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**International
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Court**

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Date: 13 May 2008

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

**Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal
against the oral decision of Trial Chamber I of 18 January 2008**

Dissenting Opinion of Judge Georghios M. Pikis



Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval



Dissenting Opinion of Judge Pikis

1. Article 82 (1) of the Statute confers a right upon either party to the proceedings to appeal a number of decisions other than final decisions of the Trial Chamber pertaining to the guilt or innocence of the accused or sentence appealable under another article of the Statute¹. Some of the decisions enumerated thereunder are subject to appeal as of right whereas others, as it is in the case with decisions under Article 82 (1) (d), are subject to the prior approval and definition of their subject by the competent Chamber.

2. On 18 January 2008, the Trial Chamber gave an oral decision “on six filings of the Prosecutor that all relate to redactions”². The appellant sought the leave of the Trial Chamber³ to appeal three issues specified in his application⁴, arising from the aforesaid decision(s). The Trial Chamber certified three issues, other than the ones put forward by the appellant, as proper subjects of appeal. The appellant founded his appeal thereupon. In his document in support of the appeal, the appellant requests “that the proceedings be stayed for the duration of the appeal”⁵, arguing that “[w]ere the trial to commence on the basis of unfair rules, the Defence would find itself in a situation which might be impossible to remedy, even if its appeal were to be allowed by the Appeals Chamber”⁶. The Prosecutor opposes suspension as unwarranted by reference to the issues raised on appeal. Furthermore, he submits that the appellant

¹ Article 81 of the Rome Statute, hereinafter called “the Statute”.

² ICC-01/04-01/06-T-71, 18 January 2008.

³ Under Rule 155 of the Rules of Procedure and Evidence, “Decision on the defence request for leave to appeal the oral Decision on redactions and disclosure of 18 January 2008”, (ICC-01/04-01/06-1210).

⁴ Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 (Règle 155 du Règlement de procédure et de preuve), 28 janvier 2008, (ICC-01/04-01/06).

⁵ *Prosecutor v Lubanga Dyilo*, “Defence Appeal against the Decision on Redactions and Disclosure Issued Orally on 18 January 2008” 17 March 2008 (ICC-01/04-01/06-1227-tENG), para 44.

⁶ *Ibid*, para 45.

“appears to be asking for more than the suspension of the impugned terms of the Decision, but is in effect seeking a suspension (or stay) of all proceedings”⁷.

3. Article 82 (3) vests power in the Appeals Chamber to give, at its discretion, suspensive effect to an appeal taken against decisions enumerated in paragraphs 1 and 2 of article 82. It reads: “An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence”⁸.

4. The subject of an appeal taken under article 82 (1) (d) is the decision, or a part or aspect of it, involving the issue raised as the subject of appeal. Neither directly nor by necessary implication does article 82 (3) of the Statute confer power upon the Appeals Chamber to stay the proceedings before the first instance court that certified the sub judice decision. As much was explicitly decided by the Appeals Chamber in the case of *The Prosecutor v. Mr. Thomas Lubanga Dyilo*⁹. Stay of the proceedings is, according to the majority reasoning in that case, a remedy “not known to the law,” explaining that there is no procedural or substantive foundation for such a remedy.¹⁰ To the same effect is the minority reasoning. Stay of proceedings, it was said, “is a relief wholly separate and distinct from the one envisaged in Article 82 (3) of the Statute”¹¹. As pointed out, “stay of proceedings in any circumstances is a drastic measure requiring authority for its invocation...”¹². The decision of the Appeals Chamber earlier given in the case of *The Prosecutor v. Mr. Thomas Lubanga Dyilo*¹³ supports the same position. Only in the face of express power conferred upon a court to stay proceedings, as indicated in the above decision, can stay be contemplated. Not

⁷ *Prosecutor v. Lubanga Dyilo*, “Prosecution’s Response to Defence Document in Support of Appeal against Oral Decision of Trial Chamber I rendered on 18 January 2008” 28 March 2008 (ICC-01/04-01/06-1243), para 34. See also paras 35-38.

