

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 3 October 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public

**Prosecution's Response to Thomas Lubanga Dyilo's
27 September 2006 Request for Leave to Appeal the
Second Decision on Prosecution Requests for Redactions**

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Introduction

1. The Prosecution hereby submits its Response to the Applicant's Request for Leave to Appeal. The Prosecution submits that the request for leave to appeal should be denied because the issues as raised by the Applicant either do not arise from the Decision, are already being comprehensively litigated before the Appeals Chamber, or the Applicant should not be permitted to raise them at this stage as he has failed to address the issues in a timely manner through other mechanisms.

Procedural Background

2. On 15 May 2006, the Single Judge issued the "Decision on the Final System of Disclosure and the Establishment of a Timetable".¹
3. On 19 May 2006, the Single Judge issued the "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules".²
4. On 23 June 2006, the Single Judge granted the Prosecution leave to appeal in respect of three issues raised in the 19 May Decision.³ The Prosecution filed the "Prosecution's Document in Support of Appeal" on 5 July 2006.⁴ The Defence filed its "Defence submissions in response to the document in support of appeal by the Prosecutor of 5 July 2006" on 20 July 2006.⁵
5. On 15 September 2006, the Single Judge issued the "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81".⁶

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

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

³ Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, ICC-01/04-01/06-166 (hereinafter, the "23 June Decision Granting Leave to Appeal").

⁴ ICC-01/04-01/06-183 (hereinafter, the "Prosecution Appeal Document").

⁵ ICC-01/04-01/06-199-tEN (hereinafter, the "Defence Response to Appeal Document").

⁶ ICC-01/04-01/06-437 (hereinafter, the "15 September Decision").

6. On 21 September 2006, the Single Judge issued the “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”.⁷
7. On 21 September 2006, Counsel for Thomas Lubanga Dyilo (“the Applicant”) filed a document entitled “Request for Leave to Appeal the First Decision on the Prosecution’s Requests and Amended Requests for redactions Under Rule 81”.⁸
8. On 27 September 2006, the Prosecution filed the “Prosecution’s Substantive Response to Thomas Lubanga Dyilo’s 21 September 2006 Request for Leave to Appeal”.⁹
9. On 27 September 2006, the Applicant filed a further document entitled “Request for Leave to Appeal the Second Decision on the Prosecution’s Requests and Amended Requests for redactions Under Rule 81”.¹⁰
10. On 28 September 2006, the Single Judge issued the “Decision on the Second Defence Motion for Leave to Appeal”,¹¹ which granted leave to appeal for three issues from the Applicant’s 21 September Application for Leave, and denied leave in respect of three other issues.
11. The Prosecution hereby files its response to the present Application.

Discussion

12. In the present Application, the Applicant repeats his prior submissions on the legal threshold to appeal, and the definition of fairness.¹² The Prosecution incorporates its response on these issues from its 27 September Response.¹³

⁷ ICC-01/04-01/06-455 (hereinafter, the “Decision”).

⁸ ICC-01/04-01/06-456 (hereinafter, the “Previous Application for Leave”).

⁹ ICC-01/04-01/06-481 (hereinafter, the “27 September Response”).

¹⁰ ICC-01/04-01/06-483 (hereinafter, the “present Application” or the “Application”).

¹¹ ICC-01/04-01/06-489 (hereinafter, the “28 September Decision Granting Leave”).

¹² Application, paras. 6-8, 10.

13. The Application identifies four purportedly appealable issues, which allegedly arise from the Decision:¹⁴

- “Whether the Single Judge was entitled to rely on *ultra vires* submissions of the Registry, which went to the heart of the impartiality of the Registry, and thus the overall fairness of the *ex parte* Rule 81 proceedings;” (“the First Issue”)
- “Whether the protection afforded by rule 81(2) should extend to the protection of confidential materials in *other* investigations (investigations which are not conducted against Thomas Lubanga Dyilo), and whether the Single Judge failed to address how disclosure of such information could in fact cause prejudice to such investigations;” (“the Second Issue”)
- “Whether the requirement that the prosecution is prohibited from relying on evidence protected under Rule 81(2) and Rule 82 without adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document;” (“the Third Issue”)
- “Whether the impugned decision creates a form of privilege for the prosecution sources in question which is not provided for in either the Statute or the Rules.” (“the Fourth Issue”)

