

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 20 June 2006

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Prosecution Response to Thomas Lubanga Dyilo's Mémoire en Désistement d'Appel

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
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Counsel for the Defence

Mr Jean Flamme

Procedural Background

1. On 24 March 2006, the Appellant filed an appeal pursuant to Rule 154, asking that the Appeals Chamber declare that the case is inadmissible and the warrant of arrest was improperly issued against Thomas Lubanga Dyilo.¹ On 10 April 2006, the Appellant filed his “Brief filed under regulation 64 in support of the appeal of 27 March 2006”,² which requested 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
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”, 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”,⁵ in which the Appellant purports to discontinue his appeal “subordonné à la conservation du droit d’encore contester la recevabilité de l’affaire devant la CPI.” The Prosecution hereby files its response to the Discontinuance.

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.

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 (hereinafter the “1 May 2006 Response”).

⁴ *Ibid.*, at paras. 7 and 26.

⁵ ICC-01/04-01/06-146 (hereinafter the “Discontinuance”).

The Appellant's Discontinuance of the Appeal

5. The Appellant firstly appears to agree with the arguments advanced by the Prosecution in its 1 May 2006 Response as to the adequacy of the appeal brought as a vehicle to discuss the admissibility of the case, in light of the existing and more specific remedies available before the Pre-Trial Chamber.⁶ On this basis, the Appellant discontinues his appeal, while expressly reserving his right to challenge the admissibility of the case against him before the Court, under Article 19 of the Statute.⁷ In relation to this aspect of the Discontinuance, the Prosecution has no comments to make, other than to commend a decision which spares unnecessary litigation before the Appeals Chamber.
6. The Discontinuance, however, contains a second, more problematic aspect: the Appellant requests the Appeals Chamber, in subsidiary form, to allow for a further – and undetermined – extension of time to develop his arguments in support of his appeal if the Chamber considers that the Appellant cannot “desist” from his appeal without simultaneously foregoing his right to challenge the admissibility of the case.⁸
7. The Prosecution opposes this particular request. The Appellant appears to consider that he is authorized to make a *conditional* discontinuance of his appeal, i.e. an abandonment of the appeal subject to specific conditions advanced by the participant seeking appellate review, in this case that the Appeals Chamber determine, even implicitly, that the Appellant is not foregoing his right to challenge admissibility by discontinuing his appeal. There is no such right under the Statute or the Rules. The provision governing discontinuance of appeals, Rule 157, establishes a straightforward system, whereby a participant may discontinue any appeal without even providing reasons for so doing at any time before judgement has been delivered. The Rule does not, on its face, allow an appellant to attach any conditions to the notice of discontinuance.⁹ No other provisions of the Statute or the Rules suggest that such a practice would somehow be compatible with the appellate regime of the Court.

⁶ See Discontinuance, paras. 11-12.

⁷ *Ibid.*, para. 13.

⁸ *Ibid.*, para. 14. The Appellant appears to be now raising a *ne bis in idem* argument, without providing any further elaboration and/or explaining how it connects with the request for a new extension of time.

⁹ The provision appears only to recognize one condition which actually *limits* the margin of action of an appellant vis-à-vis the discontinuance of an appeal: that the notice of discontinuance be filed before the judgment has been delivered. See Brady, “Appeal and Revision”, in Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Kluwer Law International, The Hague: 2001), p. 592, and

8. The Prosecution submits that once an appellant has discontinued his or her appeal, the appeal must be treated as no longer being before the Appeals Chamber, and consequently the Chamber is no longer seized with the underlying matters, its role being confined to taking note of the discontinuance.¹⁰ Hence, the Appeals Chamber lacks a proper jurisdictional basis to enter any findings as to any issues being raised in, or connected to, the discontinued appeal.¹¹ The Prosecution therefore submits that the Appellant's subsidiary request to have the Appeals Chamber examine whether the appeal may be discontinued without prejudice to the Appellant's rights to challenge jurisdiction cannot be entertained by the Appeals Chamber.¹²
9. The Prosecution however notes that the Appellant has sufficient safeguards and remedies at his disposal and does not need any further assurances coming from the Appeals Chamber. In the unlikely event of a challenge to admissibility being rejected by the Pre-Trial Chamber solely on the basis of an alleged waiver or forbearance by the Appellant, the Appellant could file an appeal against that decision as a matter of right under Article 82 (1) (a).¹³ Further, and as an exceptional remedy which would only apply if and when the Appeals Chamber refuses to hear the "new" appeal, the Appellant could request the Appeals Chamber to exercise inherent authority and reinstate the discontinued appeal, on the basis that he erred as to the effects of the act of discontinuance. Whereas this is a remedy that should be approached with caution by the Appeals Chamber, in order to avoid abusive and disruptive litigation strategies in

