

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No: ICC-01/04-01/06

Date: 15 May 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 ON THE FINAL SYSTEM OF DISCLOSURE AND THE  
ESTABLISHMENT OF A TIMETABLE**

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Ekkehard Withopf, Senior Trial Lawyer

**Counsel for the Defence**

Mr Jean Flamme

**I, Judge Sylvia Steiner**, judge at the International Criminal Court ("the Court");

**NOTING** the "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 First Decision on Disclosure") issued by Judge Sylvia Steiner on 23 March 2006,<sup>1</sup> and "the Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure" ("the Second Decision on Disclosure") issued by Judge Sylvia Steiner on 27 March 2006,<sup>2</sup> establishing an interim system of disclosure pending the submissions of the parties on their views as to the most appropriate system of disclosure within the framework of the Rome Statute ("the Statute) and the Rules of Procedure and Evidence ("the Rules");

**NOTING** the "Prosecution's Observations on Disclosure"<sup>3</sup> ("the Prosecution's Observations") filed by the Prosecution on 6 April 2006 pursuant to the First and the Second Decisions on Disclosure;

**NOTING** the "*Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006*"<sup>4</sup> ("the Duty Counsel's Observations") filed by Duty Counsel for the Defence on 6 April 2006 pursuant to the First and Second Decisions on Disclosure, whereby Duty Counsel for the Defence requested full access to the Prosecution's entire file of the investigation of the situation in the Democratic Republic of the Congo ("the DRC") and of the case against Thomas Lubanga Dyilo;

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<sup>1</sup> ICC-01/04-01/06-58.

<sup>2</sup> ICC-01/04-01/06-54.

<sup>3</sup> ICC-01/04-01/06-66.

<sup>4</sup> ICC-01/04-01/06-68.

**NOTING** the “Decision Convening a Hearing on the System of Disclosure for the Purpose of the Confirmation Hearing”<sup>5</sup> issued by Judge Sylvia Steiner on 7 April 2006, convening a hearing on 24 April 2006 with the Prosecution and the Defence to address matters relating to the system of disclosure;

**NOTING** the hearing before Judge Sylvia Steiner on 24 April 2006<sup>6</sup> which resumed on 26 April 2006<sup>7</sup>, whereby the parties were given until 2 May 2006 to present their final observations on the most appropriate system of disclosure within the statutory framework governing the Court’s criminal procedure;

**NOTING** the “Prosecution’s Final Observations on Disclosure”<sup>8</sup> filed by the Prosecution on 2 May 2006, whereby it submits, *inter alia*, that the applicable law and the effectiveness of the disclosure process require “direct disclosure between the parties, without the Registry or any other third party being the intermediary”;

**NOTING** the “Observations of the Defence relating to the System of Disclosure in View of the Confirmation Hearing”<sup>9</sup> filed by Counsel for the Defence on 2 May 2006, whereby the Defence submits, *inter alia*, that the disclosure process should be *inter partes*;

**NOTING** the decision of Pre-Trial Chamber I of 22 March 2006<sup>10</sup> designating Judge Sylvia Steiner as single judge in the case against Thomas Lubanga Dyilo responsible, under article 57 (2) of 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”);

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<sup>5</sup> ICC-01/04-01/06-74.

<sup>6</sup> ICC-01-04-01-04-T-4-EN.

<sup>7</sup> ICC-01-04-01-04-T-5- CONF-EN.

<sup>8</sup> ICC-01/04-01/06-91.

<sup>9</sup> ICC-01/04-01/06-92

<sup>10</sup> ICC-01/04-01/06-51.

**NOTING** articles 57 (3) (c), 61, 67 and 68 of the Statute; rules 15, 76 to 83, 121, 122, 131 and 137 of the Rules; regulation 26 of the Regulations of the Court (“the Regulations”); and regulation 21 of the Regulations of the Registry;

**CONSIDERING** that the processes of (i) disclosure before the confirmation hearing and (ii) communication to the Pre-Trial Chamber of the evidence that the parties intend to present at the said hearing are distinct features of the Court’s criminal procedure and fall under different provisions;

**CONSIDERING** that the said process of disclosure will be conducted through two distinct procedures consisting of disclosure *stricto sensu* and inspection;

**CONSIDERING** that, pursuant to article 67 (2) of the Statute and rules 76 and 79 of the Rules, disclosure *stricto sensu* requires the relevant party to provide directly to the other party copies of the evidence and materials subject to disclosure, whereas inspection, pursuant to rules 77 and 78, imposes on the relevant party the obligation (i) to allow the other party to inspect the relevant books, photographs, maps, and tangible objects, and (ii) to provide those copies requested during inspection;

