Cour Pénale Internationale

International Criminal Court

Original: English

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

Decision on the Prosecutor's "Application for Leave to 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

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor pursuant to the decision of Pre-Trial Chamber I dated 23 June 2006, entitled "Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal" (ICC-01/04-01/06-166),

Having before it the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" dated 21 July 2006 (ICC-01/04-01/06-202),

Renders unanimously the following

DECISION

i) The Prosecutor's application for leave to reply is rejected.

ii) The "Prosecution's Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (ICC-01/04-01/06-223) will not be considered by the Appeals Chamber in its deliberations on the present appeal.

REASONS

1. On 20 July 2006, Counsel for Mr. Thomas Lubanga Dyilo filed a document entitled "Conclusions de la défense en réponse au mémoire d'appel du Procureur du 5 juillet 2006" (ICC-01/06-01/04-199, hereafter "response to the document in support of the appeal"). In the response to the document in support of the appeal, Counsel for Mr. Thomas Lubanga Dyilo argued *inter alia* that the Appeals Chamber should reject the Prosecutor's appeal as inadmissible (see response to the document in support of the appeal, paragraphs 5 to 7, 13 and 14).

2. On 21 July 2006, the Prosecutor filed an "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (ICC-01/04-01/06-202, hereafter "application for leave to reply"). The Prosecutor sought leave to reply to the response to the document in support of the appeal pursuant to regulations 24 (5) and 34 (c) of the Regulations of the Court, which, he submitted, applied to appeal proceedings under rule 155 of the Rules of Procedure and Evidence (see application for leave to reply, paragraph 9). To support his application for leave to reply, the Prosecutor submitted that the arguments in respect of the admissibility of the appeal that were raised in the response to the document in support of the appeal were new arguments and that the Prosecutor must have an opportunity to reply to them; he submitted further that the Appeals Chamber should have "the benefit of considering all relevant arguments, from both parties, prior to ruling on these issues" (see application for leave to reply, paragraph 8).

3. In paragraphs 10 and 11 of the application for leave to reply, the Prosecutor indicated that he would file a reply at the end of the ten-day time limit stipulated in regulation 34 (c) of the Regulations of the Court if the Appeals Chamber had not delivered a decision on his application prior to that time. He noted that the date on which the reply was due to be filed pursuant to that regulation was during the Court recess and that it was therefore possible that the Appeals Chamber might not be in a position to deliver a decision granting or denying leave to reply prior to that time. In such circumstances, the Prosecutor stated that he would file his reply "in order to preserve [his] procedural rights" and submitted that the Appeals Chamber could disregard the reply, should it later decide not to grant leave to reply (see application for leave to reply, paragraphs 10 and 11).

4. On 31 July 2006, the Prosecutor filed a document entitled "Prosecution's Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (ICC-01/04-01/06-223, hereafter "Prosecutor's reply").

5. The Prosecutor's application for leave to reply to the response to the document in support of the appeal is rejected because in appellate proceedings under rules 154 or 155

of the Rules of Procedure and Evidence, the appellant does not have a right to apply for leave to reply to the other participant's response to the document in support of the appeal.

6. This follows from the following considerations: regulation 60 (1) of the Regulations of the Court provides that the Appeals Chamber may order the appellant to file a reply to the other participant's response to the document in support of the appeal, when the Chamber considers this to be "necessary in the interests of justice". The reference to regulations 58 and 59 in regulation 60 (2) of the Regulations of the Court indicates that regulation 60 is only applicable to appeals brought under rule 150 of the Rules of Procedure and Evidence, because regulations 58 and 59 are only applicable to appeals brought under that rule. In subsection 1 of Section 4 of Chapter 3 of the Regulations of the Court, which regulates appeal proceedings, no provision is made for replies to documents in support of the appeal for appeals brought under rules 154 or 155. Regulation 24 (5) of the Regulations of the Court is not applicable to such proceedings either because the more specific regulations of subsection 1 of Section 4 of Chapter 3 of the Regulations of the Court do not foresee replies to responses to documents in support of the appeal for appeals under rules 154 or 155. It follows *a contrario* that no applications for replies may be filed pursuant to regulation 24 (5) of the Regulations of the Court to responses to documents in support of the appeal for appeals brought under rules 154 or 155 of the Rules of Procedure and Evidence.

7. This does not mean, however, that further filings by the participants will never be possible in such proceedings; should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings.

8. In the present case, the Appeals Chamber does not deem it necessary to exercise its powers pursuant to regulation 28 (2) of the Regulations of the Court because the arguments presented in the response to the document in support of the appeal do not

warrant any further submissions by the Prosecutor. Therefore, the Prosecutor's reply will not be considered by the Appeals Chamber in its deliberations on the present appeal.

