

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 9 March 2007

THE APPEALS CHAMBER

Before: Judge Georghios M. Pikis (Presiding Judge)
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

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

Public Document

Reasons for “Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ filed on 20 February 2007” issued on 23 February 2007

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The Appeals Chamber of the International Criminal Court (hereinafter the “Court”),

In the appeal of Mr. Thomas Lubanga Dyilo (the “Appellant”) of 30 January 2007 entitled “Defence Appeal Against the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007” (ICC-01/04-01/06-797),

In the application of Mr. Lubanga Dyilo of 20 February 2007 entitled “Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense” (ICC-01/04-01/06-830-Conf),

Provides the following reasons for its decision entitled “Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ filed on 20 February 2007” (ICC-01/04-01/06-838) issued on 23 February 2007:

1. By application¹ dated 20 February 2007, the Appellant seeks an order staying “all acts or proceedings likely to affect or be prejudicial to the rights of the Defence, including the transmission of the record from Pre-Trial Chamber I to the Trial Chamber, for an appropriate period in order to enable the assignment of new Counsel”². The application is premised on the following facts. Appellant’s counsel moved, pursuant to the provisions of regulation 78 of the Regulations of the Court, Pre-Trial Chamber I (hereinafter “Pre-Trial Chamber”) for leave to withdraw and sequentially, pending the choice and appointment of a new counsel, the Appeals Chamber is asked in terms to stay all acts and proceedings likely to affect the rights of the defence. In the same context, the Appeals Chamber is alerted to the fact that the time limited for the submission of two documents by the Appellant relevant to the issues raised in this appeal is due to expire on

¹ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense” 20 February 2007 (ICC-01/04-01/06-830-Conf).

² The French original reads: “Suspendre toute action ou procédure qui pourrait influencer ou nuire aux droits de la Défense, y compris le transfert du dossier de procédure de la Chambre Préliminaire I à la Chambre de Première Instance, pour une période appropriée afin de permettre la désignation d’un nouveau conseil.”



23 February 2007. The Prosecutor, who was given one day to respond by order³ of 21 February 2007, opposed⁴ the application. Firstly, on the ground “that it is in the interest of justice that any withdrawal of Counsel should not unduly delay the proceedings or result in an indefinite suspension.”⁵ Also, the withdrawal of counsel should not impede the expeditious administration of justice.⁶ Secondly, that such assistance as the Appellant may need to prepare his submissions on “the few outstanding procedural steps” could be rendered by the Office of Public Counsel for the Defence.⁷ Thirdly, any remaining member of the Defence team, meaning presumably assistant to counsel, may come to the assistance of the Appellant by submitting the documents due for filing on 23 February 2007.⁸ Meantime, on 21 February 2007, the Pre-Trial Chamber granted leave to Mr. Flamme, counsel for the Appellant, to withdraw.⁹ By a decision¹⁰ of the Appeals Chamber of 23 February 2007, the time for filing the two documents was extended to Friday, 23 March 2007. The reasons of the Appeals Chamber for the decision given follow hereafter.

I. REQUEST TO STAY ALL ACTS AND PROCEEDINGS

2. The remedy sought embraces in terms all proceedings before the Court affecting the Appellant and not merely the stay of proceedings before the Appeals Chamber. No authority is cited in support of the proposition that the Appeals Chamber is vested with power to stay proceedings before another Chamber of the Court. The first issue to be examined is whether the Appeals Chamber has power to stay proceedings before any other Chamber.

³ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Directions of the Appeals Chamber to the Prosecutor” 21 February 2007 (ICC-01/04-01/06-832-Conf).

⁴ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Prosecution’s Response to the ‘Directions of the Appeals Chamber’ of 21 February 2007” 22 February 2007 (ICC-01/04-01/06-835-Conf).

⁵ *Ibid*, paragraph 15.

⁶ See *ibid.*, paragraph 17.

⁷ See *ibid*, paragraph 18.

⁸ See *ibid.*, paragraph 22.

⁹ See ICC-01/04-01/06-833-Conf.

