

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/05
Date: 6 February 2007

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR

***vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT
ODHIAMBO and DOMINIC ONGWEN***

Public Document

**Application to Lift Redactions From Applications for Victims'
Participation to be Provided to the OTP**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Christine Chung, Senior Trial Lawyer

Ad Hoc Defence Counsel

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Preliminary Statement

The Office of the Prosecutor (“OTP”) respectfully applies for lifting of the redactions in the applications for victims’ participation which are the subject of the Single Judge’s decision of 1 February 2007, insofar as those applications are to be provided to the OTP.

Procedural Background

1. On 1 February 2007, the Single Judge issued a decision entitled, “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and 1/0111/06 to a/0127/06.”¹ This decision (hereinafter “Decision” or “1 February 2007 Decision”), notified the public and the OTP that the Registry had received, on a confidential basis, 49 applications for victims’ participation in these proceedings.² The Decision ordered the transmission of these applications, in conformity with Rule 89(1), to the OTP and also to *ad hoc* defence counsel appointed in the decision.³ The OTP and *ad hoc* defence counsel have been ordered to submit observations in reply to the applications, which is their entitlement under Rule 89(1).⁴

¹ Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and 1/0111/06 to a/0127/06 (public document), ICC-02/04-01/05-134, 1 February 2007.

² *See id.*, para. 1.

³ *See id.*, p. 19.

⁴ *See id.*

2. The sole aspect of the 1 February 2007 Decision raised by this application is the directive that both the OTP and *ad hoc* defence counsel be provided with versions of the applications which have been redacted of information including, but not limited to, information relating to the applicant's identity, location where victimization occurred, "commanders" who carried out the incident resulting in the victimization, and the specific features of the injury, loss or harm allegedly suffered.⁵ The Decision identified two grounds for viewing this protective measure to be warranted, vis-à-vis the Prosecution:

(1) because "serious security concerns arising from the situation in the field . . . require[] a particularly restrictive approach."⁶

(2) because "fundamental considerations of fairness (namely, the need to preserve equality of arms), . . . require that both parties be placed on an equal footing in respect of the exercise of a right which is bestowed on them by both the statutory texts."⁷

Under the terms of the Decision, the Office of Public Counsel for Victims will receive unredacted versions of the applications.⁸

Application to Lift Redactions On Applications for Participation Furnished to the OTP

3. The OTP respectfully requests that the Single Judge consider lifting the redactions on the applications for participation to be furnished to the

⁵ See *id.*, paras. 21, 22, 25.

⁶ See *id.*, para. 25.

⁷ See *id.*

⁸ See *id.*, p. 19.

OTP under the terms of the 1 February 2007 Decision. This application is made pursuant to a procedure suggested by Pre-Trial Chamber I in its “Decision on Defence Motion for Leave to Appeal,” dated 18 August 2006,⁹ wherein that Chamber opined that a proper means for a party to seek redress, in the event that it contests the propriety of being furnished with redacted applications for victim participation, would be to file “a motion requesting the lifting of all or part of the redactions,” either before or after “the receipt of the redacted versions of the Applications.”¹⁰

4. The determination in the 1 February 2007 Decision that the OTP should be furnished with redacted applications for victims’ participation creates a significant divergence in the rulings of Pre-Trial Chamber I and the Single Judge of this Chamber. On each of the numerous occasions in which Pre-Trial Chamber I or any Single Judge of that Chamber has ordered, pursuant to Rule 89(1), the transmission of applications for victims’ participation to the parties, in either the DRC situation or the *Lubanga* case, it has ordered the OTP to receive unredacted versions.¹¹

⁹ Decision on Defence Motion for Leave to Appeal (public document), ICC-01/04-01/06-338, 18 August 2006.

¹⁰ See *id.*, p. 8. By this application, the OTP does not seek leave to appeal the portion of the 1 February 2007 Decision at issue here. This is because the OTP considers it more appropriate that the matter be considered in this forum in the first instance. The OTP, however, is not foregoing its right to seek intervention of the Appeals Chamber in the future, in order to prevent the crystallization of inconsistent regimes pertaining to the non-disclosure of information relating to victims and witnesses.

¹¹ See in the DRC situation, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, 21 July 2005, p. 5; Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06 (document public), ICC-01/04-241, 29 septembre 2006, p.

