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Date: **28 September 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 Leave to Appeal the Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06

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1. Introduction:

1. On 22 September 2006, the Honourable Pre-Trial Chamber issued the 'Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06'.[1] The Decision informed the parties that the above-name applicants had filed confidential *ex parte* applications to participate in the case of Thomas Lubanga and the situation of the DRC.
2. The Pre-Trial Chamber further cited articles 68(1), and 57(3)(c) of the Rome Statute, and Rule 86 of the Rules of Procedure and Evidence in support of the proposition that the Pre-Trial Chamber may instruct the Registrar to provide the Prosecutor and the Defence with a redacted copy of the persons application, in strictly limited circumstances and in a manner which gives the parties sufficient information to determine their position as to whether the applicants meet the criteria to be recognised a victims in the proceedings.
3. The Pre-Trial Chamber concludes, however, that the present situation of the applicants only requires that redacted versions be given to the Defence, whereas the Prosecution would be entitled to receive a non-redacted copy of the applications.
4. The Defence therefore seeks leave to appeal the decision pursuant to article 82(d) of the Rome Statute, on the grounds that the impugned decision affects the fair and expeditious conduct of the proceedings, and an immediate resolution of the issue would materially advance the proceedings

2. Submissions.

2.1 Identification of an appealable issue

5. The Defence observes that the Appeals Chamber has determined that the threshold for being granted leave to appeal pursuant to article 82(d) consists of two components: "[t]he first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber."[2]
6. In terms of this first component, the identification of an appealable issue, the Appeals Chamber further specified that it was necessary for the moving party to identify a

[1] ICC-01/04-01/06-463
[2] Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 8.

subject or topic, the resolution of which has been necessary for the judicial determination in question (the impugned decision).[3]

7. The Defence is of the position that the decision erred by:
   - utilising a procedure and criteria for imposing protective measures which were *ultra vires* the Statute;
   - violating the principle of equality of arms by placing the prosecution in a privileged position vis a vis its ability to respond to the applications;
   - infringing the presumption of innocence by automatically assuming that the providing of the unredacted versions of the applications to the Defence would create a risk to the applicants; and
   - and failing to place any time limits on the ability of applicants to request to participate before the confirmation hearing.
8. These errors correspond to the following issues, which in the view of the Defence, were integral components judicial determination in question.
   - whether the Chamber may *proprio motu*, and without providing the Defence or the prosecution with a previous opportunity to present submissions, grant protective measures;
   - whether the range of protective measures which the Chamber can order in accordance with article 81(4) extends to redacting the identities of the applicants from the Defence;
   - whether it is consistent with the requirements of fairness and equality of arms to place the Prosecutor in a privileged position vis à vis their access to the substance of the victims applications;
   - whether the failure of the Chamber to utilize rigorous and transparent criteria for determining whether the measures in question were warranted violated the presumption of innocence; and
   - whether the Pre-trial Chamber's overarching obligation to ensure the fairness of the proceedings requires that some limitations be placed on the timing of applications to participate as victims in the proceedings.

2.2 Criterion of Fair

[3] Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

2.2.1 Issue 1: Whether the Chamber may proprio motu, and without providing the Defence or the prosecution with a previous opportunity to present submissions, grant protective measures

9. The Defence is of the view that requests for protective measures for victims are governed by Rule 87(1), and are thus subject to the conditions set out in Rule 87(2): that is, such requests for protective measures shall not be submitted *ex parte*,[4] 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.[5] 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.[6]
10. The impugned decision does not actually elaborate on the justification for not giving the Defence and the prosecution an opportunity to respond, or why the procedural safeguards set out in Rule 87(1) are not applicable.
11. In a previous decision, the Chamber opined that "the procedure under article 68(1) of the Statute and Rule 89(1) of the Rules […] allow for a decision on such requests before notice of such requests is given to the Prosecution and the Defence; that is because, during the application process, the Applicants have not yet been granted the procedural status of victim in the case against Thomas Lubanga Dyilo, which means that their entitlement to participate in the case remains uncertain; and that, given the particular circumstances of the Applicants, resorting to this measure was necessary."[7]
12. There appears to be two underlying legal assumptions: firstly, that persons who are neither victims nor witnesses may nonetheless avail themselves of the protective measures which are available for victims and witnesses, but without complying with the procedural safeguards which attach to such measures; and secondly, that Rule 89(1) of the Rules of Procedure and Evidence sets out an alternative procedure for granting protective measures for victims, which obviates the need for the Chamber to satisfy the procedural requirements of Rule 87(1).
13. The Defence respectfully submits that the Chamber's reliance on Rule 89 is flawed and mandates a procedural precedent which is highly detrimental to the rights of the Defence, and the requirements of a speedy trial.

