



Original : French

N°.: ICC-01/04-01/06
Date: 6 November 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 V. THOMAS LUBANGA DYILO***

Public document

**Decision on the Defence request for leave to appeal regarding
the transmission of applications for victim participation**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Mr Jean Flamme
Ms Véronique Pandanzyla

**Legal Representatives for the
Applicants**

Mr Michel Shebele
Mr Emmanuel Daoud
Mr Patrick Baudouin

**Office of the Public Counsel for the
Defence**

Ms Melinda Taylor

PRE-TRIAL CHAMBER I (“The Chamber”) of the International Criminal Court (“the Court”),

NOTING applications for participation in the proceedings a/0004/06¹, a/0005/06², a/0006/06³, a/0007/06⁴, a/0008/06⁵, a/0009/06⁶, a/0016/06⁷, a/0017/06⁸, a/0018/06⁹, a/0019/06¹⁰, a/0020/06¹¹, a/0021/06¹², a/0022/06¹³, a/0023/06¹⁴, a/0024/06¹⁵, a/0025/06¹⁶, a/0026/06¹⁷, a/0027/06¹⁸, a/0028/06¹⁹, a/0029/06²⁰, a/0030/06²¹, a/0031/06²², a/0032/06²³, a/0033/06²⁴, a/0034/06²⁵, a/0035/06²⁶, a/0036/06²⁷, a/0037/06²⁸, a/0038/06²⁹, a/0039/06³⁰, a/0040/06³¹, a/0041/06³², a/0042/06³³, a/0043/06³⁴, a/0044/06³⁵, a/0045/06³⁶, a/0046/06³⁷,

¹ ICC-01/04-01/06-144-Conf-Exp, ICC-01/04-152-Conf-Exp.

² ICC-01/04-01/06-269-Conf-Exp, ICC-01/04-153-Conf-Exp.

³ ICC-01/04-01/06-154-Conf-Exp, ICC-01/04-157-Conf-Exp.

⁴ ICC-01/04-01/06-155-Conf-Exp, ICC-01/04-158-Conf-Exp.

⁵ ICC-01/04-01/06-156-Conf-Exp, ICC-01/04-159-Conf-Exp.

⁶ ICC-01/04-01/06-157-Conf-Exp, ICC-01/04-160-Conf-Exp.

⁷ ICC-01/04-01/06-237-Conf-Exp, ICC-01/04-178-Conf-Exp.

⁸ ICC-01/04-01/06-238-Conf-Exp, ICC-01/04-179-Conf-Exp.

⁹ ICC-01/04-01/06-239-Conf-Exp, ICC-01/04-180-Conf-Exp.

¹⁰ ICC-01/04-01/06-240-Conf-Exp, ICC-01/04-181-Conf-Exp.

¹¹ ICC-01/04-01/06-241-Conf-Exp, ICC-01/04-182-Conf-Exp.

¹² ICC-01/04-01/06-242-Conf-Exp, ICC-01/04-183-Conf-Exp.

¹³ ICC-01/04-01/06-243-Conf-Exp, ICC-01/04-184-Conf-Exp.

¹⁴ ICC-01/04-01/06-244-Conf-Exp, ICC-01/04-185-Conf-Exp.

¹⁵ ICC-01/04-01/06-245-Conf-Exp, ICC-01/04-186-Conf-Exp.

¹⁶ ICC-01/04-01/06-246-Conf-Exp, ICC-01/04-187-Conf-Exp.

¹⁷ ICC-01/04-01/06-247-Conf-Exp, ICC-01/04-188-Conf-Exp.

¹⁸ ICC-01/04-01/06-248-Conf-Exp, ICC-01/04-189-Conf-Exp.

¹⁹ ICC-01/04-01/06-249-Conf-Exp, ICC-01/04-190-Conf-Exp.

²⁰ ICC-01/04-01/06-250-Conf-Exp, ICC-01/04-191-Conf-Exp.

²¹ ICC-01/04-01/06-251-Conf-Exp, ICC-01/04-192-Conf-Exp.

²² ICC-01/04-01/06-252-Conf-Exp, ICC-01/04-193-Conf-Exp.

²³ ICC-01/04-01/06-253-Conf-Exp, ICC-01/04-194-Conf-Exp.

²⁴ ICC-01/04-01/06-254-Conf-Exp, ICC-01/04-195-Conf-Exp.

²⁵ ICC-01/04-01/06-255-Conf-Exp, ICC-01/04-196-Conf-Exp.

²⁶ ICC-01/04-01/06-256-Conf-Exp, ICC-01/04-197-Conf-Exp.

²⁷ ICC-01/04-01/06-257-Conf-Exp, ICC-01/04-198-Conf-Exp.

²⁸ ICC-01/04-01/06-258-Conf-Exp, ICC-01/04-199-Conf-Exp.

²⁹ ICC-01/04-01/06-259-Conf-Exp, ICC-01/04-200-Conf-Exp.

³⁰ ICC-01/04-01/06-260-Conf-Exp, ICC-01/04-201-Conf-Exp.

