

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 3 October 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public

**Prosecution's Response to Thomas Lubanga Dyilo's 28 September 2006
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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a/0001/06 to a/0003/06**

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Introduction

1. The Prosecution hereby submits its Response to the Applicant's Request for Leave to Appeal. The Prosecution submits that the Applicant has identified some appealable issues warranting the Appeals Chamber's intervention and accordingly does not oppose leave being granted in respect of those limited issues.

Procedural Background

2. On 7 August 2006, Counsel for Thomas Lubanga Dyilo ("the Applicant") filed a document entitled "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'".¹
3. On 14 August 2006, the Prosecution filed the "Prosecution's Response to Thomas Lubanga Dyilo's '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'".²
4. On 18 August 2006, Pre-Trial Chamber I issued the "Decision on Defence Motion for Leave to Appeal", denying the Previous Request for Leave.³
5. On 22 September 2006, Pre-Trial Chamber I 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".⁴
6. On 28 September 2006, the Applicant filed a document entitled "Request for Leave to Appeal the Décision autorisant le dépôt d'observations sur les

¹ ICC-01/04-01/06-272 (hereinafter, the "Previous Request for Leave").

² ICC-01/04-01/06-331 (hereinafter, the "Prosecution's Previous Response").

³ ICC-01/04-01/06-338 (hereinafter, the "First Decision Denying Leave").

⁴ ICC-01/04-01/06-463 (hereinafter, the "Decision").

demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06”.⁵

7. The Prosecution hereby files its response to the Application.

Discussion

8. The Application identifies five purportedly appealable issues, which allegedly arise from the Decision:⁶

- “whether the Chamber may *proprio motu*, and without providing the Defence or the prosecution with a previous opportunity to present submissions, grant protective measures;” (“the First Issue”)
- “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;” (“the Second Issue”)
- “whether it is consistent with the requirements of fairness and equality of arms to place the Prosecutor in a privileged position vis a vis their access to the substance of the victims applications;” (“the Third Issue”)
- “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;” (“the Fourth Issue”) 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.” (“the Fifth issue”)

⁵ ICC-01/04-01/06-487 (hereinafter, the “Application”).

⁶ Application, para. 8.

9. The Prosecution will briefly address each of these issues in turn. The Prosecution stresses from the outset that nothing in this document should be seen as an acceptance of the merits of the underlying arguments pertaining to any future grounds of appeal brought by the Applicant. Consistent with its practice and the Court's jurisprudence to date, the Prosecution has refrained from entering into a discussion on the merits of such arguments, which can only be properly discussed before the Appeals Chamber, if and when leave to appeal is granted.

(a) The First Issue

10. The Prosecution submits that the issue of whether a Chamber may impose protective measures in the form of redactions of any identifying features pertaining to applications for victim participation without first providing the parties with an opportunity to be heard constitutes an "appealable issue", capable of affecting the fairness and expeditiousness of the proceedings, and that timely intervention by the Appeals Chamber will materially advance the proceedings. The issue raises the very relevant question of the proper and fair procedure to be followed prior to the adoption of a protective measure arguably restricting the rights of a party, and in particular whether a party must enjoy a proper opportunity to be heard before such measure is imposed, even if the measure in question is provisional in nature. The issue further raises important matters pertaining to the correct interpretation of Article 68 (1) of the Statute and Rules 87 (1) and 89 (1), the elucidation of which will materially advance the current proceedings.
11. The Prosecution further notes that, as stated by the Applicant, when rejecting his prior application for leave to appeal pertaining to the issue of "victim participant anonymity", the Chamber censured the Applicant for failing to file "a motion requesting the lifting of all or part of the redactions and, in the

alternative, leave to appeal” against the relevant decision.⁷ The Applicant is now precisely following one of the avenues indicated by the Chamber as being adequate for the relief sought. This factor further militates in favor of the Pre-Trial Chamber’s granting the Application in relation to the instant issue.

(b) *The Second Issue*

12. The Prosecution does not oppose the second issue being certified for appeal.

The Prosecution recognizes that the question of whether and to what extent protective measures are ordered in the current context, including measures taken under Article 57 (3) (c) and 68 (1) – the two statutory provisions cited by the Chamber in its Decision – is one capable of affecting both the fairness and the expeditiousness of the proceedings. The Prosecution does note, however, that (a) a similar request was previously rejected by the Pre-Trial Chamber on the basis that the Chamber had not decided the non-disclosure *in the proceedings* of the identity of those persons seeking to be admitted as victim participants;⁸ and (b) that the issue of whether protective measures pertaining to victims and witnesses may extend to the non-disclosure of identities is already before the Appeals Chamber.⁹ The Prosecution also notes that the Applicant has not sought leave to appeal against the more specific and relevant *Décision sur les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l’audience de confirmation des charges*,¹⁰ whereby the Chamber authorized anonymity of the participants *vis-à-vis* the defence in the confirmation proceedings.¹¹ Whereas this may raise doubts as to the

⁷ First Decision Denying Leave, p. 8. Application, para. 24.

⁸ See First Decision Denying Leave, pp. 7-8.