14. The Prosecution will respond to each of these issues in turn. However significant portions of the Application discuss the merits of any future appeal.¹⁵ The Prosecution will not address the majority of these assertions of

¹³ 27 September Response, paras. 8-11. The Application also makes certain statements relating to expeditiousness (Application, paras. 54-56). The Prosecution does not consider that the criterion of affecting the expeditious conduct of the proceedings is determinative for any issue in the Application, and has not addressed these statements, however it does not concede that these represent a correct interpretation of expeditiousness in the context of preparation for the confirmation hearing.

¹⁴ Application, para. 9.

¹⁵ See for example Application, paras. 29, 35, 45-47.

the Applicant, unless they directly relate to leave to appeal. The Prosecution does not concede any of these points and expressly reserves its position.

15. The Prosecution further notes that a series of issues raised by the Applicant are already before the Appeals Chamber, including the issue of whether the non-disclosure of the identity of witnesses prior to the confirmation hearing is permissible.¹⁶

(a) *The First Issue*

16. The Prosecution submits that the Application fails to demonstrate that the First Issue legitimately arises from the Decision. The Prosecution submits that an applicant cannot simply create an issue by speculative submissions or aspersions, and that contrary to the assertions in this Application, it is clear from the Decision that all participants have behaved appropriately and within their respective mandates, and not in an *ultra vires* fashion.
17. The Prosecution is conscious of the difficulties faced by the Applicant in addressing a decision taken, in part, on the basis of *ex-parte* filings. However the Applicant cannot be allowed to create an issue by merely asserting or assuming impropriety, without any point of support in the Decision or the surrounding proceedings. The Prosecution submits that there is nothing in this case to indicate any impropriety of the kind which would substantiate the issue raised by the Applicant.
18. The Prosecution respectfully submits that the Application misrepresents the submissions of the Registry. The very language of the Decision makes it clear

¹⁶ 27 September Response, paras. 14-16.

that the Registry provided its views on a range of possible protective measures which could be considered in minimizing any risk to the safety of witnesses.¹⁷

19. The Prosecution further submits that there is absolutely no evidence in the Decision to support the proposition that the Registry or the VWU has “replace[d] the role of the judge as the ultimate arbiter of fact and law”;¹⁸ nor is there any evidence that the VWU has gone beyond proper functions entrusted to it under the Rules of Procedure and Evidence¹⁹ and the 19 May Decision,²⁰ which plainly include providing advice at the request of the Single Judge about protective measures. Rather, the VWU made recommendations from a protection standpoint, and the Single Judge (not the VWU) made the determination after weighing the legal considerations.

20. The Prosecution submits that the Single Judge was required to consider all relevant information before the Chamber in making a determination. Contrary to the submission of the Applicant, there was no impropriety in considering the report. As the Single Judge herself has previously noted, “the single judge cannot, as requested by the Defence, completely disregard the problem posed by the time between the moment the identity of the relevant witness is disclosed to the Defence and the moment the witness testifies at trial, if the charges are confirmed”.²¹

¹⁷ “among other protective measures, the non-disclosure of the identity of some of the witnesses prior to the commencement of the trial is a protective measure that could minimize the risk...” – Decision, p. 9 (emphasis added).

¹⁸ Application, para. 17.

¹⁹ Rule 17(2)(a)(ii) provides that the functions of the Victims and Witnesses Unit includes “Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures.” The Prosecution does not intend to engage in a discussion of the merits of the Decision or the process, however the Prosecution submits that any suggestion by the Applicant that Rule 20 requires that the Victims and Witnesses Unit abrogates its responsibilities under Rules 17 and 18 is manifestly unfounded and should not be entertained.

²⁰ Para. 31 requires the VWU to advise on whether certain measures “were considered infeasible or insufficient”.

²¹ 28 September Decision Granting Leave, pp. 9-10. This appears to have been the core of the observation made by VWU in the 26 September 2006 status conference (ICC-01/04-01/06-T-20-EN, p. 43, lines 8-10), and also the previous response of the Prosecution (27 September Response, para. 30(d)).

