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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 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'**

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Introduction

1. On 9 May 2006, applications were filed on a confidential ex parte basis requesting that the applicants be accorded the status of Victims in the case against Thomas Lubanga Dyilo and be permitted to participate in the proceedings as such.
2. The applicants further specified that they did not want their identities communicated to the Defence, although they had no objection communicating them to the Prosecution.
3. In a decision issued on 18 May 2006,¹ the Honourable Single Judge granted the requested protective measures, and ordered that a redacted version of the application be provided to the Defence, whereas the Prosecution would be entitled to receive the applications in unredacted form.
4. On 8 June 2006, the Defence filed its 'Conclusions de la défense quant à la demande de participation à la procédures des requérants a/001/06', which was formulated on the basis of the redacted applications.
5. Amongst other things, the Defence argued that the procedure utilised by the applicants violated the Rules and Regulations in a manner which was prejudicial to the Defence. In particular, the Defence cited the fact that the applicants' requests for protective measures were filed on an ex parte basis, and the Pre-trial Chamber subsequently granted the protective measures requested without giving the defence an opportunity to be heard.²
6. The Defence further noted that its ability to respond to the applications was unfairly impeded by the redactions, and therefore requested to be provided with the opportunity to comment on the applications in their unredacted form.³
7. In addition, the Defence observed that since the applicants were seeking to be recognised as participants in the procedure, in which case they would accrue rights similar to a party, it was imperative that the Defence be disclosed their identity,⁴ otherwise they would in effect be operating as anonymous accusers.⁵
8. The Defence also presented submissions in relation to what in their view, would be the procedural consequences of granting the applicants the status of Victims. For

¹ Decision Establishing a Deadline for the Prosecution and the Defence to Submit Observations on the Applications of Applicants a/001/06 to a/003/06.

² At paras. 2-6.

³ At para. 7.

⁴ At para. 8.

⁵ At para. 9.

example, if the applicants were authorised to participate as Victims, they could not also participate as witnesses against the Defence.⁶

9. In terms of the question as to whether on the basis of the redacted applications, the applicants met the criteria to be considered a Victim, the Defence observed that without information regarding the date or place of the events, or the names of the persons involved, it was not in a position to properly comment whether the applications related to crimes within the jurisdiction of the court, or the causal link of these events with Thomas Lubanga Dyilo.⁷ In fact, the Defence informed the Pre-Trial Chamber that it had not even been provided with the applications of the second and third applicants.⁸
10. In terms of the legal basis for participating at this stage of the proceedings, the Defence contested the right of the Victims to participate during the current stage on the grounds *inter alia*, that such participation in the lead up to the confirmation of the charges would infringe the presumption of innocence,⁹ and would also delay and complicate the proceedings.¹⁰
11. On 1 August 2006, the Pre-Trial Chamber issued the public and redacted version of its '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 l'enquête en République démocratique de Congo*.¹¹ The Defence were not provided with the confidential unredacted version.
12. In its decision, the Pre-Trial Chamber set out the following four criteria which must be met for an applicant to be accorded the status of Victim under Rule 85 of the Rules of Procedure and Evidence:
 - i. the applicant must be a physical person;
 - ii. the applicant must have suffered a harm;
 - iii. that the crime which caused the harm falls within the jurisdiction of the Court; and
 - iv. that there is a causal link between the harm and the crime.¹²
13. The Pre-Trial Chamber also adopted the more elaborated description of these criteria, which it had articulated in its previous decision of 22 June 2006,¹³ namely that in

⁶ At para. 10.

⁷ At para. 15.

⁸ At para. 17.

⁹ At para. 18.

¹⁰ At para. 20.

¹¹ Dated 28 July 2006.

