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Pénale
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**International
Criminal
Court**

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Date: 14 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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Document

**Request for Access to the Unredacted Versions of the Applications of Applicants
a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06, and for an
Extension of Time**

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
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Counsel for the Defence

Mr. Jean Flamme
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1. Introduction

1. On 4 August 2006, the Honourable Single Judge issued a decision concerning the receipt of 43 requests to participate as victims in the case against Thomas Lubanga Dyilo,¹ which ordered the Registry to provide unredacted versions of the applications to the Prosecution and redacted versions to the Defence, and granted the Prosecution and the Defence the possibility to present their observations in relation to these applications by no later than 18 August 2006.
2. In response, the Defence hereby requests access to the unredacted versions of the applications in order to address the substance of the requests filed by the applicants and to be placed in the same procedural position as the Prosecution. Alternatively, if the Defence request to appeal the Pre-Trial Chamber's decision of 28 July 2006 is granted, the Defence requests that consideration of the present applications (and the procedure utilised thereof) be stayed until the Appeals Chamber has issued its decision.
3. In any case, the Defence also requests the deadline for filing its observations should be extended so that it does not commence to run until after the confirmation hearing.

2. Request for Access to Unredacted Applications

4. As a preliminary observation, the Defence notes that requests for protective measures for victims are governed by Rule 87(1), and are subject to the conditions set out in Rule 87(2): that is, such requests for protective measures shall not be submitted *ex parte*,² but shall be served on both the Prosecution and Defence, each of whom shall have the opportunity to respond to the merits of the request for protective measures.³ Even if the Chamber proceeds to consider such measures *proprio motu*, the Chamber must provide the Prosecution and the Defence with notice of its intention to do so, and an opportunity to respond before ordering such measures.⁴
5. At the very least, the Defence submits that although applications do not fall under the scheme for protective measures set out in Rules 81(2) and (4), there is no logical justification for eschewing the procedural safeguards to protect the rights of the Defence which apply to applications under these rules. In this context, the Single

¹ Décision autorisant le Procureur et la Défense à déposer des observations sur les demandes des requérants a/0004/06 à a/0009/06, a/0016/06 à a/0046/06 et a/0047/06 à a/0052/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, dated 4 August 2006.

² Rule 87(2)(a) of the Rules of Procedure and Evidence.

³ Rule 87(2)(b) of the Rules of Procedure and Evidence.

⁴ Rule 87(2)(d) of the Rules of Procedure and Evidence.

Judge has previously held that “all future applications by the Prosecution or the Defence to restrict disclosure under Rule 81(2) or (4) of the Rules shall be filed *inter partes* to notify the other party of the existence of the application and of any request for *ex parte* proceedings that might be contained in such application”.⁵

6. Although the Defence was not provided with an opportunity to present its views before the Chamber issued its 4 August 2006 decision, the Defence is of the view that consistent with the principles set out in the aforementioned 19 May 2006 decision, the Defence retains the right to present its initial submissions on this question directly to the Single Judge, rather than being required as a matter of procedure to seek leave to appeal the 4 August 2006 decision.
7. In terms of the basis of the 4 August 2006 decision, the Honourable Single Judge noted that the modalities of transmitting copies of applications to the Prosecution and the Defence are regulated by the Statute, in particular, article 68(1) which obliges the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.
8. The Single Judge also cited article 57(3)(c), which mandates the Pre-Trial Chamber to take such measures as are necessary to provide for the protection and privacy of victims and witnesses, and rule 86 of the Rules of Procedure and Evidence, which sets out the general principle that in making any direction or order, a Chamber shall take into account the needs of all victims and witnesses in accordance with article 68.
9. It has been opined that the “words ‘having regard to the provisions of the Statute’ suggest that article 67 can be limited by express provisions to the contrary”.⁶ This implies *a contrario* that absent such an express provision to the contrary, the rights of the Defence set out in article 67(1) prevail. In light of the fact that the articles and rules cited by the Pre-Trial Chamber do not expressly authorise the Pre-Trial Chamber to order a specific measure which would violate the rights of the Defence, (on the contrary, article 68(1) is expressly subject to the rights of the Defence), if the redactions authorised by the Chamber are not consistent with the rights of the Defence set out in article 67(1), they will constitute a violation of the Statute.
10. As has been recognised by the ad hoc Tribunals, the granting of protective measures constitutes a *prima facie* infringement of the Defence’s right to a fair and public

⁵ ‘Decision on the Defence Motion Concerning the *Ex Parte* Hearing of 2 May 2006’ dated 22 May 2006, ICC-01/04-01/06-119.

