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

Public

**Prosecution's Substantive Response to Thomas Lubanga Dyilo's
21 September 2006 Request for Leave to Appeal**

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Introduction

1. The Prosecution hereby submits its Response to the substantive arguments advanced by the Applicant in his Request for Leave to Appeal. The Prosecution submits that the Application for Leave to Appeal does not identify any issue which satisfies the criteria of Article 82(1)(d): the primary issues are already before the Appeals Chamber, and the other issues referred to in the Application are either premature or do not actually arise in the Decision under discussion.

Procedural Background

2. On 15 May 2006, the Single Judge issued the "Decision on the Final System of Disclosure and the Establishment of a Timetable".¹
3. On 19 May 2006, the Single Judge issued the "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules".²
4. On 23 June 2006, the Single Judge granted the Prosecution leave to appeal in respect of three issues raised in the 19 May Decision.³ The Prosecution filed its "Prosecution's Document in Support of Appeal" on 5 July 2006.⁴ The Defence filed its "Defence submissions in response to the document in support of appeal by the Prosecutor of 5 July 2006" on 20 July 2006.⁵
5. On 15 September 2006, the Single Judge issued the "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81".⁶

¹ ICC-01/04-01/06-102 (hereinafter, the "15 May Decision").

² ICC-01/04-01/06-108 (hereinafter, the "19 May Decision").

³ Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, ICC-01/04-01/06-166 (hereinafter, the "23 June Decision Granting Leave to Appeal").

⁴ ICC-01/04-01/06-183.

⁵ ICC-01/04-01/06-199-tEN.

⁶ ICC-01/04-01/06-437 (hereinafter, the "Decision").

6. On 21 September 2006, Counsel for Thomas Lubanga Dyilo filed a document entitled "Request for Leave to Appeal the First Decision on the Prosecution's Requests and Amended Requests for redactions Under Rule 81".⁷
7. On 25 September 2006, the Single Judge ruled that the Application had been filed within the applicable time limit, and granted the Prosecution until 27 September 2006 to file a response to the substance of the Application.⁸

Discussion

8. Under Article 82(1)(d), leave to appeal may be granted if the decision "involves an issue which affects the fair and expeditious conduct of the proceedings ... 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." The Appeals Chamber has confirmed that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".⁹
9. The Applicant takes a very belligerent approach in the Application. It identifies a list of errors which it claims the Single Judge made in the Decision, and then structures its application for leave against these alleged errors.¹⁰ As a result, the Application at points delves into a discussion of the merits of any future appeal, rather than the appellability of identified issues.¹¹

⁷ ICC-01/04-01/06-456 (hereinafter, the "Application").

⁸ Decision on the Prosecution's Response to Thomas Lubanga Dyilo's 21 September 2006 Request for Leave to Appeal, ICC-01/04-01/06-466, 25 September 2006.

⁹ 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, para. 9 (emphasis added), as recognized in the Application, para. 10.

¹⁰ See Application, para. 11, which lists "appellable errors" allegedly committed by the Single Judge.

¹¹ See for example Application, paras. 26, 35, 49-51. The Prosecution notes that any discussion of the correctness of the Decision or the merits of any future appeal are not relevant or appropriate at the stage of seeking leave to appeal – see e.g. "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

10. The nature of the approach taken in the Application makes it difficult to identify the appellable issues on which the Applicants are seeking leave.¹² As the Prosecution understands the Application, the Applicant is seeking leave to appeal the following issues:

- a. Whether non-disclosure of the identity of witnesses can be ordered *vis-à-vis* the defence for the purposes of the confirmation hearing, and the criteria and procedure for making such orders;¹³
- b. Whether summary evidence can be admitted in a confirmation hearing without the disclosure of the identity of the witnesses;¹⁴
- c. Whether the Single Judge may overturn a ruling made *inter-partes* through an *ex-parte* procedure;¹⁵
- d. The alleged tainting of, or pre-judgment by, the Single Judge.¹⁶

11. The Prosecution submits that the Application has in large part set out appropriate standards for the elements of Article 82(1)(d): fairness,

Proceedings of VPRS 1 - 6, ICC-01/04-135-tEN, 31 March 2006 (hereinafter, the "31 March Decision Denying Leave on Victim Participation"), para. 25.