¹⁰ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ filed on 20 February 2007” 23 February 2007 (ICC-01/04-01/06-838).

3. The Appeals Chamber is unanimous that there is no power to order stay of all proceedings before another Chamber. The reasons of the majority, namely Judge Kirsch, Judge Pillay, Judge Song and Judge Kourula, are set out in paragraph 4. The reasons of the minority are set out in paragraph 5.

A. Reasoning of the majority (Judges Kirsch, Pillay, Song and Kourula)

4. Upon a review of the relevant procedure of the Statute and Rules of Procedure and Evidence, the Appeals Chamber determines that stay of all proceedings pending before another Chamber at the instance of the Appeals Chamber is not known to the law applicable to proceedings before the Court. In the judgment of the Appeals Chamber, the Appellant's application lacks procedural and substantive foundation. The Appellant's prayer for relief is one unknown to the law applicable in proceedings before the Court and one that the Appeals Chamber has no power to grant.

B. Reasoning of the minority (Judge Pikis)

5. While fully associating with the reasoning provided in paragraph 4, the reasons given below are considered a necessary supplement to the reasoning of the decision on the subject. Therefore the following is added.

Stay of proceedings is a relief wholly separate and distinct from the one envisaged in article 82 (3) of the Statute. Akin to the remedy sought are orders of common law courts to stay proceedings regarded as an abuse of the judicial process.¹¹ Even in that case, power to stay resides with the trial court, not the appeal court. Romano-Germanic jurisdictions, such as that of Germany, make provision¹² for stay of criminal proceedings

¹¹ See *Murphy P. (Editor in Chief)* Blackstone's Criminal Practice 2006, Oxford University Press 2005, D10.41 and D19.10.

¹² Section 262 of the German Criminal Procedure Code reads: "[Preliminary Civil Law Questions] (1) If the criminal liability for an act depends on the evaluation of a legal relationship under civil law, the criminal court shall also give a decision thereon according to the provisions applicable to procedure and evidence in criminal cases. (2) The court, however, shall be entitled to suspend the investigation and to set a time limit within which one of the participants is to bring a civil action, or to await the judgment of the civil court." (translation provided by the German Federal Ministry of Justice, available at <http://www.uscomp.org/gla/statutes/StPO.htm>, last accessed on 9 March 2007).



pending the outcome of civil proceedings connected therewith. In that case too jurisdiction to stay lies with the trial court. The writ of prohibition available at common law is another remedy to which the application before the Appeals Chamber bears some resemblance. No jurisdiction is conferred upon the Appeals Chamber to issue orders similar to a writ of prohibition. Even if it were otherwise, no order in the nature of a writ of prohibition could be issued in this case for the following reason. The writ of prohibition¹³ is available to restrain excess of jurisdiction by lower courts,¹⁴ i.e. courts of limited jurisdiction under English law. The Pre-Trial and Trial Chambers of the Court are not inferior courts in that sense.

Stay of proceedings in any circumstances is a drastic measure requiring authority for its invocation, that is lacking here, and then only if stay can be reconciled with the norms of a fair trial.

II. REQUEST TO STAY THE TRANSMISSION OF THE RECORD OF PRE-TRIAL PROCEEDINGS BY THE PRESIDENCY TO THE TRIAL CHAMBER

6. By the second part of the three-fold prayer for relief, the Appellant applies for an order staying the transmission of the record of the Pre-Trial Chamber to the Trial Chamber. Under the provisions of article 61 (11) of the Statute, upon the confirmation of the charges, the Presidency “shall constitute a Trial Chamber” and sequentially thereto transmit, as provided in rule 130 of the Rules of Procedure and Evidence, the decision as well as the record of the proceedings of the Pre-Trial Chamber to the Trial Chamber. It

¹³ Compare for an overview on the usage of this term: Halsbury’s Laws of England, Volume 11 (2), (Fourth Edition, Reissue Butterworths), paragraph 1487; Halsbury’s Laws of England, Volume 1 (1) (Fourth Edition, 2001 Reissue Butterworths), paragraph 59, paragraph 117, paragraph 119; *Murphy P.* (Editor in chief) Blackstone’s Criminal Practice 2006 (Oxford University Press 2005) D26.25.