⁶ W. Schabas, Article 67, in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, at page 851.

hearing.⁷ The Defence also specifically referred to the debilitating effect of redactions on its ability to review and respond to victim applications in a previous filing.⁸ Those arguments apply with equal force to the present applications.

11. At this point in time, the Defence has no guidance as to the scope of victim participation - if granted – at the confirmation hearing, for example, whether the victims would be permitted to make statements during the hearing or to present documents, and whether such information or materials could be introduced as evidence against the Defence or in corroboration of Prosecution evidence.
12. In a previous decision concerning protective measures, the Single Judge acknowledged that “non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing i) could affect the ability of the Defence to fully challenge the evidence and credibility of those witnesses; and ii) has an impact on the rights of the Defence pursuant to articles 61(3) and (6)(b) and 67(1)(b) of the Statute”.⁹
13. The Defence respectfully submits that these findings apply equally if not with more force to the non-disclosure of the identity of victims who wish to participate at the confirmation hearings, and who have through the very fact of their applications, alleged that Thomas Lubanga Dyilo is responsible for crimes under the jurisdiction of the Court. In this regard, the Defence would like to reiterate submissions made in its previous filings regarding the injunction under human rights law of anonymous (‘faceless’) accusers.
14. However, even if the scope of the applicants’ potential participation is limited to future requests for reparations, their allegations and requests for reparations will still impact on the rights and obligations of Thomas Lubanga Dyilo *vis à vis* financial

⁷ See *Prosecutor v. Brđjanin and Talić*, Decision on Motion by Prosecution for Protective Measures, July 3, 2000, Case No. IT-99-36-PT < < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm> > .

⁸ “Unlike the Defence, the Prosecution was provided unredacted versions of the original applications and the resulting decision of the Pre-Trial Chamber. It was therefore in a better position to assess the merits of the application and, consequently, to submit a more detailed and accurate response. The fact that the Pre-Trial Chamber distinguished between the respective right of the Prosecution and the Defence to have access to the unredacted versions of the applications also sends the signal that the interests of the Victims and the Prosecution are aligned. In contrast, the scope of the redactions in the version provided to the Defence was such that the Defence was unable to ascertain whether the alleged events fell within the territorial or temporal scope of the alleged crimes set out in the arrest warrant against Thomas Lubanga Dyilo, whether the events complied with the criteria for crimes under the jurisdiction of the Court, or if there was any causal link between these events and the UPC and/or Thomas Lubanga Dyilo. The Defence was thus forced to waste time and resources analysing cryptic allegations which were obscured by the multitude of redactions, in order to devise factual arguments, which may have been rendered moot by documents which were submitted on an *ex parte* basis.” Request for Leave to Appeal 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 v. Thomas Lubanga et de l’enquête en République démocratique du Congo’ 7 August 2006, at paras. 38-42.

⁹ ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute’ dated 19 May 2006, ICC-01/04-01/06-108 at para. 30.

compensation. In this regard, the Defence notes that the right to a fair and impartial hearing, as set out in article 14 of the ICCPR, “applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law.”¹⁰ In addition, the fact that granting the status of victims to the applicants may have financial implications for future reparations proceedings also impacts on the credibility of any submissions made by the applicants, and may trigger the need for the Chamber to order further procedural safeguards to protect the rights of the Defence and ensure that the Defence is provided with any material which casts doubt on the reliance of the witness.¹¹