¹² The Prosecution notes that the Application also contains misrepresentations of fact, which further complicate this process. For example, the Applicant appears to assert, or to mistakenly believe, that the Prosecutor and the Single Judge have been discussing and reviewing all the evidence *ex-parte* (Application, para. 29). This is not correct: the Prosecutor has only brought before the Single Judge the limited portions of evidence which require redactions, as required by Rules 81(2) and (4); any reviews have addressed those sections which are likely to identify the witnesses concerned, and have not focused on the evidentiary value of the material. The Applicant also appears to assert that the Single Judge's Decision to Postpone the Confirmation Hearing (Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, ICC-01/04-01/06-126, 24 May 2006) was based on a conclusion that unredacted statements of all Prosecution witnesses must be disclosed to the defence (Application, para. 33). This is also not correct: the Decision to Postpone the Confirmation Hearing was citing a submission of the Prosecution (Prosecution's Request Pursuant to Rule 121(7) for Postponement of the Date of the Confirmation Hearing, ICC-01/04-01/06-114-Conf, 22 May 2006, para. 9) which addressed the need to disclose the identities of certain, core witnesses which for legal reasons are instrumental in the Document Containing the Charges; the Prosecution did not concede (and the Decision to Postpone the Confirmation Hearing did not decide on) the need to disclose the identities of all witnesses and their unredacted statements.

¹³ Application, paras. 13-15, 20, 24, 53, 55. See also paras. 33-34, 40.

¹⁴ Application, paras. 24-25, 46, 54-55. See also para. 40.

¹⁵ Application, paras. 21-24, 27.

¹⁶ Application, paras. 28-29, 37-40. See also para. 19.

expeditiousness, and when immediate resolution by the Appeals Chamber will materially advance the proceedings. The Prosecution does submit, however, that while “fairness can not automatically be achieved by equating the procedural rights of all participants”,¹⁷ nor does fairness require that in principle the standards be lower for the defence.¹⁸ Rather, fairness requires that the rights and obligations of all participants be respected.¹⁹

12. Despite a generally correct enunciation of the relevant standards, the Prosecution submits that leave to appeal is not warranted in the present case, as (a) the central issues raised in the Application are already before the Appeals Chamber, and therefore granting leave in this case will not materially advance the proceedings but in contrast will delay and unnecessarily complicate proceedings; and (b) the other alleged issues do not arise from the Decision, or leave to appeal for those issues based on the limited terms of the Decision is premature.

(a) Non-disclosure of the identity of witnesses vis-à-vis the defence for the purposes of the confirmation hearing

13. While the Decision may have been the first time that non-disclosure of identities of a witness *vis-à-vis* the defence has been specifically ordered by the Pre-Trial Chamber, the issue of the scope and propriety of non-disclosure of identities to the defence has been in issue before the Pre-Trial Chamber for

¹⁷ Application, para. 12.

¹⁸ As implied by the Applicant, *ibid*, referring to fairness “requir[ing] that a degree of procedural leniency is applied to the Defence”, albeit recognizing that this is justified only “in appropriate circumstances”, and relying on “the difficulties faced by the Defence in international criminal proceedings.”

¹⁹ 31 March Decision Denying Leave on Victim Participation, paras. 38-39. See also Prosecutor’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, para. 48 (“fairness involves more than mere equality of arms, and extends to respect for the rights of all participants.”)

some time.²⁰ The Applicant has already made extensive submissions on this point.²¹

14. More importantly, the issue is also already before the Appeals Chamber. As noted by the Applicant,²² the Pre-Trial Chamber has already granted leave to appeal “[t]he issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing”.²³
15. In his pleadings before the Appeals Chamber, the Applicant has already argued that “[c]learly it is not possible for the accused person to defend himself against ‘redacted’ evidence. For example, how could he challenge the credibility of a witness whose identity and origin are kept secret from him?” He went on to clarify that the disclosure of identities must apply equally to all witnesses, leaving no room for non-disclosure of identities.²⁴
16. The issue relating to the scope, propriety, and criteria for granting any non-disclosure of the identity of witnesses for the purpose of the confirmation hearing is therefore already squarely before the Appeals Chamber. The Applicant has already availed himself of an opportunity to make submissions on this issue and his position is clear.²⁵ The Prosecution submits that granting leave to appeal this issue at this stage would not serve to materially advance the proceedings, but would only complicate and unduly delay the proper resolution of the issue by leading to parallel litigation pertaining to the same issue.

²⁰ 15 May Decision, p. 6; 19 May Decision, paras 28-35.

²¹ See e.g. Observations of the Defence relation to the system of disclosure in view of the Confirmation Hearing, ICC-01/04-01/06-92, 2 May 2006, pp. 5-6, 12.

²² Application, para. 13.

²³ 23 June Decision Granting Leave to Appeal, p. 26 (dispositif); see also paras. 31-32.

