

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 May 2006

THE APPEALS CHAMBER

Before: Judge Navanethem Pillay, Presiding
Judge Philippe Kirsch
Judge Georgios M. Pikis
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 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**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Mrs Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence

Mr Jean Flamme

The Appeals Chamber of the International Criminal Court,

In the appeal of Thomas Lubanga Dyilo (“the Appellant”) of 24 March 2006 (ICC-01/04-01/06-57-Corr-tEN) against the decision of Pre-Trial Chamber I of 10 February 2006 (ICC-01/04-01/06-8-Corr) entitled “Decision on the Prosecutor’s Application for a warrant of arrest, Article 58”,

Having before it the filing of the Appellant of 10 April 2006 (ICC-01/04-01/06-75-tEN) entitled “Brief filed under regulation 64 in support of the appeal of 27 March 2006” (“Appellant’s Brief”), wherein an application for an extension of the time limit for the filing of the document in support of the appeal under regulation 64 of the Regulations of the Court was made,

Renders the following

DECISION

- i) The application for an extension of time for the filing of the Appellant’s document in support of the appeal is denied.
- ii) The Appellant is directed under regulation 28 of the Regulations of the Court by 13 June 2006:
 - a) To provide additional details of the reasons supporting his ground of appeal as set out at section 2.3 of the Appellant’s Brief;
 - b) To specify any procedural errors, errors of fact or errors of law relevant to his ground of appeal as set out at section 2.3 of the Appellant’s Brief; and
 - c) To address the procedural submissions of the Prosecutor, set out at paragraphs 7, 26 and 27 of the filing of the Prosecutor of 1 May 2006 (ICC-01/04-01/06-89) entitled “Prosecution Response to Thomas Lubanga Dyilo’s Brief in Support of the Appeal”.
- iii) The Prosecutor may respond within 10 days of notification of the document filed by the Appellant pursuant to this order.

THE NATURE OF THE APPLICATION

1. On 24 March 2006 the Appellant noted an appeal "pursuant to rule 154 of the Rules of Procedure and Evidence and articles 82(1) (a) and 19(6) of the Rome Statute" against Pre-Trial Chamber I's "Decision on the Prosecutor's Application for a warrant of arrest, Article 58" of 10 February 2006 ("Appealed Decision").
2. On 10 April 2006 the Appellant's Brief was filed, in which the Appellant's counsel stated, *inter alia*, that he had been notified of "the decision" (assumed to be the Appealed Decision) on 19 March 2006, and that, on 21 March 2006 he had received further material placed before the Pre-Trial Chamber leading to the issuance of the warrant of arrest for the Appellant.
3. The Appellant's Brief set out a request, pursuant to regulation 35 of the Regulations of the Court, for an extension of the time limit for filing the brief in support of the appeal under regulation 64 of the Regulations of the Court "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" (Appellant's Brief, p. 5). The Appellant elaborated the reasons for his request as follows:

"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." (Appellant's Brief, p. 4)

4. At section 2.3 of the Appellant's Brief, the Appellant set out his arguments in relation to admissibility as follows:

"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".

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 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.

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.” (Appellant’s Brief, pp. 4 to 5)

5. On 1 May 2006 the Prosecutor filed a response to the Appellant’s Brief pursuant to regulation 64(4) of the Regulations of the Court, entitled “Prosecution Response to Thomas Lubanga Dyilo’s Brief in Support of the Appeal” (ICC-01/04-01/06-89) (“Prosecution Response”). The Prosecutor submitted, inter alia, that all the material necessary to bring the appeal was already in the hands of the Appellant at the time that the Appellant’s Brief was filed, enabling him to put forward his grounds and reasons in support of the appeal. The Prosecutor therefore submitted that the Appellant had failed to establish “good cause” for an extension of time and that consequently his request should be rejected.
6. The Prosecutor also submitted that it was questionable whether the appeal should have been brought before the Appeals Chamber at this stage and suggested that the Appeals Chamber may wish to re-direct the Appellant to address the issue of admissibility before the Pre-Trial Chamber (paragraphs 7, 26 and 27 of the Prosecution Response).

THE MERITS OF THE APPLICATION FOR THE EXTENSION OF TIME

7. To justify an extension of time for the filing of any document “good cause” must be shown as laid down in regulation 35 (2) of the Regulations of the Court. In this case, good cause is correlated to the facts relevant to the presentation and articulation of the grounds in support of the appeal.
8. The Appellant does in no way explain in what way the undisclosed material will cast light on the issues under appeal or aid in their presentation. He has not demonstrated that on the basis of the documents and material available to him at the time that the Appellant’s Brief was filed, he was unable to formulate full grounds of appeal. Thus, his argument that without access to further material he could not formulate grounds of appeal is abstract and unsubstantiated.