further at pp. 586-87 on general principles relating to discontinuance of final appeals under Rule 152.

¹⁰ See ICTY Appeals Chamber, *Prosecutor v Milosevic*, IT-02-54-A-R77, Order on Withdrawal of Appeal, 4 December 2002, taking note of the notice to withdraw the appeal and stating "that the appeal is henceforth null and void". For examples of similar treatment in domestic jurisdictions, see Ireland, *Criminal Appeal Rules 1924*, rule 21; United Kingdom, *Criminal Appeal Rules 1968*, rule 10(4); *Criminal Procedure (Scotland) Act 1995*, s. 116(1); Australia, *Criminal Appeal Rules (NSW) reg. 27*; *Criminal Practice Rules 1999* (Qld) rule 70(2), all prescribing that upon abandonment the appeal "shall be deemed to have been dismissed or refused by the Court" (or words to that effect). Similarly, in civil law countries it is provided that the challenged decision becomes final *ipso iure* upon the discontinuance of the appeal, without any further intervention of the chamber entertaining it; see Ecuador, *Code of Civil Procedure (Código de Procedimiento Civil)*, R.O. Sup. 687 of 18 May 1987, art. 387; France, *New Code of Civil Procedure (Nouveau Code de Procédure Civile)*, art. 403; Panama, *Judicial Code (Código Judicial)*, art. 1098; Uruguay, *General Procedural Code (Código General del Proceso)*, law no. 15.982, art. 227(3).

¹¹ The Appeals Chamber obviously retains jurisdiction to issue the required administrative decisions, such as transmitting the record back to the original Chamber.

¹² In addition, the Prosecution notes that the Appellant has not even attempted to make a showing of "good cause", as required by Regulation 35.

¹³ A judicial decision rejecting a challenge to admissibility on procedural grounds arguably still qualifies as an appellable decision with respect to admissibility under Article 82 (1) (a).

appellate proceedings, the Prosecution recognizes that in the most exceptional cases the Chamber may be able to exercise its inherent jurisdiction and grant leave to withdraw a notice of discontinuance of an appeal in order to avoid a miscarriage of justice.¹⁴ In the instant case, there is no dispute that the Appellant should not be penalized for deciding to litigate the question of admissibility in the first instance prior to any determination being made by the Appeals Chamber on the matter, thereby fostering efficiency and judicial economy in the Court's proceedings.¹⁵ Much less should the discontinuance have adverse consequences to the Appellant's right to have this matter properly litigated where both parties share the same interpretation of the applicable law and of the effects of a discontinuance of the appeal.

10. Throughout these proceedings, the Prosecution has consistently recognized that the Appellant has a right to have a proper judicial discussion on the issue of admissibility of his case if he considers that a specific challenge is warranted. The Prosecution, regardless of the position that it may adopt as to the merits of any such challenge brought by the Appellant, will not abandon this position, and will not oppose the Appellant's bringing a challenge before the Pre-Trial Chamber on the grounds that the Appellant decided to discontinue his appeal; similarly, the Prosecution will not oppose on procedural grounds a request for leave to withdraw the notice of discontinuance should the Pre-Trial Chamber reject the challenge solely on the basis that the Appellant has waived his right to challenge the admissibility of the case against him by discontinuing his appeal.