²⁴ Defence submissions in response to the document in support of the appeal by the Prosecutor of 5 July 2006, ICC-01/04-01/06-199-tEN, 20 July 2006, p. 6.

²⁵ *Ibid.*

(b) *Summary evidence at a confirmation hearing without the disclosure of the identity of the witnesses*

(i) Summary evidence is provided for by the Statute and prior decisions of the Single Judge

17. Given that the issue of whether non-disclosure of witness identities can be ordered *vis-à-vis* the defence for the purpose of the confirmation hearing, and the criteria for granting such an order, is already before the Appeals Chamber, the only new issue raised by the Application is limited to whether the use of summary evidence at the confirmation hearing, or the use of such evidence without the disclosure of the identity of the witness, in and of itself affects the fairness of the proceedings.

18. The Prosecution recognizes that if non-disclosure of the identity of witnesses through redactions to their statements is determined to be inappropriate – an issue which, as already stated, is currently before the Appeals Chamber – then the reliance on summaries for the purpose of not disclosing that same identity would be impermissible as well. However if non-disclosure of witness identities can be justified in some circumstances in the lead-up to the confirmation hearing, then the Prosecution submits that the fact that this might be accomplished through the mechanism of summary evidence, as provided for in Articles 61(5) and 68(5), rather than redactions to statements can not affect the fairness of the proceedings.

19. The Applicant claims that he had no warning that the use of summaries was in issue.²⁶ The Prosecution notes that Article 61(5) explicitly refers to “summary evidence” being presented at the confirmation hearing, and Article 68 (5) expressly permits the Prosecutor to withhold evidence and submit a summary for the purposes of any proceedings conducted prior to the commencement of

²⁶ Application, para. 27.

trial, where the disclosure of evidence may lead to the grave endangerment of the security of a witness or his or her family. The Prosecution therefore submits that the fact of the statutory framework on protective measures explicitly stating that summaries of evidence are permissible at confirmation hearings should have been sufficient to put the Applicant on notice. The Prosecution further submits that the possibility of evidence being presented by written summary had been expressly referred to in the 15 May Decision and the 19 May Decision.²⁷ Thus, contrary to the Applicant's submission, it is clear that he had ample notice.

(ii) The Application in respect of this issue is premature

20. Given that the issue of the propriety of non-disclosure of witness identities to the defence prior to the confirmation hearing has already been placed before the Appeals Chamber by the Applicant in other proceedings (as respondent), the new issue here is limited to whether the use of summaries – *per se*, or in the circumstances of this case – affects the fairness of the proceedings.
21. The possibility of using summary evidence has been contemplated in the jurisprudence of the Pre-Trial Chamber since the earliest decisions relating to disclosure.²⁸ The possibility of such evidence being used is also explicitly contemplated in the Statute.²⁹ Thus, the mere possibility of the use of summary evidence *per se* cannot affect the fairness of the proceedings – to suggest that it must is to claim that the Statute explicitly provides for a violation of the rights of the accused.
22. Regarding the circumstances in this case, it is instructive to look at the precise scope of the Decision in relation to the use of summaries, which decides that “unless the Prosecution assures the Chamber by 25 September 2006 at 10h00

²⁷ 15 May Decision, p. 6 (“regardless of whether the Prosecutor intends to call them to testify or to rely on ... a written summary of the evidence”); see also 19 May Decision, para 28. See below, para. 25.

²⁸ 15 May Decision, p. 6; 19 May Decision, para. 28.

²⁹ See above, para. 19.

that the said witnesses, or some of those witnesses, have freely consented to the immediate disclosure of their identities to the Defence after having been adequately informed of the risks for their security inherent to such disclosure, the Prosecution shall be able to rely on the said witnesses at the confirmation hearing only with the authorisation of the Chamber after it has examined the summaries proposed by the Prosecution in relation to their statements, transcripts of their interviews and/or the investigators' notes and reports of their interviews."³⁰

23. The Decision does not authorize the Prosecution to rely on any summary evidence. Rather, it merely requires the Prosecution to choose between a number of options to resolve the difficulties that the Chamber has identified relating to witness protection, including to consider applying for authorization to use summary evidence. The Application is thus premature; further, it misrepresents the scope of the Decision.³¹

24. As the Chamber has not yet authorized the use of any summaries at the confirmation hearing, there is no basis for seeking leave to appeal a decision that has not yet been made. It is possible that any proposed summary evidence will not be authorized by the Chamber. Furthermore, the Applicant is speculating that if the summary of evidence is filed in the future, it would be inadequate for the purpose of preparation for the confirmation hearing. Any determination of whether the use of summary evidence affects the fairness of the proceedings cannot be answered in the abstract, but could only be made based on the totality of the circumstances: it cannot be judged without knowing the nature and extent of the proposed summary evidence, or the role that this evidence plays in the overall case against the accused at the confirmation hearing.

