

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : **English**

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

Date: **31 July 2006**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding
Judge Philippe Kirsch
Judge Erkki Kourula
Judge Navanethem Pillay
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

**Prosecution's Reply to "Conclusions de la défense en réponse
au mémoire d'appel du Procureur"**

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 15 May 2006, the Single Judge issued a “Decision on the Final System of Disclosure and the Establishment of a Timetable”.¹
2. On 19 May 2006, the Single Judge issued a further “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules”.² The 19 May Decision in large part dealt with the issues raised in the “Defence Motion Regarding Ex Parte Hearing of 2 May 2006”, filed on 8 May 2006,³ to which the Prosecution did not have an opportunity to respond.⁴
3. On 24 May 2006, the Prosecution filed its “Motion for Reconsideration and, in the Alternative, Leave to Appeal”.⁵ In this Motion, the Prosecution requested that the Pre-Trial Chamber reconsider certain aspects of the 19 May Decision, or clarify that the 19 May Decision did not establish fixed, enforceable legal standards but rather established guidelines which could be adapted in the context of specific applications if the need arose. In the alternative, the Prosecution requested leave to appeal against the 19 May Decision.
4. On 23 June 2006, the Single Judge issued the “Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal”,⁶ in which the Single Judge stated that the 19 May Decision “establishes enforceable legal standards”,⁷ denied the application for reconsideration, but granted leave to appeal on three issues.
5. Accordingly, on 5 July 2006 the Prosecution filed the “Prosecution’s Document in Support of the Appeal”.⁸

¹ ICC-01/04-01/06-102 (the 15 May Decision).

² ICC-01/04-01/06-108 (the 19 May Decision).

³ ICC-01/04-01/06-93-Conf.

⁴ The Single Judge formally responded to this Defence motion on 22 May 2006, in the “Decision on the Defence Motion Concerning the Ex Parte Hearing of 2 May 2006”, ICC-01/04-01/06-117-Conf.

⁵ ICC-01/04-01/06-125 (the Application for Leave to Appeal).

⁶ ICC-01/04-01/06-166 (the Decision Granting Leave).

⁷ *Ibid*, para. 7.

⁸ ICC-01/04-01/06-183 (the Prosecution’s Appeal).

6. Pursuant to an extension of time granted by the Appeals Chamber on 11 July 2006, the Respondent filed his “Conclusions de la défense en réponse au mémoire d’appel du Procureur du 5 juillet 2006” on 20 July 2006.⁹
7. On 21 July 2006, the Prosecution sought leave to reply to the Response.¹⁰ At the time of the filing of this document, no decision on this application had been notified to the Prosecution. The Prosecution, as already advanced in the Application for Leave to Reply, is filing this document only for the purposes of complying with the time-limit imposed by Regulation 34, thereby preserving its right to file a reply if and when leave is granted by the Appeals Chamber. In the event that the Appeals Chamber deems it necessary for the purposes of considering this document as being properly filed, the Prosecution herewith renews its prior request for leave to file a reply.

Discussion

8. The Prosecution is filing this reply within the strict terms of the leave sought on 21 July 2006, and will only address in this document the arguments raised by the Respondent pertaining to the admissibility of the appeal brought by the Prosecution, namely (a) the alleged lack of prejudice; and (b) the alleged waiver in relation to the first and second grounds of appeal raised by the Prosecution. The Prosecution does not concede any arguments raised by the Respondent which it does not address in this reply, or accept the Respondent’s representation of its earlier arguments.
9. At the outset, the Prosecution stresses that the Respondent did not file any response to the Prosecution’s Application for Leave to Appeal, as also noted by the Single Judge.¹¹ Instead, the Respondent has chosen to raise matters related to the admissibility of the appeal, and consequently to the question of whether leave to appeal should have been granted, for the first time before the Appeals Chamber. It

⁹ ICC-01/04-01/06-199. The Prosecution will refer to the English translation “Defence submissions in response to the document in support of the appeal by the Prosecutor of 5 July 2006”, ICC-01/04-01/06-199-tEN (the Response).