¹⁴ See *Murphy P.* (Editor in chief), Blackstone’s Criminal Practice 2006 (Oxford University Press 2005), D27.25 and D27.19.



may be noted that the Pre-Trial Chamber, following a hearing, confirmed the charges against Mr. Thomas Lubanga Dyilo by a decision of 29 January 2007.¹⁵

7. The Appeals Chamber is unanimous that the relief sought must be dismissed. The reasons of the majority, namely those of Judge Kirsch, Judge Pillay, Judge Song and Judge Kourula, for so holding are set out in paragraph 8. The reasons of the minority for the rejection of the remedy sought are set out in paragraph 9.

A. Reasoning of the majority (Judges Kirsch, Pillay, Song and Kourula)

8. There is no reference to the involvement of the Appeals Chamber in the transmission of the record of the Pre-Trial Chamber to the Trial Chamber in the relevant provisions to which reference has been made. Responsibility for the transmission of the record lies with the Presidency in pursuance of the administrative or other functions entrusted to the Presidency as foreseen in article 38 (3) of the Statute. As such, it is to the Presidency, and not to the Appeals Chamber, that any application to stay the transmission of the record should be made. The Appeals Chamber notes that the Appellant, in his application, states that he has applied to the Presidency for such a stay in any event.

B. Reasoning of the minority (Judge Pikis)

9. The present appeal is directed against the decision of the Pre-Trial Chamber invoking the release of the Appellant as a ground validating recourse to the provisions of article 82 (1) (b) of the Statute for mounting an appeal against the decision of the Pre-Trial Chamber confirming the charges. The proceedings pending before the Appeals Chamber, the stay of which is sought, concern the appealability of the decision of the Pre-Trial Chamber under the aforementioned provisions of the Statute. The Appeals

¹⁵ See *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* "Décision sur la confirmation des charges" 29 January 2007 (ICC-01/04-01/06-803), page 133: articles 8 (2) (b) (xxvi), 25 (3) (a) of the Statute ; articles 8 (2) (e) (vii), 25 (3) (a) of the Statute.



Chamber set down the determination of this matter preliminarily to addressing the merits of the appeal.¹⁶

Article 61 (11) of the Statute reads as follows:

Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

It is plain on any reading of the aforesaid paragraph of article 61 of the Statute that following the confirmation of charges, the Presidency is dutybound (“shall”) to constitute a Trial Chamber,¹⁷ having no discretion to refrain from so doing or doing otherwise.

Conceivably, such a duty would not arise if for any reason the Appeals Chamber suspended under the provisions of article 82 (3) of the Statute the enforcement of a decision of the Pre-Trial Chamber to confirm the charges pending the outcome of an appeal; a matter that need not concern the court in these proceedings.

The duty cast upon the Presidency is a ministerial¹⁸ one, i.e. one cast upon a public authority other than a judicial one having no discretion but do what the law instructs; being the medium for the enforcement of the law. The duty established by rule 130 of the Rules of Procedure and Evidence to transmit the record sequentially to the constitution of the Trial Chamber is likewise ministerial. As in the case of the constitution of a Trial Chamber, a mandatory duty is imposed upon the Presidency to transmit the decision of the Pre-Trial Chamber to confirm the charges and the record of the proceedings to the Trial Chamber (“shall transmit [...]”). Acts of the Presidency of the character under consideration, notably the setting up of a Trial Chamber and the transmission of the pre-

¹⁶ See *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Directions and Decision of the Appeals Chamber” 1 February 2007 (ICC-01/04-01/06-800).

¹⁷ See in this connection also rule 130 of the Rules of Procedure and Evidence that permits the assignment of a case for trial to a previously constituted Trial Chamber.