21. The Applicant also fails to provide any argument to demonstrate how the core proposition that “[i]t is contesting” in the first issue, namely “the fact that the Single Judge relied on this *ultra vires* position in formulating her ultimate stance on the appropriateness of the protective measures in question”,²² affects the fairness of the proceedings.
22. The Prosecution therefore submits that the issue alleged by the Applicant does not arise on the facts of the Decision, and therefore leave ought not be granted.²³

(b) The Second Issue

23. The second issue raised by the Applicant is whether the protection afforded by Rule 81 (2) should extend to the protection of confidential materials in *other* investigations (investigations which are not conducted against Thomas Lubanga DYILO), and whether the Single Judge failed to address how disclosure of such information could in fact cause prejudice to such investigations. In particular, the Applicant submits that the Decision appears to rely on a more expansive interpretation of ongoing investigations, extending the definition of investigations under Rule 81 (2) to include other investigations against other persons or in other situations.²⁴
24. In the Decision, the Single Judge stated that “according to rule 81 (2) of the Rules, so as not to prejudice further or ongoing investigations, the single judge may authorise the non-disclosure of materials or information to the Defence

The Prosecution notes that nothing in the language “cannot ... completely disregard” substantiates a suggestion that the Single Judge has abrogated her judicial function.

²² Application, para. 24.

²³ The Prosecution further notes that the allegations which underpin this issue are a repetition of arguments made in the prior Application for Leave to Appeal: compare Application, paras. 13-14; Previous Application for Leave, paras. 16-19. The Prosecution submits that this underlying argument has either already been deemed not to satisfy the criteria for leave to appeal, or that leave to appeal has already been granted on the issue which it forms a part of.

²⁴ Application, paras. 26 to 29.

which in principle the Prosecution is required to disclose in accordance with its disclosure obligations; and that none of the redactions proposed by the Prosecution under rule 81 (2) of the Rules is based on the need to protect information related to the ongoing investigation in the current case against Thomas Lubanga Dyilo”.²⁵

25. The issue that the Applicant claims should be certified for appeal thus relates to the proper scope of Rule 81 (2) and the correct definition of its terms. The Prosecution submits that the Applicant had ample opportunity to raise these issues, and in particular the scope of “further and ongoing investigations” within the terms of Rule 81 (2), but chose not to avail itself of the opportunity.
26. The very purpose of ordering the Prosecution to file an *inter-partes* version of any application under Rule 81 in the 19 May Decision was to ensure that the Defence would be informed of the legal basis of any such application, so that the Applicant would “be allowed the opportunity to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution’s *ex parte* application; and (ii) any other general matter which in the view of the Defence could have an impact on the disposition of the Prosecution application.”²⁶
27. Thus, the Chamber granted the Applicant a proper opportunity to be heard on the correct interpretation of the terms and scope of Rule 81 (2), which was never utilised by the Applicant. The Prosecution further notes that, contrary to the Applicant’s suggestion that it lacked proper notice about the possibility of what it calls a “more expansive definition of investigations”²⁷ being adopted, any doubts as to the possible interpretations of Rule 81 (2) being advanced should have disappeared as of 5 July 2006, when the Prosecution filed its document in support of the appeal against the Single Judge’s 19 May

²⁵ Decision, pp. 7 and 8.

²⁶ 19 May Decision, para. 17 (emphasis added).

²⁷ Application, para. 26.

Decision. In that document, the Prosecution unequivocally stated that the “wide scope of Rule 81 (2)” included, for example, “an application to redact unrelated details in order to safeguard further investigations of a different person for an unrelated case”,²⁸ and that the underlying value of the integrity of investigations extended to “investigations of other suspects for unrelated crimes”.²⁹ The Applicant never reacted to these explicit statements, either in his response to the Prosecution’s appeal or in subsequent filings before the Single Judge or the Pre-Trial Chamber.³⁰ Instead, the Applicant is raising this issue for the first time in his Request for Leave to Appeal.