¹⁰ “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, ICC-01/04-01/06-202, 21 July 2006 (the Application for Leave to Reply).

¹¹ Decision Granting Leave, para. 5.

is respectfully submitted that this procedure is flawed and that the Respondent's failure to timely raise these matters before the Single Judge cannot be cured by a belated submission before the Appeals Chamber. The Respondent had ample opportunity to discuss all matters pertaining to the appealability of the issues and decisions identified by the Prosecution before the Single Judge; he decided not to avail himself of this opportunity.

10. The Appeals Chamber has stated that within the structure of the Court's appellate process, Pre-Trial and Trial Chambers are the organs "vested with power to state, or more accurately still, to certify the existence of an appealable issue".¹² The competence of the Appeals Chamber is in principle restricted to verifying the existence of errors in the impugned decision. It is accordingly the latter, and not the decision granting leave to appeal, that primarily constitutes the object of the scrutiny to be conducted by the Appeals Chamber.¹³ Hence, the time to discuss whether the Prosecution's arguments demonstrated the existence of an appealable issue warranting the Appeals Chamber's intervention, and/or whether the formal requirements for the admissibility of an eventual appeal were satisfied, has elapsed. Any current discussion before the Appeals Chamber must focus solely on the merits of the grounds of appeal brought by the Prosecution.¹⁴

11. The Prosecution will nonetheless briefly discuss the arguments raised by the Respondent as to the formal requirements surrounding the appeal and the issue of waiver.¹⁵

¹² Situation in the Democratic Republic of the Congo, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006, para. 20 (the Judgment on Extraordinary Review).

¹³ The Prosecution acknowledges that a decision granting leave to appeal may further develop or clarify the principles and arguments set forth in the impugned decision, thereby requiring consideration by the appellate court. In such a case, however, the principle remains that the granting of leave as such, i.e. the determination of an appealable issue, remains essentially outside the scope of appellate review. Only those portions of the decision granting leave that supplement, clarify or modify the elements of the impugned decision are relevant for the purposes of the Appeals Chamber's exercise of its corrective functions.

¹⁴ The procedure enshrined in Regulation 65 is illustrative: after leave to appeal has been granted, the appellant must file within 10 days a document in support of the appeal under Regulation 64 (2) setting out the grounds of appeal being raised and advancing the reasons in support thereof. No room is left for a second discussion on the appealability of the issues raised by the impugned decision.

¹⁵ The practice of the ICTY and ICTR under their analogous Rule 73(B) is that once leave to appeal has been granted, the Appeals Chamber has generally not considered whether that leave was properly granted, but in determining the admissibility of the appeal, it has restricted itself to examining: whether leave was required; whether it was in fact granted; and whether it covered the grounds of appeal raised. Even in the few cases where the Appeals Chamber did examine whether leave to appeal was properly granted, and was of the

a) The Prosecution has not failed to fulfil the formal requirements for the appeal

12. The Respondent appears to argue that the Prosecution has failed to establish the existence of a “serious wrong”, or that the 19 May Decision “would have been different without the error”, and that accordingly its appeal should be “declared inadmissible”.¹⁶ It is respectfully submitted that neither the Statute nor the Rules impose a showing of “serious wrong” for the purposes of granting an appeal under Article 82 (1) (d).