³¹ ICC-01/04-01/06-261-Conf-Exp, ICC-01/04-202-Conf-Exp.

³² ICC-01/04-01/06-262-Conf-Exp, ICC-01/04-203-Conf-Exp.

³³ ICC-01/04-01/06-263-Conf-Exp, ICC-01/04-204-Conf-Exp.

³⁴ ICC-01/04-01/06-264-Conf-Exp, ICC-01/04-205-Conf-Exp.

³⁵ ICC-01/04-01/06-265-Conf-Exp, ICC-01/04-206-Conf-Exp.

³⁶ ICC-01/04-01/06-266-Conf-Exp, ICC-01/04-207-Conf-Exp.

³⁷ ICC-01/04-01/06-267-Conf-Exp, ICC-01/04-208-Conf-Exp.

a/0047/06³⁸, a/0048/06³⁹, a/0049/06⁴⁰, a/0050/06⁴¹, a/0051/06⁴², a/0052/06⁴³, a/0053/06⁴⁴, a/0054/06⁴⁵, a/0055/06⁴⁶, a/0056/06⁴⁷, a/0057/06⁴⁸, a/0058/06⁴⁹, a/0059/06⁵⁰, a/0060/06⁵¹, a/0061/06⁵², a/0062/06⁵³, a/0063/06⁵⁴ and a/0071/06⁵⁵ (“the Applications for participation”) filed as confidential and ex parte on 7 June 2006, 31 July 2006, 3 and 4 August 2006 and on 6 September 2006 in the records of the case of *The Prosecutor v. Thomas Lubanga Dyilo* and of the investigation into the situation in the Democratic Republic of the Congo (“DRC”), in which the applicants seek the acknowledgement of the right to participate as victims in the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and the investigation into the situation in the DRC,

NOTING the Decision authorising the filing of observations on the applications for participation in the proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06, registered in the record of the case on 22 September 2006⁵⁶,

NOTING the request by the Defence for leave to appeal the Decision authorising the filing of observations on the applications for participation in the proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 (“Defence Request”) filed in the record of the case on 28 September 2006⁵⁷,

³⁸ ICC-01/04-01/06-216-Conf-Exp, ICC-01/04-171-Conf-Exp.

³⁹ ICC-01/04-01/06-217-Conf-Exp, ICC-01/04-172-Conf-Exp.

⁴⁰ ICC-01/04-01/06-218-Conf-Exp, ICC-01/04-173-Conf-Exp.

⁴¹ ICC-01/04-01/06-219-Conf-Exp, ICC-01/04-174-Conf-Exp.

⁴² ICC-01/04-01/06-220-Conf-Exp, ICC-01/04-175-Conf-Exp.

⁴³ ICC-01/04-01/06-221-Conf-Exp, ICC-01/04-176-Conf-Exp.

⁴⁴ ICC-01/04-01/06-412-Conf-Exp, ICC-01/04-215-Conf-Exp.

⁴⁵ ICC-01/04-01/06-413-Conf-Exp, ICC-01/04-216-Conf-Exp.

⁴⁶ ICC-01/04-01/06-414-Conf-Exp, ICC-01/04-217-Conf-Exp.

⁴⁷ ICC-01/04-01/06-415-Conf-Exp, ICC-01/04-218-Conf-Exp.

⁴⁸ ICC-01/04-01/06-416-Conf-Exp, ICC-01/04-219-Conf-Exp.

⁴⁹ ICC-01/04-01/06-417-Conf-Exp, ICC-01/04-220-Conf-Exp.

⁵⁰ ICC-01/04-01/06-418-Conf-Exp, ICC-01/04-221-Conf-Exp.

⁵¹ ICC-01/04-01/06-419-Conf-Exp, ICC-01/04-222-Conf-Exp.

⁵² ICC-01/04-01/06-420-Conf-Exp, ICC-01/04-223-Conf-Exp.

⁵³ ICC-01/04-01/06-421-Conf-Exp, ICC-01/04-224-Conf-Exp.

⁵⁴ ICC-01/04-01/06-422-Conf-Exp, ICC-01/04-225-Conf-Exp.

⁵⁵ ICC-01/04-01/06-423-Conf-Exp, ICC-01/04-227-Conf-Exp.

⁵⁶ ICC-01/04-01/06-463.

⁵⁷ ICC-01/04-01/06-487.