³⁰ Decision, p. 9.

³¹ See above, footnote 12.

(c) *Whether an inter-partes ruling may be altered ex-parte*

25. In the 15 May Decision, the Single Judge decided that “pursuant to rule 76 of the Rules, and unless the single judge authorises otherwise under rule 81 of the Rules, the Prosecution must disclose to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted, non redacted statements, or a written summary of the evidence contained in those statements”.³² This clearly sets out that, although the general rule may be disclosure of the names of witnesses to be relied on at the confirmation hearing, this is subject to the exception under Rule 81 whereby the Single Judge may authorize non-disclosure. The 15 May Decision also explicitly contemplates reliance on evidence in the form of written summaries.

26. In this Decision, the Chamber merely applied these principles in a reasoned manner. The Chamber observed that the ultimate purpose of the redactions proposed by the Prosecution is to preserve the non-disclosure of the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing because (i) their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage; and (ii) no other protective measure that could significantly minimise such a danger is currently available and feasible. It further observed that the recent deterioration of the security situation in some parts of the DRC has had an impact on the range of protective measures currently available. The Chamber concluded that non-disclosure of identity *vis-à-vis* the Defence for

³² 15 May Decision, p. 6 (emphasis added).

the purpose of the confirmation hearing is the only available and feasible measure for the necessary protection of many Prosecution witnesses.³³

27. The Decision is entirely consistent with the previous decisions of the Chamber, including the 15 May Decision, and therefore does not over-turn any earlier, *inter-partes*, ruling. As this purported issue does not arise from the Decision, the Prosecution submits that leave to appeal cannot be granted.³⁴

(d) Allegations of taint or prejudgment

28. The Applicant appears to claim that the Single Judge has been tainted by her review of material prior to the confirmation hearing.³⁵ At the outset, the Prosecution stresses that it is sensitive to issues relating to possible prejudgment of a case by a Chamber. The Prosecution, like the Applicant, sought leave to appeal against the new procedure and standard created by the Pre-Trial Chamber for the purposes of determining victim participation, on the basis that the development of extra-Statutory procedures involving the assessment of evidence did risk at least the appearance of prejudgment.³⁶

29. However in this situation, the allegations of taint or prejudgment are based on the Single Judge following a procedure specifically provided for in the Statute

³³ Decision, p. 7.

³⁴ 23 June Decision Granting Leave to Appeal, paras. 18, 25.

³⁵ Application, para. 28.

³⁶ 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 - 6, ICC-01/04-103, paras. 23-28; Request for Leave to Appeal the 'Décision sur les demandes de participation a la procédure a/0001/01, a/0002/06, a/0003/06 dans la cadre de l'affaire Le Procureur v Thomas Lubanga et de l'enquête en République du Congo', ICC-01/04-01/06-272, 7 August 2006, paras. 52-61. The Prosecution did not oppose leave to appeal on this issue when the Applicant raised it in the previous context, see Prosecution's Response to 'Thomas Lubanga' Dyilo's "Request for Leave to Appeal the 'Décision sur les demandes de participation a la procédure a/0001/01, a/0002/06, a/0003/06 dans la cadre de l'affaire Le Procureur v Thomas Lubanga et de l'enquête en République du Congo'", ICC-01/04-01/06-331, 14 August 2006, paras. 8-9.

and the Rules.³⁷ The Applicant merely complains that “it will be difficult for the Chamber not to consider the relevance of the summaries in light of the full version of the statements which they have previously reviewed.”³⁸ There are many situations in the Statute and the Rules which require the Chamber to consider one body of material, and later for the same Chamber to make a decision based on a different set of evidence. The argument put forward by the Applicant could also be turned to allege that a Chamber was tainted, or had prejudged the issue, because it had issued an arrest warrant in respect of a person and then later decided whether or not to confirm charges against that person.³⁹

30. The Prosecution submits that without arguments or evidence substantiating the alleged taint of the Single Judge, or her alleged prejudgment,⁴⁰ then this issue does not arise from the Decision and accordingly leave may not be granted.⁴¹

(e) Other arguments made by the Applicant

31. The Application also makes a series of other allegations, which the Prosecution submits do not disclose an issue which affects the fair and expeditious conduct of the proceedings:

³⁷ Rules 81(2) and (4) specifically require the Prosecution to apply to the Pre-Trial Chamber for rulings relating to restrictions on disclosure, which necessarily require the Chamber to review the material in question.