[4] Rule 87(2)(a) of the Rules of Procedure and Evidence.
[5] Rule 87(2)(b) of the Rules of Procedure and Evidence.
[6] Rule 87(2)(d) of the Rules of Procedure and Evidence.
[7] Decision on Defence Motion for Leave to Appeal, 18 August 2006, ICC-01/04-01/06-338

14. In terms of the distinction employed by the Chamber between victims and applicants requesting to be victims, the Defence observes that this distinction is nowhere present in the Statute. For example, Rule 89(1) provides that victims can apply to be recognized as victims. Similarly, Rule 89(2) provides that if the application of a victim to be recognized as a victim has been rejected, the victim can reapply. It necessarily follows that the reference in Rule 87(1) to requests from victims for protective measures necessarily includes requests filed by applicants requesting to be victims. The Chamber can not ignore the plain terms of the Rules.
15. Regarding the question as to whether the Chamber can rely on Rule 89(1) in order to avoid the procedural requirements set out in Rule 87(1), the Defence respectfully submits that the objective of rule 89(1) is to govern the modalities of judicially processing applications to be recognised as victims, and the attendant rights of response. In contrast, rule 87(1) falls within subsection 2, which is titled protection of victims and witnesses. Rule 87(1) is also drafted broadly to refer to all requests for protective measures falling under articles 68(1) and 68(2). It is therefore manifestly clear that the drafters intended that Rule 87 rather than Rule 89(1) should be the controlling provisions for protective measures.
16. In terms of the substance of Rule 89(1), it provides that "[s]ubject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application [for recognition as victim] to the Prosecutor and the Defence". The Defence strongly contests any assumption that the mere reference to article 68(1) permits the Chamber to order the redaction of the applications before they are transmitted to the parties, without providing the parties with a right to be heard in relation to such measures. Firstly, although the Rule expressly cites article 68(1), it does so in the context of requiring that the rule be applied in a manner which is subject to <u>all</u> provisions in the Statute, including article 67(1). Secondly, although rule 89(1) might permit the Chamber to order that protective measures (although the Defence disputes the application of such measures to the Defence) be granted before the applications are transmitted to parties, it does seek to govern the modalities of such protective measures, in particular, it does not authorise the Chamber to grant such measures without seeking the views of the parties. In the absence of such an express provision, the right of the Defence to be heard prevails.
17. In any case, both rule 87(1) and rule 89(1) expressly state that they are subject to article 68(1) of the Statute. Thus, irrespective of whether the Chamber cites Rule 87(1) or rule 89(1), it can not ignore the requirement that any measures (and procedures)

invoked under article 68(1) must be consistent with the rights of the Defence and a fair trial.

18. In its decision, the Chamber merely stated that it was necessary to issue the order for redactions without first seeking the views of the Defence and Prosecutor. The Chamber not only failed to elaborate on why it was necessary to do so, it failed to consider whether such a procedure was consistent with the rights of the Defence.

19. In terms of necessity, the Pre-Trial Chamber has already implemented a procedure for applications for protective measures for witnesses according to which the fact of the application must be disclosed to the Defence in order to provide the Defence with an opportunity to present any submissions before the Chamber determines whether such measures are appropriate and necessary. This is absolutely no reason why such a procedure could not be employed in relation to victims' applications.