¹² At page 7.

order to participate at this stage of the proceedings, the applicants must demonstrate the existence of a sufficient causal link between the harm they have suffered and the crimes for which there is reasonable grounds to believe that Thomas Lubanga is criminally responsible for, and which are set out in the arrest warrant issued by the Pre-Trial Chamber.¹⁴

14. Regarding the first criterion, the Pre-Trial Chamber held that all applicants were natural persons.¹⁵
15. In terms of the scope of the crimes, the Pre-Trial Chamber based it on the crimes set out in the arrest warrant of Thomas Lubanga Dyilo, and confirmed that these crimes fell within the jurisdiction of the Court.¹⁶
16. With respect to applicant a/0001/06, her name and ethnicity were redacted, as were the name, birthdate, and place of birth of her son and grandson, and the date and place of the events. The following paragraphs are also redacted in such a manner as to be incomprehensible to anyone who is not privy to the redacted sections. The Pre-Trial Chamber also referred to documents which were attached in a redacted annex.
17. The Chamber concluded that there are reasonable grounds to believe that applicant a/0001/06 and those she represents had suffered moral harm as a result of the enrolment of the latter within the military of the UPC, and that there are reasonable ground to believe that the two minors represented by the applicant had suffered physical harm as a result of the fact of their enrolment in the military of the UPC.¹⁷ Finally, the Chamber held that the three persons had brought sufficient evidence to permit the Chamber to consider that there were reasonable grounds to believe that the persons were Victims of the crime set out in the arrest warrant against Thomas Lubanga Dyilo. As such, they should be recognised as Victims in the case.¹⁸
18. Regarding applicant a/0002/06, his name and ethnicity, and place of residence were redacted, as were the name and birthdate of his son, and the date and place of the alleged events. Although the Chamber referred to training camps, the place and directors of the camps were redacted. The Defence therefore has no information regarding the alleged link between these camps and the UPC.
19. The Chamber concluded that there are reasonable grounds to believe that applicant a/0002/06 and his son had suffered moral harm as a result of the latter's enrolment

¹⁴ 'Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS1 à VPRS6 dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo*'

¹⁵ At page 8.

¹⁶ At page 7.

¹⁷ At page 7.

¹⁸ At page 9-10.

¹⁹ At page 10.

within the military of the UPC, that there are reasonable grounds to believe that the son had suffered physical harm as a result of his enrolment in the UPC, and that the applicant had brought sufficient evidence to permit the Chamber to conclude that there are reasonable grounds to believe that the applicant and those he represents are Victims of the arrest warrant issued against Thomas Lubanga Dyilo. As such, the Chamber held that they should be accorded the status of Victim.¹⁹

20. With respect to applicant a 0003 06, his name, ethnicity, and place of residence were redacted, as were the place and precise date of the alleged events, and the name and birthdate of his son.²⁰ Any information regarding why the applicant believed the military to be linked to the UPC is either non-existent or redacted.

21. The Chamber concluded that there are reasonable grounds to believe that the applicant had suffered moral harm as a result of the enrolment of his son within the military of the UPC, that there are reasonable grounds to believe that his child was a victim of the practice of the UPC of recruiting minors in a village (whose name is redacted) to reinforce their troops, and that the applicant has provided sufficient evidence to permit the Chamber to believe that there are reasonable grounds to believe that he was a victim of the crimes set out in the arrest warrant issued against Thomas Lubanga Dyilo.²¹

22. The Chamber therefore ordered the Registry to disclose all public documents in the case file to the applicants, and granted the applicants 15 days from the notification of the decision to file observations regarding the modalities of their participation during the confirmation hearing.²²

23. In accordance with article 82(1)(d) of the Statute, and Rule 155 of the Rules of Procedure and Evidence, the Defence hereby seeks the leave of the Chamber to appeal the decision on the basis that the Chamber:

- Erred by failing to address the submissions of the Defence regarding the procedural inequality it faced in addressing the substance of the applications;
- Erred by failing to accord the Defence procedural equality by restricting the Defence to a public redacted version of the Decision;

¹⁹ At page 11.

²⁰ Pages 11-12.

²¹ Pages 12-13.

²² Page 16-17.

- Erred by failing to address the submissions of the Defence regarding the question as to whether it was permissible for the Victims to participate in an anonymous manner;
- Erred by failing to consider whether the participation of the Victims at this stage was consistent with the rights of the Defence, in particular, the right to a fair, impartial and expeditious proceeding; and
- Erred by utilising a definition of Victims which is not based in the Statute or Rules, and which discriminates against classes of potential defence-oriented Victims.

2. Submissions

24. Article 82(1)(d) of the Statute provides that a party may appeal a “decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the conduct of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” In accordance with Rule 155 of the Rules of Procedure and Evidence, a party wishing to appeal under this provision has five days from the notification of the impugned decision to do so.