28. The Applicant himself has recently argued that the purpose of the procedure established by the 19 May Decision is “in order to provide the Defence with an opportunity to present any submissions before the Chamber determines whether such measures are appropriate and necessary.”³¹ The Applicant, by his own admission, was provided with a procedure to exercise this right prior to the Decision being issued, but chose not to. The Prosecution submits that it is the duty of any participant to raise issues before the Chamber seized of the matter in a timely fashion, much more so when proper opportunities to be heard on those issues have been granted, and not to raise them extemporaneously by impugning or seeking to impugn decisions.³² In this

²⁸ Prosecution Appeal Document, para. 33.

²⁹ Prosecution Appeal Document, para. 34.

³⁰ The Applicant never filed a response to the Prosecution’s inter-partes filings identifying Rule 81(2) as the basis for the redactions sought, including: Prosecution’s Application pursuant to Rule 81(2), ICC-01/04-01/06-153-Conf, 16 June 2006; Prosecution’s Amended Application pursuant to Rule 81(2), ICC-01/04-01/06-198-Conf, 13 July 2006; Prosecution’s Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-341-Conf, 18 August 2006; Prosecution’s Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-347-Conf, 23 August 2006; Prosecution’s Application pursuant to Rules 81(2) and 81(4) with Further Details, ICC-01/04-01/06-358-Conf, 28 August 2006; Prosecution’s Amended Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-381-Conf, 4 September 2006.

³¹ Request for Leave to Appeal the Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06, ICC-01/04-01/06-487, 28 September 2006, para. 19.

³² The Prosecution notes that this also appears to be the position of the Applicant, as in a parallel filing he is claiming that he was not properly granted “a right to be heard at first instance.” – Request for Leave to Appeal the Décision autorisant le dépôt d’observations sur les demandes de participation à la

respect, the Prosecution notes that in a prior decision on leave to appeal, the Single Judge considered that the failure of the applicant to raise the issue in a timely fashion negatively impacted on his right to later seek leave to appeal.³³

29. The Prosecution submits that the Applicant could and should have made submissions before the Pre-Trial Chamber relating to the interpretation of Rule 81 (2), and the scope of “further or ongoing investigations”, pursuant to the 19 May Decision. The Applicant had ample notice of this issue. The Prosecution therefore submits that leave to appeal this issue should be denied.

30. In the alternative, if the Single Judge considers that it may be appropriate to consider the merits of the application for leave on the Second Issue, despite the Applicant’s failure to avail himself of the specific procedural avenue created by the 19 May Decision and the belated manner in which it has been raised, the Prosecution acknowledges that this may affect the fair and expeditious conduct of the proceedings warranting an immediate resolution by the Appeals Chamber. The Prosecution however submits that it strongly disputes the factual and legal arguments adduced by the Applicant, and in particular finds the underlying interpretation of Rule 81 (2) misconceived. However, the Prosecution recognizes that these issues go to the merits of any future ground of appeal, and should not be discussed here.³⁴

procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06, ICC-01/04-01/06-487, 28 September 2006, para. 21.

³³ Decision on Defence Motion for Leave to Appeal, ICC-01/04-01/06-338, 18 August 2006, p. 8.

³⁴ The Prosecution nonetheless submits that the interpretation and application of the scope of Rule 81 (2) by the Single Judge are neither expansive nor unreasonable.

(c) *The Third Issue*

31. The Applicant sets out an argument alleging that the Single Judge “errs” in the Decision in respect of the Third Issue, but fails to clearly set out³⁵ at any stage how this alleged error impacts on the fairness of the proceedings.³⁶

32. The Applicant seems to assume that “any redaction infringes the rights of the Defence”³⁷ and that therefore the issue must affect the fairness of the proceedings. The Prosecution recognizes that the question of whether disclosure of documents with some elements redacted could ever satisfy the requirement of “adequate prior disclosure to the accused”³⁸ is one which will have an ongoing impact on proceedings. However to the extent that the Applicant has brought no arguments relating to fairness, but merely repeats the assertion that any redaction must have such an impact, then the Prosecution submits that there is no new issue which is not already before the Appeals Chamber.³⁹

³⁵ The Prosecution submits that the relevance of the following statement in the Application is unclear: “if a document or statement has been redacted, it is a redacted document. An unredacted document it is [sic] one which has no redactions. That should be a relatively clear and uncontroversial position.” (para. 34). Nowhere do Rules 81 or 82 refer to “redacted document” or “unredacted document”.