15. The Defence thus submits that the protective measures ordered by the Chamber contravene article 68(1) to the extent that they are in fact prejudicial to/inconsistent with the rights of the Defence.¹²
16. On the basis of past practice, it can also be assumed that the Chamber will issue a public (presumably redacted) decision regarding whether the applicants have adduced sufficient information to allow the Chamber to believe that there are reasonable grounds for considering that the applicants have suffered harm as a result of a crime under the jurisdiction of the Court, which can be attributed to Thomas Lubanga Dyilo. In essence, this roundabout inquiry constitutes a public finding regarding Thomas Lubanga Dyilo’s alleged criminal responsibility. Although such a finding has been distinguished by the Chamber from the procedure under the Statute for confirming the charges, the Defence submits that this formal distinction is irrelevant for the purpose of determining Thomas Lubanga Dyilo’s right to be informed of the particulars of the allegations against him.
17. In this connection, the Human Rights Committee has interpreted the right of the accused to be informed of the charges against him in a broad manner, observing that “the right to be informed of the charge “promptly” requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an

¹⁰ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) at para. 2. < <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm> >

¹¹ See *Inter Alia, Prosecutor v. Zigiranyirazo* ‘Scheduling Order – In Camera Hearing On Prosecutor’s Motion To Permit Limited Disclosure Of Information Regarding Payments And Benefits Provided To Witness Ade And His Family’ Case No. ICTR-2001-73-T, dated 19 January 2006 < <http://69.94.11.53/default.htm> > ; Verhoek v. The Netherlands (Decision of the European Court of Human Rights of 27 January 2004) < <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=netherlands%20%7C%20verhoek&sessionid=8043168&skin=hudoc-en> >

¹² *Prosecutor v. Blaskic*, Decision of 2 October 1996 (Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June And 30 August 1996 in Respect of the Protection of Witnesses) < <http://www.un.org/icty/blaskic/trialc1/decisions-e/61002ND113279.htm> >

investigation a court or an authority of the Prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.”¹³ Accordingly, the Defence respectfully submits that a public finding by a Chamber of the ICC that there are grounds to believe persons have suffered harm as a result of crimes committed by Thomas Lubanga Dyilo has the same legal effect and consequences as a charge.

18. The degree of specificity of charges has been considered at length by the jurisprudence of the ad hoc Tribunals and the Special Court for Sierra Leone in the context of challenges to the form of the indictment. It has been held that an indictment/charge must plead with particularity the identity of victims unless the sheer scale of the victims makes it impossible to identify the victims.¹⁴
19. Hence, in order to meet the requirements of informing the Defence of the nature and details of the charges/allegations raised by the applications, it is necessary for them to provide further particulars regarding the identities of the alleged victims. Irrespective of the mode of liability alleged, it is also necessary to specify the date or range of dates, and address (or location) with as much precision as is reasonably possible.¹⁵
20. As a general principle and irrespective of the terms of the Statute, it has been recognised that any measure which restricts a human rights must be necessary and proportionate to their objective.
21. Thus, in the context of Rule 81(4) applications, the Single Judge has held that *ex parte* proceedings should only be employed on an exceptional basis, and the applicant

¹³ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) at para. 8. <<http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>>

¹⁴ See *Prosecutor v. Kupreskic et al.*, Appeals Judgement, Case No. IT-95-16-A, 23 October 2001 paras. 89-90 <<http://www.un.org/icty/kupreskic/appeal/judgement/index.htm>>, *Prosecutor v. Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, 12 April 1999, para. 23 <<http://www.un.org/icty/kvočka/trials/decision-e-90412FI56822.htm>>, *Prosecutor v. Brima et al* Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment ,Case No. SCSL-04-16-PT, 1 April 2004 para. 46 <<http://www.sc-sl.org/Documents/SCSL-04-16-PT-046-1.pdf>>, *Prosecutor v. Kanu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment Case No. SCSL-2003-13-PT, 19 November 2003, para21 <<http://www.sc-sl.org/Documents/SCSL-03-13-PT-036.pdf>>; *Prosecutor v. Sesay et al.*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. SCSL-04-15-PT, 13 October 2003 para. 20 <<http://www.sc-sl.org/Documents/SCSL-03-05-PT-080.pdf>>.

