

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06 OA8

Date: 21 February 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 the “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” issued on 16 February 2007

The Office of the Prosecutor

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

In the appeal of Mr. Thomas Lubanga Dyilo (hereinafter 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. Thomas Lubanga Dyilo of 7 February 2007 entitled “Demande de modification des délais en vertu de la norme 35 du règlement de la Cour” (ICC-01/04-01/06-811-Conf),

provides the following reasons for the decision entitled “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) issued on 16 February 2007.

1. Mr. Thomas Lubanga Dyilo appealed the decision of Pre-Trial Chamber I (hereinafter “Pre-Trial Chamber”) confirming charges against him for war crimes¹. The appeal was taken under the provisions of article 82 (1) (b) of the Statute entitling a party to appeal “decisions granting or denying release of a person being investigated or prosecuted”. By its ruling² of 1 February 2007, the Appeals Chamber directed the Appellant, pursuant to regulation 28 of the Regulations of the Court, “to make his submission on the subject defined above in a document to be filed by Wednesday, 7 February 2007, at 4pm.” By virtue of the same directions, the Prosecutor would thereafter be at liberty “to make his response by Tuesday, 13 February 2007, at 4pm.”

2. The Appellant filed³ his submission on the last day stipulated for by the ruling of the Appeals Chamber. Simultaneously, he made an application⁴ requesting the

¹ *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.

² *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).

³ *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).

modification of the time limits for making his submissions before the Appeals Chamber envisaged by its directions⁵ of 1 and 5 February 2007. The Appellant asserts that he filed his response in order to be within the prescribed time limit “subject to the consideration that Mr Thomas Lubanga Dyilo’s right to effective representation could not be satisfactorily exercised under the current circumstances”⁶. As may be gathered the submission was filed in order to avert the possibility of the application for extension of time being refused and his stance on the appealability of the decision challenged not being articulated before the Appeals Chamber. The inability of counsel to submit as comprehensive a document as the merits of the case might warrant was due to difficulties with his health affirmed to be the case by a doctor’s certificate attached thereto.

3. Meantime, on 2 February 2007, the victims a/0001/06, a/0002/06, a/0003/06 and a/0205/06 (hereinafter “Victims”) applied⁷ to the Appeals Chamber for permission to participate in the appeal proceedings. By directions⁸ of the Appeals Chamber of 5 February 2007, the Appellant and the respondent (the Prosecutor) were held to be entitled under the provisions of rule 89 (2) of the Rules of Procedure and Evidence to respond to the request of the Victims limiting the time to do so by Friday, 9 February 2007, 4pm. The Prosecutor filed his response⁹ on 9 February 2007 intimating therein that he does not object to the approval of the application of the Appellant for the extension of the “time limits”¹⁰. On the same day, a document was filed purportedly on behalf of Mr. Lubanga

⁴ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* “Demande de modification des délais en vertu de la norme 35 du règlement de la Cour” 7 February 2007 (ICC-01/04-01/06-811-Conf).

⁵ *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); “Directions of the Appeals Chamber” 5 February 2007 (ICC-01/04-01/06-805).

⁶ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Demande de modification des délais en vertu de la norme 35 du règlement de la Cour” 7 February 2007 (ICC-01/04-01/06-811-Conf), page 2.

⁷ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “Demande conjointe des victims a/0001/06 à a/0003/06 et a/105/06 relative aux ‘Directions and Decision of the Appeals Chamber’ déposées le 1^{er} février 2007” 2 February 2007 (ICC-01/04-01/06-802).

⁸ *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).

⁹ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* “Prosecution’s Response to the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 pursuant to ‘Directions of the Appeals Chamber’ of 5 February 2007” 9 February 2007 (ICC-01/04-01/06-817).

¹⁰ *Ibid*, paragraph 11.

Dyilo entitled “Defence Response to Appeals Chamber’s Directions of 5 February 2007”¹¹ in response to the directions of the Appeals Chamber of 5 February 2007. The heading of the application couched in accordance with the template approved by the Presidency (regulation 23 (2) of the Regulations of the Court) discloses a) that this is a document emanating from the Defence and b) who “Counsel for the Defence” appear to be, namely Mr. Jean Flamme, Mr. Geoff Roberts and Ms. Veronique Pandanzyla. Nevertheless, the document is not signed in the space allotted for the signature of counsel, which ordinarily signifies the person who prepared the document. In the body of the document, the Appeals Chamber is informed that it did not originate from nor was it reviewed by “Lead Counsel”¹². Only one counsel was assigned for the defence of the Appellant, namely Mr. Jean Flamme.

4. To complete the procedural history, it may be noticed that the Prosecutor submitted his response¹³ to the admissibility of the appeal on 13 February 2007 within the time set down by the Appeals Chamber’s ruling of 1 February 2007.

5. The issues arising, the ones the Appeals Chamber shall seek to resolve by this ruling, are a) the acceptability of the document submitted on behalf of the Appellant on 9 February 2007 emanating from a source other than counsel for the Appellant, b) the directions to be given, if adjudged that the application of the Appellant of 7 February discloses “good cause” for extension of the time limit, and c) the right, if any, on the part of the Appellant to supplement his document of 7 February 2007 owing to the circumstances surrounding its preparation and submission.

