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No.: ICC-01/04-01/06  
Date: 9 February 2007

**THE APPEALS CHAMBER**

**Before:** Judge Georgios M. Pikis, President  
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 Response to Appeals Chamber's Directions of 5 February 2007**

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor  
Mr. Ekkehard Withopf, Senior Trial  
Attorney

**Counsel for the Victims a/0001/06 to  
a/003/06**

Mr. Luc Walley, n,  
Mr. Frank Mulenda

**Counsel for the Defence**

Mr. Jean Flamme  
Mr. Geoff Roberts  
Ms. Véronique Pandanzyla

1. On 29 January 2006, the Pre-Trial Chamber issued a decision confirming the charges against Thomas Lubanga Dyilo.<sup>1</sup> The Defence filed a notice of appeal against this decision on 30 January 2007<sup>2</sup>, and an urgent request for an extension of the time and page limits for the document in support of this appeal filed later on the same day.<sup>3</sup> This appeal was filed on the basis of Article 82(1)(b), namely that the Confirmation Decision constituted a ‘decision granting or denying release of the person being investigated or prosecuted’. In response to Directions issued by the Appeals Chamber,<sup>4</sup> the Defence elaborated on its reasons for submitting that this Decision was appealable as of right under this Article on 7 February 2007.<sup>5</sup>
2. After the Appeals Chamber’s Directions, but before the Defence Response to these Directions, the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 (the Legal Representatives) filed a Joint Application concerning the Appeals Chamber’s Directions.<sup>6</sup> In this Joint Application, the Legal Representatives requested the Appeals Chamber to:
  - 1) Authorise the Legal Representatives to file a response to the submission of the Defence as stated in paragraph 3 of the Directions and Decision of the Appeals Chamber; and
  - 2) Authorise the Legal Representatives to participate in the appeal proceedings, in particular by submitting written observations on any issue raised by the Prosecution or Defence that affects their interests.
3. The Appeals Chamber issued subsequent Directions<sup>7</sup> allowing the Defence and Prosecution to make their response to this application.<sup>8</sup>
4. The Defence opposes the Joint Application as it (i) is not foreseen by the Statute or Rules; (ii) unnecessarily adversely affects the expeditiousness of proceedings on an

<sup>1</sup> Décision sur la confirmation des charges, 29 January 2007, ICC-01/04-01/06-796-Conf

<sup>2</sup> Defence Appeal Against the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007”, ICC-01/04-01/06-797, 30 January 2007

<sup>3</sup> Urgent Defence Request for Extension of Time and Page Limits for Brief in Support of Appeal Against the ‘Décision sur la confirmation des charges’, ICC-01/04-01/06-800, 1 February 2007

<sup>4</sup> Directions and Decision of the Appeals Chamber, 1 February 2007, ICC-01/04-01/06 (Hereafter ‘Directions and Decision’)

<sup>5</sup> ‘Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute’ of 7 February 2007 ICC-01/04-01/06-812.

<sup>6</sup> Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber”, filed on 1 February 2007, 2 February 2007, ICC-01/04-01/06-802-tEN (Hereafter ‘Joint Application’)

<sup>7</sup> Directions of the Appeals Chamber, 5 February 2007, ICC-01/04-01/06-805

<sup>8</sup> The Defence requested an extension of time to file these observations on Wednesday 7 February. However, at the time of filing this motion, no decision had been rendered by the Appeals Chamber on this request. Consequently, the Defence files this response to the Appeals Chamber without the signature of the Lead Counsel who has been unable to review it. It is also filed subject to the caveat that Thomas Lubanga Dyilo’s right to effective representation is possibly not being respected.

issue that the Statute recognises needs to be adjudicated rapidly; and (iii) overburdens the Defence.

## **Submissions**

### **1) The right of the Legal Representatives to file a response to the submission of the Defence as stated in paragraph 3 of the Directions and Decision of the Appeals Chamber**

5. The Defence notes firstly that the Appeals Chamber, in its Decision and Directions, held that the ‘appellant is directed to make his submission on the subject defined above in a document to be filed by Wednesday, 7 February 2007, at 4pm. Thereafter, the Prosecutor shall be at liberty to make his response by Tuesday, 13 February 2007, at 4pm.’<sup>9</sup> There is no direction to the Legal Representatives to file any document on this issue.
6. The Defence submits that the clear wording of these Directions demonstrates that there is no right for the Legal Representatives to file any submissions on whether or not the ‘subject-matter of the appeal is an appealable decision within the meaning of article 82(1)(b)’. Consequently, the Defence submits that the Joint Application should have been rejected on this issue.
7. The Defence submits that this position has support from the Decision of the Appeals Chamber<sup>10</sup> on the right of the Legal Representatives to participate in the Defence Appeal of 18 October 2006.<sup>11</sup> In that Decision, the Appeals Chamber only granted the Legal Representatives ‘the right to participate in this appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal’.<sup>12</sup> Therefore, the scope of the submissions that the Legal Representatives were permitted to file was severely limited.
8. The Defence further submits that although the Legal Representatives were granted the right to participate in Pre-Trial proceedings in the Thomas Lubanga Dyilo case, they do not have the right to file appeals against decisions of the Pre-Trial or Trial Chamber unless expressly granted that right under the Statute or Rules. Under Article 82(1) ‘either party’ may appeal a decision ‘granting or denying release’. The phrase ‘either

