Evidence.

release' pending trial. Article 81(3)(c) refers to immediate release where the person has been acquitted at trial.

24. If the operation of the article 82(1)(b) was limited to specific decisions or a particular form of release, the article would have explicitly so provided, either by reference to the above provisions or through qualifying the term 'release' within the provision. The Defence thus submits that, under its own terms, the article has a broad scope corresponding to the categories of release decisions set out in Rule 185, including a decision on the confirmation of charges.

ii. *The second component*

25. Article 82(1)(b) further delimits the subject-matter of an appealable decision by reference to the object of a decision, referring to the 'person being investigated or prosecuted'.
26. It is self-evident that a person is 'investigated or prosecuted' within the meaning of article 82(1)(b) if he is the object of confirmation of charges proceedings under Part V of the Statute.

C. Interpretation of article 82(1)(b) in light of its object and purpose

27. In the view of the Defence, the primary function of this *lex generalis*, according a right to appeal on decisions impacting on release, is clear: it ensures that a detainee has relief against all decisions that impact on his personal liberty. When it is recalled that a decision to confirm charges may result in a prolonged period of detention pending and during trial, the importance of the right to interlocutory appeal on such a decision becomes evident.
28. In this regard, the Defence finds highly relevant the opinion of the Appeals Chamber of the ICTY that a primary function of interlocutory appeal is to safeguard the interests of the Defence:
 "Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when

facts are weighed, but equally when laws are surveyed and the proper rule is selected.”⁹

A consequence of a confirmation decision is that the detainee is likely to remain in detention for a further two to three years during the trial phase and potential appellate phase. Such a deprivation of liberty and right to family life cannot be compensated for in monetary terms. An early resolution of the issues set out in the confirmation decision would avoid the possibility of unfair and unwarranted detention and eliminate the prospect of a lengthy, expensive and emotional trial.

29. When considered, as such, in terms of the practical application of this interpretation of article 82(1)(b) in the context of the Statute, it is clear that this interpretation is reasonable.

i. The right to appeal a decision confirming charges in other criminal justice systems

30. The Defence finds support for its contention that the scope of article 82(1)(b) under the interpretation accorded to it hereinabove is reasonable from the fact that other major criminal justice systems provide for the review of decisions akin to the confirmation decision of the Pre-Trial Chamber.

31. The French Code de Procédure Pénal provides for review as of right of a decision by the *juge d'instruction* to issue an *ordonnance de non-lieu*¹⁰ or an *ordonnance de renvoi*¹¹ before the *Chambre de l'instruction*. The *ordonnance de non-lieu* and *ordonnance de renvoi* can be compared to a confirmation decision of the Pre-Trial Chamber not to confirm charges or to confirm charges respectively; in these decisions the *juge d'instruction*, like the Pre-Trial Chamber, makes a determination as to whether there is sufficient evidence to bring criminal charges against a suspect.¹²

32. The Rules of Procedure and Evidence of the ICTY provide for appeal as of right of a decision of the Trial Chamber pursuant to Rule 65 *ter* to direct the Prosecutor to proceed to trial on certain counts in its indictment.¹³

33. Finally, as noted above, the practical consequence of a confirmation decision for a detained person is that their detention will be prolonged for a minimum period of two to three years, which in terms of the practical effects could be equated to serving a

⁹ *Dusko Tadic v Prosecutor*, Appeals Chamber of the ICTY, decision on interlocutory appeal on jurisdiction of 2 October 2005 <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>

¹⁰ Article 177(1) Code Pénal de Procédure.

¹¹ Article 178, 179, 181 Code Pénal de Procédure.

¹² Article 176 Code Pénal de Procédure.

¹³ Rule 73(E) *bis* of the ICTY Rules of Procedure and Evidence <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf>

criminal sentence for such a period. In this connection, the Human Rights Commission held that a charge which involved a one-year sentence was serious enough to warrant a review by a higher tribunal regardless of whether the domestic law classified the offence as criminal.¹⁴

ii. *The irrelevance of the supplementary means in interpretation*

34. The Defence submits that it is not necessary to assert that such a right of appeal exists under article 21(3)(d) because the plain text of the statute clearly provides for it, and this interpretation is both reasonable, and consistent with the corresponding provisions in the Rules and the objects and purposes of the Statute.

35. The Defence therefore submits that in accordance with article 32 of the Vienna Convention on the Law of Treaties there is no scope for the recourse to supplementary means of interpretation, except insofar as it confirms the interpretation set out above.

36. In this regard, the Defence submits that it is highly relevant that the Appeals Chamber has only referred to travaux préparatoires of the Rome Statute to confirm an interpretation accorded to a provision under its plain meaning.¹⁵

2. The Confirmation Decision falls within the ambit of article 81(2)(b)

37. Pursuant to the interpretation accorded hereinabove, article 82(1)(b) of the Statute confers the automatic right to appeal any decision which has the effect of denying or granting any form of release of a person provided for in the Statute during confirmation of charges proceedings.