20. Regarding the question as to whether the procedure utilised was consistent with the rights of the Defence, the Defence would like to reiterate that article 67 enshrines the right to be heard. As noted by the Pre-Trial Chamber in several decisions, the rights set out in article 67 apply to all stages of the proceedings. Accordingly, the right to be heard applies to all procedural applications both in relation to the process utilised to determine the outcome and the outcome itself.

21. A further consequence of the Chamber's decision to deny the Defence a right to be heard before imposing the protective measures is that the onus for determining the merits of imposing redactions was reversed. Since the Chamber has already determined it its decision of 22 September 2006 that protective measures were warranted in accordance with article 68(1), article 57(3)(b), and Rule 86, rather than the applicants or the chamber being required to demonstrate exceptional circumstances, the Defence were presented with the redactions as a *fait accompli*. In effect, the Defence is forced to request the Chamber to reconsider a decision to which it was not initially a party and is therefore subject to the attendant argumentative difficulties of doing so. In this regard, the Defence submits that a right to be heard translates to a right to be heard at first instance.

22. The assumption of the Chamber that the interest and right of the Defence to be disclosed the identity of the applicants does not crystallise until after the Chamber has granted them the status of victim ignores the fact that the Defence could suffer irreversible procedural prejudice during the interim. For example, the arguments of the Defence as to whether the applicants meet the criteria to be recognised as victims might be contingent on certain information pertaining to their identities. Similarly, the

Defence might have information that incontrovertibly contradicts the assertion of an applicant that he/she was physically present in the alleged location at the alleged time that the alleged harm occurred, or that the reasons of the applicants for identifying the perpetrators as UPC were clearly incorrect.

23. However, if the Defence is only notified of the victims' identities after the decision to recognise the applicants as victims has been issued, it may be too late for the Defence to subsequently request leave to appeal the decision recognising the applicants as victims. Even if the Defence is granted an extension of time to file leave to appeal, the possibility of being granted leave to appeal is highly uncertain, and in any case, the argumentative onus on appeal is far more difficult.

24. As a final point on this issue, the Defence observes that in the Chamber's recent decision rejecting the Defence request for leave to appeal the decision admitting as a/0001/06 to a/0003/06 as victims in the case,[8] the Chamber held that the Defence had waived its right to raise the issue of redactions, and opined that the Defence "could have filed a motion requesting the lifting of all or part of the redactions and, in the alternative, leave to appeal against the Decision".[9] In the view of the Defence, the proposal implies that the two options (requesting the redactions, and if rejected, requesting leave to appeal the rejections) are real and available remedies. The Defence thus submits that the Chamber has implicitly conceded that a request for access to redactions meets the criteria to be granted leave to appeal pursuant to article 82(1)(d) of the Statute.

2.2.2 Issue 2: whether the range of protective measures which the Chamber can order in accordance with the Statute extends to redacting the identities of the applicants from the Defence.

25. In the impugned decision, the Chamber cited article 57(3)(c), and 68(1) of the Statute, Rule 89(1) of the Rules and Regulation 35 of the Regulations of the Court as a legal basis for the redactions.

26. Article 57(3)(c) provides that the Chamber may, "[w]here necessary, provide for the protection and privacy of victims and witnesses". It has been observed that "[t]he protection and privacy of victims and witnesses is dealt within in article 68, thus the reference in article 57 mainly serves the purpose of clarifying the competence of the

[8] Decision on Defence Motion for Leave to Appeal 18 August 2006, ICC-01/04-01/06-338
[9] 'Decision on Defence Motion for Leave to Appeal' 18 August 2006, ICC-01/04-01/06

Chamber to provide for the applicable measures at the pre-trial stage".[10] Article 57(3)(c) therefore does not constitute an independent basis for granting protective measures which are not subject to the requirements set out in Article 68(1). The power of the Pre-Trial Chamber to issue orders in accordance with article 57(3)(C) should also be balanced by the responsibility of the Chamber under article 57(3)(b) to order such measures as are necessary to assist in the preparation of the Defence.

27. In terms of Rule 89(1), as stated above, the Defence strongly disputes that it sets forth any criteria or procedures for protective measures which are independent of article 68(1) of the Statute.