**CONSIDERING** that the parties have agreed to carry out their exchanges during the disclosure process electronically;

**CONSIDERING** that the relevant rules on disclosure are a key tool in the Court’s criminal procedure to ensure the fundamental right of any person to a fair and expeditious trial, and that they must be interpreted in a way consistent with, *inter alia*, the rights of the accused to be informed promptly and in detail of the nature,

cause and content of the charges and to have adequate time and facilities to prepare the defence;

**CONSIDERING** that, as provided for in article 61 (7) of the Statute, the scope of the confirmation hearing is limited to determining whether sufficient evidence exists to establish substantial grounds to believe that a person has committed the crimes charged;

**CONSIDERING** furthermore the arguments and reasons provided for in Annex I to this decision, which form an integral part thereof;

**FOR THESE REASONS**

**DECIDE** to reject the Defence request for full access to the entire Prosecution file of the investigation of the situation in the DRC in the case against Thomas Lubanga Dyilo;

**DECIDE** that prior to the confirmation hearing the process of disclosure of the evidence which the parties intend to use at that hearing and other materials which are potentially exculpatory or otherwise material to Defence preparations for the confirmation hearing, as governed by articles 61 (3), 67 (1) (a) and (b) and 67 (2) of the Statute and rules 76 to 83 of the Rules, is to be conducted *inter partes* between the Prosecution and the Defence;

**DECIDE** that, pursuant to article 61 (3) of the Statute and rule 121 (2) (c) of the Rules, the Prosecution shall communicate to the Pre-Trial Chamber the evidence on which it intends to rely at the confirmation hearing as soon as practicable after it has been

subject to disclosure under rule 76 or to inspection under rule 77 of the Rules; and that such communication shall take place by filing in the record of the case against Thomas Lubanga Dyilo the original and electronic copies, or electronic photographs in the case of tangible objects, of the relevant evidence containing the details required by the Draft Protocol on the Presentation of Evidence as it stands on 15 May 2006;

**DECIDE** that, pursuant to article 67 (2) of the Statute, after each act of disclosure the Prosecution shall file in the record of the case against Thomas Lubanga Dyilo a disclosure note signed by both the Prosecution and the Defence which shall include a list of the items disclosed and their reference numbers;

**DECIDE** that, pursuant to rule 76 of the Rules, and unless the single judge authorises otherwise under rule 81 of the Rules, the Prosecution must disclose to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements.

**DECIDE** that, pursuant to rule 77 of the Rules, the Defence shall inspect evidence and materials in the possession or control of the Prosecution on the premises of the Prosecution at a time and in a manner agreed by the parties; that, at the request of the Defence during inspection, the Prosecution shall provide to the Defence electronic copies, or electronic photographs in the case of tangible objects, of all evidence or material subject to inspection; and that as soon as practicable after each act of inspection the Prosecution shall file an inspection report, signed by both parties, which shall include a list of the items inspected, their reference numbers and a brief account of how inspection took place, including the fact that the Defence received the electronic copies or photographs requested;

**DECIDE** that, pursuant to rule 78 of the Rules, the Prosecutor shall inspect the evidence on which the Defence intends to rely at the confirmation hearing at a location and time and in a manner agreed by the parties; that, at the request of the Prosecution during inspection, the Defence shall provide to the Prosecution electronic copies or photographs of all evidence or material inspected; and that, as soon as practicable after inspection, the Defence shall file in the record of the case against Thomas Lubanga Dyilo the evidence subject to inspection in the same manner as prescribed above for filing the evidence on which the Prosecution intends to rely at the confirmation hearing;

**DECIDE** that as soon as practicable after this decision has been issued, the Registry shall make the necessary arrangements to provide the Defence with access to and training in the software necessary to facilitate (i) *inter partes* exchanges between the Prosecution and the Defence, and (ii) subsequent filings in the record of the case in accordance with the Draft Protocol for the Presentation of Evidence;

**DECIDE** that as soon as practicable after this decision has been issued, the Registry shall make the necessary arrangements to provide Thomas Lubanga Dyilo with unrestricted access to a computer terminal in the Detention Unit for the purpose of accessing the evidence and materials exchanged between the parties, and that any practical or security concerns shall be raised with the single judge at the latest at the status conference on 24 May 2006;

**DECIDE** that, subject to a determination under rule 81 of the Rules, the Prosecution and Defence filings of the evidence they intend to present at the confirmation hearing shall be classified as confidential;