NOTING the response from the Prosecutor to the Defence request registered in the record of the case on 3 October 2006⁵⁸,

PURSUANT to articles 57 (3) (c), 68 et 82 (1) (d) of the Rome Statute (“the Statute”), rules 86 and 89 of the Rules of Procedure and Evidence (“the Rules”) and regulation 86 of the Regulations of the Court,

CONSIDERING that the Defence raises the issue of (1) whether the Chamber may grant protective measures proprio motu without giving either the Defence or the Prosecutor the possibility of submitting their observations; (2) whether the range of protective measures which the Chamber may order under rule 81 (4) of the Rules also includes the non-disclosure of the identity of the applicants to the Defence ; (3) whether the fact of placing the Prosecutor in a privileged position vis-à-vis his access to the full applications for participation would run counter to the requirement of fairness and equality of arms; (4) whether the failure by the Chamber to base its decision on strict and transparent criteria in order to determine whether such measures are necessary would violate the principle of presumption of innocence ; (5) whether the obligation of the Chamber to ensure fair proceedings requires that it set time limits for the filing of the applications for participation in the proceedings,

CONSIDERING that article 82 (1) (d) of the Statute provides that either of the parties may appeal a decision that raises an issue that would significantly affect the fair and expeditious conduct of the proceedings, for which an immediate resolution by the Appeals Chamber may materially advance the proceedings,

CONSIDERING that article 82 (1) (d) of the Statute has two components; that the first concerns the pre-requisites for the definition of an appealable issue and the

⁵⁸ ICC-01/04-01/06-498.

second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber⁵⁹,

CONSIDERING that, according to the decision rendered by the Appeals Chamber on 13 July 2006⁶⁰:

- i. Only an “issue” may form the subject-matter of an appealable decision⁶¹;
- ii. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination⁶² ;
- iii. Not every issue may constitute the subject of an appeal, but it must be one apt to “significantly affect”, i.e. in a material way, either a) “the fair and expeditious conduct of the proceedings”, or b) “the outcome of the trial”⁶³ ; and
- iv. Identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal in so far as it must be an issue “for which in the opinion of the Pre-Trial or Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings”⁶⁴

CONSIDERING that the Chamber recalls that it is necessary to distinguish between (i) the non-disclosure of the identity of the Applicants during the application for participation procedure, in accordance with article 68 (1) of the Statute and rule 89 (1) of the Rules and (ii) the non-disclosure of the identity of the Applicants in accordance

⁵⁹ ICC-01/04-168, par. 8.

⁶⁰ ICC-01/04-168.

⁶¹ ICC-01/04-168, par. 9.

⁶² ICC-01/04-168, para.9.

⁶³ ICC-01/04-168, par. 10.

⁶⁴ ICC-01/04-168, par. 14.

with rules 87 and 88 of the Rules, once a) they have been granted the status of victim in the case and b) that the manner in which they will participate has been defined⁶⁵,

CONSIDERING that rules 87 to 89 of the Rules derive from article 68 (1) of the Statute,

CONSIDERING that rule 89 (1) specifically refers to the applications for the participation of victims in the proceedings and that, accordingly, the non-disclosure of the identity of the applicants to the Defence at this stage in the proceedings is a measure decided *proprio motu* by the Chamber in application of article 68 (1) of the Statute and rule 89 (1) of the Rules,

CONSIDERING moreover that rule 87 of the Rules does not apply to requests or applications for protective measures vis-à-vis the Prosecutor or the Defence ; that the measures covered by this rule in principle concern the protective measures vis-à-vis the public, the press or news agencies ; and that consequently rule 87 (2) (a) requires that these applications or requests not be presented *ex parte*,

CONSIDERING that only the arrangements for participation and the protection measures granted to persons whose status as victims authorised to participate in the proceedings has been recognised may raise, if applicable, an issue which might significantly affect the fair and expeditious conduct of the proceedings⁶⁶,

⁶⁵ ICC-01/04-01/06-338.

⁶⁶ ICC-01/04-01/06-462, pages 6 et 7.

CONSIDERING moreover that the criteria for assessing the equality of arms are based on the circumstances of the case and on the de facto situation which resulted in the matter originally being referred to the Chamber,

CONSIDERING that equality of arms implies the obligation to provide each party with a reasonable opportunity to present his case to the court, including evidence, in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party ⁶⁷ ;

CONSIDERING that the Chamber is of the opinion that to grant the Prosecutor access to the full applications for participation does not raise an issue of the fairness of the proceedings in view of the obligations and powers of the Prosecutor in respect of investigations and within the meaning of article 54 of the Statute and in particular the fact that “[he] respects the interests and personal circumstances of victims and witnesses”,

CONSIDERING moreover that the Chamber holds that not disclosing the identity of the applicants to the Defence does not constitute an infringement of the presumption of innocence afforded to Thomas Lubanga Dyilo but constitutes a measure allowing the applicants to make an application for participation whilst protecting their security and well-being,

CONSIDERING that the Chamber held in its decision of 20 October 2006 that no further applicants for participation would be entertained in the case of *The Prosecutor v. Thomas Lubanga Dyilo* prior to the confirmation of charges hearing⁶⁸,

⁶⁷ CEDH, 27 October 1993, *Dombo Beheer v. The Netherlands*, Series A, no 274.

⁶⁸ ICC-01/06-01/04-601.

FOR THESE REASONS

REJECTS the request of the Defence.

Done in English and French, the French version being authoritative.

[signed]
Judge Claude Jorda
Presiding Judge

[signed]
Judge Akua Kuenyehia

[signed]
Judge Sylvia Steiner

Dated this Monday 6 November 2006

At The Hague

The Netherlands