

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/06
Date: 18 August 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
*v. THOMAS LUBANGA DYILO***

Public Document

Decision on Defence Motion for Leave to Appeal

The Office of the Prosecutor

Mr Luis Moreno Ocampo

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**The Legal Representatives of the
Victims**

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Mr Jean Flamme

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**The Office of Public Counsel for the
Defence**

Ms Melinda Taylor

Pre-Trial Chamber I ("the Chamber") of the International Criminal Court ("the Court");

NOTING the "Application for Participation in the Proceedings No. a/0001/06"¹, the "Application for Participation in the Proceedings No. a/0002/06"² and the "Application for Participation in the Proceedings No. a/0003/06"³ ("the Applications"), all filed as confidential and *ex parte* only available to Applicants a/0001/06 to a/0003/06 ("the Applicants") on 9 May 2006, in which the Applicants request (i) to be granted the procedural status of victim in the case *The Prosecutor v. Thomas Lubanga Dyilo*; (ii) that their identity not be disclosed to the Defence; and (iii) that the Applicants be contacted only through their legal representatives;

NOTING the "Decision Establishing a Deadline for the Prosecution and the Defence to submit Observations on the Applications of Applicants a/0001/06 to a/0003/06" ("the Decision Establishing a Deadline"),⁴ issued by Judge Sylvia Steiner acting as single judge on 18 May 2006, in which *inter alia*: (i) the Registry was ordered to provide to the Prosecution an unredacted copy of the Applications and to the Defence a redacted copy of the Applications after having expunged any information which could reveal the identity of the Applicants; and (ii) the Prosecution and the Defence were given fifteen days from the notification of the Applications to reply under rule 89 (1) of the Rules of Procedure and Evidence ("the Rules") to such applications;

NOTING the redacted versions of the Applications of Applicants a/0001/06 to a/0003/06 ("the Redacted Versions of the Applications") filed by the Registry

¹ ICC-01/04-01/06-98-Conf-Exp.

² ICC-01/04-01/06-99-Conf-Exp.

³ ICC-01/04-01/06-100-Conf-Exp.

⁴ ICC-01/04-01/06-107.

pursuant to the Decision Establishing a Deadline and notified to the Defence on 2 June 2006;⁵

NOTING the “Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l’affaire *Le Procureur c. Thomas Lubanga Dyilo* et de l’enquête en République démocratique du Congo” (the “Decision”),⁶ issued *ex parte* and only available to the Applicants and the Prosecution by the Chamber on 24 July 2006 stating “that the status of victim is granted to Applicants a/0001/06, a/0002/06 and a/0003/06 in the stage of the case of *The Prosecutor v. Thomas Lubanga Dyilo* in the situation in the Democratic Republic of the Congo (“the DRC”) in view of the harm linked to the crimes as described in the arrest warrant issued against Thomas Lubanga Dyilo”⁷;

NOTING the public redacted version of the Decision issued by the Chamber on 28 July 2006,⁸ of which the Defence received notification on 1 August 2006;

NOTING the “Request for Leave to Appeal the ‘Decision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l’affaire *Le Procureur v. Thomas Lubanga Dyilo* et de l’enquête en République démocratique du Congo” (“the Defence Request”),⁹ filed by the Defence on 7 August 2006, in which the Defence alleged that the Chamber erred by:

- (i) failing to address the submissions of the Defence regarding the procedural inequality it faced in addressing the substance of the Applications because: (i) it did not have access to the full versions of the Applications; and (ii) it indeed received only the redacted version of Application a/0001/06;¹⁰

⁵ ICC-01/04-01/06-133-Conf, ICC-01/04-01/06-134-Conf and ICC-01/04-01/06-135-Conf.

⁶ ICC-01/04-01/06-205-Conf-Exp.

⁷ ICC-01/04-01/06-Conf-Exp-tEN, p. 17.

⁸ ICC-01/04-01/06-228.

⁹ ICC-01/04-01/06-272.

¹⁰ The Defence Request, paras. 23 and 36 to 42.

