

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 14 August 2006

**PRE-TRIAL CHAMBER I**

**Before:** Judge Claude Jorda, Presiding Judge  
Judge Akua Kuenyehua  
Judge Sylvia Steiner

**Registrar:** Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR  
*vs.* THOMAS LUBANGA DYILO**

**Public document**

**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 Lubanga et de l'enquête en République Démocratique du Congo"**

**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

## Introduction

1. On 7 August 2006, counsel for Thomas Lubanga Dyilo<sup>1</sup> filed a document requesting leave to appeal Pre Trial Chamber I's "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 et de l'enquête en République Démocratique du Congo", issued by the Chamber on 28<sup>th</sup> July 2006.<sup>2</sup> Pursuant to Regulation 65 (3), the Prosecution herewith responds to the Application. The Prosecution considers that the Defence has met the requirements for leave to be granted under Article 82 (1) (d) and consequently does not oppose the Application.
  
2. The Prosecution is filing this document within the deadline imposed by the Single Judge's 9 August 2006 Decision Rectifying the Time Limit for the Prosecution and the Victims to submit their responses to the Request for Leave to Appeal by the Defence<sup>3</sup>, notified on the same day to the Prosecution.

## Argument

3. The Defence submits that the Chamber incurred the following errors:

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<sup>1</sup> Hereinafter, "the Defence".

<sup>2</sup> "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 et de l'enquête en République Démocratique du Congo", ICC-01/04-01/06-272 (hereinafter, "the Request").

<sup>3</sup> ICC-01/04-01/06 -318.

- i) Failure to address the submissions of the Defence regarding procedural inequality.<sup>4</sup>
- ii) Restriction of the Defence to a public redacted version of the Decision on Victims' participation.<sup>5</sup>
- iii) Failure to consider whether the Victims can participate in the proceedings anonymously.<sup>6</sup>
- iv) Failure to consider whether the participation of Victims at this stage is consistent with the rights of the defence – right to a fair, impartial and expeditious proceeding.<sup>7</sup>
- v) Adoption of a flawed and restrictive definition of Victims not provided for in the Statute or Rules.<sup>8</sup>

4. When developing the specific arguments on the criteria enshrined in Article 82 (1) (d), the Defence firstly contends that the Chamber did not address the substance of their arguments regarding the redactions and anonymity granted to Victims/applicants. In particular, the Defence claims that the Chamber's ruling placed the Defence in a position of disadvantage for the purposes of responding adequately to the applications, and to counter any allegations brought by the Victims.<sup>9</sup> The Defence submits that the scope of the redactions in the version provided to them was such that they were unable to ascertain whether the alleged events fall within the territorial or temporal scope of the alleged crimes set out in the warrant of arrest against Thomas Lubanga Dyilo, whether the

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<sup>4</sup> Hereinafter, the "First issue".

<sup>5</sup> "Second Issue".

<sup>6</sup> "Third Issue".

<sup>7</sup> "Fourth Issue".

<sup>8</sup> "Fifth Issue".

<sup>9</sup> Paras 36-47 of the Request.

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.<sup>10</sup>

5. The Defence further argues that the Chamber failed to consider whether the participation of Victims at this stage of the proceedings close to the confirmation hearing is consistent with the right of the defence to a fair, impartial and expeditious proceeding. The addition of participants at this stage, it is contended, would overburden the defence in view of their limited resources and the defence would not have adequate time and facilities to prepare its case.<sup>11</sup> Further, the Pre-Trial Chamber arguably failed to consider the impact of its decision on the right to an impartial hearing and presumption of innocence since the Chamber, for the purposes of determining the applicants' entitlement to participate, has found grounds for believing that the applicants suffered harm as a result of crimes allegedly committed by Thomas Lubanga Dyilo. This procedure, it is argued, has the effect of creating an appearance of prejudgement, if not actual prejudgement.<sup>12</sup>

6. Finally, the Defence contends<sup>13</sup> that the definition of a "victim" adopted by the Pre-Trial Chamber is not in accordance with the Statute and Rules, including Rule 85 which defines Victims as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court. They argue that the definition of victim is not

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<sup>10</sup> Para 40 of the Request.