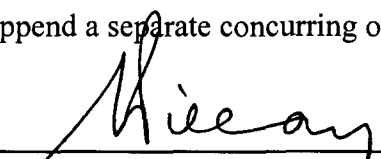
9. No valid cause has been shown for extending the time for the filing of what may be described as supplementary grounds for appeal.

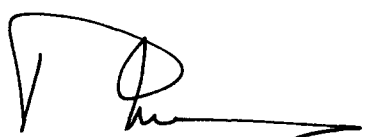
REASONS FOR THE ORDER UNDER REGULATION 28 OF THE REGULATIONS OF THE COURT

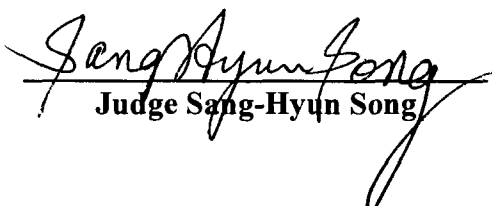
10. The Appellant provides grounds in support of the appeal at section 2.3 of the Appellant's Brief (which is set out at paragraph 4 above). However, he does little by way of articulating the reasons in support of his grounds for appeal as provided in regulation 64(2) of the Regulations of the Court. It is for this reason that the Appeals Chamber has decided to act under regulation 28 of the Regulations of the Court in seeking additional details of the reasons supporting the grounds of appeal.
11. Furthermore, in the light of the submissions in relation to procedure made by the Prosecutor at paragraphs 7, 26 and 27 of the Prosecution Response, the Appeals Chamber considers that it is appropriate for the Appellant to be granted the opportunity to address those submissions in the circumstances of this case.
12. Accordingly, the Appeals Chamber makes the directions set out at paragraph (ii) under the heading "DECISION" above, also making provision for the Prosecutor to respond to the further filing of the Appellant, as set out at paragraph (iii) under the heading "DECISION" above.

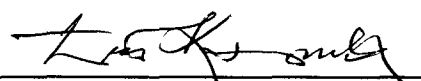
Done in both English and French, the English version being authoritative.

Judge Georghios M. Pikis will append a separate concurring opinion to this decision.


Judge Navanethem Pillay
 Presiding Judge


Judge Philippe Kirsch


Judge Sang-Hyun Song


Judge Erkki Kourula

Dated this 30th day of May 2006

At The Hague, The Netherlands

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” (ICC-01/04-01/06)

Separate opinion by Judge Georghios M. Pikis

1. This is an appeal against a decision¹ of Pre-Trial Chamber I directing the arrest of Mr. Thomas Lubanga Dyilo (“the appellant”). The decision was made after the Pre-Trial Chamber ruled that the case is admissible under the provisions of article 17 (1) of the Rome Statute (“Statute”). Article 82 (1) (a) of the Statute confers a right to appeal decisions on admissibility. This is the context of the appeal.

2. The arrest of the appellant was sought by the Prosecutor pursuant to the provisions of article 58 of the Statute on the basis that there are reasonable grounds to believe that he committed war crimes in the district of Ituri of the Democratic Republic of the Congo between July 2002 and December 2003.²

3. Proceedings leading to the arrest of the appellant were held in camera and their documentation was kept under seal in virtue of an order³ to that effect of the Pre-Trial Chamber. On 19 March 2006 duty counsel acting for the appellant received inter alia a copy of the decision of the court and two days later he was put in possession of the material before the Pre-Trial Chamber for the issuance of the warrant of arrest. Among the documents furnished to counsel was the letter of referral of the Democratic Republic of the Congo to the Prosecutor of the International Criminal Court, worded in French, to the effect that the aforementioned State was unable to undertake the investigation and

¹ “Decision on the Prosecutor’s Application for warrant of arrest, Article 58” 10 February 2006, Annex I to *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “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” 24 February 2005, ICC-01/04-01/06-8-US-Exp.

² *Situation en République Démocratique du Congo Affaire Le Procureur c/Thomas Lubanga Dyilo* « Requête du Procureur aux fins de délivrance de mandats d’arrêt, article 58 » 12 janvier 2006 (ICC-01/04-01/06-39-US-AnxB).

³ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Redacted Version of the Decision concerning Supporting Materials in Connection with the Prosecution’s Application REDACTED pursuant to article 58” 9 March 2006 (ICC-01/04-01/06-27).

prosecution of crimes falling within the jurisdiction of the Court.⁴ The judgment of the Pre-Trial Chamber was redacted in a way confining its content to matters bearing on the decision leading to the arrest of Mr. Thomas Lubanga Dyilo. The editing was done by Pre-Trial Chamber I.⁵

4. Mr. Thomas Lubanga Dyilo appealed⁶ the decision within the time limit stipulated for by rule 154 (1) of the Rules of Procedure and Evidence for the reason that the Pre-Trial Chamber erroneously held the case against him to be admissible in the light of the provisions of article 17 (1) of the Statute. The appellant signified that he will file a “brief” in support of the appeal as required by regulation 64 (2) of the Regulations of the Court within the time limited for the purpose viz 21 days.

5. In the document⁷ filed sequentially thereto, he argues in essence that the decision on admissibility is erroneous in that there is no convincing evidence or indication that the Democratic Republic of Congo is not in a position to assume jurisdiction in relation to the offences for the commission of which he is suspected.

6. No argument is advanced to fortify or validate his ground of appeal; a fact inexplicable in itself unless seen in the light of the second leg of his document, consisting of an application to extend the time for filing a document in support of the appeal. He submits he is unable to provide further reasons before disclosure to him of the content of the file of the Prosecutor and “the materials on which the Pre-Trial Chamber based its decision”. No doubt, the means sought for the extension of time for filing or supplementing the document in support of the appeal are unorthodox. Regulation 35 (1) of the Regulations of the Court envisages a written or oral application for the purpose,

⁴ The French original (ICC-01/04-01/06-39-US-AnxB1) reads as follows: “En raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d’engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale.”

⁵ See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “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” 24 February 2005, ICC-01/04-01/06-8-US-Exp.

⁶ *Situation en République Démocratique du Congo Affaire Le Procureur c/Thomas Lubanga Dyilo* « Requête d’appel du conseil de permanence de la décision du 10 février 2006 de la Chambre préliminaire I, relative à la requête du Procureur aux fins de délivrance d’un mandat d’arrêt en vertu de l’Article 58 du statut » 24 mars 2006 (ICC-01/04-01/06-57-Corr).

⁷ *Situation en République Démocratique du Congo Affaire Le Procureur c/Thomas Lubanga Dyilo* « Mémoire déposé en vertu de la norme 64, à l’appui de l’appel du 27 mars 2006 » 10 avril 2006 (ICC-01/04-01/06-75).

separate from any document the submission of which is sought to be extended. Be that as it may, this shall not be treated as fatal in the circumstances of this case. In his response⁸, the Prosecutor submitted that the appellant was furnished with all material before the Court relevant to the decision under appeal.

7. To justify an extension of time for the filing of any document “good cause” must be shown as laid down in regulation 35 (2) of the Regulations of the Court. Good cause should be founded on the facts relevant to or interwoven with the presentation and articulation of the grounds and reasons in support of the appeal. Inability to file the document envisaged by regulation 64 (2) of the Regulations of the Court must stem from lack of information bearing on the appealable issues or be associated with fact-specific difficulties or obstacles in the exposition of such grounds and reasons; deriving ordinarily from the complexity of the case or the magnitude of the research that has to be undertaken.

8. The appellant does not explain in what way the undisclosed material might throw light on the issues under appeal or aid in their presentation.

9. The redacted decision of the Pre-Trial Chamber will be the only decision to which reference may be made on appeal in examining the issues raised therein. So, the appellant is well aware of the subject-matter of the appeal, the decision, and cognisant of the facts leading to its issuance. Had he alluded to a fact or facts that might have had a bearing on the decision of the Pre-Trial Chamber but that were not disclosed and not made available to him, another complexion would be cast on the matter. As it is, the appellant is in possession of the decision under appeal and all the material leading to it. That being the case, the application is doomed to failure, whichever way it might be made.

10. The document filed in support of the appeal does not conform to the procedural rules regulating its content and composition set down in regulation 64 (2) of the Regulations of the Court. Such inadequacy may be addressed in the way ordained by regulation 29 (1) of the Regulations of the Court empowering the Chamber to “[...] issue any order that is necessary in the interests of justice.” As decided, the gap in the document in support of the appeal may be filled and the non-compliance with the

⁸ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* “Prosecution Response to Thomas Lubanga Dyilo’s Brief in Support of the Appeal”, 1 May 2006 (ICC-01/04-01/06-89).

Regulations of the Court remedied by invoking the provisions of regulation 28 (1) of the Regulations of the Court reproduced hereafter: "A Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber."

A handwritten signature in black ink, consisting of a stylized 'G' followed by a long horizontal stroke, positioned above a solid horizontal line.

Judge Georghios M. Pikis

Dated this 30th day of May 2006

At The Hague, The Netherlands