



Original: English

No: ICC-01/04-01/06

Date: 23 March 2006

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

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 REQUESTING OBSERVATIONS OF THE PROSECUTION AND THE
DUTY COUNSEL FOR THE DEFENCE ON THE SYSTEM OF DISCLOSURE
AND ESTABLISHING AN INTERIM SYSTEM OF DISCLOSURE**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Ekkehard Withopf, Senior Trial Lawyer

Duty Counsel for the Defence

Mr Jean Flamme

I, Judge Sylvia Steiner, judge at the International Criminal Court (the “Court”);

NOTING the warrant of arrest issued by Pre-Trial Chamber I against Mr Thomas Lubanga Dyilo on 10 February 2006;¹

NOTING the surrender of Mr Thomas Lubanga Dyilo to the Court by the authorities of the Democratic Republic of the Congo on 17 March 2006;

NOTING the appointment of Mr Jean Flamme as Duty Counsel for Mr Thomas Lubanga Dyilo on 18 March 2006;²

NOTING that, pursuant to the Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo issued by Judge Sylvia Steiner on 17 March 2006³, the first appearance of Mr Thomas Lubanga Dyilo before Pre-Trial Chamber I took place on 20 March 2006; and that, at that appearance, Pre-Trial Chamber I scheduled the confirmation hearing for 27 June 2006;⁴

NOTING the decision of Pre-Trial Chamber I of 22 March 2006 designating Judge Sylvia Steiner as single judge in the case against Mr Thomas Lubanga Dyilo responsible, under article 57 (2) of the Rome Statute (the “Statute”), for exercising the functions of the Chamber in that case, including those functions provided for in rule 121 (2) (b) of the Rules of Procedure and Evidence (the “Rules”);

¹ ICC-01/04-01/06-2.

² ICC-01/04-01/06-40.

³ ICC-01/04-01/06-38.

⁴ ICC-01/04-01/06-T-3-EN, p. 8, lines 9-12.

NOTING articles 57 (3) (c), 61 (3) and 67 (2) of the Statute, rules 15, 76 to 83 and 121 of the Rules and regulation 21 of the Regulations of the Registry (the “Regulations”);

CONSIDERING that, according to article 61 (3) (b) of the Statute, the defence must be informed of the evidence on which the Prosecutor intends to rely at the hearing (the “Incriminating Evidence”) “within a reasonable time before the hearing”; and that, according to rule 78 of the Rules, “the defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use as evidence for the purposes of the confirmation hearing”;

CONSIDERING that, as provided for in rule 121 (2) (c) of the Rules, “[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber”; that according to rule 121 (10) of the Rules, “the Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule”; and that, according to regulation 21 of the Regulations, the case record against Mr Thomas Lubanga Dyilo “shall be a full and accurate record of all proceedings which shall contain, *inter alia*: [...] (c) [t]he evidence communicated to the Pre-Trial Chamber pursuant to rule 121, sub-rule 2 (c)”.

CONSIDERING that, in addition to the prosecution’s obligation to disclose to the defence within a reasonable period of time the Incriminating Evidence pursuant to article 61 (3) (b) of the Statute, the surrender of Mr Thomas Lubanga Dyilo to the Court on 17 March 2006 triggered the obligation of the prosecution under article 67 (2) of the Statute to disclose, as soon as practicable, to the defence “evidence in the

Prosecutor's possession or control which he or she believes shows or intends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence" (the "Exculpatory Evidence");

CONSIDERING that the preservation of the evidence, the effectiveness of the disclosure process, the protection of victims and witnesses and the proper safeguarding of the rights of Mr Thomas Lubanga Dyilo require that the system of disclosure of the evidence that the prosecution and the defence intend to use at the confirmation hearing and the system of disclosure of the Exculpatory Evidence pursuant to article 67 (2) of the Statute be consistent;

CONSIDERING that it is necessary to provide the prosecution and Duty Counsel for the Defence with the opportunity to present their observations on the most appropriate system of disclosure of (i) the evidence they intend to use at the confirmation hearing and (ii) the Exculpatory Evidence gathered by the prosecution before the confirmation hearing;

CONSIDERING that, pending a decision on the system of disclosure which will ultimately be followed, it is necessary to establish an interim system of disclosure by which the prosecution may start disclosing to the defence (i) the Incriminating Evidence which the prosecution might have already decided to rely on at the confirmation hearing and (ii) the evidence currently in the possession or control of the prosecution which it might have already identified as Exculpatory Evidence;

CONSIDERING that, pending a decision on the system of disclosure which will ultimately be followed, any disclosure of the Incriminating Evidence or the Exculpatory Evidence by the prosecution to the defence should be channelled through the Registry as the organ of the Court which, under rule 15 (1) of the Rules,

is responsible for keeping “a database containing all the particulars of each case brought before the Court”;

FOR THESE REASONS

DECIDE that the prosecution and Duty Counsel for the Defence will have until 6 April at 16.00 hours to present their observations on what they consider the most appropriate system of disclosure of (a) the evidence which they intend to use at the confirmation hearing and (b) the Exculpatory Evidence gathered by the prosecution before the confirmation hearing, in view of:

- (i) The Statutory framework provided for in the Statute, the Rules, the Regulations of the Court and the Regulations; and
- (ii) The need to ensure the preservation of the evidence, the effectiveness of the disclosure process, the protection of victims and witnesses and the proper safeguarding of the rights of Mr Thomas Lubanga Dyilo;


DECIDE that, pending a decision on the system of disclosure which will ultimately be followed, the interim system of disclosure set out below shall be followed in order to make it possible for the prosecution to start disclosing to the defence (a) the Incriminating Evidence which it might have already decided to rely on at the confirmation hearing; and (b) the evidence currently in the possession or control of the prosecution which it might have already identified as Exculpatory Evidence:

- (i) The prosecution shall file in the record of the case against Mr Thomas Lubanga Dyilo any Incriminating Evidence or Exculpatory Evidence which it intends to disclose to the defence;

- (ii) The prosecution shall include in each filing referred to in (i) above a list identifying all Incriminating Evidence or Exculpatory Evidence included in that filing and indicating whether any such evidence has been filed pursuant to either article 61 (3) (b) or article 67 (2) of the Statute;
- (iii) The Registrar shall assign a different reference number in the record of the case against Mr Thomas Lubanga Dyilo to each piece of Incriminating Evidence or Exculpatory Evidence filed by the prosecution;
- (iv) The Registrar shall ensure that the reference number makes it possible to determine immediately whether the relevant piece of evidence has been submitted by the prosecution pursuant to article 61 (3) (b) or article 67 (2) of the Statute;
- (v) The Registrar shall organise the index of the record of the case against Mr Thomas Lubanga Dyilo so as to set out in separate sections (a) all evidence submitted by the prosecution pursuant to article 61 (3) (b) of the Statute; and (b) all evidence submitted by the prosecution pursuant to article 67 (2) of the Statute;
- (vi) Whenever the prosecution makes a filing pursuant to (i) above, the Registrar shall ensure:

- a. That the standard notification of the prosecution's filing does not contain any attachment with the Incriminating Evidence or the Exculpatory Evidence submitted by the prosecution in that filing;
- b. That a list identifying each piece of Incriminating Evidence or Exculpatory Evidence included in the filing is notified as soon as practicable to the single judge and the Duty Counsel for the Defence;
- c. That the Duty Counsel for the Defence is given access as soon as practicable to each piece of Incriminating Evidence or Exculpatory Evidence included in that filing.

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



Judge Sylvia Steiner
Single Judge

Dated this Thursday 23 March 2006

At The Hague

The Netherlands