Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **12 June 2006**

**THE APPEALS CHAMBER**

**Before:** **Judge Navi Pillay, President**
**Judge Philippe Kirsch**
**Judge Erkki Kourula**
**Judge Sang-Hyun Song**
**Judge Georghios M. Pikis**

**Registrar:** **Mr Bruno Cathala**

**SITUATION**
***IN THE CASE OF***
***THE PROSECUTOR***
***v. THOMAS LUBANGA DYILO***

**Public Document**

# Brief Relative to Discontinuance of Appeal

**The Office of the Prosecutor**
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

**Counsel for the Defence**
Mr Jean Flamme

**Legal Assistant**
Ms Véronique Pandanzyla

**1.Background**

1. On 10 February 2006, Pre-Trial Chamber I issued its decision on the Prosecutor's application for the issuance of an arrest warrant under article 58 in the case *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 appeal against the decision was filed on 24 March 2006, whereas Pre-Trial Chamber I, by order of 22 March 2006, had declared that it was not competent to entertain the request formulated by the Defence in its application of 20 March 2006 for an extension to the five day time-limit for appeals.

4. In its brief of 10 April 2006, the Defence requested that the Appeals Chamber extend the time-period for filing a brief in support of the appeal to 21 days.

5. The Prosecutor submitted his observations in his brief of 1 May 2006.

6. In its decision of 30 May 2006, the Appeals Chamber requested that the Appellant respond to the above and provide further details in respect of his appeal by 13 June 2006 at the latest.

**2. Discontinuance**

7. The Prosecutor is of the opinion that the delivery of documents to Duty Counsel on 19 March 2006 at the Detention Unit in Scheveningen does not, strictly speaking, constitute "notification".

   Indeed, the Prosecutor's argument is supported by regulation 31 which expressly restricts "notification" to "**participants in the relevant proceedings**". Consequently, the appellant could not have been notified of the decision which

concluded the proceedings for the issuance of an arrest warrant, as he was not a participant in those proceedings.

8. The Prosecutor rightly draws a distinction between "notification" and "access to the record". He submits that only "notification" as such "triggers" the relevant time-limits provided for in the Rules of Procedure and Evidence of the Court.

9. Accordingly, Duty Counsel received no "notification" on 19 March 2006.

10. The Prosecutor correctly submits that the Defence was misled, however, by the French text of rule 154 which provides for a time-limit for filing an appeal of five days from the date upon which the decision to be appealed was "portée à la connaissance" [*brought to the attention*] of the appellant. This different formulation might – erroneously however – lead to the belief that "notification" as it appears in regulation 31 is not at issue and the restriction to "participants in the relevant proceedings" would not be applicable.

11. The Prosecutor moreover – also correctly – notes that the decision of Pre-Trial Chamber I of 10 February 2006 is only provisional within the limited framework of the issuance of an arrest warrant, and that under article 19 of the Statute, the appellant may subsequently and at any moment challenge admissibility and/or the jurisdiction of the Court, possibly before the Pre-Trial Chamber.

12. In such circumstances and in view of the position of the Prosecutor and his interpretation of the texts, the appellant waives neither his right to first defend his view on admissibility before the Trial Chamber nor his right of appeal.

13. Subject to the above, the appellant discontinues the current proceedings and his appeal of 24 March 2006, without however waiving his right to challenge the admissibility of this case before the Court in accordance with article 19 of the Statute.

14. Only alternatively and provided that the Appeals Chamber - *per impossibile* – ruled that the appellant could not discontinue his appeal without also waiving his right to challenge admissibility, would the appellant request additional time to provide more detailed reasons for his appeal. It is appropriate to refer here to the decision of 16 March 2006 of the Prosecutor General of the Armed Forces of the Democratic Republic of the Congo (FARDC), the disposition of which reads *: I also decide to close the Prosecutor General's legal proceedings against the accused in order to facilitate the joinder of the proceedings at the ICC as well as the proper application of the principle of '**ne bis in idem**', …*

    It should indeed be concluded that the investigations in DRC did pertain to the facts and charges of which the Appellant is the subject before the ICC. To decide otherwise would be tantamount to ignoring the principle of *res judicata* in a court decision which is part of the current proceedings and this principle in general.

**FOR THESE REASONS**

**MAY IT PLEASE THE COURT TO**

Provide formal acknowledgement to the Appellant of his discontinuance, subject to his retaining the right to challenge the admissibility of the case before the ICC.

Alternatively, grant him additional time to argue his appeal in greater detail.

For the Appellant,

His Counsel,

[Signature]

Jean Flamme

Defence Counsel

---

Dated this 12 June 2006

At The Hague