I. THE VALIDITY OF THE DOCUMENT SUBMITTED ON 9 FEBRUARY 2007.

6. The first question to be addressed is the acceptability of the document of 9 February 2007. Regulation 23 (1) (a) of the Regulations of the Court establishes that the

¹¹ 9 February 2007 (ICC-01/04-01/06-816).

¹² *Ibid.* paragraph 3, footnote 8.

¹³ *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v Thomas Lubanga Dyilo* “Prosecution’s Response to the Directions and Decision of the Appeals Chamber of 1 February 2007” 13 February 2007 (ICC-01/04-01/06-825).

identity of the person (persons) filing the document must be disclosed. The document filed does not bear the insignia of counsel. It is not signed by counsel and, as the Appeals Chamber is informed in the body of the document, it does not emanate from him nor does it have his approval. For that reason, the document must be rejected. In the absence of any real indication as to the provenance of the document, the majority of the Judges, i.e. Judge Kirsch, Judge Pillay, Judge Song and Judge Kourula, are of the view that the Appeals Chamber should make no further inquiry into the question of who might have filed the document. In the view of the minority one other subject must be inquired into before resolving the issue. The views of the minority are recorded at the end of this decision, in paragraphs 13, 14 and 15.

II. THE EXISTENCE OF GOOD CAUSE

7. Has then “good cause” been shown for extending the time for filing the response of the Appellant to the application of Victims for participation in the proceedings? “Good cause” in this context imports the existence of valid reasons for non-compliance with the procedural obligations of a party to the litigation. What amounts to a good cause was debated, albeit not exhaustively, in a number of previous decisions¹⁴ of the Appeals Chamber. Such reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations. The question, the Appeals Chamber must answer, is whether counsel’s illness and sequential temporary inability to represent the person under

¹⁴ See decisions of the Appeals Chamber in *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo* “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” 30 May 2006 (ICC-01/04-01/06-129); “Decision on the ‘Prosecutor’s Motion for Extensions of the Time and Page Limits’” 3 July 2006 (ICC-01/04-01/06-177); “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 the appeal” 11 July 2006 (ICC-01/04-01/06-190); “Decision on the Request by Mr. Thomas Lubanga Dyilo for an Extension of Time” 12 October 2006 (ICC-01/04-01/06-562) and the separate opinion of Judge Pikis in “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” 30 May 2006 (ICC-01/04-01/06-129).

charge proficiently constitute a “good cause”. Counsel is the person acquainted with the facts and circumstances defining a party’s case, the only one who can authoritatively speak on behalf of his/her client. There is no second counsel who could conceivably assume the task in the stead of Mr. Flamme, counsel of Appellant. More often than not, illness is an unforeseeable occurrence equated in some respects with a supervening event. In such circumstances, inability of counsel to perform his/her duties owing to illness, medically certified, does provide a good cause for the extension of time envisaged by regulation 35 (2) (first sentence) of the Regulations of the Court.¹⁵ The time therefore for submitting the response of the Appellant to the application of Victims for participation is extended to 23 February 2007 by 4pm.

III. SUPPLEMENTATION OF A DOCUMENT

8. The situation with regard to the modification of the time limit for the submission of the Appellant respecting the admissibility of the appeal is more complicated inasmuch as a response was filed, albeit one prepared under the rigours of illness. The submission filed cannot be ignored or disregarded. It is a document put forward for the purposes of litigation and strives to address issues relevant thereto. The filing of the submission coincides, as noted, with the application for extension of time. Viewing the two steps in perspective, the Appellant is saying that his right to effective representation requires affording him an opportunity to supplement the submission filed.

9. In essence, the application of the Appellant aims to provide him with an opportunity to supplement his submission, with the benefit of counsel’s facility to fulfil his duty. The procedure followed is unorthodox and one not to be encouraged because the remedy to a party’s inability to comply with his/her litigation obligations lies in moving the Chamber to extend the time limit to accomplish the task. Seemingly, counsel found himself on the horns of a dilemma as to what to do in the absence of authoritative

¹⁵ It may be noted that illness was found to provide a good cause for the extension of the time stipulated for taking a procedural step by the Appeals Chamber of the International Criminal Tribunal for Rwanda in the case *Arsène Shalom Ntahobali; Pauline Nyiramashuhuko v The Prosecutor* ICTR-97-21-AR73 “Decision on the appeals by Pauline Nyiramashuhuko and Arsène Shalom Ntahobali on the ‘Decision on Defence urgent motion to declare parts of the evidence of witnesses RV and QBZ inadmissible’ 2 July 2004, paragraph 4.

guidance by precedent respecting the construction of regulation 35 (2) of the Regulations of the Court. There may, however, be room for the supplementation of a submission in light of exceptional circumstances, such as those envisaged by regulation 35 (2) (last sentence) of the Regulations of the Court, namely for reasons outside the control of a person. If a party is allowed in the exceptional circumstances envisaged by regulation 35 (2) to submit a document out of time, a similar right is imported to supplement a party's submission, incomplete as it may be, for reasons outside his/her control.¹⁶

10. Illness and sequential inability to carry out one's duties or complete his/her work is a cause outside one's control. And as such may legitimize the completion of one's address; vindicating thereby a party's right to effective representation before the Court.

