



Original : French

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

Date: 20 July 2006

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Thomas Lubanga Dyilo***

Public Document

**Defence submissions in response to the document in support of the appeal by the
Prosecutor of 5 July 2006**

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. Pre-Trial Chamber I issued its “Decision establishing general principles governing application to restrict disclosure pursuant to Rule 81 (2) and (4) of the statute” on 19 May 2006.

2. The Prosecutor filed his “Motion for reconsideration and, in the alternative, leave to appeal” on 24 May 2006.

The Single Judge delivered her decision on this matter on 23 June 2006, rejected the motion for reconsideration and granted leave to appeal for three reasons.

3. The Prosecutor filed his document in support of the appeal on 5 July 2006.

4. The Defence filed its application for an extension of the time limit for responding to the document in support of the appeal by the Prosecutor on 3 July 2006.

In its decision of 11 July 2006, the Appeals Chamber granted a five-day extension to the time limit for responding.

2. In law

The Defence refers expressly to its “Observations of the Defence relating to the system of disclosure in view of the Confirmation Hearing” of 2 May 2006 and the case law cited therein, and deems them to be expressly repeated in the present appeals proceedings.

2.1 Right of appeal

5. It is the responsibility of the Appeals Chamber to examine the admissibility of the appeal by the Prosecutor beforehand.

Article 83 (2) of the Rome Statute makes the admissibility of an appeal dependent on whether the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence or that the decision or sentence appealed from was materially affected by error of fact or law.

6. The Defence would point out that the Prosecutor has not raised any error of fact or law in the decision under appeal.

The Prosecutor has merely criticised this decision in that it would establish “general principles of an enforceable nature”, “that the Prosecution does not necessarily oppose” but “create an overly rigid regime, lacking the “necessary latitude” for case by case determination”.¹

In so far as the Prosecutor **is not challenging** the principles of interpretation established by Pre-Trial Chamber I with a view to the confirmation hearing, he is clearly in no way asserting that there may have been an error of fact or law.

Moreover, the error referred to would need to be **grave** and significant. In other words it would need to result in a serious wrong.

The Prosecutor therefore ought in addition to demonstrate that the decision which is being contested would have been different without the error mentioned and that this would cause a serious wrong.

This is all the more so because the Prosecutor does not demonstrate these facts.

As a result, his appeal must be declared inadmissible and lacking a basis in law.

2.2. **Alternatively – regarding the merits**

¹ Document in support of the appeal of 5 July 2006, p.3

2.2.1. First ground of appeal – criteria for authorising the non-disclosure of identity of witnesses before the confirmation hearing.

2.2.1.1. Of primary importance: admissibility of the appeal on this issue

7. Pre-Trial Chamber I has already ruled on this issue in its decision of 15 May 2006 (para. 101). The Single Judge held that **as a general rule** complete statements must be disclosed to the Defence. Any restrictions on this must be **authorised** by the Single Judge under the proceedings set out in rule 81.

The Defence notes that the Prosecutor has not requested leave to appeal the previous decision of 15 May 2006 which set out the principles which the Prosecutor contests in the later decision of 19 May 2006, a single decision which was appealed.

As the time limit for appeal set out in rule 155 has elapsed, the decision of 15 May 2006 has become final.

The Prosecutor's appeal against the decision of 19 May 2006 is therefore inadmissible because the decision of 15 May 2006 became final on 24 May 2006.

The Appeals Chamber would therefore be unable to reverse the decision of 19 May 2006 on a point determined beforehand by the decision of 15 May 2006, without thereby violating the authority and the *res judicata* of the first decision. It would also establish contradictory decisions.

The appeal of the Prosecutor is therefore inadmissible on this point.

2.2.1.2. Alternatively: regarding the merits

8. The decision appealed against rightly stipulates that non-disclosure of identity of witnesses can be authorised only **in exceptional circumstances** and where specific conditions are met.

The Prosecutor criticises this part of the decision in that it:

- would establish a “presumption of disclosure”
- would put the confirmation hearing on the same footing as the trial phase, the only phase where the credibility of a witness could be tested
- would not allow interpretation on a case by case basis, for each individual witness

a) Presumption of disclosure

9. The Prosecutor seems to want to call into doubt the principle, evident though it may be, of exception, of which the protection measures form part, including the non-disclosure of identity.