Judge Pikis appends a separate concurring opinion to this decision.

Done in both English and French, the English version being authoritative.

Judge Sang-Hyun Song
Presiding Judge

Dated this 12th day of September 2006

At The Hague, The Netherlands

Separate opinion of Judge Georghios M. Pikis

1. The facts founding the application and the issues raised for consideration are set out in the preceding decision, so I shall not repeat them. The Prosecutor seeks leave to make a reply[1] to the response of the opposite party on the ground that the respondent raised "new arguments" in his address not touched upon by himself in the document in support of his appeal. Evidently, the Prosecutor regards as "new arguments" points relevant to the strength or weakness of the appeal not foreseen and not addressed by himself. To describe such reasons as "new" is to my mind a misnomer. Every argument relating to the subject-matter of the appeal as defined by the grounds of appeal is from the outset a relevant and foreseeable matter that may be made a subject of the address. Failure on the part of the appellant to deal with it in the document in support of the appeal does not dissociate it from the appeal nor does it qualify it as a new subject. To qualify as "new" in the sense used by the Prosecutor, the argument must refer to a matter arising *ex improviso*. What the Prosecutor seeks is a second opportunity to address the Appeals Chamber in support of his case.

2. I agree that regulation 65 (4) and (5) and by reference thereto regulation 64 (2) and (4) of the Regulations of the Court establish the framework for the presentation of the parties' addresses for and against the appeal in proceedings raised under article 82 (1) (d) of the Statute (see rule 155 of the Rules of Procedure and Evidence). The reason why I write a separate opinion is to underline that sub-regulations 4 and 5 of regulation 65 of the Regulations of the Court accord with the principle of equality of arms that pervades the interpretation and application of every aspect of the law applicable under the Statute.

3. Article 21 (3) of the Statute binds the Court to apply and interpret the law applicable under the Statute in a manner consistent with "internationally recognized human rights". Internationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions. The right to a fair trial belongs to this class of rights. Expression to it is given by the

[1] The word "reply" ("réplique") is used as a term of art primarily deriving from its usage in the procedural law of common law countries and French law signifying a second pleading or response by the first party (usually the plaintiff or appellant) in response to the answer of the second party.

Universal Declaration of Human Rights[2] in article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." The International Covenant on Civil and Political Rights[3] likewise puts a fair trial at the nucleus of the judicial process. Article 14 (1) provides: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]." The Convention for the Protection of Human Rights and Fundamental Freedoms[4] ("European Convention on Human Rights") postulates in article 6 (1): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]." To the same effect is article 8 (1)[5] of the American Convention on Human Rights[6]. The African Charter on Human and People's Rights[7] incorporates fair trial as the fundamental right of the individual by a series of provisions set out in article 7 (1)[8]. The extent to which the right to a fair trial has been proclaimed as a legal norm and its incorporation in international instruments denotes comprehensive assent to its emergence as a principle of customary international law.[9]

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[2] Adopted and proclaimed by the United Nations General Assembly Resolution 217A(III) of 10 December 1948.

[3] General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966), entered into force 23 March 1976, 999 United Nations Treaty Series 171.

[4] Signed on 4 November 1950, European Treaty Series No. 5.

[5] "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

[6] "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955.

[7] Signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363.

[8] "Every individual shall have the right to have his cause heard. This comprises: a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b. The right to be presumed innocent until proved guilty by a competent court or tribunal; c. The right to defence, including the right to be defended by counsel of his choice; d. The right to be tried within a reasonable time by an impartial court or tribunal."

[9] See *inter alia Cassese A* , International Criminal Law, (Oxford University Press, 2003) page 395.

4. The Rules of Procedure and Evidence form part of the applicable law under the Statute (see article 21 (1) of the Statute) and as such must be construed in accordance with the provisions of article 21 (3); and in the event of conflict with the Statute the latter shall prevail (see article 51 (5) of the Statute). Furthermore, the Regulations of the Court must be evolved "in accordance with the Statute and the Rules of Procedure and Evidence" (article 52 (1) of the Statute) and must "be read subject to the Statute and the Rules" as laid down in regulation 1 (1) of the Regulations of the Court. Evidently, they must conform to the Statute. Article 21 (3) of the Statute is an integral part of the Statute applicable in the case of the Regulations of the Court too. The provisions of article 21 (3) of the Statute govern the interpretation and application of both the Rules of Procedure and Evidence and the Regulations of the Court.

5. Moreover, the right to a fair trial at every stage of the proceedings before the International Criminal Court is expressly assured by the provisions of article 67 (1), article 64 (2), rule 121 (1) and rule 149 of the Rules of Procedure and Evidence (see also article 55 of the Statute).