25. The criteria for being granted leave to appeal under this provision was initially stated by Pre-Trial Chamber II, and subsequently cited with approval by Pre-Trial Chamber I,²³ namely, that the “Application must be examined in light of the following three principles: the restrictive character of the remedy provided for in article 82(1)(d) of the Statute; the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal”.²⁴

26. Pre-Trial Chamber I also confirmed that the applicant must establish that the decision involves an issue that would significantly affect the fair and expeditious conduct of

²³ 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’ issued on 31 March in the Situation in the Democratic Republic of Congo proceedings, at para. 19.

²⁴ Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58’ No. ICC-02-04-01-05-US-EXP, 19 August 2005 at para 15.

the proceedings or outcome of the trial and an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings.²⁵

27. The Defence respectfully submits that the present request for leave to appeal involves issues that would significantly affect the fair and expeditious conduct of the pre-trial proceedings, and in addition, an immediate resolution of the issues by the Appeals Chamber would materially advance the pre-trial proceedings, and if the charges are confirmed, subsequent proceedings.

28. As a preliminary observation, the Defence notes that whilst it has been generally accepted that any arguments regarding the merits of the appeal will be disregarded,²⁶ in previous decisions, the Pre-Trial Chamber has considered the substance of the issues raised for appeal in order to determine firstly, whether the issues derived from the decision, and secondly, whether resolution of these issues was necessary for fair and expeditious proceedings.²⁷

2.1 The Criterion of Fairness

2.1.1 Legal definition

29. Although the Defence acknowledges that article 82(1)(d) evinces a strict control over interlocutory appeals, the Defence nonetheless submits that the emphasis in article 82(1)(d) on fairness and expeditiousness militate in favour of a more lenient approach vis à vis applications from the Defence. Under article 67(1), the Defence possess the right to a fair hearing. The minimum guarantees set out in the subsequent sub-paragraphs are components of this right to a fair hearing.²⁸ Accordingly, if the issues for appeal affect the rights of the Defence, as set out in those sub-paragraphs, it can only be concluded that the issues will impact on the fairness of the proceedings.

30. In this regard, the Defence disagrees with the definition of fairness previously utilised by the Pre-Trial Chamber in its 31 March 2006 decision, in which, after discussing linguistic roots of fairness in the concept of equity,²⁹ the Pre-Trial Chamber concluded that “fairness of the proceedings includes respect for the procedural rights

²⁵ At para. 26.

²⁶ At para. 30.

²⁷ 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 6¹ issued on 31 March 2006 in the Situation in the Democratic Republic of Congo proceedings, and Decision on the Prosecution Motion For Reconsideration and in the Alternative, Leave to Appeal² issued on 23 June 2006 in the Situation in the Democratic Republic of Congo, Case against Thomas Lubanga Dyilo.

²⁸ See *inter alia* Decision on the Final System of Disclosure and the Establishment of a Timetable, Annex I at para. 5 (and footnote 12), issued on 15 May 2006 in the Situation of the Democratic Republic of Congo in the Case against Thomas Lubanga Dyilo.

²⁹ At para. 38.

of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes”.³⁰

31. The Pre-Trial Chamber also described fairness as equating to “equilibrium between the parties” or the “principle of adversarial proceedings”.³¹
32. The Defence is of the view that the cases cited by the Pre-Trial Chamber at paragraph 38 (and footnote 30 in particular) in support of its definition of fairness actually relate to principle of equality of arms, as opposed to the broader right to a fair trial. However, in the ICTY Tadić appeals judgement, the Appeals Chamber observed that “[t]he parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee (“HRC”) under the ICCPR. The HRC stated in *Morael v. France* that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms.”³² The Defence would like to emphasise the use by the Appeals Chamber of the words ‘covers’, and ‘includes’: i.e. the right to a fair trial covers/includes equality of arms. This therefore implies that the right to a fair trial in fact broader than the right to equality of arms. It is indeed possible to envisage the situation whereby equality of arms may have been accorded to the parties, but the proceedings were not fair, for example, due to a lack of due diligence or impartiality.
33. The Defence also notes that human rights jurisprudence has held that discrimination and procedural unfairness can also result as a consequence of treating unlike things in a like manner.³³
34. Since the proceedings concern the deprivation of liberty of Thomas Lubanga Dyilo, it is in fact unfair to hold that all participants, including Victims, should be placed in the same position. This is particularly the case when the right being pursued by Victims is a civil right (the right to a remedy), whereas Thomas Lubanga Dyilo potentially faces a criminal penalty. The Statute also expressly states that Victim participation shall not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”³⁴. Thus, the Statute recognises that the right of Victims to participation

³⁰ At para. 38.