13. Under the relevant test an appellant is required to demonstrate that the issue or issues raised in the application for leave to appeal are “apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹⁷ It is the certification of these factors by the Pre-Trial or Trial Chamber that “constitutes the definitive element for the genesis of a right of appeal”¹⁸ under Article 82 (1) (d) and the admissibility of that appeal; not additional elements imported from Article 83 (2), on which the Respondent bases his arguments,¹⁹ but which applies to appeals against final judgement or sentence under Article 81.²⁰

14. Not only are the requirements of Article 83 (2) not formally applicable to appeals under Article 82 (1) (d), they are also inappropriate given the nature of such interlocutory appeals. Such appeals deal with the resolution of a specific category of issues by the Appeals Chamber, albeit issues which must arise from the decision under appeal.²¹ An interlocutory appeal may be heard where that issue has a

opinion that leave to appeal ought not to have been granted, the Appeals Chamber still addressed the merits of the appeal, albeit in a brief manner – see e.g. *The Prosecutor v Nyiramasuhuko*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004 (<http://69.94.11.53/ENGLISH/cases/Nyira/decisions/041004.htm>).

¹⁶ Response, para. 6. In the original French “*tort important*”. The Respondent also alleges that “the Prosecutor has not raised any error of fact or law in the decision under appeal”. The Prosecutor refers to the Prosecution’s Appeal, *inter alia* paras. 2, 7, 14 and 26.

¹⁷ Judgment on Extraordinary Review, para. 9.

¹⁸ Judgment on Extraordinary Review, para. 20.

¹⁹ Response, para. 5.

²⁰ See Article 83(1). This is reinforced by the fact that Article 83(2) sets out the possible remedies for appeals against judgement or sentence, whereas the remedies in appeals against other decisions (including appeals under Article 82(1)(d)) are set out separately in Rule 158(1).

²¹ Judgment on Extraordinary Review, para. 9.

substantial effect on the past, present or future proceedings.²² This may involve a “forecast of the consequences” of the issue under appeal on the ongoing proceedings,²³ with a view to preventing future detrimental consequences to the proceedings in question. Therefore it is not necessary, and in some cases it may even not be possible, to show that there is a “grave and significant” error which has resulted in a “serious wrong” in the specific decision for which leave to appeal was properly granted.

15. The Respondent did not raise any of his arguments relating to material error or serious wrong before the Pre-Trial Chamber in the context of the Prosecution’s Application for Leave to Appeal. Once the Pre-Trial (or Trial) Chamber has certified that an issue involved in the decision significantly affects the proceedings as a whole, then the appeal is admissible before the Appeals Chamber: a party need make no further specific showing of the kind argued by the Respondent to demonstrate the admissibility of the appeal.

16. Even if a showing of the kind argued by the Respondent is required in appeals under Article 82 (1) (d) which have been certified for appeal by the Pre-Trial or Trial Chamber, the Prosecution submits that these criteria are met in this case.

- a. The Prosecution submits that “the decision which is being contested would have been different without the error mentioned.”²⁴ If the Pre-Trial Chamber had correctly interpreted the law relating to the issues for which leave to appeal was granted, then it would not have established the binding principles which it did in relation to the matters under appeal.
- b. The Prosecution further submits that if the errors were made on these issues then they constitute “grave and significant”²⁵ errors, as previously argued by the Prosecution.²⁶ The same arguments demonstrate that if the errors

²² Judgment on Extraordinary Review, paras. 12, 17.

²³ Judgment on Extraordinary Review, para. 13. A requirement to show specific prejudice at this stage is particularly inappropriate in the current case, where the decision under appeal establishes binding principles that govern the future conduct of proceedings.

²⁴ Response, para. 6.

²⁵ *Ibid.*

²⁶ The Prosecution notes that arguments demonstrating that the issue significantly affects (“i.e. in a material way” - Judgment on Extraordinary Review, para. 10) the fair and expeditious conduct of the proceedings will often also demonstrate that the error was “grave and significant” - see e.g. Application for Leave to

were made on these issues then they are likely to lead to a “serious wrong”²⁷ in the context of the ongoing proceedings.

b) The Prosecution has not waived its right to appeal any of the issues

17. The Respondent argues that the 15 May Decision was final, that the Prosecution has waived its right to appeal against two of the issues for which it was granted leave, and that an appeal against the 19 May Decision is consequently inadmissible and time barred. The Respondent further submits that the Appeals Chamber cannot reverse the 19 May Decision on issues already determined in the 15 May Decision as this may have a contradictory effect.²⁸

