

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : **French**

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

Date: **10 July 2006**

THE APPEALS CHAMBER

Before: Judge Navi 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
IN THE CASE OF
THE PROSECUTOR
V. THOMAS LUBANGA DYILO**

Public Document

**Application for Referral to the Pre-Trial Chamber/in the Alternative,
Discontinuance of Appeal**

The Office of the Prosecutor

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

Counsel for the Defence

Mr Jean Flamme
Legal Assistant
Ms Veronique Pandanzyla

1. Background

1. On 10 February 2006, Pre-Trial Chamber I rendered its decision on the Prosecutor's Application for Warrants of Arrest pursuant to Article 58 in the case of the Prosecutor v. Thomas Lubanga Dyilo.
2. This decision was brought to the attention of the Duty Counsel on 19 March 2006. The brief of 10 April therefore contains an error in so far as it states that the Defence was "notified" of the decision on 19 March 2006.
3. The decision was appealed on 24 March 2006, whereas Pre-Trial Chamber I had declared in its order of 22 March 2006 that it did not have jurisdiction to entertain the application by counsel for the Defence of 20 March 2006 for an extension of the 5-day time limit for appeal.
4. By brief dated 10 April 2006, the Defence applied to the Appeals Chamber for an extension of the 21-day time limit in order to file a brief in support of its appeal.
5. The Prosecutor submitted his observations by brief dated 1 May 2006.
6. In its decision of 30 May 2006, the Appeals Chamber asked the appellant to respond to the Prosecutor's brief, and to provide further information on his appeal no later than 13 June 2006.
7. The appellant filed his brief relative to discontinuance of appeal on 12 June 2006.
8. In its decision of 3 July 2006, the Appeals Chamber rejected discontinuance in the manner submitted, and granted a further 7 days for the appellant to give reasons for his appeal.

2. Further background

9. The Defence refers to its brief of 12 June 2006 and the arguments set out therein.

The Defence wishes to point out that at the time the appeal was filed, counsel for the Defence had just been appointed Duty Counsel, that he did not have any legal assistance that the Office of Public Counsel for the Defence did not even exist, and that there was no existing case law on what is a very complex procedural matter.

In addition, Duty Counsel would point out that he was faced with a legal text in French, and did not even have the text in English, which was different.

10. Having filed its application on 20 March 2006 for an extension of the time for appeal, the Defence was further misled by the order of 22 March 2006 of Pre-Trial Chamber I referring the Defence to the Appeals Chamber for this matter.

Since by then the deadline for lodging an appeal had, in the (erroneous) view of the Defence, almost expired, the Duty Counsel filed an appeal. The use of the phrase “[e]ither party may appeal a decision with respect to jurisdiction or admissibility” caused the Duty Counsel to persist in his error.

11. Unlike the Prosecutor, the Defence does not have an appeals section.

It has never been the intention of the Defence to waive its right to trial chamber proceedings before the Pre-Trial Chamber, as provided in article 19 (6) of the Statute.

3. Legal Submissions: request for referral to the Pre-Trial Chamber

12. Article 19(6) states:

“Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber.”

13. The applicant’s notice of appeal must be considered as his first challenge to admissibility.

This is all the more so as prior proceedings resulting in the decision of 10 February 2006 were *ex parte*.

Moreover, the Pre-Trial Chamber confirms this itself because it explains in paragraph 20 that its decision on admissibility is without prejudice to subsequent determinations on admissibility.

The Defence therefore considers that any other interpretation would violate the principle of equality of arms in that the accused would be deprived of one level of proceedings.

14. Furthermore, there are grounds for interpreting any ambiguity in the texts in a manner consistent with the rights of the Defence.

Having to challenge admissibility before an Appeals Chamber for the first time would mean that the Defence might need to respond to a higher level of participation and submission, whereas the Prosecution was not placed in this position in proceedings, which, moreover, were *ex-parte*.

Furthermore, the Defence could not be placed in a position to respond to this standard had it not been able to plead its case before a Trial Chamber on a more factual basis beforehand.

15. Moreover, the Defence would lose the right to the second level of proceedings.

16. The Defence would also lose the right to challenge admissibility at a time it has sufficient time, resources and materials to do so. To date, the Prosecutor has not disclosed his entire case file.

Under article 19 (4) of the Statute, challenges to admissibility may be brought only prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought at a later stage of the trial.

17. The Defence therefore supports the Prosecutor's position, which is to request that the Appeals Chamber refer the application challenging jurisdiction before the Pre-Trial Chamber.

4. In the alternative – discontinuance

In the alternative, should the Appeals Chamber deny the application to refer the matter to the Pre-Trial Chamber, the Defence respectfully requests that the Registrar take notice of the discontinuance of its appeal of 24 March 2006.

FOR THESE REASONS

MAY IT PLEASE THE COURT

To refer the matter to Pre-Trial Chamber I.

In the alternative, the Defence respectfully requests the Registrar to consider the above submissions as a discontinuance of appeal pursuant to rule 152.

(signed)

Jean Flamme
Counsel for the Defence

Done on 3 July 2006
At Ghent