In doing so the Prosecutor seems to forget that the principle of disclosure of identity is set out and recognised in the Rules, in particular in rule 76:

“The Prosecutor shall provide the Defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses.”

The Prosecutor has never contested that this rule applies to the current phase of the proceedings.

In addition, measures for the non-disclosure of identity under article 68 of the Statute and rule 81 must be authorised by the Pre-Trial Chamber, as the Prosecutor recognised in his observations of 6 April 2006.²

Article 68 (1) of the Statute also states that:

“These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

² Prosecutor’s Observations on Disclosure, p.9

Clearly it is not possible for the accused person to defend himself against “redacted” evidence. For example, how could he challenge the credibility of a witness whose identity and origin are kept secret from him?³

As a result of this, protective measures are first and foremost a protection against public disclosure, but cannot be applied to the detriment of the defence. At the very least they must be raised for the benefit of the defence sufficiently early so that the Defence is able to monitor the credibility of the evidence concerned.

The Prosecutor has in fact recognised that the aim of protective measures is to avoid the disclosure of protected information to the public.⁴

Clearly the overriding principle is disclosure whereas the non-disclosure of identity is the exception, as recognised by the Prosecutor in paragraph 7 of his document in support of the appeal.

In addition it is quite remarkable to note that in his document in support of the appeal the Prosecutor seems to want to set up a difference between “important” witnesses and other witnesses.⁵

The Prosecutor explicitly recognises that the Defence will “often” have strong justification for needing to know the identity of the former.

The Defence is of the opinion that what applies to “important” witnesses, also applies equally to other witnesses, indeed all the more so.

b) A “different” regime with a view to the confirmation hearing

10. The Prosecutor’s argument is entirely new.

³ The argument, which has based the rule favourable to the disclosure of witness identity is stated in case KOSTOVSKI v/ Netherlands: “If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author’s reliability or cast doubt on his credibility”. (1990) 12 European Human Rights Reports/EHHR 434

⁴ Prosecutor’s Observations on Disclosure, 6.4.2006 p.10

⁵ Document in support of the appeal of 5 July 2006, paragraph 7

In his observations on disclosure of 6 April 2006, the Prosecutor in no way makes the distinction he is currently making for “the needs of his case”.

Nor has the Prosecutor ever contested the principle enshrined in rule 121 (1), which grants the accused the rights listed under article 67 of the Statute as of the initial stage of the proceedings.

These rights involve the **full** rights of defence in any proceedings against the accused, as recognised in international instruments.

11. The confirmation hearing is an essential stage in the proceedings because its purpose is precisely to decide whether there is **sufficient evidence** which gives substantial grounds to believe that that person has committed the crimes ascribed to him.

The Prosecutor’s argument, which seems to indicate that this would be a mere “formality”, to which the procedural guarantees referred to would not apply, is totally lacking a basis in law.

In addition, these guarantees are enshrined in article 61 (3), (5) and (6) of the Statute.

Because the accused can object to the charges and challenge the evidence presented by the Prosecutor and also present evidence himself, without any restriction, it is unnecessary from a case law point of view to impose restrictions on an article of law which is clear.

To do so would run counter to the presumption of innocence under article 66 and the rights of the Defence in article 67.

In addition, by making provision for court intervention in a timely manner, the ICC Statute sought to correct the approach of the international criminal tribunals and make it possible to avoid situations where a criminal court,

intervening after the facts, is forced to note that the rights of the defence have been violated and to order appropriate remedy".⁶

This is in fact the approach taken in many systems of criminal procedure under continental law.

c) Case by case approach, with each witness individually

12. It is not at all clear how the principles set out in the decision which is being appealed against might not be applied to each witness individually.

The Prosecutor has not given concrete reasons for his appeal on this subject.

2.2.2 Second ground of appeal: the temporal framework of the investigation

2.2.2.1. Primary submission: admissibility of the appeal on this issue

13. In the decision under appeal, Pre-Trial Chamber I held that, pursuant to article 61 (4) and (9) of the Statute, the investigation must be brought to an end by the time the confirmation hearing starts, and, to this effect, refers to its previous decision of 15 May 2006 (paras 130 and 131).