5. The reasoning of Pre-Trial Chamber I is fully applicable with respect to the applications which are the subject of the 1 February 2007 Decision of the Single Judge. On 21 July 2005, Pre-Trial Chamber I first determined to furnish the OTP with unredacted versions of applications for victims' participation.¹² This decision was entered in the DRC situation and entitled "Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp."¹³ In its decision, Pre-Trial Chamber I observed initially that "the scope of redactions cannot exceed what is strictly necessary in light of the applicant's security situation"¹⁴ It then made the following findings:

4; Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and the Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06 (public document), ICC-01/04-147, 18 May 2006, p. 4; 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 (document public), ICC-01/04-228, 22 septembre 2006, p. 5; *see* in the *Lubanga* case, Decision Establishing a Deadline for the Prosecution and the Defence to submit Observations on the Applications of Applicants a/0001/06 to a/0003/06 (document public), ICC-01/04-01/06-107, 18 May 2006, p.4; 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* (document public), ICC-01/04-01/06-270, 4 août 2006, p. 5; 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 (document publique), ICC-01/04-01/06-463, 22 septembre 2006, p.5; Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06 (document publique), ICC-01/04-01/06-494, 29 septembre 2006, p. 4; Décision sur la demande d'autorisation d'appel de la Défense relative à la transmission des Demandes de participation des victimes (document public), ICC-01/04-01/06-672, 6 novembre 2006, p. 7;

¹² *See* Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, 21 July 2005.

¹³ *See id.*

¹⁴ Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp (public redacted version), ICC-01/04-73, p. 4.

(1) “that according to rule 5, paragraph 1(b) and rule 6, paragraphs 1 and 2 of the Rules, the Prosecutor, Deputy Prosecutor and all staff members of the Office of the Prosecutor are bound by principle of confidentiality; that to date the Pre-Trial Chamber has no indication of any breach of such confidentiality obligations; and that according to article 68, paragraph 1 of the Statute, the Prosecutor is also under an obligation to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;”¹⁵

(2) “further that the Prosecutor is already aware of the situation of many victims, including in particular that of the Applicants, and that there are no indications that the transmission of unredacted copies of the Applications to the Prosecutor will increase the security risks that they currently face.”¹⁶

6. In August 2006, after commencement of the case, counsel for the Defence in the *Lubanga* case twice challenged the practice of Pre-Trial Chamber I of ordering that only the defence should receive redacted versions of the

¹⁵ See *id.*, p. 5. The Pre-Trial Chamber logically did not deem defence confidentiality duties to be of similar force. For defence counsel, the matter of confidentiality is an ethical prohibition, see Code of Professional Conduct for Counsel, Art. 8(1), but not Rule-based.

¹⁶ See *id.*

applications for victims' participation to the defence.¹⁷ The Defence specifically raised a claim of "procedural inequality" between the Prosecution and the Defence, in light of the Prosecution's receipt of unredacted applications for participation.¹⁸ The Pre-Trial Chamber I¹⁹ and subsequently the Single Judge²⁰ rejected the respective Defence's challenges, and the Chamber continued to furnish unredacted versions of the applications to the OTP only.²¹

7. The reasons which have consistently been stated and relied upon by Pre-Trial Chamber I demonstrate that it is appropriate to lift all of the redactions ordered in this proceeding, in the copies to be furnished to the OTP. The first ground stated in the 1 February 2007 Decision notes the seriousness of the security situation in Northern Uganda but does not explain why the disclosure to the OTP of information relating to the

¹⁷ See Request for Leave to Appeal the 'Decision sur les demandes de participation a la procedure 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' (public document), ICC-01/04-01/06-272, 7 August 2006 and Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to 1/0009/06, 1/0016/06 to 1/0046/06, and a/0047/06 to a/0052/06, and for an Extension of Time (public document), ICC-01/04-01/06-328, 14 August 2006.

¹⁸ See Request for Leave to Appeal the 'Décision sur les demandes de participation a 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' (public document), ICC-01/04-01/06-272, 7 August 2006, section 2.1.2.1, specifically paras. 38-39; see also Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to 1/0009/06, 1/0016/06 to 1/0046/06, and a/0047/06 to a/0052/06, and for an Extension of Time (public document), ICC-01/04-01/06-328, 14 August 2006, para. 25 and Section 3.1.

¹⁹ See Decision on Defence Motion for Leave to Appeal (public document), ICC-01/04-01/06-338, 18 August 2006, pp. 7-8.