³⁶ para. 32 quotes the Decision; para. 33 submits that the Decision is in error; para. 34 sets out the Applicant’s view of what constitutes a “redacted document” and an “unredacted document”; para. 35 proposes an interpretation of Rules 81(2) and 82; para. 36 quotes Rule 82; para. 37 repeats an assertion that “any redaction infringes the rights of the Defence” and proposes an interpretation of the respective roles of the Chamber and the Defence; para. 38 argues that any reduction in the probative value of a document cannot cure the alleged error; para. 39 claims that the Decision may “establish an extremely dangerous precedent”; and para. 40 refers to an earlier decision, and “protests” its apparent reversal on an *ex-parte* basis.

³⁷ Application, para. 37 (emphasis in original).

³⁸ Rules 81(2), 81(5), 82(1). See also Rule 81(6): “adequate prior disclosure to the Prosecutor”.

³⁹ See above, para. 15. The Prosecution submits that the issue of whether there are any circumstances under which redacted documents can be relied upon in the confirmation hearing is distinguishable from the issue of whether summary evidence may be used in the confirmation hearing in relation to witnesses whose identities have not been disclosed (28 September Decision Granting Leave, pp. 7-8, 15): the former has been regularly and comprehensively ventilated before this Chamber and the Appeals Chamber, whereas the 15 September Decision was the first decision “drafted on the premise that [summaries are] an option available in the circumstances as exceptional as those in the present case” (28 September Decision Granting Leave, p. 8).

33. The argument that any redaction, at this stage in proceedings, infringes the rights of the accused merely encapsulates prior disputes over the nature of the confirmation hearing, the scope of the right of the Defence to challenge the evidence of the Prosecution at that hearing, and whether that right can be effectively exercised⁴⁰ if some of the evidence brought by the Prosecution contains some redactions. Each of these aspects – the nature of the confirmation hearing,⁴¹ the nature of the right to challenge evidence,⁴² and the impact of redactions on this right⁴³ – have been fully argued before the Appeals Chamber, and a decision is pending. In these circumstances, the Prosecution submits that leave to appeal should not be granted as such an appeal would complicate the resolution of the issues, rather than materially advance the proceedings.⁴⁴

34. The Prosecution notes that some assertions made in the Application go more to the merits of the Decision than the appealability of any issue. While recognizing that discussion of the merits is generally inappropriate in the context of an application for leave to appeal, the Prosecution wishes to briefly state its position on a few of these submissions:⁴⁵

- The Prosecution notes that Rule 82 refers to “material or information” because it is dealing with both documentary evidence and witness testimony;⁴⁶
- The Prosecution further notes that, contrary to the submission that the Decision “has the potential to establish an extremely dangerous precedent in that Rule 82 and Rule 81(2) do not differentiate between

⁴⁰ And thus the rights of the Defence would be respected.

⁴¹ Prosecution Appeal Document, para. 9; Defence Response to Appeal Document, pp. 7-8.

⁴² Prosecution Appeal Document, para. 10; Defence Response to Appeal Document, p. 7.

⁴³ Prosecution Appeal Document, paras. 10-12; Defence Response to Appeal Document, pp. 6-7.

⁴⁴ See further, Previous Application for Leave, para. 16.

⁴⁵ The Prosecution reserves its right to make full submissions on these issues should leave to appeal be granted.

⁴⁶ Contrast Application, para. 36.

the stages of the proceedings”,⁴⁷ the Prosecution has consistently maintained that the nature of the relevant proceedings, and in particular whether the proceedings are proximate to the trial or to the confirmation hearing, is a factor which must be considered in applying for and determining any restriction on disclosure.⁴⁸

- The Prosecution submits that the Applicant has misrepresented the nature of the decision of 25 August 2006,⁴⁹ which did refer to a right to access unredacted documents, but was subject to an authorization for the Prosecution to apply for redactions.⁵⁰ Therefore there has been no reversal of that earlier decision.

(d) The Fourth Issue

35. The Prosecution submits that the discussion of the Fourth Issue in the Application again focuses heavily on the merits of any eventual appeal, rather than the manner in which the issue affects the fairness of the proceedings. The fact that the Applicant disagrees with a conclusion⁵¹ does not make the issue appealable.