18. The Prosecution submits that the Respondent’s arguments have no legal basis and run contrary to the essence of appellate jurisdiction. To the extent that the Respondent maintains that a decision by the Appeals Chamber overturning the 19 May Decision would effectively lead to the co-existence of two contradictory decisions pertaining to the same issues (the Appeals Chamber’s Decision and the Single Judge’s 15 May Decision), the Prosecution respectfully submits that the Respondent’s reasoning is flawed. As further explained below, the 15 May Decision is of a preliminary or preparatory nature *vis-à-vis* the 19 May Decision. Hence, all relevant elements of the 15 May Decision must be seen as incorporated in the 19 May Decision, which is the one setting out the legal principles being appealed. Consequently, a decision by the Appeals Chamber overturning the impugned principles would not only affect the 19 May Decision, but necessarily also the lesser included elements of the 15 May Decision. Needless to say, the prevailing decision would always be the one reached by the Appeals Chamber. In this scheme, there are no contradictory decisions; rather, there would be one decision by the Appeals Chamber affecting a string of interlocked decisions on the same issues by a lower court, a frequent consequence of appellate review.

Appeal, paras. 20-23, 25, 32-34, 39-41, 48-49, 60-62, 65, 68-71, 75. See also Decision Granting Leave, paras. 31-33, 54-56.

²⁷ Response, para. 6.

²⁸ Response, paras. 7, 13-14.

19. It is further submitted that the Respondent has misconstrued the interplay between the 15 May and the 19 May Decisions, which are of a distinct nature and scope, as it will be demonstrated below.

The relationship between the two Decisions

20. The 19 May Decision has its genesis in the 15 May Decision on the system of disclosure. In the 15 May Decision, the Single Judge, *inter alia*, decided that pursuant to Rule 76, the Prosecution must disclose to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, unless the Single Judge authorises otherwise under Rule 81.²⁹ The Single Judge observed that statements must be disclosed to the Defence in full. Any restriction or redaction including of names must be authorised by the Single Judge under Rule 81.³⁰ The Single Judge also stated that the investigation must be completed before the confirmation hearing, except for exceptional circumstances that might justify subsequent acts of investigation.³¹
21. On 19 May 2006, the Single Judge rendered a further decision establishing principles specifically governing applications to restrict disclosure. In the 19 May Decision, the Single Judge elaborated on the 15 May Decision concerning the disclosure of names and statements of witnesses the Prosecution intends to rely on at the confirmation hearing.³² The Single Judge further decided that non-disclosure of the identity of witnesses to be relied on at the confirmation hearing can be authorised only exceptionally.³³
22. The Single Judge also decided that investigation in the Lubanga case must be concluded by the time the confirmation starts barring exceptional circumstances that might justify later isolated acts of investigation,³⁴ and further that no redactions could therefore be maintained under Rule 81 (2) in order not to

²⁹ See 15 May Decision, page 6.

³⁰ *Ibid.*, para 101.

³¹ *Ibid.*, paras. 130-131.

³² 19 May Decision, para 28.

³³ *Ibid.*, para 31.

³⁴ *Ibid.*, paras 39-41.

prejudice the ongoing investigations in the case against Thomas Lubanga Dyilo more than 15 days prior to the confirmation hearing.³⁵

The doctrine of waiver does not apply in these circumstances

23. The Prosecution submits that it is erroneous in law for the Respondent to submit that the Prosecution waived its right to appeal issues which partially arose in the 15 May Decision because it did not specifically seek leave to appeal that decision. The legal issues were still very much alive, and had been further developed, in the subsequent 19 May Decision. The Prosecution disputes the proposition that by deciding not to appeal an issue that is dealt with in one decision, and within a particular context, a party therefore perpetually waives its right to appeal that issue if it arises in a later, different context. It would be absurd for a party to be forced to seek to appeal every decision that takes a position which might, in the context of a future decision, pose difficulties for that party, in order to preserve its rights and not later be found to have waived its right to appeal. Such a system would be contrary to the scheme of interlocutory appeals in the Statute, which is aimed at reducing appeals to those which are adequate and necessary, and would place an undue burden on the Appeals Chamber.

