

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : French

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

Date: 10 April 2006

THE APPEALS CHAMBER

Before: Judge Navi Pillay
Judge Erkki Kourula
Judge Georgios M. Pikis
Judge Sang-Hyun Song

Registrar: Mr Bruno Cathala

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

Public Document

Brief filed under regulation 64 in support of the appeal of 27 March 2006

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkelhard Withopf, Senior Trial
Lawyer

Duty Counsel for the Defence
Mr Jean Flamme

1. Preparatory Document

As the defence has only very limited access to the procedural and supporting documents in the record of the case of the Prosecutor v. Thomas Lubanga Dyilo, it recalls the following elements in the decision under appeal:

- In his application of 13 January 2006, the Prosecutor requested the issuance of an arrest warrant for Mr Thomas Lubanga Dyilo.
- In its decision of 20 January 2006, Pre-Trial Chamber I invited the prosecution to submit supporting materials.
- The prosecution presented information and materials by filing a document on 25 January 2006 entitled “Prosecution’s Submission of Further Information and Materials”.
- The prosecution presented further information and materials by filing a document on 27 January 2006 entitled “Prosecution Submission of Further Information and Materials” (“Further Information and Materials”).
- On 2 February, a hearing was held *ex parte* and in closed session with the prosecution to address certain issues raised in the prosecution’s application.
- In its decision of 10 February 2006, Pre-Trial Chamber I ruled that the case concerning Mr Thomas Lubanga Dyilo falls within the jurisdiction of the Court and is admissible. In that same decision, it issued an arrest warrant for him.
- In its decision of 24 February 2006, Pre-Trial Chamber I also ruled that several documents mentioned were to be included in the record of the case of the Prosecutor v. Thomas Lubanga Dyilo and that these documents are to remain under seal until the Chamber decides otherwise.

The following should also be noted:

Duty Counsel was notified of the decision on 19 March 2006.

Duty Counsel made an application on 20 March 2006 requesting that Pre-Trial Chamber I:

- extend the time limit for appealing the decision ;
 - grant the person charged and his counsel access to the full record of the Prosecutor against the person charged, in particular to a certain number of documents relating to the procedural and evidentiary documents.
- In its decision of 22 March 2006, Pre-Trial Chamber I found that it is not competent to entertain the application for an extension to the time limit and asked for the Prosecutor's observations on the request for disclosure.
 - In its decision of 23 March 2006, Pre-Trial Chamber I asked the Prosecutor and Duty Counsel for their observations on the disclosure system and an internal disclosure system.
 - Duty Counsel filed an appeal against the decision of 10 February 2006 on 24 March 2006.
 - In its decision of 27 March 2006, Pre-Trial Chamber I requested further observations on the disclosure system from the Prosecutor and Duty Counsel.
 - In its decision of 30 March 2006, Pre-Trial Chamber I found that the Duty Counsel should not have access to unredacted versions of the documents relating to the arrest warrant for Mr Thomas Lubanga Dyilo.

2. The Law

2.1 Disclosure – reservations

Under rules 76 and 77, the Prosecutor must disclose his or her evidence, which is also consonant with national and international rules generally in force.

Article 61 (3) (b) of the Statute is clear in this regard.

In order to verify the legality of his arrest and the admissibility of the case, the person charged must have this material at his disposal from the moment of his arrest.

To date, the defence still does not have this material.

The decision of Pre-Trial Chamber I relating to disclosure is still pending. A hearing on the matter has been set for 24 April 2006.

The defence therefore has strong reservations on this matter.

2.2. Request for an extension to the time limit in regulation 64 (2)

As the defence has not received the disclosure materials to which it is entitled, it is unable to provide the grounds for its appeal, since it does not have the materials on which Pre-Trial Chamber I based its decision.

