

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-01/06 (OA 6)**

Date: 14 December 2006

THE APPEALS CHAMBER

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

Judgment

on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Mr. Fabricio Guariglia, Senior Appeals Counsel

Mr. Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence

Mr. Jean Flamme

Legal Assistant

Ms. Véronique Pandanzyla

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4. *Determination by the Appeals Chamber*

28. In relation to the first ground of appeal and for the reasons given below, the Appeals Chamber determines that the Impugned Decision was erroneous because it lacked sufficient reasoning in relation to the authorisation of disclosure of witness statements and other documents with redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence.

29. The Appeals Chamber notes that the appellant has sought to incorporate arguments made in relation to the appeal 01/04-01/06 OA 5 in his Document in Support of the Appeal in the present appeal. The Appeals Chamber disapproves of this practice. The arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court.

30. The Appeals Chamber explains in paragraph 20 of today's judgment on the appeal 01/04-01/06 OA 5 in relation to the First Decision on Requests for Redactions that decisions authorising the non-disclosure to the defence of the identities of witnesses on whom the Prosecutor intends to rely at the confirmation hearing need to be sufficiently reasoned. This paragraph reads as follows:

“Decisions of a Pre-Trial Chamber authorising the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. The Statute and the Rules of Procedure and Evidence emphasise in various places the importance of sufficient reasoning (by way of example, see, in the context of evidentiary matters, rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to “give reasons for any rulings it makes”). The Appeals Chamber notes in this context the judgment in the case of *Hadjianastassiou v. Greece* (application number 12945/87) of 16 December 1992, where the European Court of Human Rights held in paragraph 32 of its judgment that as part of the fair trial guarantees of article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 as amended by Protocol 11 (213 United Nations Treaty Series 221 et seq., registration no. 2889; hereinafter: “European Convention on Human Rights”), courts are required to “indicate with sufficient clarity the grounds on which they based their decision.” The European Court of Human Rights went on to state that “[i]t is this, inter alia, which makes it

possible for the accused to exercise usefully the rights of appeal available to him.” The cases of the European Court of Human Rights cited by the Prosecutor in the footnotes to paragraphs 19 to 21 of the Response to the Document in Support of the Appeal, although not relating to criminal proceedings, also confirm the importance of a reasoned decision for the right to a fair trial. Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible (see *Prosecutor v. Momir Nikolić*, “Judgement on Sentencing Appeal”, 8 March 2006, Case No. IT-02-60/1-A, paragraph 96; *Prosecutor v. Dragoljub Kunarac et al.*, “Judgement”, 12 June 2002, Case No. IT-96-23 & 23/1-A, paragraph 41). In paragraph 11 of its “Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release” of 1 November 2005 in the case of *Prosecutor v. Milutinović et al.* (Case No. IT-05-87-AR65.1), the Appeals Chamber of the ICTY held that “as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision”. Although in the present case the right of the appellant to appeal the Impugned Decision was conditional on the granting of leave by the Pre-Trial Chamber pursuant to article 82 (1) (d) of the Statute and rule 155 (1) of the Rules of Procedure and Evidence, the analysis of the European Court of Human Rights and of the Appeals Chamber of the ICTY in the cases referred to above applies with similar force to the case at hand.”

31. The same applies to decisions that authorise the disclosure with redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence. The reasoning must state how the Pre-Trial Chamber came to the conclusion that disclosure of witness statements and other documents with redactions pursuant to rule 81 (2) of the Rules of Procedure could be authorised; the reasoning should also state which of the facts before it led the Pre-Trial Chamber to reach its conclusion.

32. The reasoning in the Impugned Decision is insufficient because it is not clear from the reasoning what facts, in the evaluation of the Pre-Trial Chamber, justified the authorisation of the redactions. To a large extent, the Pre-Trial Chamber only limited itself to reciting the substance of the provisions concerning authorisations of disclosure with redactions without providing any information as to how it applied these provisions to the facts of the case. The Impugned Decision fails to set out expressly which redactions are being authorised under rule 81 (2) of the Rules of Procedure and Evidence. It equally fails to make any express reference to the facts which it considers justify the application of rule 81 (2) of the Rules of Procedure and Evidence. It is possible to surmise that certain redactions have been authorised under that provision, but nowhere is the factual and legal basis for those redactions explicitly considered together. Furthermore, the Pre-Trial Chamber did not address, even in general terms, why the Chamber considered that the disclosure of sources of the Prosecutor and any other matters in relation to which it authorised redactions could prejudice further investigations.