⁸ Article 82 (3) of the Statute.

⁹ *Prosecutor v. Lubanga Dyilo*, “Reasons for Decision of the Appeals Chamber of 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” 9 March 2007 (ICC-01/04-01/06-844).

¹⁰ *Ibid*, para 4.

¹¹ *Ibid*, Reasoning of the minority, para 5.

¹² *Ibid*, Reasoning of the minority, para 5.

¹³ *Prosecutor v. Lubanga Dyilo*, “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” 14 December 2006 (ICC-01/04-01/06-772).

even for abuse of process is there authority to stay the proceedings. Such power to stay proceedings does reside with the court only where the holding of a fair trial, the object of the process, appears to be impossible.

5. The subject of suspension under article 82 (3) is the appeal. The appeal is constituted by its subject-matter, consisting of the decision giving rise to the appealable issue(s).

The request for stay embraces every aspect of the proceedings, including the decision or decisions giving rise to the contested issue. Consequently, the generality of the relief sought does not rule out suspension of part of the process, notably the decision or decisions giving rise to the appealable issue(s). Sequentially it becomes necessary to identify the appealable issues and the decision(s) wherefrom they stem before addressing the question of suspension.

The issues sought to be set down as the subjects of appeal by the appellant were the following three: 1) « La Chambre de première instance impose erronément un fardeau à la Défense qui incombe exclusivement au Procureur »¹⁴ (The Chamber of First Instance erroneously imposed a burden on the Defence which falls exclusively on the Prosecutor¹⁵); 2) « La Chambre de première instance privilégie de manière erronée la protection de témoins potentiels à décharge sur les droits fondamentaux de la Défense »¹⁶ (The Chamber of First Instance erroneously privileged the protection of potential witnesses over the fundamental rights of the Defence¹⁷); and 3) « La Chambre, dans sa Décision, définit d'une manière trop restrictive la notion de ce qui

¹⁴ *Prosecutor v. Lubanga Dyilo* « Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 » 28 January 2008 (ICC-01/04-01/06-1134), page 4.

¹⁵ Unofficial translation of the first issue.

¹⁶ « Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 » 28 January 2008 (ICC-01/04-01/06-1134), page 6.

¹⁷ Unofficial translation of the second issue.



« est nécessaire à la Défense » »¹⁸ (The Chamber, in its decision, defines too restrictively the notion of what is necessary for the Defence.¹⁹)

6. The issues certified by the Trial Chamber as the subjects of appeal are not the same as the ones put forward by the appellant, though they revolve around related issues. The following are the issues set down by the Trial Chamber as the subjects of appeal:

*“First Issue: Whether the Trial Chamber erred in imposing an obligation on the defence to disclose its lines of defence in advance;”*²⁰

*“Second Issue: Whether the Chamber was wrong in giving preference to the protection of witnesses for the Prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial;”*²¹ (By a corrigendum to the aforesaid decision, the Trial Chamber corrected what was noticed to be a clerical error in the definition of the aforesaid issue, resulting in the substitution of the word “Prosecution” for the word “Defence” in the phrase “the protection of witnesses for the Defence”²². And so it shall be read.

*“Third Issue: The interpretation of Rule 77 of the Rules of Procedure and Evidence”*²³

7. The Members of the Appeals Chamber (the majority on the one hand and myself on the other) are not ad idem as to which are the issues specified by the Trial Chamber as the subject-matter of the appeal. We are only agreed that the Second Issue is couched in the terms noted above. It would be strange to my mind if the other

¹⁸ « Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 » 28 January 2008 (ICC-01/04-01/06-1134), page 7.

¹⁹ Unofficial translation of the third issue.

²⁰ *Prosecutor v. Lubanga Dyilo*, “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” 6 March 2008 (ICC-01/04-01/06-1210), para 14.

²¹ *Ibid.*, page 6.

²² *Prosecutor v. Lubanga Dyilo*, “Corrigendum to Decision on the defence request for leave to appeal the Oral Decision on redactions and disclose of 18 January 2008” 14 March 2008 (ICC-01/04-01/06-1224).