28. The Defence therefore submits that article 68(1) should be the primary reference for determining the propriety of redacting the identities of the applicants from the applications disclosed to the Defence. The application of article 68(1) invites two inquiries: firstly, whether the range of measures envisaged by articled 68(1) includes redacting the identities of the applicants from the applications provided to the Defence (the first limb of article 68(1)), and if so, whether such a measure would be consistent with rights of Defence and the requirements of fair trial (the second limb of article 68(1)).

29. In its request for access to the unredacted versions of the applications, the Defence delineated the following arguments.

30. Firstly, the Defence underscored that as a matter of statutory interpretation, any rights set out in article 67(1) could only be derogated from in accordance with express provisions to the contrary. The Defence asserted that neither the Statute nor the Rules explicitly contemplated such a measure (redaction of identities) being imposed against the Defence, as opposed to the general public, for the protection of persons who were voluntarily applying to be a party in the proceedings.[11]

31. Secondly, the Defence observed that even if such measures were within the power of the Chamber to grant under article 68(1), they would violate the Defence's right to be

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[10] F. Guariglia, K. Harris, 'Functions and Powers of the Pre-Trial Chamber' in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, at page 749.

[11] In this regard, the Defence refers to article 34 of the European Convention on Human Rights, which states that the Court shall not receive any applications which are filed anonymously. < http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf > Article 33 of the Rules of Court of the European Court of Human Rights, which requires that all applications must be filed publicly with the identity of the applicant, although the applicant may request in exceptional circumstances that confidential measures apply *vis à vis* the general public < http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf >. Similarly, article 33 of the Rules of Procedure of the Inter-American Court provides that applications must provide "the name and address of the original petitioner, and also the name and address of the alleged victims, their next of kin" < http://hei.unige.ch/humanrts/iachr/rule12-03.html >.

heard and to be informed of nature of the allegations against him.[12] In this connection, the Defence referred to the fact that such redactions greatly hinder the ability of the Defence to meaningfully respond to the substance of the applications.

32. The imposition of redactions also impact on the coherence of any subsequent decision of the Chamber as to whether the applicants meet the criteria to be recognised as victims, which has the consequence of impeding the ability of the Defence to request to appeal such a decision. As stated in its previous request for leave to appeal, the Defence considers that it is highly inappropriate to place the Defence in the same position as the general public in such a matter.
33. For these reasons, the Defence respectfully submits that the issue as to whether it legally possible, and consistent with the rights of the accused to order that the applications provided to the Defence be redacted goes to the heart of fairness.
34. The Defence also observes that in a prior decision regarding a prosecution request for leave to appeal, the Single Judge concluded that decisions regarding the scope of protective measures are "directly related to the fairness of the proceedings insofar as non-disclosure could affect the ability of the Defence to fully challenge the evidence of the relevant Prosecution witnesses and has an impact on the rights of the Defence pursuant to articles 61 (3) and (6) (b) and 67 (1) of the Statute."[13] The Defence submits that in order to be consistent with this decision, the Chamber must also conclude that orders for redactions are also directly relevant to the fairness of proceedings.

2.2.3 Issue of equality of arms

35. Unlike the Defence, the Prosecution was provided unredacted versions of the original applications and the resulting decision of the Pre-Trial Chamber. It will therefore in a better position to assess the merits of the application and, consequently, to submit a more detailed and accurate response. In the view of the Defence, the decision to discriminate between the respective rights of the Defence and the prosecution to receive unredacted versions violated the principle of equality of arms.
36. As stated in a previous Defence application, the Defence is of the view that the fact that the Pre-Trial Chamber distinguished between the respective right of the

[12] The drafting history of article 68(1), the reference to appropriate measures in article 68(1) was intended to replicate the range of measures set out in Rule 75 of the respective rules of procedure and evidence of the ICTY and ICTR (D. Donat-Cattin, 'Protection of Victims and Witnesses' in in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, at page 875). However, Rule 75 does not allow for ex parte measures to be imposed against the Defence.
[13] Decision on the prosecution motion for reconsideration and, in the alternative, leave to appeal, 23 June 2006, ICC-01/04-01/06-166 at para. 32.

