

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 13 June 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**

**Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la confirmation des charges” of 29 January 2007”**

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda  
Mr Fabricio Guariglia  
Mr Ekkehard Withopf

**Mr. Lubanga Dyilo**

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Mr Luc Walley  
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**Legal representative of victim a/0105/06**

Ms Carine Bapita Buyangandu

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 ‘D cision sur la confirmation des charges’ of 29 January 2007” (ICC-01/04-01/06-797),

*Renders* unanimously the following

## DECISION

The appeal is dismissed.

### REASONS

#### I. PROCEDURAL HISTORY

1. On 29 January 2007 the Pre-Trial Chamber confirmed charges levied against the Appellant,<sup>1</sup> putting him on trial for the crimes attributed to him thereby. Mr. Lubanga Dyilo appealed<sup>2</sup> the decision under the provisions of article 82 (1) (b) of the Statute which provides:

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

2. The subject-matter of the appeal, the sub judice decision, is not on the face of it a “decision granting or denying release” of a person. Therefore, before dealing with the appeal, the Appeals Chamber, pursuant to the provisions of regulation 28 of the

<sup>1</sup> See *Prosecutor v. Lubanga Dyilo* “D cision sur la confirmation des charges” 29 January 2007 (ICC-01/04-01/06-803).

<sup>2</sup> *Prosecutor v. Lubanga Dyilo* “Defence Appeal Against the Pre-Trial Chamber’s ‘D cision sur la confirmation des charges’ of 29 January 2007” 30 January 2007 (ICC-01/04-01/-6-797).

Regulations of the Court, set down for consideration the appealability of the decision under article 82 (1) (b) of the Statute and sequentially the admissibility of the appeal.<sup>3</sup>

## II. THE APPELLANT

3. The Appellant argued in his first<sup>4</sup> as well as in his supplementary document<sup>5</sup> that the decision confirming the charges entailing the prolongation of his detention comes within the purview of article 82 (1) (b) of the Statute and for that reason it is a fit subject of appeal under its provisions. In support of his submission, he raised a number of arguments recounted in brief below.

- a. The combination of the decision, the subject of the appeal, with “the person being investigated or prosecuted” indicates that the provisions of article 82 (1) (b) of the Statute can be invoked by any person being investigated or prosecuted.<sup>6</sup>
- b. The decisive consideration in determining whether a decision is appealable under article 82 (1) (b) of the Statute is the effect it has on the liberty of a person. To quote from paragraph 16 of the first document of the Appellant: “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.”
- c. Every decision having an impact on detention or release of the person is appealable under article 82 (1) (b) of the Statute, described as “*lex generalis*”, governing detention and release in all circumstances as

<sup>3</sup> See *Prosecutor v. Lubanga Dyilo* “Directions and Decision of the Appeals Chamber” 1 February 2007 (ICC-01/04-01/06-800).

<sup>4</sup> *Prosecutor v. 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-01/04-01/06-812) (“first document”).

<sup>5</sup> *Prosecutor v. Lubanga Dyilo* “Corrigendum des arguments supplémentaires au document intitulé ‘Defence submissions on the scope of the right to appeal within the meaning of article 82-1-b of the Statute’ of 7 February 2005” 22 May 2007 (ICC-01/04-01/06-808-Corr) (“supplementary document”).

<sup>6</sup> See first document, para 25.

opposed to article 81 and article 82 (1) (a) of the Statute, labelled “*lex specialis*”, confining the application of their provisions to the specific decisions itemized therein.<sup>7</sup> To quote from paragraph 18 of his first document: “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 provisions for the appellate parties, article 81 and 82(1)(a) should be understood as the *lex specialis* of the general right to appeal decisions granting or denying release.” [footnote omitted]

- d. Rule 185 of the Rules of Procedure and Evidence outlining the process to be followed for the resettlement of a person released from custody broadens, in the submission of the Appellant, the ambit of the provisions of article 82 (1) (b) of the Statute.<sup>8</sup>
- e. The appealability of decisions of the investigating judge (juge d’instruction) under the French legal system, putting on trial a person for the commission of a serious crime, is *inter alia* referred to as an implicit exemplification of a general principle of law acknowledging a right of appeal against decisions entailing the restriction of the liberty of a person.<sup>9</sup> Reference is made to the Universal Declaration of Human Rights and International Treaties and Conventions bearing on the subject leading him to the conclusion: “Therefore, according to these international instruments, a genuine right to liberty exists and this right is guaranteed by a permanent right to appeal a decision to deny release at any stage in proceedings.”<sup>10</sup>

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<sup>7</sup> *Ibid.* para. 18.