²³ *Prosecutor v. Lubanga Dyilo*, “Decision on the defence request for leave to appeal the oral Decision on redactions and disclosure of 18 January 2008” (ICC-01/04-01/06-1210) para 21.



two appealable issues, so classified by the Trial Chamber, were not specified in the same manner and format as the Second Issue. According to the majority, the following issues are the first and third issues respectively: “whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure”²⁴ and whether the conclusion of the Trial Chamber that “the Prosecution is not under an obligation to ‘serve material that relates [to] the general use of child soldiers’ because it does not constitute exculpatory material contravenes Rule 77 of the Rules”²⁵.

Division of opinion as to the precise issues posed for resolution derives from the reasoning of the Trial Chamber attending the identification of the First and Third Issues. With regard to the First Issue, the Trial Chamber notes that the Chamber has not “imposed a duty of disclosure on the accused in the sense suggested”²⁶, (meaning, as I read the judgment, in the sense suggested by the appellant,) adding significantly at the end of the same paragraph that “the issue, therefore, that was addressed in the relevant part of the impugned decision is whether the prosecution has an inflexible obligation to disclose material, irrespective of whether or not the defence has acted unreasonably in revealing relevant aspects of the defence or the issues to be raised late in the case”²⁷. This was said, as I read the decision of the Trial Chamber, by way of explanation as to why the court did not frame the First Issue as requested by the appellant. Any doubt as to this is dispelled by the paragraph following, where the court declares: “Accordingly, the request for leave to appeal on the basis requested in refused”²⁸.

8. Thereafter, the Trial Chamber identifies the parameters of the pertinent question that should, in its view, be posed for resolution by the Appeals Chamber: “The Chamber, however, is of the view that the issue of Prosecution disclosure in this context (viz. whether unnecessary and unjustified late disclosure by the defence can properly have an impact on Prosecution disclosure) could significantly affect the fair

²⁴ *Ibid*, para 14.

²⁵ *Ibid*, para 21.

²⁶ *Ibid*, para 12.

²⁷ *Ibid*, para 12.

²⁸ *Ibid*, para 13.

and expeditious conduct of the proceedings and the outcome of the trial, and furthermore an immediate resolution of this issue by the Appeals Chamber could materially advance the proceedings”²⁹. I do not extract from this paragraph the identification of an appealable issue in replacement of the issue distinctly stated to be the “First Issue”. This is made abundantly clear in the next paragraph, where the Court states: “it follows that leave to appeal the First Issue, which is inextricably linked to the Second Issue, is granted for these reasons”³⁰. The reasoning following the identification of the “First Issue” is explanatory of the reasons warranting its specification as the subject of appeal. It is not fortuitous that the First Issue is referred to in the form earlier articulated by the Trial Chamber with the initial letters of each word in capital. I am in no doubt that the first issue raised for resolution is the “First Issue”, specifically identified as such by the Trial Chamber.

The Third Issue is likewise the one identified by the Trial Chamber as such. In the concluding paragraph of its reasoning under this issue, the Trial Chamber says: “Accordingly, the Chamber grants leave to appeal on this issue; however, given the absence of argument, the Chamber does not express a view as to whether Rule 77 bears the significance contended for”³¹. This is the reason why, as I comprehend the decision of the Trial Chamber, the interpretation of article 77 of the Statute is made the subject of the Third Issue.

I am further fortified in my view that First Issue and Third Issue are those identified and so characterised by the Trial Chamber by the “conclusions” of the Court. “The Chamber grants leave to appeal on the Three Issues, on the bases and for the reasons identified heretofore.”³² It is no coincidence that here, as elsewhere, the initial letters of the three issues are in capital, corresponding to the way the three issues are specified by the Trial Chamber.

9. Having concluded the inquiry into the issues raised for resolution on appeal, we must examine whether the decision or decisions founding them should be suspended.

²⁹ *Ibid.*, para 14.

³⁰ *Ibid.*, para 15.