- (ii) failing to accord procedural equality to the Defence by restricting the Defence to a public redacted version of the Decision;¹¹
- (iii) failing to address the submissions of the Defence regarding the question of whether it is permissible for Victims to participate anonymously;¹²
- (iv) failing to consider whether the participation of the Applicants at this stage was consistent with the rights of the Defence, in particular, the right to fair, impartial and expeditious proceedings, because of the fine distinction between the "grounds to believe" standard used in the Decision to assess whether the Applicants could be granted the procedural position of victim and the standard for confirming the charges "invites confusion and an appearance of prejudgement, if not actual prejudgement";¹³ and
- (v) using a definition of victim which is not based in the Statute or the Rules, and which discriminates against classes of potential defence-oriented victims who, although they do not claim any harm as a result of the crimes contained in warrant of arrest against Thomas Lubanga Dyilo, may have a personal interest in participating in the proceedings in order, for instance, "to highlight certain atrocities or crimes which occurred contemporaneously in the relevant geographical area, and which may be relevant to assessing the context of the charges, or potential defences or mitigating circumstances such as necessity, impossibility or self-defence";¹⁴

NOTING the "Prosecution's Response to Thomas Lubanga Dyilo's 'Request for Leave to Appeal the 'Decision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire *Le Procureur v. Thomas*

¹¹The Defence Request, paras. 23, 43 and 44.

¹²The Defence Request, paras. 23, 45 and 46.

¹³The Defence Request, paras. 23 and 49 to 62.

¹⁴The Defence Request, paras. 63 to 69.

Lubanga Dyilo et de l'enquête en République démocratique du Congo'"("the Prosecution Response")¹⁵, filed by the Prosecution on 14 August 2006, in which the Prosecution submits that (i) the Defence has met the requirements for leave to appeal under article 82 (1) (d) of the Rome Statute ("the Statute") in relation to the first four issues;¹⁶ and (ii) that "[i]n relation to the fifth issue ("the definition of "victim"), the Prosecution whereas not opposing the granting of certification, respectfully submits that the alleged impact of the issue on the fair and expeditious conduct of the proceedings is not entirely clear from the Defence's arguments"¹⁷;

NOTING the "Réponse à la requête de la Défense sollicitant l'autorisation de faire appel contre la décision sur les demandes de participation des victimes" ("the Applicants' Response"),¹⁸ filed by the Applicants on 11 August 2008, in which the Applicants request the Chamber to reject the Defence Request¹⁹;

NOTING articles 21, 57 (3) (c), 67, 68 and 82 (1)(d) of the Statute and rules 87, 88, 89 (1) and 155 of the Rules of Procedure and Evidence ("the Rules");

CONSIDERING that according to the "Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6" ("the Decision on Prosecution Request for Leave to Appeal")²⁰ issued by the Chamber on 31 March 2006 and the "Decision on the Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58" issued by Pre-Trial Chamber II on 19 August 2005²¹ in order to grant leave to appeal under

¹⁵ ICC-01/04-01/06-331.

¹⁶ The Prosecution Response, paras. 3 to 9.

¹⁷ The Prosecution Response, para. 10.

¹⁸ ICC-01/04-01/06-323.

¹⁹ The Applicants' Response, p. 10.

²⁰ ICC-01/04-135, See in particular para. 28.

²¹ ICC-02/04-01/05-20 –US-Exp. Unsealed according to the Decision ICC-02/04-01/05-52, issued on 13 October 2005. See in particular para. 20.

article 82 (1) (d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

CONSIDERING that, according to the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (“the Appeals Chamber Judgement”)²², issued by the Appeals Chamber on 13 July 2006:

- (i) “only an issue may form the subject-matter of an appealable decision;”²³
- (ii) “an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;²⁴
- (iii) “not every issue may constitute the subject of an appeal”,²⁵ but “it must be one 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’”²⁶; and
- (iv) “identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an

²² ICC-01/04-168.

²³ The Appeals Chamber Judgement, para. 9.

²⁴ The Appeals Chamber Judgement, para. 9.

²⁵ The Appeals Chamber Judgement, para. 9.

²⁶ The Appeals Chamber Judgement, para. 10.

appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may, materially advance the proceedings’²⁷;

CONSIDERING that, in the view of the Chamber, it is necessary to distinguish between:

- (i) the non-disclosure of the identity of the Applicants, pursuant to article 68 (1) of the Statute and rule 89 (1) of the Rules, during the application process; and
- (ii) the non-disclosure of the identity of the Applicants, pursuant to rules 87 and 88 of the Rules, once (a) they have been granted the status of victims of the case; and (b) the manner in which they will participate in the proceedings of the case to be held before the Chamber has been determined;

CONSIDERING that, in the view of the Chamber, the procedure under article 68 (1) of the Statute and rule 89 (1) of the Rules in relation to the Applicants’ requests for non-disclosure of their identity during the application process allows for a decision on such requests before notice of such requests is given to the Prosecution and the Defence; that this is because, during the application process, the Applicants have not yet been granted the procedural status of victim in the case against Thomas Lubanga Dyilo, which means that their entitlement to participate in this case remains uncertain; and that, given the particular circumstances of the Applicants, resorting to this procedure was necessary;

²⁷ The Appeals Chamber Judgement, para. 14.