To date, the defence has received the record of the proceedings as listed in the acknowledgement of receipt dated 21 March 2006 annexed hereto, the **redacted** documents, annexes A-I disclosed by the Prosecutor on 6 April 2006, and six documents relating to potentially exculpatory materials disclosed by the Prosecutor to Duty Counsel on 31 March 2006.

Pursuant to regulation 35, the defence therefore requests an extension to the time limit for filing a brief in support of its appeal, as provided under regulation 64, up to 21 days after the date of full and unredacted disclosure of both the record of the proceedings and the Prosecutor's record in the present case.

2.3 Admissibility issues at the current stage in order of importance

The decision being appealed considered that "the Prosecution's general statement that the DRC national judicial system continues to be unable [sic] in the sense of article 17 (1) (a) to (c) and 3, of the Statute does not wholly correspond to the reality any longer".¹

Pre-Trial Chamber I has, however, held that the DRC cannot be considered to be acting in relation to the specific case before the Court, since the arrest warrants in question do not refer to the criminal responsibility entailed in respect of the policies/practices implemented by the UPC/FLPC between July 2002 and December

¹ Decision, p 22 (end of paragraph 36).

2003 relating to the enlisting and conscription of children younger than fifteen years of age into the FPLC for the purpose of using them to participate actively in hostilities.²

The defence would recall that it already raised the issue of the possible illegality of Mr Thomas Lubanga Dyilo's arrest in the DRC at the hearing of 20 March 2006.

In particular, counsel of the person charged in the DRC have informed Duty Counsel that no arrest warrant had been issued to the person charged and that they had not been provided with any record.

The defence consequently holds that Pre-Trial Chamber I erred in holding that it is competent to rule on the content of the charges against the person charged in the DRC in the restricted way it has proposed.

FOR THESE REASONS

MAY IT PLEASE THE COURT TO

Admit the appeal of 24 March 2006,

Extend the time limit for filing the brief in support of this appeal to at least 21 days from the date of disclosure of both the full and unredacted versions of the record of the proceedings and the evidentiary record of the Prosecutor;

Find in the above indicated order that there are grounds for the appeal and judge the case inadmissible.

For Mr Thomas Lubanga Dyilo,

His Counsel,

[Signature]

Jean Flamme

Duty Counsel

Dated this 10 April 2006

At Ghent

² Decision p 23 (paragraphs 38-39).



Acknowledgement of Receipt

From:

Document Number	Document Title	Date of Registration
ICC-01/04-01/06-2	Mandat d'arrêt	10-Feb-2006
ICC-01/04-01/06-8	Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo	27-Feb-2006
ICC-01/04-01/06-9-US	Demande d'arrestation et de remise de M Thomas Lubanga Dyilo adressée à la République démocratique du Congo	27-Feb-2006
ICC-01/04-01/06-8-Corr	Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo	9-Mar-2006
ICC-01/04-01/06-8-Corr-tFR	Décision relative à la décision de la Chambre préliminaire I du 10 février 2006 et à l'inclusion de documents dans le dossier de l'affaire concernant M Thomas Lubanga Dyilo	9-Mar-2006
ICC-01/04-01/06-10	Decision Assigning Situation in DRC to PTC I	6-Jul-2004
ICC-01/04-01/06-10-tFR	Décision relative à l'assignation de la situation en RdC à la Chambre préliminaire I	7-Jul-2004
ICC-01/04-01/06-11	Élection du juge président de la Chambre préliminaire I	16-Sep-2004
ICC-01/04-01/06-11-tEN	Election of the Presiding Judge of Pre-Trial Chamber I	17-Sep-2004
ICC-01/04-01/06-18-Corr	Registration in the record of material presented during the hearing held in closed and ex parte session on 2 February 2006	17-Feb-2006
ICC-01/04-01/06-19	Enregistrement au dossier de pièces présentées lors de l'audience à huis clos et ex parte du 2 février 2006	20-Feb-2006