¹⁵ *Prosecutor v. Ntagerura et al*, Judgement and Sentence, Case No. ICTR-99-46-T, 25 February 2004 para 32 <<http://69.94.11.53/default.htm>>, *Prosecutor v. Brdjanin and Talic*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, Case No. IT-99-36-PT, 20 February 2001, para 22 <<http://www.un.org/icty/brdjanin/trials/decision-e/10220FI214869.htm>>, *Prosecutor v. Ademi*, Decision on the Second Defence Motion on the Form of the Indictment , Case No. IT-01-46-PT, 21 January 2002, p. 4 <<http://www.un.org/icty/ademi/trials/decision-e/20121FI117469.htm>>.

must demonstrate that the ex parte proceeding would serve a sufficiently important objective, is necessary, and that the prejudice to the Defence interests is proportional to the benefit derived.¹⁶

22. Although the Defence has not been privy to the justifications submitted by the applicants in support of the requested measures, the Defence considers it dubious that these justifications could constitute exceptional measures as all applicants thus far have been granted the same protective measures. A measure can hardly be exceptional if it is implemented as the rule.

23. The Defence also questions the rationale for applying such extreme protective measures to the applicants. The justification for such protective measures for witnesses has been limited by the ad hoc Tribunals to the following grounds:

- Protective measures are only legitimate to redress fears of potential retaliation in the future; thus, they may not merely be founded on events which took place in the past. In addition, protective measures may not merely be granted on the overall security situation within a certain region.¹⁷
- The Chamber must take into account the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not to the public;¹⁸
- Any fears expressed by potential witnesses themselves that they may be in danger or at risk are not in themselves sufficient to establish any real likelihood that they may be in danger or at risk.¹⁹ These concerns must be “based on circumstances which can objectively be seen to cause fear”;²⁰ and
- If the applicant has a criminal record, or there is prima facie evidence that they are untrustworthy or have participated in crimes, they may not apply for non-disclosure of their identity.²¹

¹⁶ ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute’ dated 19 May 2006, ICC-01/04-01/06-108 at para. 13.

¹⁷ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, Case No. IT-99-36-PT, at para. 11 < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm> > .

¹⁸ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, Case No. IT-99-36-PT, at para. 24 < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm> > .

¹⁹ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, Case No. IT-99-36-PT, at para. 26 < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm> > .

²⁰ *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, < <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm> > .

²¹ *Prosecutor v. Tadic*, Decision on the Prosecution’s Motion Requesting Protective Measures for Witness L, 14 November 1995, at para. 13 cited in Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996, < <http://www.un.org/icty/tadic/trialc2/decision-e/61205pm2.htm> > .

24. The Defence strongly disputes that any of the above grounds apply to the present applications. As compared to witnesses, who may be subpoenaed if they refuse to testify, the present applicants have freely chosen to request to participate in the proceedings. They are also free to choose the timing and manner of their requests for participation, and to accept the consequences thereof.
25. The Defence also questions the justification for discriminating between the versions given to the Prosecution and those given to the Defence. The Defence is constituted of professional counsel and assistants, who are subject to the code of conduct. If the applicants are viewed as independent participants who are not linked to either the Prosecution or the Defence, how can it be presumed that the Defence would be likely to threaten or intimidate them whereas the Prosecution would not?
26. In assessing the objective risk of intimidation to witnesses, the ad hoc Tribunals have taken into consideration the fact that information regarding the witnesses might leak as a result of background inquiries conducted by the Defence in the course of its investigations.²² However, that rationale must apply equally to the Prosecution and the Defence. If the applicants are recognised as victims, and entitled to present submissions during the confirmation hearing or other hearings, it is likely that both the Defence and the Prosecution would conduct background inquiries in order to ascertain how their submissions would impact on the respective cases. Alternatively, if the victims are not permitted to make direct submissions, it is unlikely that the Defence would waste its time and resources conducting such inquiries. As such, disclosing their identities to the Defence would not generate any objective risk that information regarding their identity would be disseminated to third parties. Thus, the decision to provide the unredacted version of the applications to the Prosecution necessarily implies that they should also be provided to the Defence.