<sup>11</sup> Para 48 of the Request.

<sup>12</sup> Para 53 of the request.

<sup>13</sup> Paras 63-69 of the Request.

limited to crimes investigated and charged by the Prosecution, and that the Chamber's definition reduces the Victims' role to that of secondary accusers.

7. The Prosecution submits that the Defence has met its burden of identifying appealable issues, warranting examination by the Appeals Chamber. This is particularly clear in relation to the first, second, third and fourth issues raised by the Defence. The first three of these issues relate to the right of the Defence to access identifying information pertaining to persons claiming victim status and seeking participation in the Court's process. The potential impact of the issues raised on the fairness of pre-trial proceedings is twofold. On the one hand, the issues relate to the ability of the Defence to adequately respond to applications for victim participation absent full provision of information pertaining to the applicants and the crimes allegedly suffered; on the other, to the right of the Defence to know the identity of those persons who have been admitted as victim participants and will intervene in that character at the Article 61 confirmation hearing.
  
8. The fourth issue relates to the right of Thomas Lubanga Dyilo to fair, expeditious and impartial proceedings, and the allegedly detrimental consequences to this right stemming from victim participation at the confirmation hearing and the adoption of a "grounds to believe" test by the Chamber for the purposes of determining a person's status as a victim. The first aspect of this issue goes to the heart of the expeditiousness of the confirmation proceedings, and arguably also to Thomas Lubanga Dyilo's right to speedy proceedings. The Prosecution submits that the arguments

advanced by the Defence raise the important question of the adequate balance that ought to be struck between the Victims' right to participate in the Court's process, on the one hand, and the need to ensure fair and expeditious proceedings, on the other.

9. As to the second aspect, the Chamber is well aware of the fact that the adoption and use of the "grounds to believe" test by the Pre-Trial Chamber is a matter for concern also for the Prosecution.<sup>14</sup> Regardless of the Chamber's approach to this issue in the past, it is respectfully submitted that the fact that both parties to the present proceedings share the same concerns as to the appearance of prejudice that the use of the "grounds to believe" test entails, is a strong and compelling ground for the Chamber to certify this particular question for appeal. The Prosecution further notes that the Defence is bringing additional arguments in support of its position.<sup>15</sup>

10. In 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. The Prosecution need not, however, delve further into this question, since, as stated, it is not opposing certification being granted in relation to this particular issue.

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<sup>14</sup> See "Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", ICC-01/04-141, 23 January 2006; The Prosecution has advanced further arguments as to the risks of the "grounds to believe" test in its "Prosecution's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-141, 24 April 2006, footnote 117.

<sup>15</sup> Request, paras. 54-62. See also Prosecutor's Application for Extraordinary Review, *supra* note 9.

11. In all cases, the Prosecution reserves its position as to the merits of the Defence's arguments in support of its future grounds of appeal, a matter that, as the Defence rightly concedes, and in accordance with the Court's jurisprudence, are not at issue at this stage.<sup>16</sup>
12. The Prosecution submits that the 82 (1) (d) criteria as discussed by the Appeals Chamber is met by the Defence in this application<sup>17</sup>. The Appeals Chamber stated *inter alia* that the meaning conveyed by the word advance is move forward by ensuring that the proceedings follow the right course<sup>18</sup>. The Appeals Chamber stated further that "A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal, will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process". The Appeals Chamber clarified that proceedings that may be set back by a wrong decision is the entirety of the proceedings.<sup>19</sup> Consequently, if the appealable issues set out by the Defence are found to have been wrongly decided, these would undoubtedly affect the confirmation hearing and subsequent proceedings and therefore require an immediate resolution by the Appeals Chamber.
13. While concurring that the Defence application contains appealable issues and meet the Article 82 (1) (d) criteria, the Prosecution nonetheless

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<sup>16</sup> "Decision on Prosecutor's Application for Leave to Appeal Pre-Trial Chamber II's Decision on the Prosecutor's Application for Warrants of Arrest under Article 58", 19<sup>th</sup> August 2005 (ICC-02/04-01/05-20 US-Exp) para. 15.

