

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 18 July 2006

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution Response to Thomas Lubanga Dyilo's Demande de renvoi à la Chambre
Préliminaire / désistement d'appel dans l'ordre subsidiaire**

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

Procedural Background

1. On 24 March 2006, Counsel for Thomas Lubanga Dyilo (hereinafter called “the Appellant”) filed an appeal pursuant to Rule 154, requesting the Appeals Chamber to declare that the case against Thomas Lubanga Dyilo is inadmissible and the warrant of arrest against him was improperly issued.¹ On 10 April 2006, the Appellant filed his “Brief filed under regulation 64 in support of the appeal of 27 March 2006”,² requesting an extension of time to file the brief in support of appeal.
2. The Prosecution filed its “Prosecution Response to Thomas Lubanga Dyilo’s Brief in Support of Appeal” on 1 May 2006.³ In that response, the Prosecution submitted *inter alia* that the appeal under Article 82 (1) (a) was premature, and that any such challenge should have been brought before the Pre-Trial Chamber under Article 19.⁴ The Prosecution maintains the same position.
3. On 30 May 2006, the Appeals Chamber rendered its “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”,⁵ in which the Appeals Chamber denied the application for an extension of the time limit but directed the Appellant to provide additional details pertaining to his appeal by 13 June 2006, including addressing the procedural submissions of the Prosecution relating to a challenge under Article 19.
4. On 12 June 2006 the Appellant filed a “Mémoire en désistement d’appel”,⁶ in which the Appellant purported to discontinue his appeal “subordonné à la

¹ “Appeal by Duty Counsel for the Defence against Pre-Trial Chamber I’s Decision of 10 February 2006 on the Prosecutor’s Application for a Warrant of Arrest, Article 58”, ICC-01/04-01/06-57-Corr-tEN, 24 March 2006 (the “Appeal”).

² ICC-01/04-01/06-75-tEN. The Appeal was originally filed on 24 March 2006. The Brief refers to a corrected version filed on 27 March 2006, but also dated 24 March 2006.

³ ICC-01/04-01/06-89 (the “1 May Response”).

⁴ *Ibid.*, at paras. 7 and 26.

⁵ ICC-01/04-01/06-129 (the “30 May 2006 Decision”).

⁶ ICC-01/04-01/06-146.

conservation du droit d'encore contester la recevabilité de l'affaire devant la CPI.”

5. On 20 June 2006, the Prosecution filed its “Prosecution Response to Thomas Lubanga Dyilo’s Mémoire en désistement d’appel”,⁷ in which it reiterated that the Appellant should discontinue his appeal without any conditions, and bring a separate challenge to admissibility before the Pre-Trial Chamber if he considers it warranted.⁸
6. On 3 July 2006, the Appeals Chamber issued its “Decision on Thomas Lubanga Dyilo’s Brief Relative to Discontinuance of Appeal”,⁹ which decided that the Appellant’s first notice, purporting to discontinue the appeal subject to his retaining the right to challenge admissibility before the Court, was invalid and directed the Appellant to file a new document in compliance with the 30 May 2006 Decision within seven days.
7. On 10 July 2006, the Appellant filed its “Demande de renvoi à la Chambre Préliminaire / désistement d’appel dans l’ordre subsidiaire”,¹⁰ In which the Appellant requested that the Appeals Chamber send the matter of his challenge to admissibility to the Pre-Trial Chamber, or as subsidiary relief order the Registrar to take notice of his withdrawal of his Appeal.

The Appellant’s Discontinuance of the Appeal

8. The Prosecution takes no issue with the Appellant on his right to challenge the admissibility of the case pursuant to Article 19 of the Statute. The Prosecution also takes no issue with the Appellant on his right to discontinue his appeal. The position of the Prosecution from the beginning of this appeal has consistently been that the appeal was premature, and that the most convenient course of action was for the Appellant to discontinue the appeal and bring a

⁷ ICC-01/04-01/06-158 (the “20 June Response”).

⁸ The Prosecution also repeated its assurance that it would not oppose such a challenge on the grounds that the Appellant had discontinued the present appeal. *Ibid* at para. 10.

⁹ ICC-01/04-01/06-176 (the “3 July Decision”).

¹⁰ ICC-01/04-01/06-189 (the “10 July Filing”).

challenge to admissibility before the Pre-Trial Chamber under Article 19 if he considered it necessary.¹¹ The Prosecution maintains this position.