³¹ At para. 38.

³² Appeals Judgement of 15 July 1999, *Prosecutor v. Dusko Tadić*, Case No. IT-95-I-A, at para. 44 <<http://www.un.org/icty/tadic/appeal/judgement/index.htm>>

³³ See for example, *Thlimmenos v. Greece* 34369-97 (2000) 17 ECHR 162 <<http://www.worldlii.org/au/cases/ECHR/2000/162.html>>. See also para. 8 of the Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) <<http://www1.umn.edu/humanrts/gencomm/hrcom18.htm>>

³⁴ Article 68(3).

in the proceedings is subordinate to the rights of the Defence. In this regard, since the Statute expressly places an obligation on the Pre-Trial Chamber to ensure that a decision concerning whether and how an applicant is permitted to participate as a Victim at a particular stage of the proceedings comports with the criterion of fairness, it is arguable that any decision concerning Victims participation in a concrete case *prima facie* affects the fairness of the proceedings, and thus fulfils the first criterion of article 82(1)(d).

35. The Defence also submits that a further consequence of the principle that the Pre-Trial Chamber should not automatically equate the positions of the participants is that the fact that the Pre-Trial Chamber may have dismissed certain grounds for appeal raised by the Prosecution in their application earlier this year in the context of the Situation of the Democratic Republic of Congo, should not bar the Defence from raising similar grounds in the context of the concrete case against Thomas Lubanga Dyilo.

2.1.2 Application of the definition to the issues, which are the subject of the requested appeal

2.1.2.1 Failure to address the submissions of the Defence regarding the procedural inequality it faced and will continue to face in addressing the submissions of the applicants

36. As noted above, although the Pre-Trial Chamber described the legal submissions of the defence regarding the redactions and anonymity granted to the applicants, the Pre-Trial Chamber did not address the substance of these arguments.
37. To the extent that the decision silently endorsed the use of such redactions and the anonymity of the Victims, it has also set a precedent for future Victims' applications in this case.
38. The Defence submits that the procedure employed by the Pre-Trial Chamber, both in terms of procedure governing the ability of the parties to respond to the applications and the procedure employed in notifying the parties of the legal and factual basis of the decision, violated the principle of equality of arms, which as discussed above, is a component of fairness.
39. 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.

40. 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.
41. 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.
42. In the case of two of the applicants, the fact that the Defence were not provided with any documentation or justification for participation completely denied the Defence the opportunity to meaningfully comment on the substance of their applications and to structure their response strategy and arguments accordingly.
43. The extent of the redactions in the resulting decision continues to have the effect of depriving the Defence of the ability to analyse the substance of the applicants' allegations, for the purpose of this particular request, and for the purpose of its preparation for the confirmation hearing. In this regard, the Defence submits that it is highly inappropriate to place the Defence in the same position as the general public in such a matter. By limiting the Defence to the public redacted version of the decision, the Defence are procedurally treated like second-tier participants. The Statute and Rules of Procedure and Evidence recognise that the rights of the Defence should comprise the central concern of all court proceedings whereas in the present procedure, the Defence have been relegated to the position of sideline commentators.
44. In terms of the result of the decision, it is arguable that the acceptance of these Victims may assist the Prosecution in its case, for example, by corroborating certain events or policies. In fact, because the Defence has not been disclosed the identities of the Victims, it is unable to determine whether the Victims were ever interviewed by the Prosecution as potential witnesses.