38. The Defence is of the view that the Confirmation Decision can properly be characterised as a decision as to release within the meaning of article 82(1)(b) Statute.

A. Legal Characterisation of the Confirmation Decision

¹⁴ Salgar de Montejó v. Colombia, (64/1979), 24 March 1982, 1 Sel. Dec. 127, at 129 – 130. <http://www1.umn.edu/humanrts/undocs/newscans/64-1979.html>

¹⁵ In any case, reliance on the travaux préparatoires to the Rome Statute has been recognised as problematic in light of the fact that discussion during the drafting process generally took the form of informal discussions. See A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections on the Rome Statute' 10 EJIL 144 at 145, available online: <http://www.ejil.org/journal/Vol10/No1/100144.pdf>.

39. In the view of the Defence a decision of the Pre-Trial Chamber pursuant to article 61(7)(a) confirming charges can fall within the ambit of article 82(1)(b) as it has the effect of denying release of the person during confirmation of charges proceedings before the Court.

40. The Defence is of the view that the Confirmation Decision can properly be characterised as a decision as to release within the meaning of article 82(1)(b) Statute.

41. A 'confirmation of charges decision' is the decision that the Pre-Trial Chamber delivers pursuant to article 61(7) on the basis of a confirmation of charges hearing. Following a confirmation of charges hearing, the Pre-Trial Chamber may take one of three courses of action enumerated by article 61(7) of the Statute. Article 61(7) provides:

"The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed.

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence.

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court. "

42. Paragraph (c) of article 61(7) does not provide for a final 'confirmation decision', but rather provides for an adjournment to the confirmation of charges hearing. As such, the Chamber is limited to two courses of action in the 'confirmation decision' that it issues. It can either: i) decide to confirm some or all of the charges brought by the Prosecutor pursuant to article 61(7)(a); or, ii) decline to confirm some or all of the charges brought by the Prosecutor pursuant to article 61(7)(b). Accordingly, a decision to adjourn the confirmation hearing under article 61(7)(c) would not in itself trigger a right to appeal via article 82(1)(b).

B. A decision of the Pre-Trial Chamber pursuant to article 61(7)(a) confirming charges can fall within the ambit of article 81(2)(b) when it has the effect of denying or granting release of a person being investigated or prosecuted

43. A decision of the Pre-Trial Chamber pursuant to either article 61(7)(a) and article 61(7)(b) can have the effect of either denying or granting release of a person being investigated or prosecuted. As such, the Defence submits, a ‘confirmation decision’ of the Pre-Trial Chamber pursuant to article 61(7)(a) or (b) to confirm or not to confirm charges can fall within the ambit of article 81(2)(b).

i. A decision having the effect of granting or denying release of the person for the purposes of article 82(1)(b)

44. The effect of a decision to decline to confirm all of the charges brought by the Prosecutor pursuant to article 61(7)(b) is prescribed by article 61(10), according to which:

“[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”.

45. Accordingly, if the Pre-Trial Chamber refuses to confirm the charges against the person, the automatic consequence must be the release the person, in the case that the person is in the custody of the Court. Rule 185 of the Rules confirms that a decision not to confirm the charges results in the unconditional release of the person, providing that:

“[w]here a person surrendered to the Court is released from the custody of the Court because [...] the charges have not been confirmed under article 61 [...]”.

A decision not to confirm any charge, by reference to its effect, must therefore be characterised as a decision granting release.

46. The above analysis of the effects of a decision under article 61(7) becomes clear when considered in the context of the ‘Décision sur la confirmation des charges’ issued by the Pre-Trial Chamber on 29 January 2007. The relief sought by the Defence in its submissions to the Court not to confirm charges was the immediate and unconditional

release of the suspect.¹⁶ 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. 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.

ii. *A person being investigated or prosecuted*

47. It is clear that Thomas Lubanga Dyilo constituted a ‘person being investigated or prosecuted’ for the purposes of article 81(1)(b).

Relief Sought:

48. For the reasons outlined above, the Defence submits that the Confirmation Decision, which confirmed the charges against Thomas Lubanga Dyilo and thereby denied his release, falls within the ambit of article 81(2)(b).

49. Accordingly, the Defence respectfully requests the Honourable Appeals Chamber to declare the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ to be appealable under article 82(1)(b).

¹⁶ The Defence expressly requested the unconditional release of Thomas Lubanga Dyilo in its ‘Brief on Matters Raised During the Confirmation Hearing –Legal Observations’ Filed on 7 December 2006, ICC-01/04-01/06-764, at paragraph 53, paragraph 53.



Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo

Dated this 7th day of February, 2007

At Gent