9. The Prosecution submits that the Appellant's request that the Appeals Chamber remit the matter to the Pre-Trial Chamber does not appear to be a course of action supported either by law or by practice. A matter may be remitted to a first instance Chamber where there is an existing process before that Chamber that must be completed, corrected or reinitiated; a matter may also be remitted to a first instance Chamber if the Appeals Chamber concludes that it lacks jurisdiction in relation to that matter, and further decides to remand it to the Chamber that it considers to be vested with jurisdiction. None of those circumstances applies to the present appeal: the Appeals Chamber is vested with jurisdiction to entertain this appeal, and there are no related pre-existing proceedings before the intervening Pre-Trial Chamber related to the issues raised in this appeal that ought to be completed, corrected or reinitiated.¹²

10. The Prosecution further notes that the application that the Appeals Chamber remit the matter to the Pre-Trial Chamber is actually inconsistent with some of the concerns raised by the Appellant in his 10 July Filing. One reason cited by the Appellant for not wishing to proceed before the Appeals Chamber is that he wishes to be able to contest the admissibility of the case at a later time, when he has sufficient time, resources and material to do so.¹³ Remitting the

¹¹ 1 May Response at paras 7, 26-27; 20 June Response at paras. 5, 10.

¹² Subsequent to the filing of his appeal, the Appellant has filed an Application for Release before the Pre-Trial Chamber (*Requête de Mise en Liberté*, ICC-01/04-01/06 -121, filed on 23 May 2006). The Prosecution notes that there is a significant lack of clarity surrounding that application, and in particular its legal basis (see Prosecution's Response to the Application for Release, ICC-01/04-01/06-149, dated 13 June 2006). See also the Order of the Pre Trial Chamber of 13 July 2006 ordering the Appellant to clarify which procedural remedy he is using for the application for release. The Appellant has also filed "Conclusions suite à l'ordonnance du Juillet 2006," ICC-01/04-01/06-197, on 17 July 2006.

¹³ 10 July Filing, para. 16. The Appellant further submits in para. 16 that the Prosecution has not disclosed its entire case file. There is no legal obligation on the Prosecution to disclose its entire file – see "Decision on the Final System of Disclosure and the Establishment of a Timeline", ICC-01/04-01/06-102, 15 May 2006, page 5 where the single Judge rejected the Defence request for full access to the entire Prosecution file. Disclosure is still ongoing between the Prosecution and the Appellant in line with the timelines in the "Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure", ICC-01/04-01/06-126, 24 May 2006.

matter directly to the Pre-Trial Chamber would have the effect of compelling the Appellant to exercise his right to challenge the admissibility of the case at this stage.

11. The Prosecution nonetheless submits that whereas the preceding considerations militate against the Appellant's request that the underlying matters in the instant appeal be remanded to the Pre-Trial Chamber, they do not affect the Appellant's discontinuance of his appeal. In his present filing, the Appellant has made clear his intention to withdraw his Appeal,¹⁴ and has confirmed that this was likewise his intention in his filing of 12 June 2006.¹⁵ Regardless of any technical mistakes incurred by the Appellant, the fact remains that he has twice manifested his desire to discontinue the current appellate proceedings. The Appeals Chamber should accordingly reject the request by the Appellant to remit this matter to the Pre-Trial Chamber and notice should be taken of the discontinuance of the Appeal as requested by the Appellant, under Rule 157.¹⁶ The Appellant will be in a position to make a challenge to the admissibility of the case under Article 19 at an appropriate time, if he wishes to do so.
12. The Prosecution, as previously submitted, regardless of the position that it may adopt as to the merits of any subsequent challenge on Admissibility brought by the Appellant, will not oppose the Appellant's bringing a challenge before the Pre-Trial Chamber on the procedural ground that the Appellant decided to discontinue his appeal.¹⁷

¹⁴ 10 July Filing, para. 18.

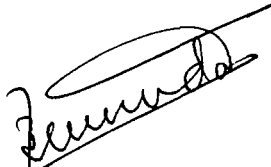
¹⁵ 10 July Filing, para. 7.

¹⁶ The Appellant relies on Rule 152 in paragraph 18 of the 10 July Filing to withdraw the Appeal. Rules 150 to 153 deal with Appeals against convictions, acquittals, sentences and reparation orders. Rules 154 to 158 on the other hand, deal with Appeals against other Decisions. Consequently, the application to discontinue should have been filed pursuant to Rule 157 and not Rule 152. The Prosecution further notes that the Appellant requests that notice of the discontinuance be taken by the Registrar (see 10 July Filing, p. 5). Rule 157 provides that notices must be filed with the Registrar, and that the Registrar shall inform the other parties of such a filing. The Rule is silent as to who should "take notice" of the discontinuance. The Prosecution submits that the latter is a judicial function that should be left for the Appeals Chamber. This interpretation is consistent with the jurisprudence of the ad hoc Tribunals cited by the Prosecution in its 20 June Response (See para 8, footnote 10).

¹⁷ See 20 June Response, para 10.

Conclusion

13. For the above reasons, in view of the unconditional discontinuance of the Appeal, the Prosecution respectfully requests the Appeals Chamber to reject the request by the Appellant to remit this matter to the Pre-Trial Chamber.



Fatou Bensouda
Deputy Prosecutor

Dated this 18th day of July 2006

At The Hague, The Netherlands