<sup>17</sup> Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006, paras 6-20.

<sup>18</sup> Para 15 supra.

<sup>19</sup> Paras 16-17 supra.

disagree with specific arguments advanced by the Defence pertaining to the interpretation of Article 82 (1) (d) of the Statute. In particular, the Prosecution opposes any interpretation of Article 82 (1) (d) whereby a particular participant would be placed in a privileged position vis-à-vis other participants for the purposes of seeking leave to appeal, as expressly stated by the Defence.<sup>20</sup> Whereas the Prosecution shares the view that “fairness” within the terms of Article 82 (1) (d) is broader than “equality of arms”<sup>21</sup>, and that, consequently the concept should be construed as covering respect for all rights of all participants, the Prosecution opposes the notion that any issues arguably affecting the rights of the Defence must be viewed as necessarily impacting on the fairness of the proceedings. As the Appeals Chamber noted in the Decision on Extraordinary Review, there may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination but that alone does not make it an appealable issue.<sup>22</sup> Whether a participant has met the test for leave to appeal being granted under Article 82 (1) (d) is a matter that must be decided solely on the basis of the merits of the particular application, regardless of who the applicant is in the concrete case.

14. Accordingly, there is no basis for the proposition that participants should not be treated equally for the purposes of deciding whether leave to appeal should be granted in relation to any given issue. The very concept of procedural fairness requires that all parties are treated equally, without any undue privilege or favoritism. In this sense, the Prosecution notes that

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<sup>20</sup> See Request, paras. 29-35.

<sup>21</sup> As suggested by Pre-Trial Chamber II in the 19 August 2005 Decision, *supra* note 11, para. 30.

<sup>22</sup> Judgment on the Prosecutor’s Application for Extraordinary Review, para. 9.



the Defence's reliance in the ICTY *Tadic* Appeals Judgment is misplaced. There is nothing in that decision that suggests that the defence and prosecution are placed on different pedestals during criminal proceedings, or for the purposes of specific aspects of the proceedings. It is also a well established principle in the ICTY jurisprudence that the very concept of fair trial must be applied in favor of *both* parties. The principle of equality "does not affect the fundamental protections given by the general law or Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond strict compliance with those fundamental protections".<sup>23</sup>

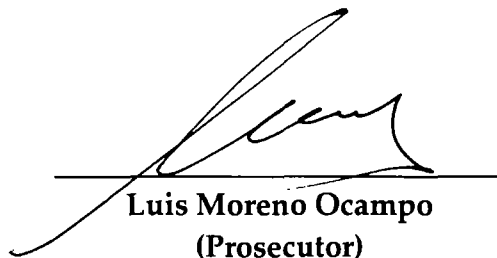
15. The Prosecution consequently submits that it is correct, as Pre-Trial Chamber I has previously suggested, that all participants begin on equal footing when evaluating the requirement of Art. 82 (1) (d) of substantial effect on the fairness of the proceedings.<sup>24</sup> For the purposes of the instant proceedings, however, despite the flawed interpretation of Article 82 (1) (d) by the Defence particularly on the interpretation of fairness, this should not result in any adverse consequences, since, as previously

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<sup>23</sup> ICTY Appeals Chamber, *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25 (available at <http://www.un.org/icty/alkesovski/appeal/decision-e/90216EV36313.htm>).

<sup>24</sup> See "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", ICC-01/04-135, 31 March 2006, para. 38.

submitted, the Defence has nevertheless satisfied the requirements for leave to appeal set forth in that provision.



**Luis Moreno Ocampo**  
**(Prosecutor)**

Dated this 14<sup>th</sup> day of August 2006  
At The Hague, The Netherlands