**DECIDE** that, subject to any eventual postponement of the hearing, the disclosure process for the purpose of the confirmation hearing on 27 June 2006 and the subsequent filing in the record of the case against Thomas Lubanga Dyilo of the evidence on which both parties intend to rely at that hearing shall be completed according to the following timetable:

- 1- *Inter partes* disclosure of potentially exculpatory materials under article 67 (2) of the Statute shall commence as soon as this decision has been issued, and the first exchange shall take place before the status conference to address disclosure matters on 24 May 2006;
- 2- As soon as the Prosecution has identified an item of potentially exculpatory material within the scope of article 67 (2) of the Statute, the Prosecution shall:
  - (i) disclose it to the Defence;
  - (ii) bring to the attention of the Chamber any delay in disclosure caused by the procedure under article 54 (3) (e), 72 or 93 of the Statute; or
  - (iii) request an exception to the disclosure requirement under rule 81 of the Rules;
- 3- The parties shall make every effort to agree on the frequency of the exchanges with a view to ensuring that most of potentially exculpatory materials within the scope of article 67 (2) of the Statute in the current case against Thomas Lubanga Dyilo are disclosed as soon as practicable and no later than 2 June 2006;
- 4- As soon as the Prosecution has identified the evidence it intends to use at the confirmation hearing, or other materials referred to in rule 77 of the Rules, and which must be subject to inspection pursuant to such a rule:



- (i) the Defence shall be permitted to inspect such evidence and materials; or
- (ii) the Prosecution shall:
  - a) request, under rule 81 of the Rules, an exception to the requirement to allow inspection of evidence and materials under rule 77; or
  - b) in case of materials that the Prosecution does not intend to use at the confirmation hearing, bring to the attention of the Chamber any delay in inspection caused by the procedure under article 54 (3) (e), 72 or 93 of the Statute;

5- Subject to a determination under rule 81, the Prosecution shall allow the Defence to inspect no later than 2 June 2006 the evidence which is subject to inspection under rule 77 of the Rules and which the Prosecution has indicated in the document filed pursuant to rule 121 (3) of the Rules that it intends to use at the confirmation hearing;

6- The parties shall make every effort to agree on the frequency of inspection under rule 77 of the Rules with a view to ensuring that the Defence is allowed to inspect as soon as practicable and no later than 2 June 2006 most of the materials obtained from or belonging to Thomas Lubanga Dyilo or material to the Defence preparation;

7- As soon as the Prosecution decides to rely on a given witness at the confirmation hearing, the Prosecution shall:

- (i) transmit, pursuant to rule 76 of the Rules, to the Defence the name of that witness and copies of his or her statements in the

original and in a language that Thomas Lubanga Dyilo fully understands and speaks; or

- (ii) request authorisation under rule 81 not to provide the name of that witness to the Defence and to provide the Defence with redacted versions of his or her statements;

8- Subject to a determination under rule 81 of the Rules, the Prosecution, pursuant to rule 76 of the Rules, shall disclose to the Defence no later than 2 June 2006 the names and the statements of the witnesses on whom the Prosecution intends to rely at the confirmation hearing according to the document filed pursuant to rule 121 (3) of the Rules;

9- As soon as practicable after the full or the redacted versions of the statements have been transmitted to the Defence pursuant to rule 76 of the Rules, the Prosecution shall file in the record of the case against Thomas Lubanga Dyilo:

- (i) the original statements which, if so authorised by the single judge pursuant to rule 81 of the Rules, shall be filed *ex parte*, only available to the Prosecution;
- (ii) the redacted versions of the statements, if previous authorisation has been granted by the single judge, pursuant to rule 81 of the Rules;
- (iii) a copy of the statements in a language that Thomas Lubanga Dyilo fully understands and speaks, which may be submitted in a redacted version if so authorised by the single judge, pursuant to rule 81 of the Rules; and

- (iv) an electronic copy of the statements under (i), (ii) and (iii) above, including such details required by the Draft Protocol for the Presentation of Evidence;

10- A status conference on the process of disclosure shall be held on 24 May 2006 at 11.00 hours;

11- On 29 May 2006, the Prosecution shall make available to the Defence and file in the record of the case against Thomas Lubanga Dyilo, pursuant to rule 121 (3) of the Rules, a comprehensive document ("the Prosecution's Charging Document and List of Evidence") containing a detailed description of the changes together with the list of evidence which the Prosecution intends to present at the hearing. The Prosecution shall ensure that it is organised so that:

- (i) each item of evidence is linked to the factual statement it intends to prove; and
- (ii) each factual statement is linked to a specific element of the crime, a mode of liability or both;

12- Requests, under rule 81 of the Rules, for exceptions to disclosure concerning evidence included in the Prosecution's Charging Document and List of Evidence shall not be made after 29 May 2006;

13- On 5 June 2006 at 14.00 hours a status conference shall be held to address the disclosure process and the filing in the record of the case the evidence the parties intend to use at the confirmation hearing;

14- The Defence shall have until 12 June 2006 to file, pursuant to rule 121 (6) of the Rules, the list of evidence ("the Defence List of Evidence") it intends to

present at the confirmation hearing in light of the Prosecution's Charging Document and List of Evidence filed on 29 May 2006;

15- Requests for exceptions to disclosure, under rule 81 of the Rules, concerning evidence included in the Defence's List of Evidence shall not be made after 12 June 2006;

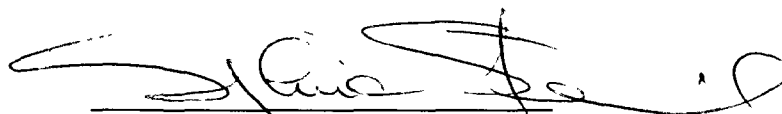
16- Subject to a determination under rule 81 of the Rules, the Defence shall as soon as practicable after 12 June 2006 and no later than 20 June 2006 allow the Prosecution, pursuant to rule 78 of the Rules, to inspect the books, documents, photographs and any tangible objects which the Defence intends to present at the confirmation hearing;

17- As soon as practicable after the Defence List of Evidence has been filed, the Defence shall file in the record of the case against Thomas Lubanga Dyilo:

- (i) the original statements of the witnesses on which it intends to rely at the confirmation hearing, which, if authorised by the single judge, pursuant to rule 81 of the Rules, shall be filed *ex parte*, only available to the Defence;
- (ii) the redacted versions of the statements, if previous authorisation has been granted by the single judge pursuant to rule 81 of the Rules;
- (iii) an electronic copy of statements under (i) and (ii) above, including the details required by the Draft Protocol for the Presentation of Evidence;

18- A status conference to address the disclosure process and the filing in the record of the case of the evidence which the parties intend to use at the confirmation hearing shall be held on 16 June 2006 at 14.00 hours;

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

A handwritten signature in black ink, appearing to read 'Sylvia Steiner', written over a horizontal line.

**Judge Sylvia Steiner**  
**Single Judge**

Dated this Monday 15 May 2006

At The Hague

The Netherlands

## ANNEX I: DISCUSSION OF THE DECISION ON THE FINAL SYSTEM OF DISCLOSURE

### I. Preliminary Considerations

#### I.1. Interpretative Criteria

1. As the single judge stated in her decisions of 23 and 27 March 2006 establishing the interim system of disclosure, the final system of disclosure must first and foremost follow the statutory framework provided for in the Rome Statute ("the Statute"), the Rules of Procedure and Evidence ("the Rules"), and the Regulations of the Court ("the Regulations").<sup>11</sup> In determining the contours of such a framework, the single judge must look at the general principles of interpretation as set out in article 31 (1) of the Vienna Convention on the Law of Treaties, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".
2. The single judge refers to the general principle of interpretation set out in article 21 (3) of the Statute, according to which "the application and the interpretation of law pursuant to this article must be consistent with internationally recognized human rights".
3. Interpretation of the relevant provisions of the Statute and the Rules, and in particular those relating to the disclosure procedure, must fully respect Thomas Lubanga Dyilo's right to a fair trial as enshrined in article 14 (1) of

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<sup>11</sup> "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 First Decision on Disclosure"), issued by Judge Sylvia Steiner on 23 March 2006, ICC-01/04-01/06-54, p. 5; and "Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure" ("the Second Decision on Disclosure"), issued by Judge Sylvia Steiner on 27 March 2006, ICC-01/04-01/06-58, p. 4.

the International Covenant of Civil and Political Rights,<sup>12</sup> article 6 (1) of the European Convention for the Protection of Human Rights and Individual Freedoms,<sup>13</sup> and article 8 (1) of the American Convention on Human Rights.<sup>14</sup>

4. Furthermore, the single judge considers that the need to safeguard the uniqueness of the criminal procedure of the International Criminal Court ("the Court") is one of the primary considerations in contextual interpretation of the relevant provisions. It can be met by addressing possible tensions among those provisions so as to ensure consistency, and full expression to the meaning of each.
5. The single judge also considers that the final system of disclosure must satisfy the minimum guarantees provided for in article 67 of the Statute, among them (i) the right of the Defence to know as soon and as fully as possible the evidence the Prosecution intends to rely on at the confirmation hearing, and about potentially exculpatory and other materials that may assist the Defence in preparing for the confirmation hearing, and (ii) adequate time and facilities to prepare the defence.