45. The redactions and anonymity granted to the Victims will also continue to perpetuate unfairness in the proceedings. Under article 67(1)(e), the Defence has the right to examine persons accusing or providing evidence against the accused/person and to raise any defences. Although Victims exercise a role which is distinct from the Prosecution, in effect and in the eyes of the public, the Victims' applications accuse Thomas Lubanga Dyilo of committing crimes within the jurisdiction of the Court. In this connection, the Defence referred in its response to the prohibition under human rights law of anonymous accusers.³⁵
46. As noted by the Prosecution in their request for leave to appeal dated 23 January 2006,³⁶ the Chamber lacks investigative tools of its own, and is therefore not in a position to conduct inquiries regarding the credibility of the documents submitted by the applicants. In addition, it is not necessarily in the interests of the Prosecution to conduct such inquiries or to challenge the applicants' credibility. It is therefore imperative that the Defence is placed in a procedural position where they can meaningfully challenge such applications or documents submitted by Victims in the proceedings.
47. The Defence therefore submits that the failure of the Pre-Trial Chamber to consider the submissions of the Defence on these issues, and to order appropriate measures to safeguard the rights of the Defence had and continues to have a significant affect on the fairness of the proceedings.

2.1 2.2 Failure to consider whether the participation of the Victims at this stage was consistent with the rights of the Defence, in particular, the right of a fair, impartial and expeditious proceeding

48. As observed above, article 68 requires the Court to consider whether the stage of participation is appropriate and exercised in a manner which is not prejudicial to the Defence and is consistent with the rights of the accused and a fair and impartial trial.
49. Although the Pre-Trial Chamber analysed whether the applicants complied with the criteria to be recognised as Victims in the proceedings, the Chamber failed to consider this second limb of article 68. In the last paragraph of its decision, the Chamber

³⁵ See for example, Second Report on the Situation of Human Rights in Peru, Inter-Am. C.H.R., OEA Ser.L.V.B.106, Doc. 59 rev. (2000), (Chapter II) < <http://www1.unm.edu/humanrts/iachr/country-reports/peru2000-chap2.html#66#66>

³⁶ Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, filed in the Situation of the Democratic Republic of Congo, at paragraph 5.

granted the applicants 15 days to submit observations concerning the modalities of their participation in the confirmation hearing. However, it is the view of the Defence that article 68 requires the Chamber to determine whether participation would prejudice or impact on the rights of the Defence before granting the right to participate - the procedure utilised by the Chamber has thus put the cart before the horse. It will also, as will be addressed below, delay the proceedings.

50. In terms of the question as to whether it is appropriate to participate at this stage, the Defence submits that the Chamber should not merely conduct a theoretical inquiry as to whether in general, it is appropriate to participate during the pre-confirmation stage. Rather, the Chamber should undertake this assessment in light of the particular circumstances of this case, for example, the fact that the confirmation hearing is scheduled for the very near future, the fact that the Defence is already overburdened with pending disclosure issues and has extremely limited resources to address the current volume of filings, the fact that the confirmation hearing has already been delayed once pursuant to the request of the Prosecution, and finally, the fact that Thomas Lubanga Dyilo is currently in detention, and as such, all organs of the Court should exercise due diligence to facilitate his right to speedy proceedings.
51. Under article 67(1)(b), the Defence has the right to adequate time and facilities for the preparation of his defence. Article 67(1)(c) enshrines the right to be tried without undue delay. The inclusion of additional participants in the proceedings at this point in time will result in additional filings, and require the Defence to focus not only on the case of the Prosecution, but also any allegations of the Victims which are potentially detrimental to the Defence. The consequence of the Chamber's failure to consider the impact of Victims' participation on this particular stage of this particular case is that the Defence team will simply not have the time and resources to ensure Thomas Lubanga's right to effective representation.
52. The Defence also submits that the Pre-Trial Chamber failed to consider the impact of its decision on Thomas Lubanga Dyilo's right to an impartial hearing, which comports to the principle of the presumption of innocence.
53. The decision of the Pre-Trial Chamber essentially constitutes findings regarding the alleged culpability of Thomas Lubanga Dyilo for crimes falling under the jurisdiction of the Court. One of the criterion for Victims' participation is that there are 'grounds to believe' that the applicants suffered harm as a result of crimes committed by Thomas Lubanga Dyilo, which fall within the jurisdiction of the court. The fine distinction between this test and the test for confirming charges (whether there are

substantial grounds to believe) invites confusion and an appearance of prejudgement, if not actual prejudgement. In addition, the finding that there are grounds to believe that Thomas Lubanga committed crimes within the jurisdiction of the Court has the effect of alleviating the onus of proof for the Prosecutor. As a result of such a finding, the Prosecutor now only has to prove that these grounds meet the requisite substantial level.