6. Equality of arms is treated as an indivisible element of a fair trial, as repeatedly acknowledged and proclaimed by international courts[10] and institutions[11] established to monitor the application of human rights. Furthermore, equality of arms constitutes an indispensable requisite of an adversarial trial, an incident of a fair trial, designed to afford

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[10] See *inter alia* European Court of Human Rights (judgments and decisions *available in* HUDOC database *at*: www.echr.coe.int/echr), *Case of Dombo Beheer BV v The Netherlands* "Judgment", Application No. 14448/88, 27 October 1993, paragraph 33,: "Nevertheless, certain principles concerning the notion of a 'fair hearing' in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of equality of arms, in the sense of a 'fair balance' between the parties, applies in principle to such cases as well as to criminal cases (see the Feldbrugge v. the Netherlands judgment of 26 May 1986, Series A no. 99, p. 17, para. 44)."; *Case of Brandstetter v. Austria,* "Judgment", Application no. 11170/84; 12876/87; 13468/87, 28 August 1991, paragraph 66; *Case of Ruiz-Mateos v Spain* "Judgment", Application no. 12952/87, 23 June 1993, paragraph 63; *Case of Belziuk v Poland,* "Judgment" Application no. 23103/93, 25 March 1998, paragraph 37.

[11] See *inter alia Views of the Human Rights Committee on Communications* 207/86 (Morael v. France) paragraph 9.3.: "the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformation in pejus* [footnote omitted] and expeditious proceedings." and 514/92 (Fei v. Colombia) paragraph 8.4 (cited in: *Joseph S, Schultz J, Castan M.,* The International Covenant on Civil and Political Rights. Cases, Materials and Commentary, (Second Edition, Oxford University Press, 2004) paragraphs 14.41 and 14.42).

the same opportunities to the prosecution and the defence in confronting one another's case.[12] The notion of a fair trial in all its manifestations is interwoven with that of equality of arms, warranting the assurance of equal opportunities to either side to present his/her case before the court.[13] The opportunity afforded to either side must, no doubt, be adequate for the presentation of his/her case. Equality before the law and the administration of justice permeates the entire judicial process. It is a pillar of justice; a fundamental principle of the law, as acknowledged by the International Court of Justice.[14]

7. The Regulations of the Court provide an equal opportunity to the parties to address the Appeals Chamber, envisaging a document in support of the appeal and a document in response thereto of equal length (regulations 65 (4) and (5) and 37 (1) of the Regulations of the Court). And in face of exceptional circumstances making the space afforded insufficient to accommodate the presentation of a party's case, this may be enlarged upon application to the court (regulation 37 (2) of the Regulations of the Court).

8. The regulated opportunity to address the Appeals Chamber must be distinguished from clarifications that may be sought by the Chamber respecting the position or stance of the parties or the elicitation of an issue not touched upon or inadequately explored by them. In this case, as noted in the preceding decision, the Appeals Chamber does not require further clarification of the position of the parties on any matter.

9. To conclude, the Prosecutor exhausted his right to address the Appeals Chamber on the issues raised by the appeal and has no right to claim a second opportunity. Regulation 65 of the Regulations of the Court gives effect to the principle of equality of

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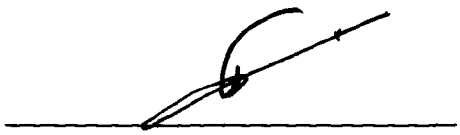
[12] See *inter alia* European Court of Human Rights, *Case of Rowe and Davis v. The United Kingdom,* "Judgment", Application no. 28901/95, 16 February 2000, paragraphs 59 to 61; *Case of Laukkanen and Manninen v Finland,* "Judgment", Application no. 50230/99, 3 February 2004, paragraph 34.

[13] See *inter alia* European Court of Human Rights, *Case of Bulut v. Austria,* "Judgment", Application no. 17358/90, 22 February 1996, paragraph 47: "The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent [...]. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice [...]."

[14] See *inter alia* International Court of Justice, *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO,* Advisory Opinion of 23 October 1956, ICJ Reports (1956) pp. 77, 84 et seq. (as cited by *Kolb R* in Zimmermann A., Tomuschat Ch., Oellers-Frahm K., (Editors), The Statute of the International Court of Justice. A Commentary, (Oxford University Press, 2006) at pages 800, 803).

arms; hence, I associate myself with the dismissal of the application for the reasons given in the preceding decision and the additional ones furnished herein.



Judge Georghios M. Pikis

Dated this 12th day of September 2006

At The Hague, The Netherlands