³¹ *Ibid.*, para 24.

³² *Ibid.*, para 25.

Suspension, or more accurately, giving suspensive effect to a decision under appeal, entails its non-enforcement to the extent that it gives rise to the issue under appeal; leaving matters in abeyance pending determination of the issue by the Appeals Chamber. The object of suspension is to avert adverse consequences on the proceedings that may follow from acting upon the decision given by the first instance court. The guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court. Would enforcement of the decision be likely to have negative consequences on any one or more of the aforesaid aspects of the proceedings, such that suspension of the decision could forestall?

In appeals under article 82 (1) (d) of the Statute, we have it as a given fact that a wrong decision on the issue under consideration may have repercussions on the fairness or expeditiousness of the proceedings or the outcome of the trial. The very reason in this case that the three issues were posed as subjects of appeal is that the decisions founding them, if wrong, would impact adversely on the fairness of the proceedings.

Questions relevant to the identification and certification of appealable issues were analysed in the decision of the Appeals Chamber in *Situation in the Democratic Republic of the Congo*³³, to which reference is made by the Trial Chamber as a guide to the identification of appealable issues and their content.

10. At this stage, the Appeals Chamber will not pronounce on the merits of the appeal including the acceptability of the issues raised as proper subjects of an appeal under article 82 (1) (d). The exercise is confined to determining whether the decision involving the appealable issues should be suspended. Such issues are assessed, at this phase of the appellate process, on their face value. We may repeat that the subject of suspensive effect, under article 82 (3) of the Statute, is the appeal itself, defined by

³³ *Situation in the Democratic Republic of the Congo*, "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).



the decision giving rise to the issues that constitute the subject-matter of the appeal. Hence the importance of the precise identification of the issues posing for resolution and sequentially the decisions founding them.

11. Guided by these considerations, I shall determine whether suspensive effect should be given to the decision or decisions giving rise to the appealable issues.

“First Issue: Whether the Trial Chamber erred in imposing an obligation on the defence to disclose its lines of defence in advance.”³⁴

12. Enforcement or implementation of the decision of the Trial Chamber giving rise to an obligation on the part of the accused to disclose his line of defence, if the decision is erroneous, will undoubtedly have adverse and possibly dire consequences on the fairness of the proceedings. Therefore suspension is warranted and so would I order.

“Second Issue: Whether the Chamber was wrong in giving preference to the protection of witnesses for the prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial.”³⁵

The question is made up of two constituent parts: a) whether the discharge of the duty of the Prosecutor to disclose evidence to the Defence is subject to the prior protection of the safety of Prosecution witnesses; and b) the opinion of the Trial Chamber that such “preference” would not impair the fairness of the trial. The second part does not involve a separate decision but provides in reality the *raison d’être* for the subordination of the duty to disclose evidence to the Defence to the prior protection of Prosecution witnesses.

Is the duty cast upon the Prosecutor to disclose Prosecution evidence in any way dependent upon prior assurance of the safety of Prosecution witnesses? This is what

³⁴ *Prosecutor v Lubanga Dyilo* “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” 6 March 2008 (ICC-01/04-01/06-1210), page 4.

³⁵ *Ibid*, page 6.



the question boils down to. Inasmuch as delay in making disclosure, where there is a duty to disclose, may have a bearing on the fairness of the proceedings, suspension is justified in the interest of the efficacy of the process. The decision, as above distilled, is a proper subject of suspension, and so would I order.

“Third Issue: The interpretation of Rule 77 of the Rules of Procedure and Evidence.”³⁶

13. On the face of it, the issue raised for consideration does not arise from a decision of the Trial Chamber. In the absence of a decision no question for suspension can arise. Nothing further need be said.

14. Consequently, no question of suspending the third issue does arise.

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



Judge Georghios M. Piki

Dated this 13th day of May 2008

At The Hague, The Netherlands

³⁶ *Prosecutor v. Lubanga Dyilo* “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” 6 March 2008 (ICC-01/04-01/06-1210), page 8.