

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 6 September 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. MR THOMAS LUBANGA DYILO**

**Public Document
DECISION ON THOMAS LUBANGA DYILO'S 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 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 Mr 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 entitled "Decision on the Prosecutor's Application for a warrant of arrest, Article 58",

Having before it the filing of 10 July 2006 (ICC-01/04-01/06-189-tEN) entitled "Application for Referral to the Pre-Trial Chamber / in the Alternative, Discontinuance of Appeal" ("Appellant's Application"),

Renders the following

DECISION

- i) The Appellant's application for referral to the Pre-Trial Chamber is rejected.
- ii) The appeal is deemed abandoned and dismissed.

PROCEDURAL HISTORY

1. On 3 July 2006 the Appeals Chamber rendered its "Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal" (ICC-01/04-01/06-176) ("Decision on Discontinuance") in which the Appellant's notice of conditional discontinuance was declared invalid and the Appellant was directed to comply with the Appeals Chamber's previous order pursuant to regulation 28 of the Regulations of the Court (ICC-01/04-01/06-129) within seven days.

2. On 10 July 2006 the Appellant's Application was filed in which he requested the Appeals Chamber to refer the matter to the Pre-Trial Chamber as "[i]t 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” (see paragraph 11, Appellant’s Application).

3. In the alternative the Appellant requested that should the Appeals Chamber deny the application to refer the matter to the Pre-Trial Chamber then the Registrar should take notice of his discontinuance of the appeal (see page 4, Appellant’s Application).

4. The Prosecutor filed a response dated 18 July 2006 to the Appellant’s Application entitled “Prosecution Response to Thomas Lubanga Dyilo’s Demande de renvoi à la Chambre Préliminaire / désistement d’appel dans l’ordre subsidiaire” (ICC-01/04-01/06-200) (“Prosecutor’s Response”).

5. The Prosecutor submitted that, in the present circumstances, “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 practice” (see paragraph 9, Prosecutor’s Response).

6. The Prosecutor further submitted that in view of the Appellant’s unconditional discontinuance of the appeal the Appeals Chamber should 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 (see paragraphs 11 and 13, Prosecutor’s Response).

DISCUSSION ON THE MERITS

Application for referral to the Pre-Trial Chamber

7. The Appellant has lodged an appeal with respect to admissibility under article 82 (1) (a) of the Statute against a decision of the Pre-Trial Chamber. Unless unconditionally discontinued (see Decision on Discontinuance, paragraphs 8 and 9), the Appeals Chamber remains seized of the appeal and must address it as warranted by law.

8. The Appellant relies on article 19 (6) of the Statute as a legal basis for referring the matter to the Pre-Trial Chamber. Article 19 (6) of the Statute reads as follows:

“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. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.”

9. Article 19 (6) of the Statute has two parts. The first part specifies which Chamber may hear challenges with respect to the admissibility of a case or the jurisdiction of the Court. Such challenges may be raised *inter alia* by a person in the position of the appellant who is under arrest (see article 19 (2) of the Statute). The second part of article 19 (6) of the Statute confers a right to appeal decisions with respect to admissibility or jurisdiction. The jurisdiction of the Appeals Chamber is different and distinct from that of the Pre-Trial Chamber. It is a contradiction in terms to suggest that an appellate issue may be referred to the Pre-Trial Chamber for adjudication in these circumstances. Article 19 (6) of the Statute therefore has no relevance in relation to, and provides no legal basis for, the referral of an appeal to the Pre-Trial Chamber or Trial Chamber for consideration.

10. Decisions on admissibility are subject to appeal at the instance of “either party” under the provisions of article 82 (1) (a) of the Statute. Whether this provision extends a right of appeal to the Appellant against an *ex parte* decision is a matter that the Appeals Chamber will not rule on at this stage. Should such a right be available to the Appellant the subject-matter of the appeal would be solely and exclusively a matter within the jurisdiction of the Appeals Chamber.

11. For the above reasons, the Appellant’s application for referral of this matter to the Pre-Trial Chamber cannot be countenanced.

Discontinuance of the appeal


12. The Appellant’s notice of discontinuance, made in the alternative, once again does not conform with the requirements of rule 157 of the Rules of Procedure and Evidence to

the extent that the withdrawal of the appeal is preceded by a request to adjudicate upon a matter. A notice under rule 157 does not require any action by the Chamber and should deal exclusively with the discontinuance (see Decision on Discontinuance, paragraphs 7 to 9).

13. Pursuant to regulation 29 (1) of the Regulations of the Court, in the event of non-compliance by a participant with an order of a Chamber, the Chamber may issue any order that is deemed necessary in the interests of justice. The Appellant has failed to comply with the directions of the Appeals Chamber requiring him to define the appealable issues and clarify his submissions in support of them. In the instant case it is in the interests of justice to dismiss the appeal, because it is evident that the Appellant is disinclined to proceed with his appeal a fact evidenced by his present application and his previous one (see ICC-01/04-01/06-146-tEN). The Appellant's conduct leads to the irresistible conclusion that the Appellant has abandoned the appeal.

14. The Appeals Chamber therefore concludes that the appeal is deemed abandoned and as such the appeal is dismissed.

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



Judge Philippe Kirsch
On behalf of the Presiding Judge

Dated this 6th day of September 2006
At The Hague, The Netherlands