3. Request for extension of time

27. In accordance with Regulation 35, a participant may request an extension of time, and must demonstrate good cause for the extension.
28. The Defence respectfully submits that for the following reasons, there is good cause to grant the Defence an extension of time until after the confirmation hearing.

²² *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, Case No. IT-99-36-PT < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm> >

3.1 Procedural inequality between the Prosecution and the Defence

29. In the decision of 4 August 2006, the Single Judge does not impose any deadline on the Registry for disclosing the redacted versions of the applications. The Defence thus had no indication as to when the Registry will disclose the redacted versions of the applications. This uncertainty impeded its ability to organise its very limited time for Defence preparation before the confirmation hearing.
30. The deadline imposed by the Single Judge also discriminates between the Prosecution and the Defence as the Registry was presumably able to disclose the unredacted versions of the applications to the Prosecution immediately. The Prosecution will thus have the full benefit of the 14 days.
31. Although the Prosecution will also be ensconced in pre-confirmation hearing preparation, it is to be presumed that over the course of the investigations period and the process of seeking the arrest of Thomas Lubanga Dyilo, the Prosecution would have become extremely familiar with the details of their own case. They therefore do not need to engage in the same intense review of disclosure documents during this time period as will be required for Defence preparation. Accordingly, the deadline imposed by the Pre-Trial Chamber will have a disproportionate effect on Defence preparation as compared to the impact on Prosecution preparation.

3.2 Lack of Defence resources to address the applications at this stage of the proceedings

32. If one is to use the Pre-Trial Chamber's allocation of 14 days as a yardstick of the amount of time necessary to review the applications and devise response arguments, and taking into account that the Defence only received the redacted versions by 4pm, 9 August 2006,²³ it is reasonable to conclude that the Defence will not be in a position to revise and respond to the applications until at least 23 August 2006. This, however, presumes that the Defence would be able to dedicate all of its resources and time to this sole task.
33. In the Defence 'Request to file a Reply to the Prosecution's Response to Conclusion de la défense quant aux divulgations de documents expurgés par le Procureur',²⁴ the Defence informed the Pre-Trial Chamber and the Prosecution that it intended to

²³ Although the applications were notified by email on 8 August, due to their size, they were stored on a CD rom. The Registry sent the CD rom by internal mail to the OPCD on 9 August 2006.

²⁴ Filed on 1 August 2006.

conduct a mission to the Democratic Republic of Congo from 21 until 31 August 2006.²⁵ This mission will require substantial preparatory work both in terms of logistics, and in terms of formulating the Defence strategy.

34. In the meantime, the Defence has a deadline for drafting and filing its reply on the question of redactions conducted *proprio motu* by the Prosecutor, which is due on the 15 August 2006, a deadline for formulating its response on the subjective fields for the E-Court protocol, which must be presented during the Status Conference of 24 August 2006, and a deadline for responding to the observations of victims on the modalities of the participation at the confirmation hearing, which is due on 25 August 2006 .
35. If leave to reply to the observations of the DRC and victims on the request for release is granted, the reply is likely to fall due during the first couple of weeks of September.
36. If leave to appeal the Pre-Trial Chamber decision of 28 July 2006 on victim participation is granted, the Defence will have 21 days within which to file its appeal brief. Again, it is possible that this may fall due in September.
37. According to the 'Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set out in the Decision on the Final System of Disclosure'.²⁶ the Prosecution is obliged to provide the Defence with all witness statements relating to the confirmation hearing and the comprehensive charging document by 28 August 2006. The Defence then has an obligation to provide the Prosecution with a list of the evidence it intends to use during the confirmation hearing by 12 September 2006.
38. The Defence team is only comprised of one counsel and one legal assistant. Thus far, the Defence has been so busy addressing the influx of procedural motions that it has been unable to devote any meaningful time to reviewing the thousands of pages disclosed by the Prosecution, or to devising its investigative strategy for the confirmation hearing. Moreover, an additional member of the defence team will not be in a position to commence investigative actions until at least 21 August 2006, due to delays in the assignment of an appropriate investigator, which were beyond the control of the Defence. The present application thus has the potential to both delay the proceedings, and to divert the scarce resources of the Defence from the integral task of focusing on the Prosecution case.
39. The Defence would like to underscore that it should not have to choose between defending its client from possible procedural prejudice and addressing the actual

²⁵ At footnote 4.