54. The Defence is aware that when such arguments were raised by the Prosecution in its application for appeal of the 17 January 2006 decision, the Pre-Trial Chamber responded that the “system established by the Statute under articles 55, 58, and 61 requires that a Preliminary Chamber rule on the existence to believe, reasonable grounds to believe and substantial grounds to believe that a person committed a crime falling within the jurisdiction of the Court. Were one to adopt the Prosecutor’s line of reasoning, the issuance of an arrest warrant or summons to appear would also constitute a prejudgment with respect to a decision on the confirmation of charges and would therefore be detrimental to the fairness of proceedings”.³⁷

55. However, the Defence respectfully submits that there is a clear distinction between the procedures set out in the articles cited by the Pre-trial Chamber (articles 55, 58, and 61) and Victims’ participation, and the safeguards against prejudice to the Defence set out therein.

56. With respect to the procedure set out in article 55, article 55(2) provides that “[w]here there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by the national authorities pursuant to a request made under Part 9, that person shall have the following rights [...]”. The assessment of reasonable grounds is made by the entity questioning the person rather than the court judging the person. The provision also operates to the benefit of the suspect rather than their detriment, and as such, should be construed widely to protect the rights of the suspect.

57. Article 58(1)(a) requires the Pre-Trial Chamber to issue an arrest warrant if after assessing the application and evidence submitted by the Prosecution, it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court. This provision is however qualified by article 21(3), in particular, the requirement under international human rights law that pre-trial detention should be the exception rather than the rule.

³⁷ At para. 59.

58. A decision under article 58 also does not prejudge the Defence position – it constitutes a finding that on the basis of Prosecution evidence and arguments and without the benefit of a Defence response, there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. In contrast, decisions on Victims' applications constitute an evaluation of the respective positions of the Prosecution, Victims and the Defence.
59. Moreover, as opposed to the appellate regime for Victims' applications, a person subject to an arrest warrant has an automatic right to challenge the finding of the Pre-Trial Chamber regarding the grounds for issuing the arrest warrant under article 60(2) of the Statute.
60. Regarding article 61, which governs the procedure for confirmation of charges, article 61(7) provides that the Pre-Trial Chamber can only base its determination on testimony and evidence presented during the hearing. This contrasts to the procedure utilised by the Chamber in its decision on the Victims' applications, which was significantly based on ex parte confidential material.
61. Article 61(11) also protects the impartiality of the proceedings by stipulating that if the charges are confirmed by the Pre-Trial Chamber, the Presidency shall constitute a Trial Chamber which shall be responsible for the conduct of the subsequent proceedings. Notably article 68 refers to the Court, as opposed to the Pre-Trial Chamber or Trial Chamber. There is thus no obligation that such applications be heard by the Chamber seised of the case. Article 58 and 61 recognise that preliminary decisions regarding culpability can impact on the impartiality of the Chamber, or at least, the appearances of impartiality, and as such, the person should have the right to automatically challenge such decisions (article 58) or to have a new Chamber (article 61).
62. Accordingly, in view of the fact that Defence does not have an automatic right to challenge decisions on Victims' participation, or an entitlement that following such a decision, the case is automatically transferred to a new Chamber, the Chamber's decision of 28 July 2006 necessarily and significantly impacts on the question as to whether the Defence will receive a fair and impartial hearing by this Pre-Trial Chamber at the confirmation hearing.

2.1.2.3 The definition of Victim employed by the Pre-Trial Chamber

63. The definition and criteria for Victims' participation employed by the Pre-Trial Chamber requires that the applicant establish they have suffered harm as a result of a crime charged by the Prosecution and attributed by the Prosecution to Thomas Lubanga Dyilo.
64. Rule 85 of the Rules of Procedure and Evidence defines Victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". Article 68(3) of the Statute conditions Victims' participation on the requirement that "the personal interests of Victims are affected". The Pre-Trial Chamber purportedly derived its criteria for Victims' participation from these provisions.
65. However, the Defence respectfully submits that there is nothing in Rule 85 or article 68(3), or elsewhere in the Statute or Rules which links and limits the definition of Victims or Victims' participation to crimes investigated and charged by the Prosecution.
66. In the view of the Defence, the emphasis in article 68(3) on the personal interests of the Victims being affected refers to being affected by the proceedings as opposed to being affected by the person/accused. Linking participation to having a personal concern in the outcome of the proceedings is consistent with the principle under human rights instruments of Victims' right to a remedy.
67. The right to a remedy implies that Victims have the right to have the correct person held criminally responsible and the incorrect person acquitted. Hence, a remedy does not necessarily imply that the person who has been arrested must be convicted. For example, a person may wish to participate in the proceedings in order 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. Alternatively, the applicant might be of the view that the crimes charged by the Prosecution should have been attributed to someone else, or did not occur in the manner charged by the Prosecution.
68. There are thus several scenarios for Victims' participation which are excluded by the definition of Victim utilised by the Pre-Trial Chamber.
69. The Defence respectfully submits that the effect of this exclusion is that Victims' participation is cast in the mould of the Prosecution: their participation is limited to the role of secondary accusers rather than participating in order to facilitate the truth.