11. In light of the above, the Appellant is allowed to supplement his submission by 23 February 2007, 4pm. And, to keep the scales even, the Prosecutor is allowed, following the supplementation of the document of the Appellant, to supplement his response by 28 February 2007, 4pm.

12. The application for extension of time was filed confidentially. Nothing said in this decision qualifies it as confidential. Therefore, this decision will be made known publicly.

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¹⁶ It may be noted that the International Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") have acknowledged power to supplement a document filed on good cause being shown by, in the case of the ICTY, reference to the provisions of rule 127 of the Rules of Procedure and Evidence of the ICTY. This rule is similar but not identical to regulation 35 of the Regulations of the Court. Regulation 35 (2) of the Regulations of the Court postulates, as a justification for submitting a document after the effluxion of time appointed for the purpose, the presence of reasons beyond the control of a person. Reference may be made to the following decisions of the two Tribunals eliciting their position on supplementation of a document: ICTY, Appeals Chamber, *Prosecutor v Zeljko Mejakic, Momcilo Gruban, Dusan Fustar, Dusko Knezevic*, Case no. IT-02-65-AR11bis.1, "Decision on joint defense motion for enlargement of time to file appellants' brief" 30 August 2005; "Decision on second joint defense supplement to joint appeal brief in support of notice of appeal" 16 November 2005 "Decision on joint defence appeal against decision on referral under rule 11Bis" 7 April 2006, paragraph 91; *Prosecutor v Mladen Naletilic, aka "Tuta", Vinko Martinovic, aka "Stela"*, Case No. IT-98-34-A "Decision on Naletilic's consolidated motion to present additional evidence" 20 October 2004, paragraph 57, ICTR, Appeals Chamber, *Jean Kambanda v. The Prosecutor* ICTR-97-23-A, Decision of 18 May 2000.

Sequence to the issues raised in paragraph 6:

13. In the light of the circumstances surrounding the filing of the document, especially reference on the face of the application, wherein assistants to counsel are included in the team of counsel representing the Appellant, and the information conveyed in the document that it had not been sanctioned by “Lead Counsel”, it may be inferred or at the least assumed that the document was prepared and submitted by an assistant or assistants to counsel without authorization or approval of its content by counsel. For that reason, I consider it pertinent to examine whether an assistant to counsel has the right or is empowered under the Statute, Rules of Procedure and Evidence and Regulations of the Court to represent the appellant.

14. Article 67 (1) (d) of the Statute safeguards the right of the accused and by reference to the provisions of rule 121 (1) of the Rules of Procedure and Evidence of the person subject to confirmation proceedings to have “legal assistance” of his/her choosing. Such legal assistance must be provided by counsel,¹⁷ in fact a counsel from the list of counsel¹⁸ maintained by the Registrar or a counsel meeting the requirements for inclusion in the list of counsel. Counsel chosen by the person under charge shall file a power of attorney verifying the appointment.¹⁹ A person appointing counsel to represent him/her must act through such counsel unless otherwise directed by the Court, as regulation 74 (2) of the Regulations of the Court lays down. The qualifications that a person must possess in order to gain registration as counsel with authority to act before the Court are established by rule 22 and supplemented by regulation 67 of the Regulations of the Court.

15. Counsel for the defence may, again as provided in rule 22 (1) of the Rules of Procedure and Evidence, be assisted by other persons with relevant expertise including professors of law. Regulation 68 of the Regulations of the Court provides that assistants to counsel “may include persons who can assist counsel in the presentation of the case before a Chamber”. The qualifications of legal assistants are established by regulation

¹⁷ The whole scheme of representation of persons under charge or the accused is based on defence through counsel (see Section 2 of Chapter 4 of the Regulations of the Court, rules 21 (1) (2) and 22 of the Rules of Procedure and Evidence).

¹⁸ See rule 21 (2) of the Rules of Procedure and Evidence.

¹⁹ See rule 22 (2) of the Rules of Procedure and Evidence.

124 of the Regulations of the Registry. The qualifications of counsel and assistants to counsel are different, both in terms of legal expertise and years of experience. The authority of assistants is limited to rendering assistance to counsel in the presentation of the case before a Chamber. They have no authority to replace counsel or stand in for him/her, except perhaps with the authorization of the latter. The document filed in this case was submitted without the approval of counsel or, more accurately, it was submitted independently of counsel. The document does not represent counsel's views and sequentially the Appellant's views on the sub judice proceedings. Consequently, it cannot be accepted as a document emanating from the person through whom the Appellant acts, the only person who has authority to represent him in Court proceedings. Hence, the document in question must be rejected as inadmissible.

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



Judge Georghios M. Pikis
Presiding Judge

Dated this 21st day of February 2007

At The Hague, The Netherlands