<sup>8</sup> See *ibid.* para. 22.

<sup>9</sup> See *ibid.* paras 27 to 33.

<sup>10</sup> Supplementary document (ICC-01/04-01/06-808-Corr-tEN), para. 39.

- f. A decision confirming charges affirms, in the view of the Appellant, the evidence that led to the issuance of a warrant of arrest. Consequently, the decision confirming charges can be equated to or assimilated with a decision involving the detention of a person.<sup>11</sup>

### III. THE PROSECUTOR

4. The Prosecutor contradicts<sup>12</sup> the contentions of the Appellant that amount, as he says, to nothing other than an attempt to circumvent the provisions of article 82 (1) (b) of the Statute.

5. He draws attention to the fact that, parallel to mounting this appeal,<sup>13</sup> the Appellant sought leave from the Pre-Trial Chamber to appeal the decision or issues arising therefrom under article 82 (1) (d) of the Statute, rendering the present proceedings an abuse of process.<sup>14</sup>

6. In the Prosecutor's submission decisions revolving around the detention or release of a person issued in the context of article 60 of the Statute qualify as appealable decisions under article 82 (1) (b) of the Statute.<sup>15</sup>

7. Decisions involving the confirmation of charges can only be made the subject of appeal, wholly or in part, under the provisions of article 82 (1) (d) of the Statute.<sup>16</sup>

<sup>11</sup> See *ibid.*, paras 21 to 24.

<sup>12</sup> *Prosecutor v. Lubanga Dyilo* "Prosecutions' Response to the Directions and Decision of the Appeals Chamber of 1 February 2007" 13 February 2007 (ICC-01/04-01/06-825).

<sup>13</sup> On 5 February 2007

<sup>14</sup> See *Prosecutor v. Lubanga Dyilo* "Prosecutions' Response to the Directions and Decision of the Appeals Chamber of 1 February 2007" 13 February 2007 (ICC-01/04-01/06-825), para. 27.

<sup>15</sup> See *ibid.*, paras 24 and 25.

<sup>16</sup> See *ibid.*, para. 36.

#### IV. EXAMINATION AND RESOLUTION OF THE ISSUES POSED FOR CONSIDERATION

8. The parties agree that the Vienna Convention on the Law of Treaties (23 May 1969)<sup>17</sup> is the principal guide to the interpretation of the Statute. Both parties rely<sup>18</sup> upon the extract cited below from the judgment<sup>19</sup> of the Appeals Chamber on the “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” as the authentic guide to the interpretation of the 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 subsection of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.”<sup>20</sup> [footnotes omitted]

9. In the same case, the Appeals Chamber determined that the Statute defines exhaustively the right of appeal, ruling out the invocation of such a right outside the parameters of the relevant provisions of the Statute defining the right to appeal decisions of first instance courts. The following passage encapsulates the principle:

“39. The inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. [...]”

10. The underlying theme of the submissions of the Appellant is that article 82 (1) (b) of the Statute should be viewed in a broader perspective assuring a right of appeal against any decision having an impact on the detention or release of the person. Therefore, he

<sup>17</sup> Signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232.

<sup>18</sup> Prosecutor: *Prosecutor v. Lubanga Dyilo* “Prosecutions’ Response to the Directions and Decision of the Appeals Chamber of 1 February 2007” 13 February 2007 (ICC-01/04-01/06-825), para 17; Appellant: *Prosecutor v. 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-01/04-01/06-812), para. 11

<sup>19</sup> *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).

<sup>20</sup> *Ibid.*, para 33

ascribes<sup>21</sup> in the first place a meaning to the expression “the person being investigated or prosecuted” in article 82 (1) (b) of the Statute other than the one it is capable of bearing, having regard to its language. The aforesaid phrase in no way qualifies the compass of the article respecting the nature of the decisions that may be the subject of appeal under its provisions.