CONSIDERING that this procedure did not prejudice the procedural rights of the Defence under rule 89 (1) of the Rules to reply to the Applications because the Defence, within the time limits provided for in rule 155 of the Rules, could have filed a motion requesting the lifting of all or part of the redactions and, in the alternative, leave to appeal against the Decision Establishing a Deadline; that, neither after the issuance of the Decision Establishing a Deadline nor after the receipt of the redacted versions of the Applications, did the Defence do so; and that the Defence first raised the issue in its “Conclusions de la défense quant à la demande de participation à la procédure des requérants a/0001/06” filed on 14 June 2006²⁸.

CONSIDERING therefore that the issues of non-disclosure of the identity of the Applicants during the application process and the subsequent transmission to the Defence of redacted versions of the Applications were not dealt with in the Decision because such they were the subject of the Decision Establishing a Deadline;

CONSIDERING that, according to the notification records kept by the Registry, the Defence received a copy of the redacted version of all three Applications well before the expiration of the time-limit set by the single judge for the Defence to reply;²⁹

CONSIDERING that the Decision was the last step of the application process; that it granted the Applicants only the procedural status of victim in the case against Thomas Lubanga Dyilo; and that the Decision did not address the modalities of participation in the proceedings leading to the confirmation hearing and during the hearing;

²⁸ ICC-01/04-01/06-151-Conf.

²⁹ Court Management-Court Records electronic notification to Mr Flamme on 2 and 5 June 2006 and notification by way of DHL delivery, sent on 2 June 2006 and received and signed for on 6 June 2006.

CONSIDERING therefore that the protective measure of non-disclosure of the identity of the Applicants in force throughout the application process was also in force when the Decision was issued; and that, for this reason, the Defence was provided only with a redacted version of the Decision, which did not however prejudice it in respect of its submission of the Defence Request;

CONSIDERING further that the issue of non-disclosure of the identity of the Applicants after the issuance of the Decision and prior to the confirmation hearing was not dealt with in the Decision; and that, therefore, the Applicants are in error when they allege that the Chamber has already endorsed the principle of non-disclosure of identity prior to the confirmation hearing of those granted the procedural status of victim in the case against Thomas Lubanga Dyilo;³⁰

CONSIDERING further that, in the view of the Chamber, the issue of non-disclosure of the identity of the Applicants prior to the confirmation hearing is closely related to the modalities of the Applicants' participation in the proceedings leading to the confirmation hearing and during the hearing;

CONSIDERING that a decision on the modalities of the Applicants' participation in the proceedings leading to the confirmation hearing and during the hearing and on the related issue of non-disclosure of their identity prior to the confirmation hearing is still pending because the Prosecution and the Defence have until 25 August 2006 to address these issues when responding to the observations filed by the Applicants on 8 August 2006;

³⁰ The Applicants' Response, para. 6.

CONSIDERING that, as the Prosecution asserts in the Prosecution Response,³¹ in its Decision on Prosecution Request for Leave to Appeal, the Chamber has already ruled that the use of the “grounds to believe” standard to assess whether a given applicant can be granted the procedural status of victim is not an issue which meets the criteria provided for in article 82 (1) (d) of the Statute;³²

CONSIDERING that the Defence has not demonstrated how tailoring the definition of victim provided for in rule 85 of the Rules to the scope of the case against Thomas Lubanga Dyilo, which is the subject of the proceedings in which the Applicants have requested to participate, may significantly affect the fair and expeditious conduct of such proceedings or the outcome of the trial;


FOR THESE REASONS

REJECTS the Defence Request for leave to appeal the Decision.

³¹ The Prosecution Response, para. 9.

³² The Decision on the Prosecution Request for Leave to Appeal, paras. 57 to 59.

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



Judge Claude Jorda
Presiding Judge



Judge Akua Kuenyehia



Judge Sylvia Steiner

Done this Friday 18 August 2006

At The Hague

The Netherlands