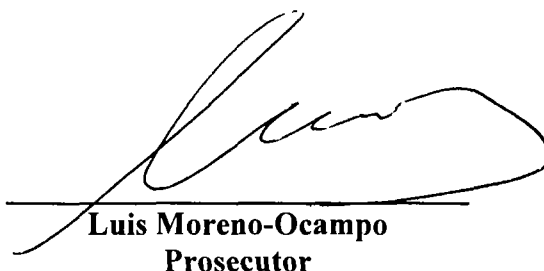
¹⁴ See, e.g., *R v Young* [1999] NSWCCA 279 (9 September 1999) at para 41, approving *R v Cartwright* [1989] 17 NSWLR 243. See also *R v Medway* [1976] QB 779 at 798, holding that leave to withdraw the abandonment of an appeal can only be granted where the abandonment should be treated as a nullity, i.e. the court is satisfied that the abandonment was not a deliberate and informed decision and "the mind of the appellant did not go with his act of abandonment"; *R v Patterson* (1992) 57 A Crim R 290.

¹⁵ For a relevant parallel, see the discussion by the ICJ of the discontinuance of proceedings in the *Barcelona Traction* Case, where the discontinuance was seen as procedural, and did not necessarily imply renouncing the substantive rights. In that case, the Court held that the purpose of the relevant provision governing discontinuance of proceedings and of the renunciation was to facilitate the settlement of the dispute, and to penalize a participant for attempting to settle a matter would not promote the aim of the Statute (Rosenne, *The Law and Practice of the International Court 1920-2005* (4th ed) – vol. III, procedure (Martinus Nijhoff Publishers, Leiden: 2006) at 1432-1434).

Conclusion

11. For the above referred reasons, the Prosecution respectfully requests the Appeals Chamber to:

- (a) Take note of the Discontinuance filed by the Appellant; and
- (b) Reject the Appellant's alternative request for a further extension of time.



Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of June 2006

At The Hague, The Netherlands

LIST OF AUTHORITIES

Jurisprudence

ICTY

Prosecutor v Milosevic, IT-02-54-A-R77, Order on Withdrawal of Appeal, 4 December 2002

Australia

R v Young [1999] NSWCCA 279

<http://www.austlii.edu.au/au/cases/nsw/NSWCCA/1999/275.html>

R v Cartwright [1989] 17 NSWLR 243

R v Patterson (1992) 57 A Crim R 290

United Kingdom

R v Medway [1976] QB 779

National Legislation

Australia

Criminal Appeal Rules (NSW)

http://www.austlii.edu.au/au/legis/nsw/consol_reg/car186/

Criminal Practice Rules 1999 (Qld)

http://www.austlii.edu.au/au/legis/qld/consol_reg/cpr1999208/

Ecuador

Code of Civil Procedure (Código de Procedimiento Civil), R.O. Sup. 687 of 18 May 1987

<http://www.dlh.lahora.com.ec/paginas/judicial/PAGINAS/Cod.Proc.Civil.htm>

France

New Code of Civil Procedure (Nouveau Code de Procédure Civile)

<http://www.legifrance.gouv.fr/WAspad/RechercheSimplePartieCode?commun=CPROCI&code=CPROCIV0.rcv>

Ireland

Criminal Appeal Rules 1924

[http://www.bailii.org/cgi-](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/legis/num_reg/1924/ZZSIV8PG815.html&query=criminal+appeal+rules&method=titleall)

[bin/markup.cgi?doc=/ie/legis/num_reg/1924/ZZSIV8PG815.html&query=criminal+appeal+rules&method=titleall](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/legis/num_reg/1924/ZZSIV8PG815.html&query=criminal+appeal+rules&method=titleall)

Panama

Judicial Code (Código Judicial)

http://www.realpanama.org/filemgmt_data/files/Codigo_Judicial_Panama_Libro_II_Parte_I_%28Procedimiento_Civil%29.pdf

United Kingdom

Criminal Appeal Rules 1968

Criminal Procedure (Scotland) Act 1995

http://www.bailii.org/uk/legis/num_act/cpa1995268/index.html

Uruguay

General Procedural Code (Código General del Proceso), law no. 15.982

<http://www.parlamento.gub.uy/Leyes/Ley15982.htm>

Secondary Materials

Brady, “Appeal and Revision” in Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Kluwer Law International, The Hague: 2001)

Rosenne, *The Law and Practice of the International Court 1920-2005 (4th ed) – vol. III, procedure* (Martinus Nijhoff Publishers, Leiden: 2006)