14. The Defence points out that the Prosecutor did not request authorisation to appeal the previous decision of 15 May 2006 which determines the principles that the Prosecutor attacks in the subsequent decision of 19 May 2006, the single decision under appeal.

Since the time limit for its submission, as determined in rule 155, had elapsed, the decision of 15 May 2006 became definitive.

The appeal of the Prosecutor against the decision of 19 May 2006 is therefore inadmissible because on 24 May 2006 the decision of 15 May 2006 had become definitive.

⁶ Anne-Marie LA ROSA – Juridiction pénales internationales- la procédure et la preuve, puf 2003, p. 71

The Appeals Chamber would therefore be unable to reverse the decision of 19 May 2006 on a point determined beforehand by the decision of 15 May 2006, without thereby violating the authority and the *res judicata* of the first decision. It would also establish contradictory decisions.

The Prosecutor's appeal is therefore inadmissible on this matter.

2.2.2.2 Alternatively: Merits

15. The Prosecutor is wrong in asserting that the Single Judge made a "teleological" interpretation of article 61 of the Statute.

On the contrary, the Single Judge limited herself to a strict interpretation of article 61 (4), which is clear:

*"**Before** the hearing, the Prosecutor may continue the investigation..."*

As a result, *a contrario*, this **can no longer** be done **after** this time.

In paragraph 130 of her decision of 15 May 2006, the Single Judge notes only **additionally** that no other provision of the Statute confers upon the Prosecution to continue with the investigation after the confirmation hearing.

The legal basis for her decision, however, lies only in the **literal** interpretation of article 61 (4).

16. Furthermore, and in addition, the following observations are appropriate:
17. Because deprivation of liberty is an extremely serious matter under the Statute, the Prosecutor must verify whether he has the necessary incriminating evidence before doing so, and after having evaluated both the incriminating and exonerating evidence.

For this reason, article 54 of the Statute obliges the Prosecutor, in order to establish **the truth**, to extend the investigation to cover all the facts and evidence relevant to an assessment of whether there is criminal responsibility under this

Statute, and in doing so, investigate incriminating and exonerating circumstances equally.

Article 54 (1) (b) obliges the Prosecutor to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.

Article 58 (1) obliges the Prosecutor to verify whether there are sufficient pieces of evidence or other information to convince the Pre-Trial Chamber that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

In order to establish this truth, the Prosecutor must therefore investigate all incriminating and exonerating elements before presenting a case before the Pre-Trial Chamber.

If particular pieces of evidence were not accessible, the Prosecutor would be obliged to exhaust all of the means offered by article 54, and more specifically, article 54 (1) (b).

The Prosecutor's submissions seem to indicate that he is not acting in this way, but is requesting the arrest in a supplementary manner and will continue the investigation subsequently to verify *post factum* whether there is sufficient evidence.

However, under article 53 (2), the Prosecutor must fulfil various criteria in the course of the investigation and before any prosecution.

18. The Prosecutor refers to examples of situations in which it would be necessary to continue investigations after the fact.

The Defence points out that the Prosecutor himself does what he criticises the Single Judge of doing, that is, proceeding by generalisations.

The present dispute concerns the confirmation hearing in the case of The Prosecutor v. Thomas Lubanga Dyilo.

The Prosecutor makes no indication whatsoever as to the **concrete** problems encountered in this case which would justify the requested measure.

The Prosecutor's request is therefore hypothetical and cannot be granted under these circumstances.

Moreover, the Prosecutor has, to date, waived his right to add further charges to the existing charges.

It must therefore be concluded that he has completed his investigations and that his request is totally unfounded.

19. Wholly alternatively, it must be noted that, regarding the Prosecutor's remark (which is general and hypothetical) of the possibility of not having access to evidence which might subsequently become accessible on account of a conflict on the ground, the Defence refers to article 53 (2) (c).

A key element in the decision to initiate proceedings will be to establish whether the Prosecutor was able to access all incriminating and exculpatory evidence and whether the Defence will be able to conduct investigations as such.

If these elements are lacking, prosecution could not be initiated without violating the basic principles set out in article 67 of the Statute, notably the right to be tried without undue delay. In this case, it would not be in the interest of the court to initiate prosecution.