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.

37. In terms of the possible result of the decision, it is arguable that the acceptance of these applicants as victims may assist the Prosecution in its case, for example, by corroborating certain events or policies. However, since the Defence has not been disclosed the identities of the applicants, it is unable to determine whether any of the applicants were ever interviewed by the Prosecution as potential witnesses, and thus whether the issues of collusion or prior inconsistent statements comes into play.

38. In fact, certain statements or portions of statements may also have contained information which was exculpatory or helpful for the Defence case, and it may indeed have been consistent with the rights of the Defence to have such persons participate in the proceedings as victims. However, since the Defence has not been disclosed the precise details of their statements, it is in effect, denied access to a potentially exculpatory source of information.

39. As noted by the Prosecution in their request for leave to appeal dated 23 January 2006,[14] 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 inquires 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.

40. In light of the above, the Defence submits that the redactions will continue to handicap the Defence in the proceedings by denying it access to a potentially useful source of information, and as a corollary effect, excluding the Defence from any hearings or prosecution requests regarding the substance of the applications, whilst at the same time, providing the prosecution with an unjustified advantage.

2.2.4 Violation of the presumption of innocence and the appearances of justice

41. As a preliminary point, the Defence notes that the Chamber is clearly not requiring the existence of exceptional circumstances before invoking such measures because the Chamber has granted protective measures (imposed against the Defence) for every single application thus filed.

[14] 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.

42. In the impugned decision, the Pre-Trial Chamber merely concludes that "la situation actuelle des demandeurs exige que le conseil de la Défence reçoive une copie expurgée des demandes dans laquelle toute information qui pourrait mener à leur identification aura été supprimée".
43. In response, the Defence respectfully submits that behind this anodyne conclusion lies a disturbing level of bias and preconceptions in relation to the Defence, which infringes the presumption of innocence.
44. The Defence considers that the fact that the Pre-Trial Chamber concluded that disclosure of the identities of all and any participants to the Defence could potentially endanger the applicants is either a conclusion regarding the professional competence of the Defence team, or an allegation regarding the potentially dangerous propensities of Thomas Lubanga Dyilo. In this regard, the Defence stresses that the presumption of innocence translates to "a right to be treated in accordance with this principle".[15]
45. Even if the decision of the Single Judge was merely a neutral assessment that disclosure of their identities would in itself inevitably cause difficulties for the applicants – then on what grounds does the Single Judges distinguish between disclosing their identities to the Prosecution as compared to the Defence?
46. The Defence is also concerned that the most recent decision is merely evidence of a disturbing trend towards associating the Defence with potential threatening and intimidating behavior, whilst aligning the interests of victims with the Prosecution. This is particularly evident when considering the contemporaneous decision to provide the ad hoc counsel with redacted versions of applications, which was issued in the situation file. Although the ad hoc counsel was not representing any concrete client but rather the interests of the Defence *per se*, the Chamber nonetheless concluded that there would be a potential risk if the unredacted versions were disclosed to the ad hoc counsel. This conclusion could be construed as a clear statement that the interests of victims are automatically opposed to and threatened by those of the Defence.
47. The Defence further submits that even if the Court's decisions are in good faith and not motivated by any bias or partiality, the Court must be extremely cautious regarding the impact of its decisions on the appearances of justice and impartiality. The impugned decision could give the impression to the public that the Court considers that Thomas Lubanga Dyilo is dangerous and has reason to seek retaliation against victims. In this regard, the Defence notes that the European Court of Human

[15] 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. 7. < http://www1.umn.edu/humanrts/gencomm/hrcom13.htm >

Rights has concluded that security measures imposed on a suspect must be limited to what is strictly necessary for security reasons because measures, such as handcuffing a suspect or accused in public, create the impression that the suspect/accused is dangerous, and may foster the conclusion in the eyes of the public that he is therefore guilty.[16]

48. For the above reasons, the Defence considers that the issue as to whether the Chamber can *proprio motu* conclude that that disclosure of the identities of the applicants to the Defence would create a real risk of endangerment to the safety of the applicants, without any objective or real indications to this effect, directly concerns the fairness of the proceedings.