²⁰ See Décision relative aux requêtes de la Défense et de l'Accusation concernant la prorogation de délai (document public), ICC-01/04-01/06-334, 16 August 2006, p.4.

²¹ See *supra* note 11 (*String cite – for reference*).

applicants, in particular, should be considered to pose a risk of exposing the applicants to endangerment in Northern Uganda. As such the Decision fails to demonstrate why redaction of the copies to be furnished to the OTP are “strictly necessary.”²² The Appeals Chamber of this Court recently has written at length, in two decisions reversing judgements of Pre-Trial Chamber I, about the need of the Chambers to “indicate with sufficient clarity the grounds on which they based their decision.”²³ Particularly relevant to this application is the “Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,’” which discusses the fundamental obligation of the Chambers to provide sufficient reasoning, based in the facts presented, to justify any redaction of a document to which a party would otherwise be entitled, when redaction is imposed as a protective measure.²⁴

²² See Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-773 (OA 5), 14 December 2006, para 22.

²³ See Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-773 (OA 5), 14 December 2006, para 30; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-774 (OA 6), 14 December 2006, para 20.

²⁴ See Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-773 (OA 5), 14 December 2006, para 30, paras. 20-21 (fundamental fairness requires that non-disclosure on grounds of protection be supported by sufficient reasoning based in the facts, and when Chamber authorizes non-disclosure of identity of a witness on ground of “endangerment of the

8. Nor is equality of arms a consideration which justifies the non-disclosure to the OTP of redacted applications for participation. As Pre-Trial Chamber I found, the Prosecution and Defence are not on equal footing on the issues of confidentiality and victim protection. Unlike the defence, the Prosecution has obligations of confidentiality based in the Rules of Procedure and Evidence, as well as duties of victim and witness protection under Art. 68(1) of the Statute. Withholding from the OTP the identities and full circumstances of victimization and harm is therefore unwarranted, particularly absent prior breaches of the OTP's confidentiality obligations. Non-disclosure additionally affirmatively undermines the OTP's ability to execute its own statutory duties, at a minimum by frustrating the OTP's capacity to identify victims or witnesses to whom it may owe (or indeed may already be providing) protective measures.²⁵

9. Finally, the OTP notes that the lack of explanation of reasons underlying the 1 February 2007 Decision to furnish the OTP with only redacted material, perhaps combined with the view expressed in that Decision of the principle of equality of arms, may create unwarranted distinctions

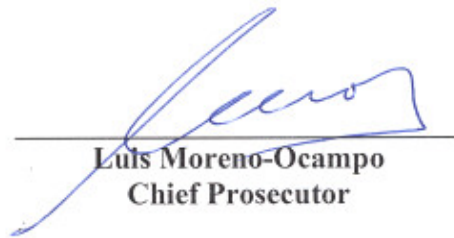
witnesses or members of their families," it must indicate "why the Pre-Trial Chamber expected that the security of witnesses or their families may be endangered if the witnesses' identities were disclosed to the [party].")

²⁵ Notably, Pre-Trial Chamber I, which has evoked the principle of equality of arms in other pre-trial contexts, *see* *Décision relative à la requête du procureur sollicitant l'autorisation d'interjeter appel de la décision de la chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 ET VPRS 6* (document public), ICC-01/04-135, 20 April 2006, paras. 38, 54, did not apply that principle when deciding the propriety of releasing unredacted applications for victims' participation to the OTP. *See* *Decision on Defence Motion for Leave to Appeal* (public document), ICC-01/04-01/06-338, 18 August 2006, pp. 7-8.

among the sections of this Court. Rules 5 and 6 of the Rules of Evidence and Procedure impose confidentiality obligations upon officers and staff within the Organs of the Court generally. It is therefore of importance that confidentiality obligations routinely be considered in weighing the necessity of non-disclosure of victim- and witness-related information to the OTP, or to any other section of this Court. This will avoid any appearance of creating an unwarranted disparity in treatment among any of the multiple sections of the Court- including the OTP, the VWU, VPRS and the OPCV- which in the ordinary course receives and handles victim- and witness-related information.

Conclusion

For all of the foregoing reasons, the OTP respectfully requests that the Single Judge lift all of the redactions on the applications for participation to be furnished to the OTP under the terms of the 1 February 2007 decision.



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 6th day of February 2007
At The Hague, The Netherlands