¹⁸ See *Garner B A.*, Blacks Law Dictionary (Seventh Edition, West Group, St. Paul, Minn., 1999): “Of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment or skill.” page 1011; Shorter Oxford English Dictionary on historical principles (Fifth Edition, Oxford University Press 2002), Volume 1 A-M, page 1785: “Pertaining to or entrusted with the execution of the law or the commands of a superior.”.

trial record, cannot be the subject of judicial proceedings. Nor does power lie to stop a body or authority established under the Statute from doing what the Statute warrants. Only failure to carry out a ministerial duty might possibly be the subject of judicial proceedings in order to ensure that the process ordained by law is followed, thereby assuring that the course of justice is not impeded or frustrated. Such a power is akin to the one acknowledged to an English superior court to issue a writ of mandamus¹⁹ (mandatory order) to a public authority to carry out a duty mandated by law.²⁰ No need arises in these proceedings to delve further into the subject or postulate in any definitive way the powers of the Appeals Chamber in this area of the law.

III. REQUEST TO STAY PROCEEDINGS BEFORE THE APPEALS CHAMBER

10. The third prayer is to the effect that the Appeals Chamber should stay proceedings before it for such time as would enable the Appellant to secure the services of new counsel. The length of time needed for the purpose is not specified nor does the Appellant indicate any time interval within which this would be accomplished. Stay of proceedings for an indefinite or indeterminate period of time is an extreme measure, not lightly countenanced in any jurisdiction. In the case of *The Prosecutor v. Mr. Thomas Lubanga Dyilo* in “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”²¹, the Appeals Chamber adverted to the power acknowledged to judicial authorities in various national jurisdictions to stay proceedings; a species of jurisdiction that constitutes a distinct feature²² of common law jurisdictions. As the Appeals Chamber determined, no power vests in the Court to stay proceedings for abuse

¹⁹ Nowadays an aspect of judicial review (see “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168), paragraph 29).

²⁰ See *inter alia* Halsbury’s Laws of England, Volume 1(1) (Fourth Edition, 2001 Reissue, Butterworths), paragraph 61 and paragraph 133 *et seq.*; *Murphy P* (Editor in chief), Blackstone’s Criminal Practice 2006, (Oxford University Press 2005) D27.24.

²¹ 14 December 2006 (ICC-01/04-01/06-772).

²² See Halsbury’s Laws of England, Volume 37 (Fourth Edition, 2001 Reissue, Butterworths), paragraph 926 *et seq.*

of process as such. But power does reside with the Court to stay proceedings where a fair trial is impossible.

11. In the above case, the Appeals Chamber examined a distinct aspect of stay, notably the stopping of proceedings, where justice could not be done. The Appeals Chamber did not advert to other aspects of stay of proceedings of a nature regulatory of the progress and fruition of the judicial process. No need arises to do so in this case inasmuch as what the application of Mr. Lubanga Dyilo really aims at is a respite in order to submit the documents due with the benefit of counsel's help and advice. Effective representation is sought in order to enable him to fulfil his obligations in the litigation in hand. The Regulations of the Court acknowledge in regulation 35 (2) power to a Chamber to extend the time set down by its directions for the presentation of a party's case before it.

12. The right of the accused to legal representation by counsel as well as the corresponding right of a person against whom charges have been laid is safeguarded as his/her fundamental right under the provisions of article 67 (1) (d) of the Statute and rule 121 (1) of the Rules of Procedure and Evidence. Such a right is a universally recognized human right (see article 21 (3) of the Statute) that finds expression in international and regional treaties and conventions.²³ Under the Statute, the Rules of Procedure and

²³ Article 14 of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, reads: "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;" Article 6 (3) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), European Treaty Series No. 5, reads: "Everyone charged with a criminal offence has the following minimum rights: [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." Article 7 (1) of the *African Charter on Human and Peoples' Rights*, signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363, reads: "1 Every individual shall have the right to have his cause heard. This comprises: "c. The right to defence, including the right to be defended by counsel of his choice;" The *American Convention on Human Rights*, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, provides under the heading "Article 8. Right to a Fair Trial" in paragraph 2: "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:[..] e. the inalienable right to be assisted by counsel