In the present case, the Prosecutor has already expressed doubts as to the possibility of continuing investigations and therefore as to the possibility for the Defence to conduct its investigations.

2.2.3. Third ground of appeal: "Ex parte" proceedings

20. Rule 81 (2) is clear on this matter: "The matter shall be heard on an ex-parte basis by the Chamber".

Nowhere does it state that the request of the Prosecutor could be *ex parte*. It must therefore be concluded that, a contrario, it must be *inter partes*. Since the principle of the proceedings is, evidently, *inter partes*, any exceptions to this rule must be expressly provided for and interpreted in a restrictive manner.

In addition, the Defence wishes to refer to the general principle of international human rights law whereby any restriction of the rights of the accused must be subordinate to the principle of proportionality, as the ICTY Appeals Chamber ruled⁷

“Any restriction of a fundamental right must be in service of “a sufficiently important objective”, and must “impair the right... no more than is necessary to accomplish the objective.”⁸ Similarly, while the International Covenant on Civil and Political Rights allows some restriction of certain civil rights where “necessary to protect national security, public order (order public), public health or morals, or the rights and freedoms of others,”⁹ the United Nations Human Rights Committee has observed that any such restrictions “must conform to the principle of proportionality; ... they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected¹⁰. And the ICTY itself has been guided by a “general principle of proportionality in assessing defendants’ suitability for provisional release, noting that a restriction on the fundamental right to liberty is acceptable only when it is “(1) suitable, (2) necessary

⁷ “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel” Prosecutor v. Milosevic, Appeals Chamber Decision of 1 November 2004, at paragraph 17

⁸ *Elloy de Feitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing*, 1 A.C. 69 (1998) (United Kingdom Privy Council) (striking down a restriction of civil servants’ right to demonstrate) (citing Zimbabwean, South African, and Canadian jurisprudence); see also e.g. *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) (United States Supreme Court) (finding that a campaign finance law must not restrict the right to free speech substantially more than the extent necessary to advance the state’s interest in preventing electoral corruption); *Chassagnou v. France*, 29 E.H.R.R. 615 (2000) (European Court of Human Rights) (holding that only “indisputable imperatives” can justify restrictions on a right protected by the European Convention of Human Rights, and even then only if the restrictions are a “necessary” and “proportionate” means of advancing the state objective) (striking down French law requiring rural landowners to make their land available to hunters); *Edmonton Journal v. Alberta*, 1989 Carswell Alta 198 (Canadian Supreme Court) (holding that a statute restricting the publication of information about divorce proceedings must impair the right to freedom of expression no more than strictly necessary to protect personal privacy).

⁹ International Covenant on Civil and Political Rights, Article 12, paragraph 3

¹⁰ Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GENT//1/Rev.6, 12 May 2003, p. 176 (“The application of restrictions in any individual case must ... meet the test of necessity and the requirements of proportionality.”)

and when (3) its degree and scope remain in a reasonable relationship to the envisaged target.”¹¹

21. Moreover, the Defence refers expressly to its submissions in its motion of 2 May 2006 regarding the ex parte proceedings and the case law cited therein, and hereby reiterates the submissions entirely.
 22. Reference must also be made to the general principle set by article 68 (5) which states that protective measures shall be exercised in a manner which is not prejudicial to or inconsistent with the **rights of the accused** and a **fair and impartial trial**.
 23. The Prosecutor states in paragraph 31 of his document in support of the appeal “that there **may** well be situations in which the specific nature of the evidence concerned, the witness or victim, or the identity or concerns of the information provided may require keeping the fact of the application from the defence to avoid prejudice”.
- The Defence counters that it could identify the source of such information by the mere fact that a request was submitted by the Prosecutor.
24. If, beyond the specific cases provided for by the texts, the Prosecutor is authorised to submit requests on an ex-parte basis, the entire proceedings would be secret and the Defence would not even know of the existence of the proceedings, which is contrary to its fundamental rights.

¹¹ Prosecutor v. Limaj, Case No. It-03-66-AR65, 31 October 2003, paragraph 13 (three-judge bench of the Appeals Chamber)

25.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER,

To reject the appeal of the Prosecutor

[signed]

Jean Flamme, Defence Counsel

Done this 20 July 2006

At Ghent, Belgium