24. The Prosecution submits that contrary to Respondent's contention that the 15 May Decision was final, it is in fact inconclusive, hence the subsequent decision on 19 May which clarified and amplified the 15 May Decision.³⁶ The Prosecution did not consider it warranted to seek leave to appeal the 15 May Decision, which raised the issues in a partial and abstract manner, in the absence of their application to any specific case. However the 19 May Decision developed on some of the general principles from the 15 May Decision, and converted them into "enforceable legal standards" with no apparent room for further discussion in their

³⁵ *Ibid.*, page 23 (*dispositif*). Prior to this further ruling, specifically applying the principle from the 15 May Decision to the pre-confirmation hearing procedures, the prior decision on the end of the investigation was of questionable effect as the Pre-Trial Chamber was purporting to regulate the activities of the Prosecution after the confirmation hearing, at which stage the case under the authority of a Trial Chamber – Article 61(11).

³⁶ The Single Judge had herself confirmed that "the Decision responds to a need arising from the ongoing proceedings in the case against Thomas Lubanga Dyilo and complements the Decision on the Final System of Disclosure." - Decision Granting Leave, para 7 (emphasis added).

application to specific cases.³⁷ The nature of the 19 May Decision was therefore substantially more far reaching than the 15 May Decision and presented clear adverse and materially prejudicial consequences for the Prosecution.

25. In addition to crystallizing the guidelines from the 15 May Decision as fixed standards which are legally binding on the parties, the Prosecution submits that the 19 May Decision also overlaid additional and specific procedural requirements on the Prosecution which justified it seeking leave to appeal that decision.

- a. One such obligation is the requirement that non disclosure of the identity of witnesses for the confirmation hearing can be authorised only exceptionally, and when less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered infeasible or insufficient;³⁸
- b. Furthermore, in the 19 May Decision, the Single Judge decided that any redaction of witness statements authorised to protect the ongoing investigation shall not be maintained beyond the 15-day limit provided for in Rule 121 (4) and (5).³⁹

The right to appeal these requirements could not possibly have been waived as they were nowhere to be found in the 15 May Decision.

26. It is therefore clear that the Prosecution was legally entitled to seek leave to appeal the fundamental legal issues dealt with in the 19 May Decision. Furthermore, the Respondent again did not raise any of these arguments relating to waiver before the Single Judge in the context of the Prosecution's Application for Leave to Appeal. By granting leave to appeal on 23 June 2006, the Single Judge accepted that the Prosecution has met the legal requirements to lodge an appeal against these issues arising from the 19 May Decision.

³⁷ Decision Granting Leave, para. 7.

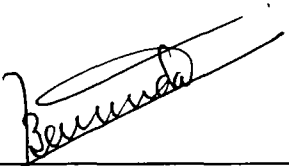
³⁸ 19 May Decision, para 31.

³⁹ *Ibid.*, page 23 (*dispositif*).

Conclusion

27. For the foregoing reasons, the Prosecution respectfully requests that the Appeals Chamber:

- a. Grant leave to file this reply, as requested in the application for leave to reply filed on 21 July 2006 and in this document, and consider this reply to have been properly filed within the time limits set out in Regulation 34(c);
- b. Reject the Respondent's arguments pertaining to the formal requirements of the appeal and the alleged waiver by the Prosecution; and
- c. Allow the Prosecution's appeal.



Fatou Bensouda
Deputy Prosecutor

Dated this 31st day of July 2006

At The Hague, The Netherlands