2.2.5 Failure to impose any threshold test

49. In the Defence request for access to unredacted versions and an extension of time, the Defence submitted 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.

50. Indeed, Rule 89 (2) allows the Chamber to reject applications *in limine* if it considers that the criteria set out in article 68(3) of the Statute have not been met. In turn, article 68(3) of the Statute provides that the Court "shall permit [victims'] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court". In the view of the Defence, this necessarily implies that the Chamber must consider whether it is appropriate to admit a large volume of applications in the months immediately preceding the confirmation hearing, given the sheer number of outstanding issues which must also be addressed by the parties in this short time period.

51. Although the power to dismiss the applications *in limine* is discretionary, as a rule of statutory construction, if an article provides for discretionary power, the Court must consider whether it is appropriate to exercise such a power.

52. The Defence therefore submits that it was incumbent for the Chamber to consider whether it would be appropriate to reject *in limine* any applications which because of

[16] S. Treschel, Human Rights in Criminal Proceedings (Oxford University Press Oxford 2005) at page 175.

their size and the timing of the filing, will *ipso facto* delay the proceedings in violation of article 67(1)(c) and prejudice the ability of the Defence to have sufficient time and resources for its preparation for the confirmation hearing, as required by article 67(1)(b).

53. Failure to impose any threshold criteria could open the floodgates to countless applications, with no restriction as to the latest date that such application could be filed. The Defence would thus face the spectre of being confronted with such applications right up until the day of the confirmation hearing.
54. The Defence also submits that such an approach would be consistent with the fact that the Statute imposes limitations on the ability of the Prosecution to disclose or provide documents after a certain date before the confirmation hearing, or to subsequently raise new charges/allegations. It also would not prejudice the ability of the applicants to reapply at a later stage in accordance with Rule 89(2).

2.3 Criterion of Expeditious

2.3.1 Issue 1: Whether the Chamber may proprio motu, and without providing the Defence or the prosecution with a previous opportunity to present submissions, grant protective measures;

55. The Defence respectfully submits that the procedure utilised by the Chamber in the present and past instances creates a two level tier for granting protective measures, i.e. the Chamber orders the applications to be redacted, the Defence is then informed of the order, and must then attempt to contest the decision to impose such redactions, which the Prosecution and the applicants have a right to respond to. This process draws out what should be a relatively simple procedural process.
56. Moreover, in order to request access to the unredacted versions, the Defence is effectively compelled to request the Chamber to reconsider their previous conclusions, which in practice, is an extremely onerous task.

2.3.2 Issue 2: Whether the range of protective measures which the Chamber can order in accordance with article 81(4) extends to redacting the identities of the applicants from the Defence;

57. As a general point, the Defence notes that the more relaxed the procedure is for applying to be recognized as victims, the more likely it is that the court will receive a

greater volume of applications. Whilst this could be construed as a positive consequence, a greater volume of applications will inevitably impact on the expeditiousness of the proceedings.

58. The granting of anonymity may also encourage the filing of fraudulent applications, which would constitute an abuse of process and impede the expeditiousness of the proceedings. In this regard, the Defence does not wish to challenge the good faith of applicants per se, but would nonetheless like to observe that the risk of anonymity being used as a shield for false testimony has been demonstrated by the experiences of the ad hoc Tribunals in relation to anonymous witnesses.[17]

59. Indeed, there may be many instances in which early disclosure of the person's identity would allow the Defence to bring important information to the attention of the Court in a timely and effective manner, for instance, if the Defence has incontrovertible information that the applicant was not actually in the DRC at the relevant point in time.

60. As the matter currently stands, if the Defence is subsequently disclosed the identities of the applicants only after they have been admitted as victims, the Defence would in such a situation have to request the Chamber to grant an extension of time post facto to appeal the decision granting the applicant the status of victim. This would be a lengthy and inefficient process, which could have been avoided by the timely disclosure of their identities.