²⁶ Dated the 24 May 2006, No. ICC-01/04-01/06-126.

merits of the Prosecution case. Nor should the Defence have to choose between having sufficient time and resources to adequately prepare its case, and Thomas Lubanga Dyilo's right to speedy proceedings. Article 68(3) is clear – victim participation should be exercised in a manner which is consistent with the rights of the Defence – this includes both the right to a speedy trial and the right to adequate time and resources.

40. Moreover, the Defence submits that the procedure utilised by the Chamber to consider applications to be recognised as victims within the proceedings should also be consistent with the rights of the Defence. Hence, the impossible burden that such applications place on the Defence should be taken into consideration when determining whether it is appropriate and consistent with the rights of the Defence to permit victim participation at this particular point in time, and even whether such applications should be stayed until such time that the Defence is in a position to properly respond.
41. In light of the timetable for disclosure, the investigative mission planned by the Defence, and the deadlines imposed for other filings which fall in the near future, the Defence is of the firm view that it will not be in a position to properly respond to these 43 applications until after the confirmation hearing.
42. In determining whether good cause exists to grant such an extension, the Defence respectfully suggests that the Pre-Trial Chamber should take into consideration the fact that the need for this request was occasioned by events beyond the control of the Defence, and was in no way caused by any negligence or lack of planning on the part of the Defence. The Defence could not possibly anticipate that so many applications for recognition as victims would be received at this late stage. In addition, due to security restrictions, which were brought to the attention of the Chamber during the last two Status Conferences, the Defence was not permitted to conduct its mission to the DRC at an earlier time.
43. The Defence also respectfully submits that such a delay would not cause undue prejudice to the applicants. If the charges are confirmed, the applications can be considered after the hearing. If, however, the charges are not confirmed, then the applicants would not have had a right of a remedy against Thomas Lubanga Dyilo. They would however retain their right to request to participate in the situation, or in any subsequent proceedings brought against other persons. In order to preserve their position in the interim, the Defence also suggests that the Pre-Trial Chamber could

order the Registry to provide the applicants with electronic copies of all public documents in the case.

44. Even if the applicants were to incur a prejudice as a result of the delay (which the Defence disputes), it would in no way be proportional to the prejudice which the Defence would incur by being forced to address the applications under the present circumstances.

4. Request to delay decision until after appeals decision

45. In the view of the Defence, several issues raised by the 'Defence Request for Leave to Appeal 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 v. Thomas Lubanga et de l'enquête en République démocratique du Congo'²⁷ are germane to the procedure and principle utilised for considering such applications.
46. The Defence therefore respectfully requests that in the event that leave to appeal the decision of 28 July 2006 is granted, that both the request for access to the unredacted versions and issue of the deadline (and by extension, the commencement of the deadline) are stayed until the Appeals Chamber renders its decision.

5. Relief Sought

47. For the reasons set out above, the Defence respectfully requests the Honourable Single Judge to:
- i. if leave to appeal the decision of 28 July 2006 is granted, stay the proceedings *vis à vis* the applications of a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06; or, in the alternative, if leave to appeal the decision of 28 July 2006 is not granted;
 - ii. order the Registry to provide the Defence with the unredacted versions of the applications; and
 - iii. order that the deadline for responding to these applications shall not commence to run for the Defence until after the confirmation hearing.

²⁷ Dated 7 August 2006.

A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above a horizontal line.

On behalf of Jean Flamme, Defence Counsel,
Melinda Taylor, Associate Counsel OPCD

Dated this 14th day of August, 2006

At The Hague