36. The Applicant appears to argue that the Single Judge has granted the redactions on the sole basis that they were requested by the relevant providers of information, and that the implications of this affect the fairness of the proceedings.⁵² The Prosecution submits that this is an inaccurate

⁴⁷ Application, para. 39.

⁴⁸ Prosecution’s Document in Support of Appeal, ICC-01/04-01/06-183, 6 July 2006, paras. 8-12.

⁴⁹ Application, para. 40.

⁵⁰ Decision on the Prosecution practice to provide to the Defence redacted versions of evidence and materials without authorization by the Chamber, ICC-01/04-01/06-355, 25 August 2006, p. 5.

⁵¹ “the Defence fails to comprehend...”, para. 42; “the Defence queries how...”, para. 45; “The Defence further submits that the Prosecution should not be allowed to...”, para. 46. As the Appeals Chamber has stated, a mere “conflict of opinion does not define an appealable subject.” – 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. 9.

⁵² Application, paras. 49 and 53.

characterization of the Decision, which is explicitly based on the fact that the relevant sources live in a “risk area”.⁵³ The determination is therefore not made purely on a subjective request of the source, but on an objective assessment of risk.⁵⁴ The justifications advanced by the Applicant for why this issue affects the fair conduct of the proceedings therefore arise out of a misinterpretation, or a misrepresentation, of the Decision. The Prosecution submits the issue as advanced by the Applicant does not arise from the Decision, and that therefore leave to appeal cannot be granted.⁵⁵

37. The Applicant does make one further argument regarding the manner in which this purported issue affects the fairness of the proceedings, namely that “an overly broad interpretation of Rule 81 (2) significantly impacts on the fairness of the proceedings to the extent that by claiming protection under this rule, the Prosecution denies the Defence access to an otherwise accessible source of information”.⁵⁶ The Prosecution submits that this argument recasts the issue far more broadly, and repeats the concerns raised by the Applicant in relation to the Second Issue. In respect of this argument, the Prosecution hereby incorporates its response to the Second Issue.⁵⁷

38. The Prosecution notes that the discussion of this issue in the Application contains further specific assertions which go to the merits of the Decision,

⁵³ or “areas of risk”: Decision, p. 9.

⁵⁴ See, e.g., *Prosecutor v Brdjanin & Talic*, IT-99-36, Decision on Third Motion for Protective Measures, 8 November 2000, para. 13(2).

⁵⁵ Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, ICC-01/04-01/06-166, 23 June 2006, paras. 18, 25.

⁵⁶ Application, para. 42.

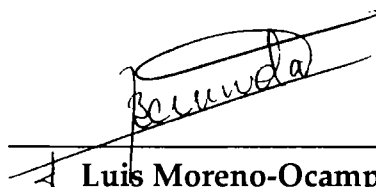
⁵⁷ See paras. 26 - 28, above, including the fact that the very purpose of the 19 May Decision to allow the Defence “to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution’s *ex parte* application” (para. 17(ii)). The Prosecution reiterates that the Defence did not make any such submissions in response to the applications for redactions pursuant to Rule 81(2), and therefore questions the propriety of now applying for leave based on “an overly broad interpretation of Rule 81(2) [which] significantly impacts on the fairness of the proceedings” (Application, para. 42).

rather than to the appealability of any issue, and on which the Prosecution wishes to briefly state its position:⁵⁸

- The Prosecution submits that the Applicant has mischaracterized the relationship between Articles 54 (3) (c) and (3) (e),⁵⁹ and that the former is not limited by the latter but rather that they are independent authorities for the Prosecutor;
- The Prosecution further submits that the Applicant has also misunderstood the relationship between the Court, NGOs, and the ICRC in particular with regard to cooperation and privilege.⁶⁰

Conclusion

39. For the above referred reasons, the Prosecution respectfully requests the Chamber to deny the Application for leave to appeal.



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of October 2006
At The Hague, The Netherlands

⁵⁸ The Prosecution recognizes that discussion of the merits of the Decision is generally inappropriate in the context of an application for leave to appeal, and the Prosecution reserves its right to make full submissions on any issue relating to the merits should leave to appeal be granted – see para. 34, above.

⁵⁹ Application, para. 47.

⁶⁰ Application, paras. 47, 52.