³⁸ Application, para. 28.

³⁹ See also 31 March Decision Denying Leave on Victim Participation, para. 59.

⁴⁰ The Applicant also alleges that the Single Judge “Violat[ed] the presumption of innocence” when in stating that delay of the transmission of the statements until shortly before the confirmation hearing would be an “inadequate solution should the charges be confirmed” (Application, para. 37, quoting the Decision, p. 8). The Prosecution notes that the Single Judge was referring to the situation “should the charges be confirmed” (emphasis added): considering the possibility that the charges might be confirmed, not assuming that they would be. The Prosecution therefore submits that no issue of prejudgement or violation of the presumption of innocence arises based on this statement.

⁴¹ 23 June Decision Granting Leave to Appeal, paras. 18, 25.

- a. On the alleged failure of the Single Judge to provide a reasoned decision,⁴² it is unfair and inaccurate to assert that reasons have not been given. In light of the scope of the present Decision,⁴³ the Prosecution submits that there is no requirement that further reasons be given. Moreover, the foundations for the present Decision were laid out in earlier decisions, including the 15 and 19 May Decisions previously referred to. The issues in the Decision are a culmination of a combination of previous decisions and protective issues ventilated during the *ex-parte* hearings. The Single Judge has consistently given the underlying reasons for the Decision as essentially the need to protect witnesses and victims as provided for under the Statute and the Rules. The Prosecution finally submits that to give more detailed reasons may endanger the security of the victims and witnesses that are subject to the protective measures in question.

- b. On the alleged failure to consider the temporal scope of the security situation in the DRC,⁴⁴ the Prosecution submits that contrary to the suggestion of the Applicants that non-disclosure is essentially due to the deterioration of the security situation in the DRC, it was merely a factor taken into consideration by the Single Judge. The primary reasoning was the general and broader protection of victims and witnesses. Consequently the submissions of the Applicant in paragraphs 34 and 35 are misconceived. The Decision of the Single Judge was essentially based on the non availability of alternative effective protective measures, a finding which was not unreasonable under the circumstances.

⁴² Application, para. 14.

⁴³ See e.g. paras. 22 - 24, above.

⁴⁴ Application, paras. 30-35.

- c. On the alleged failure to consider alternative solutions,⁴⁵ the point is moot as the confirmation hearing has been postponed from 28 September 2006. In any event, the Single Judge did consider alternative measures before the impugned Decision. The Single Judge was of the view that despite alternative measures like redactions, the relevant prosecution witnesses may still be identified.
- d. The Applicants also raise allegations that the Single Judge is questioning the professional integrity of the defence team or alleging that Thomas Lubanga Dyilo is dangerous.⁴⁶ The Prosecution submits that no such implications or allegations on the part of the Single Judge can be distilled from the Decision. The Decision is based on a range of factors which support the conclusions reached therein. Any recognition by the Single Judge that expanding the circle of people with access to certain highly sensitive information may increase the risk of the inadvertent dissemination of that information cannot and should not be read as any aspersion on the integrity of any individual, but merely a reflection of reality.⁴⁷

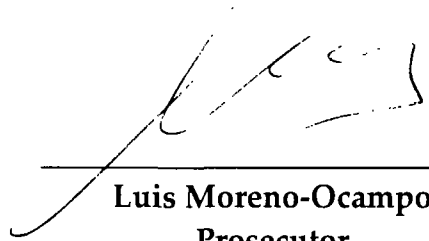
⁴⁵ Application, paras. 47-51.

⁴⁶ Application, paras. 16-19.

⁴⁷ In relation to the submission that the Decision could portray Thomas Lubanga Dyilo as dangerous (Application, para. 19), the Prosecution notes that the Decision was made within the statutory framework of protective measures for witnesses. The Prosecution submits that the Applicant's reliance on ECHR jurisprudence dealing with security measures imposed on a suspect, such as handcuffing in public to prevent escape, is not relevant to the point at issue and that the allegation is unfounded. The Prosecution further notes that in the ECHR case to which the Applicant refers, the handcuffing of the suspect "did not violate the presumption" of innocence: Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 175 (emphasis added)

Conclusion

32. For the above referred reasons, the Prosecution respectfully requests the Chamber to deny the Application for leave to appeal.



Luis Moreno-Ocampo
Prosecutor

Dated this 27th day of September 2006
At The Hague, The Netherlands