<sup>9</sup> At paragraph 3

<sup>10</sup> Decision of the Appeals Chamber, 12 December 2006, ICC-01/04-01/06-769

<sup>11</sup> Defence Appeal Against 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 20 October 2006, ICC-01/04-01/06-594

<sup>12</sup> At page 3

party' clearly refers only to the Prosecution and Defence.<sup>13</sup> The Legal Representatives are participants and as such are not granted the right to appeal under this article. This interpretation is further supported by Article 82(4) which refers explicitly to the right of a 'legal representative of the victims' to appeal against an order for reparations. Therefore it is clear that where the Legal Representatives are granted the right to appeal, this right is clearly set out in the Statute. In the absence of such an express provision, no right to appeal is available.

9. The right to appeal a decision also extends to the right to file a response to the party seeking to appeal. It would be illogical to find that the Legal Representatives were not permitted to file an appeal, but could file a response to the appeal filed by one of the parties.
10. The Defence therefore requests that the Appeals Chamber deny the Legal Representatives request to respond to the Defence Response to the Appeals Chamber's Order of 1 February 2007.

**2) The right of the Legal Representatives to participate in the appeal proceedings, in particular by submitting written observations on any issue raised by the Prosecution or Defence that affects their interests**

11. The Legal Representatives also requested in their Joint Application to be authorised to submit written observations on any issue raised by the Prosecution or Defence that affects their interests if the Appeals Chamber determines that the Defence Appeal is within the scope of Article 82(1)(b).
12. The Defence has already made extensive submissions on the modalities of participation of the Legal Representatives during appeal proceedings.<sup>14</sup> The Defence reiterates the submissions made in previous filings as the Defence's concerns and views apply equally to these proceedings. As then, this appeal also concerns a decision denying release by the Pre-Trial Chamber.
13. The Defence highlights firstly that under Article 68(3) of the Statute, if the Court permits the views of victims to be heard, this must be done 'in a manner which is not

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<sup>13</sup> This interpretation finds support in, 'The Appeal Procedure of the ICC', Roberts Roth and Marc Henzelin pp 1535 – 1559, in Cassese, Gaeta and Jones (eds.) 'The Rome Statute of the International Criminal Court', at page 1551: "Victims, civil parties and third parties affected by a decision cannot normally be considered as parties, in the strictest sense of the word, to an appeal against an interim decision under article 82, unless such decisions affect their civil rights as envisaged by Article 82(4)/Article 75".

<sup>14</sup> See Defence Response to the Appeals Chamber Order of 24 November 2006, 29 November 2006, ICC-01/04-01/06-734, paragraphs 30-40

prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

14. Therefore, the submissions of the Legal Representatives must be limited to the evidence and the submissions they made during the confirmation hearing. To expand their submissions to include new factual information would be providing argument and evidence to the Appeals Chamber that was not presented to the Pre-Trial Chamber. This would deprive the Defence of the procedural right to be able to challenge the accusations made against the person and would also mean that the Appeals Chamber would be hearing these issues without them having been fully litigated before the Pre-Trial Chamber. In this regard, the Defence wishes to express its concern on the effect the role of the Legal Representatives is having on the resources of the Defence team. The Defence, with very stretched resources, has to respond to any issue raised on appeal by any participant. Therefore unless the submissions of the Legal Representatives are strictly limited this will place an unfair burden on the Defence team.
15. Secondly, if the Legal Representatives are authorised to file submissions before the Appeals Chamber on the impact of release, the Defence submits that they must be ordered to do so at the same time as the Prosecution files its response to the Prosecution appeal. This would ensure that a resolution by the Appeals Chamber of the issue on appeal is not delayed. Under Rule 118(1), decisions pertaining to provisional release shall be decided without delay. The Rules therefore recognise the importance of deciding on issues relating to release in an expeditious manner, and participation by the Legal Representatives must not prejudice that right under Article 68(3).
16. Thirdly, the Defence submits that it should have the automatic right to file a reply to any response filed by the legal representatives. The Defence submits in light of the nature of the submissions that the victims’ representatives are permitted to make, a reply from the Defence is necessary to ensure that the issues have been fully litigated.

### **Relief Sought**

The Defence therefore respectfully requests that the Appeals Chamber:

- i. Deny the Joint Application of the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 to respond to the Defence Response to the Appeals Chamber’s Order of 1 February 2007;

- ii. Strictly limit the right of the Legal Representatives to participate in the appeal proceedings to the evidence and the submissions they made during the confirmation hearing;
- iii. Order that all authorised submissions of the Legal Representatives on the impact of release be filed at the same time as the Prosecution files its response to the Defence appeal; and,
- iv. Grant the Defence the automatic right to file a reply to any response filed by the Legal Representatives.

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Dated this 9th day of February, 2007

At The Hague