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Official Court Translation

ICC-01/04-01/06-21	Decision rectifying typographical errors in the decision of 24 February 2006	6-Mar-2006
ICC-01/04-01/06-21-tFR	Décision rectifiant des erreurs typographiques relevées dans la décision du 24 février 2006	9-Mar-2006
ICC-01/04-01/06-22	Demande adressée à la République démocratique du Congo en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs de M Thomas Lubanga Dyilo	9-Mar-2006
ICC-01/04-01/06-23-Conf	Request by the Registrar for an extension of his mandate	9-Mar-2006
ICC-01/04-01/06-24-Con	Decision concerning the Registrar's Request of 9 March 2006	9-Mar-2006
ICC-01/04-01/06-26-Conf	Prosecution's observations on the request by the Registrar for the extension of his mandate	10-Mar-2006
ICC-01/04-01/06-27	Redacted Version of the Decision concerning Supporting Materials in Connection with the Prosecution's Application REDACTED pursuant to article 58	10-Mar-2006
ICC-01/04-01/06-28-Conf	Redacted Version of the Decision concerning the Hearing on 2 February 2006	10-Mar-2006
ICC-01/04-01/06-29-Conf	Redacted Version of the Transcripts of the Hearing of 2 february 2006 and Certain Materials presented during that hearing	10-Mar-2006
ICC-01/04-01/06-29-Conf-tFR	Version expurgée de la transcription de l'audience du 2 février 2006 et de certaines pièces à conviction présentées lors de cette audience	15-Mar-2006
ICC-01/04-01/06-30-Anxl	Annex I to ICC-01/04-01/06-30-US-Exp	10-Mar-2006
ICC-01/04-01/06-31-Conf	Decision on the Extension of Mandate of the Registrar	10-Mar-2006
ICC-01/04-01/06-32-US-AnxA + AnxAI-AI0+ AnxB-B2 + AnxC-C10	Submission of Formatted and Redacted Documents	12-Mar-2006

ICC-01/04-01/06-33	Décision portant désignation d'un juge unique	15-Mar-2006
ICC-01/04-01/06-34	Decision Concerning the Redacted Version of the Prosecution's Application and the Prosecution's Submissions of Further Information and Materials	15-Mar-2006
ICC-01/04-01/06-35	Order concerning the incorporation of certain documents into the record of case against Mr Thomas Lubanga Dyilo	16-Mar-2006
ICC-01/04-01/06-36	Decision convening an in camera meeting	16-Mar-2006
ICC-01/04-01/06-37	Decision to Unseal the Warrant of Arrest Against Mr Thomas Lubanga Dyilo and Related Documents	17-Mar-2006
ICC-01/04-01/06-38-tFR	Ordonnance fixant la date de la première comparution de M Thomas Lubanga Dyilo	18-Mar-2006
ICC-01/04-01/06-38	Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo	17-Mar-2006
ICC-01/04-01/06-39-US + AnxA + AnxBI-BIO + AnxC-C3 + AnxD-D10	Submission of Redacted Documents	18-Mar-2006
ICC-01/04-01/06-40	Désignation de Maître Jean Flamme comme conseil de permanence pour assister M Thomas Lubanga Dyilo	20-Mar-2006
ICC-01/04-01/06-41	Prestations de serment par Maître Jean Flamme, conseil de permanence pour M Thomas Lubanga Dyilo	20-Mar-2006
ICC-01/04-01/06-42	Decision to unseal and reclassify certain documents in the record of the case against MR Thomas Lubanga Dyilo	20-Mar-2006
ICC-01/04-01/06-44	Order authorising photographs at the hearing of 20 March 2006	20-Mar-2006
ICC-01/04-01/06-45	Requête du conseil de permanence de prorogation du délai d'appel et de communication du dossier du Bureau du Procureur	20-Mar-2006

I, the undersigned
Acting as counsel for
above.

declare that I have received the documents listed

Date : 21 March 2006 at 19:17

Place : The Hague

[signature]

[Sceau de la Cour]