⁹ See further, Prosecution’s Substantive Response to Thomas Lubanga Dyilo’s 21 September 2006 Request for Leave to Appeal, ICC-01/04-01/06-481, 27 September 2006, paras. 13-16. See also Prosecution’s Response to Thomas Lubanga Dyilo’s 27 September 2006 Request for Leave to Appeal the Second Decision on Prosecution Requests for Redactions, 3 October 2006, para. 33.

¹⁰

¹¹ Ibid., pp. 6-7.

consistency of the Applicant's positions, it should not in any event preclude the Applicant from seeking leave to appeal against these aspects of the Decision.

(c) The Third Issue

13. The Prosecution does not oppose leave being granted in relation to the third issue. The Prosecution recognizes that the regime established by the Chamber, allowing for full access to all applications by the Prosecution, but not by the Defence, can arguably affect the fair and expeditious conduct of the proceedings. The Prosecution further notes that the question of whether this system is *per se* compatible with the rights of the defence and the requirements of a fair process, including the principle of equality of arms, is one that so far has not been addressed by the Chamber, despite having been previously raised by the Applicant.¹² It is respectfully submitted that timely guidance on this issue by the Appeals Chamber can materially advance the proceedings.

(d) The Fourth Issue

14. The Prosecution does not consider that the Applicant has met his burden of demonstrating the existence of an appealable issue warranting intervention by the Appeals Chamber in relation to the fourth issue. The Prosecution submits that the Applicant's claim that the presumption of innocence has been violated essentially reproduces the substance of assertions made in earlier filings.¹³

¹² See Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06, and for an Extension of Time, ICC-01/04-01/06-328, 14 August 2006, paras. 24-26, *inter alia*.

¹³ Request for Leave to Appeal the First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-456, 21 September 2006, paras. 16-19; Request for Leave to Appeal the Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-483, 27 September 2006, paras. 13-14.

15. As with the previous iterations of this argument, the Prosecution submits that the allegations of the Applicant are not supported by the Decision, and that therefore leave to appeal ought not to be granted.¹⁴ In particular, the Prosecution submits that the Decision is based on a range of factors which support its conclusions. Any recognition by the Single Judge that distributing highly sensitive information more widely 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, or an indication of bias or prejudgment, but merely a reflection of reality.¹⁵

(e) The Fifth Issue

16. The Prosecution recognizes that a significant increase in the volume of applications for participation in the proceedings may require at some point the exercise of additional regulatory powers by the Chamber seized of the proceedings. However, the Applicant's claim that the Chamber should have rejected *in limine* the applications is one that the Prosecution cannot endorse. The Chamber is under a duty to at least consider the applications and hear

¹⁴ Prosecution's Substantive Response to Thomas Lubanga Dyilo's 21 September 2006 Request for Leave to Appeal, ICC-01/04-01/06-481, 27 September 2006, para. 31(d) and footnote 40. See also Prosecution's Response to Thomas Lubanga Dyilo's 27 September 2006 Request for Leave to Appeal the Second Decision on Prosecution Requests for Redactions, 3 October 2006, footnote 23.

¹⁵ In relation to the submission that the Decision could portray Thomas Lubanga Dyilo as dangerous (Application, para. 47), the Prosecution notes that the Decision was made within the statutory framework of protective measures for victims. The Prosecution reiterates 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 ECIR 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).

The Prosecution recognizes that the Applicant has identified an additional dimension in this case: where the Prosecution was not already in possession of the identifying information, but it was subsequently disclosed to the Prosecution, and not to the Applicant (in contrast with a situation dealing with the identity of the witness of a party), see Application, paras. 45-46. The Prosecution submits that if the Single Judge does grant leave on this issue in this case, this factor distinguishes the issue from the analogous issues in the previous filings referred to above.

from the parties. It has not yet decided on the merits of the applications and in particular whether it is “appropriate”, within the terms of Article 68 (3), to allow for participation at this stage. Nothing precludes the Applicant, who is now being given a proper opportunity to be heard on the matter, from requesting prompt rejection of the Applications by the Chamber on the same basis that he argues for *in limine* rejection of the applications.

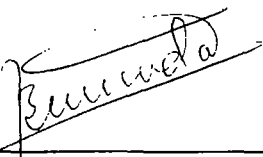
17. The Prosecution further submits that if the Applicant considers that the specific circumstances of these proceedings require that the Chamber adopt a practice of rejecting *in limine* any new applications for participation, then he should make a specific request before the Chamber, instead of raising this issue in the context of an application for leave to appeal. Adopting a general practice of rejecting *in limine* any voluminous application for victim participation in the months immediately preceding the confirmation hearing, as advocated by the Applicant,¹⁶ is a step that, due to its importance and consequences for the rights of third parties, would at a minimum require a full discussion before the Chamber pertaining to its necessity and proportionality as well as its anchorage in the Statute and the Rules.

¹⁶ See Application, paras. 49-50.

Conclusion

18. For the above referred reasons, the Prosecution respectfully requests the Chamber to

- grant the Application for leave to appeal in respect of the first, second and third issues; and
- deny the Application for leave to appeal in respect of the fourth and fifth issues.



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of October 2006
At The Hague, The Netherlands