11. The gravamen of the Appellant’s arguments is that it is the effect of the decision on the liberty of the subject as such that is relevant to determining the appealability of a decision under article 82 (1) (b) of the Statute and not its nature.<sup>22</sup> This leads him to attribute to article 82 (1) (b) of the Statute a significance out of all proportion to its compass within the scheme of the Statute defining the right to appeal; so much so that he identifies it as “*lex generalis*”.<sup>23</sup> The gloss placed upon the interpretation of articles 81 and 82 of the Statute is totally unwarranted. Its adoption would render article 81 and article 82 (1) (a) of the Statute largely superfluous. Contrary to the submission made, article 82 (1) (b) of the Statute defines succinctly the decisions subject to appeal, leaving no ambiguity as to the intentions of the makers of the Statute. Indeed, had they intended to make decisions confirming or refusing confirmation of charges the subject of a distinct right of appeal, a crucial decision for the progress of the proceedings, they would have done so expressly, as they did with other decisions itemized as the subjects of appeal in articles 81 and 82 of the Statute.

12. Rule 185 of the Rules of Procedure and Evidence, put forward by the Appellant as widening the meaning of article 82 (1) (b) of the Statute,<sup>24</sup> is simply irrelevant to the interpretation of article 82 (1) (b) of the Statute and the identification of its ambit. Rule 185 of the Rules of Procedure and Evidence regulates the relocation of a person who is released from custody after his acquittal, his discharge for lack of jurisdiction, the inadmissibility of the case against him/her or for or any other reason. There is no nexus whatever between article 82 (1) (b) of the Statute and rule 185 of the Rules of Procedure and Evidence.

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<sup>21</sup> See above para. 3(a).

<sup>22</sup> See above para. 3(b).

<sup>23</sup> See above para. 3(c).

<sup>24</sup> See above para. 3(d).



13. The human right<sup>25</sup> of a person to have recourse to judicial review of a decision affecting his liberty is entrenched in article 60 of the Statute. The review of any ruling on the release or detention of a person may be undertaken at any time at the request of the Prosecutor or the person (article 60 (3) of the Statute). Moreover, provision is made for the periodic<sup>26</sup> review by the Pre-Trial Chamber of any ruling on the release or detention of a person (article 60 (3) of the Statute); whereas article 60 (4) of the Statute makes it incumbent upon the Pre-Trial Chamber to “ensure that a person is not detained for an unreasonable period prior to trial due to the inexcusable delay of the Prosecutor”. The breadth of the provisions of article 60 of the Statute is explored in the judgment<sup>27</sup> of the Appeals Chamber in the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”. The Statute not only safeguards the human right to judicial review of a decision restricting the liberty of a person, but also assures a right to appeal decisions emanating from such review.

14. Contrary to the submission<sup>28</sup> of the Appellant the prerequisites for the issue of a warrant of arrest and the confirmation of the charges are different. Whereas the test for the issuance of a warrant of arrest under article 58 (1) (a) and (b) of the Statute is the presence of “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” coupled with the existence of grounds warranting detention, the denominator for the confirmation of the charges is the existence of “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” (article 61 (7) of the Statute). A comparison of the two provisions reveals the absence of any basis for the submission made.

<sup>25</sup> See article 21 (3) of the Statute and also Article 9 (4) 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; Article 5 (4) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889; Article 7 (6) of the *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.

<sup>26</sup> A task that must be performed within 120 days according to rule 118 (2) of the Rules of Procedure and Evidence.

<sup>27</sup> *Prosecutor v. Lubanga Dyilo* “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” 13 February 2007 (ICC-01/04-01/06-824).

<sup>28</sup> See above para. 3(f).

15. Article 82 (1) (b) of the Statute is explicit in what it imports. It confers a right to appeal decisions “granting or denying release”. Such decisions may be given in the context of article 60 of the Statute, as the Prosecutor submits. The decision confirming the charges neither grants nor denies release. The effect or implications<sup>29</sup> of a decision confirming or denying the charges do not qualify or alter the character of the decision. The submission of the Appellant that both decisions confirming charges and decisions of the Trial Chamber under article 74 of the Statute fall within the ambit of article 82 (1) (b) of the Statute is irreconcilable with the content and meaning of article 82 (1) (b) of the Statute.

16. The wording of article 82 (1) (b) of the Statute is explicit and as such it is the sole guide to the identification of decisions appealable under its provisions. There is no ambiguity as to its meaning, its ambit or range of application. It confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest.

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



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**Judge Georghios M. Pikis**  
**Presiding Judge**

Dated this 13th day of June 2007

At The Hague, The Netherlands

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<sup>29</sup> See *inter alia* article 61 (10) of the Statute.