This clearly causes a grave imbalance in the proceedings and moreover, fundamentally jeopardises the impartiality of the proceedings.

2.2 The Criterion of Expeditious

70. Since the right to a speedy trial is also a component of the right to a fair trial, the Defence already addressed the impact of this decision on the expeditious conduct of the proceedings at paragraphs 51 and 52 above.
71. The Defence would also like to refer to the fact that three days after the public redacted version of the Chamber's decision was issued, the Chamber issued another decision concerning the receipt of 43 new requests to participate in the case against Thomas Lubanga Dyilo.⁵⁸ Since the Chamber's decision of 28 July 2006 did not qualify the right to participate at this stage of the proceedings to address the particular circumstances of this case (in particular, the limited time frame before the confirmation hearing), there is nothing to prevent the filing of many further such applications before the confirmation hearing. Accordingly, the Defence submits that it faces the prospect of being tied up responding to a multitude of applications as a direct consequence of the 28 July 2006 decision.
72. In addition, the decision of the Chamber to defer consideration of the modalities of participation until after the decision was issued, rather than addressing the Defence submissions on this point before granting the right to participate, will also trigger further submissions and responses from the parties, and an additional possibility of a request for appeal. This will further impact on the expeditious conduct of the proceedings, and will set a time-consuming procedural precedent.

2.3 The requirement that an immediate resolution by the Appeals Chamber would materially advance the proceedings

73. The charging process is an extremely important and sensitive procedure. If confirmed, the charges will form the crux of all future proceedings against Thomas Lubanga Dyilo. Given the limited time and resources available to the Defence before the confirmation hearing, it imperative that the Defence completely devote itself to

⁵⁸ 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

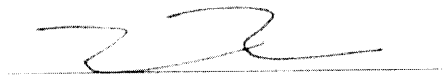
considering the Prosecution case, rather than diverting its resources to shadow-box the (redacted or ex parte) allegations and submissions of anonymous Victims.

74. In addition, the hearing for the confirmation of charges represents an extremely valuable opportunity for the Defence to seek the release of their client on the basis that there are not sufficient grounds to believe that he committed a crime under the jurisdiction of the court. It would be extremely unfair, not to mention a waste of resources to continue the proceedings and keep Thomas Lubanga Dyilo in custody if the test for confirming charges is not properly met due to the fact that the impartiality of the Chamber was compromised, the ability of the Defence to provide effective representation was impeded by the influx of Victim participants and attendant filings, or the Defence was deprived of the ability to challenge these anonymous accusations.
75. Finally, the recent decision of 4 August 2006 foreshadows many future such applications in this case.³⁹ It would therefore materially advance the proceedings to obtain an Appeals Chamber decision as soon as possible in order to determine the correct procedure for hearing for such applications, and the legal regime for determining whether the applicants were entitled to participate as Victims in the particular circumstances of this case rather than continue processing such requests in a manner which is detrimental to the Defence, and which will result in significant delays.

3. Relief requested

76. For the aforementioned reasons, the Defence of Thomas Lubanga Dyilo respectfully requests the Honourable Pre-Trial Chamber to grant leave to appeal the 28 July 2006 decision.

³⁹ The Defence notes that in the 'Decision on the Prosecution Motion for Reconsideration and in the Alternative, Leave to Appeal' issued in the case of Thomas Lubanga Dyilo on 23 June 2006, the fact that the Prosecution had indicated that it would file similar such applications in the future warranted the conclusion that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings (at para. 34).

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

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

Dated this 7th day of August, 2006

At The Hague