Evidence and the Regulations of the Court the choice of counsel lies with the person and once appointed, counsel can conduct the defence of the individual.²⁴

13. The Prosecutor contends so far as the proceedings before the Appeals Chamber are concerned that the lacuna emerging from the absence of counsel may be filled by the Office of Public Counsel for the defence. Regulation 77 (4) of the Regulations of the Court envisages that the Office of Public Counsel for the defence can represent and protect “the rights of the defence during the initial stages of the investigation”, which is not the case with the proceedings pending before the Appeals Chamber. In addition, the Office of Public Counsel may, in virtue of the provisions of regulation 77 (5) of the Regulations of the Court, provide support and assistance to defence counsel and to the person entitled to legal assistance. Neither provision can be validly invoked to sidestep the right of the person to appoint counsel of his/her choice to represent him/her in proceedings before the Court. The Regulations of the Court must be read subject to the fundamental right of the accused to legal representation. In the necessitous circumstances envisioned by regulations 73 and 75 of the Regulations of the Court, duty counsel can represent the accused or the person under charge. The wishes of the person in need of representation are according to regulation 73 (2) of the Regulations of the Court a specific factor to which regard must be had before appointing duty counsel. In this case, the Appellant is seeking to appoint counsel of his choice to represent him in every proceeding before the Court, and not the temporary replacement of his counsel. Moreover, it is in the interests of justice that the Appellant should be represented by counsel of his choice in the present proceedings before the Appeals Chamber, and by counsel that will have the overall conduct of the Appellant’s case from the current stage of the proceedings onwards – just as would have been the case had former counsel not withdrawn, through no fault of the Appellant. A similar opportunity was afforded to the Appellant when his counsel was unable to represent him, the subject of the Appeals

provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;”.

²⁴ See article 67 (1) (d) of the Statute, rules 21 and 22 of the Rules of Procedure and Evidence and regulations 67, 74, 75 of the Regulations of the Court.



Chamber's decision²⁵ of 16 February 2007. What cannot be denied to the accused or a person under charge is a reasonable opportunity to appoint counsel of their choice and affording them adequate time and facilities to prepare their defence.

14. Such help or support as assistants to counsel may render to the Appellant is no substitute for the services of counsel (see regulation 68 of the Regulations of the Court).

15. The right to choose counsel for the representation of a person in legal proceedings must, like every right of the accused or the person under charge, be reasonably exercised having regard to the principles of a fair trial. No right can be exercised in a manner frustrating the aims of a fair trial including, no doubt, the reasonableness of the time within which the proceedings must be held.

16. Envisioning, as well as the Appeals Chamber can, the length of time reasonably necessary for the choice of counsel and sequentially preparation for the filing of the expected submissions of the Appellant on the two subjects under consideration (supplementation of the submission of 7 February 2007²⁶ and submitting a response as directed by the Appeals Chamber on 5 February 2007²⁷) the Appeals Chamber considers that a period of 28 days is sufficient for the purpose. Hence, the corresponding intervals of time for the submission of the addresses will be extended, as determined and recorded in the decision of 23 February 2007.

17. The Appeals Chamber notes that the Appellant's application is filed as a confidential document. No aspect of this decision qualifies as confidential from whatever angle one may view the matter. Therefore, the decision and the reasons in support are made public. Mere labeling of a given proceeding as confidential without substantiation is not in itself conclusive.

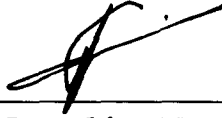
²⁵ "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" (ICC-01/04-01/06-827).

²⁶ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* "Defence submissions on the scope of the right to appeal within the meaning of article 82 (1) (b) of the Statute" 7 February 2007 (ICC-01/04-01/06-810).

²⁷ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* "Directions of the Appeals Chamber" 5 February 2007 (ICC-01/04-01/06-805)



Done in both English and French, the English version being authoritative.



Judge Georghios M. Pikis
Presiding Judge

Dated this 9th day of March 2007

At The Hague, The Netherlands