2.3.3 Issue 3: Whether it is consistent with the requirements of fairness and equality of arms to place the Prosecutor in a privileged position vis à vis their access to the substance of the victims applications;

61. As noted above, the fact that the Chamber has implicitly aligned the interests of the applicants with those of the Prosecution has consequently given the Prosecution access to a potentially valuable source of information, which may corroborate of provide new information to their case.

62. In contrast, although the information might also be potentially useful for the Defence, the Defence can not immediately cross-reference the details of the applications with the Prosecution's allegations since it has yet to be provided with the crucial details of the applicant's accounts, nor is it certain that it will be provided with such details. This necessarily impacts on the speed and efficacy of Defence preparation.

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[17] See for example, 'Decision on Prosecution Motion to Withdraw Protective Measures for Witness L' *Prosecutor v. Tadic* 5 December 1996, Case No. IT-94-1-T < http://www.un.org/icty/tadic/trialc2/decision-e/61205pm2.htm >

63. In addition, in order to preserve its position, in the absence of the precise details of the applications, the Defence is generally forced to oppose them, whereas if it had been provided with these details, it may have verified that it was in the interests of the Defence for these persons to participate as victims. The latter possibility may indeed obviate the need for extensive responses and replies in relation to their right to participate and the modalities of participation, which would thus expedite the proceedings.

2.3.4 Whether the failure of the Chamber to utilize rigorous and transparent criteria for determining whether the measures in question were warranted violated the presumption of innocence;

64. In the view of the Defence, the blanket assumption of the Chamber that all applicants warrant protective measures, irrespective of whether the applicants indeed requested or warrant such measures, is highly contentious and therefore invites litigation on the issue.
65. In addition, in the absence of any transparent criteria as to why the Chamber considered it necessary to order the redactions, the Defence must contest them in order to counter any public or internal perception that the measures were warranted by the dangerous or unethical propensities of the Defence.

2.3.5 Issue 5: Whether the Pre-trial Chamber's overarching obligation to ensure the fairness of the proceedings requires that some limitations be placed on the timing of applications to participate as victims in the proceedings.

66. The Defence submits that its arguments as to why this issue impacts on the fairness of the proceedings also directly touched on the impact of this issue expeditiousness of the proceedings.

2.4 Criterion that an immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings

67. As submitted above, the fact that the Defence has not had access to the identities of the applicants will severely impede its ability to meaningfully comment on the contents of the applications, it will impede the ability of the Defence to comprehend the bases for the Chamber's eventual decision (which – if past practice is any indication - will be

redacted from the Defence), and necessarily excludes the Defence from any hearings with the applicants or in which the applicants identities are discussed. An early resolution of this issue would immediately obviate the aforementioned issues, and would also preempt any future challenges to the impartiality of this chamber.

68. The amorphous legal and factual criteria used by the Chamber to grant the redactions may also serve as a precedent for other areas, such as the right of the prosecution to redact *proprio motu* materials emanating from a person who is neither a victim nor a witness. An early resolution of the issue by the Appeals Chamber is therefore critical to clarify and provide legal certainty in this area.

69. Moreover, as argued in a previous Defence request, 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 considering the Prosecution case, rather than diverting its resources to shadow-box the (redacted or ex parte) allegations and submissions of the applicants.

70. 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 ability of the Defence to provide effective representation was impeded by the influx of applications and attendant filings, or the Defence was deprived of the ability to effectively challenge these anonymous accusations.

71. 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 considering such applications, and the question as to whether the Chamber should impose a deadline for receiving such applications if the fact of the filing itself prejudice the right of the Defence to sufficient time and resources to prepare for the confirmation hearing.

3. Relief Sought

72. For the aforementioned reasons, the Defence of Thomas Lubanga Dyilo respectfully requests the leave of the Honourable Pre-Trial Chamber to appeal the 'Décision

autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06'.

Defence counsel

Jean FLAMME

Dated this 28th day of September, 2006

At The Hague