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<sup>12</sup> As it has been highlighted, "[t]he right to a fair trial and equality before the Courts have historically been regarded as fundamental rules of law" (Joseph, S., Schultz, J., Castan, M, *The International Covenant on Civil and Political Rights*, Oxford University Press, 2004, p. 390). In this regard, the Human Rights Committee has highlighted that "the second sentence of article 14, paragraph 1, provides that 'everyone shall be entitled to a fair and public hearing'. Paragraph 3 of the article elaborates on the requirements of a 'fair hearing' in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph (TN: ref. missing)" (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), para. 5).

<sup>13</sup> On the other hand, the European Court of Human Rights has repeatedly highlighted "the prominent place held in a democratic society by the right to a fair trial" See, for instance, the case of *Airey v. Ireland*, "Judgment", 9 October 1979, Application No. 6289/73, para. 24; and the case of the "Belgian Linguistic" "Judgment", Application number 1474/62;1677/62;1691/62;1769/63;1994/63; 2126/6423, July 1968 paras. 3 and 4.

<sup>14</sup> As the Inter-American Commission on Human Rights ("IACHR") has pointed out in relation to the rights embraced in articles 8 (1) and 25 (1) of the Convention, "The principles established in these articles --the right to judicial protection and to judicial guarantees-- rank as fundamental rights within our Convention, because they protect individuals in their complex relationship with the state. Consequently, enforcement of these principles cannot be confined to a mere formal verification of procedural requirements" (IACRH, Report No. 74/90, Case 9850 (Argentina), 4 October 1990, para. 17)

6. Finally, as the single judge highlighted in her decisions of 23 and 27 March 2006,<sup>15</sup> and as the Prosecution, the Defence and the Registry have pointed out in their respective observations,<sup>16</sup> a number of other factors must be taken into consideration in interpreting the relevant provisions on disclosure and communication to the Pre-Trial Chamber. These include: (i) effectiveness of the disclosure process; (ii) protection of victims and witnesses; (iii) confidentiality of certain information; (iv) preservation of the evidence; and (v) guarantee that those granted procedural status of victim in the case against Thomas Lubanga Dyilo are in a position adequately to exercise the relevant procedural rights under the Statute and the Rules.

## **I.2. Defence Request for Full Access to the Entire Prosecution File**

7. In its filing of 6 April 2006, the Defence requested full access to the entire Prosecution file on the investigation of the situation in the Democratic Republic of the Congo ("the DRC") and on the case against Thomas Lubanga Dyilo.<sup>17</sup> During the hearing on 24 April 2006 and in its final observations filed on 2 May 2006, the Defence insisted on its request when elaborating on the scope of the Prosecution's obligation under articles 61

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<sup>15</sup> First Decision on Disclosure, p. 5; Second Decision on Disclosure, p. 5.

<sup>16</sup> "Prosecution's Observations on Disclosure" ("the Prosecution's Observations"), filed by the Prosecution on 6 April 2006, ICC-01/04-01/06-66, pp. 11 to 15.; "*Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006*" (Defence Observations), filed by Duty Counsel for the Defence on 6 April 2006, ICC-01/04-01/06-68, pp. 4 and 5; "Prosecution's Final Observations on Disclosure" ("the Prosecution's Final Observations"), filed by the Prosecution on 2 May 2006, ICC-01/04-01/06, 91, paras. 12 and 13; and "Observations of the Defence relating to the system of disclosure in view of the Confirmation Hearing" (the Defence's Final Observations), filed by the Defence on 2 May 2006, ICC-01/04-01/06, 92, pp. 8, 9, 15, 16 and 18.

<sup>17</sup> Defence's Observations, p. 8.



(3), 67 (1) (a) and (b) and 67 (2) of the Statute and rules 76 and 77 of the Rules.<sup>18</sup>

8. The Defence maintains that if it wishes to challenge the charges and present evidence at the confirmation hearing, then “considerable investigative work” must be done.<sup>19</sup> This would require having access “immediately” to the entire Prosecution file<sup>20</sup> to study all its aspects, including exculpatory materials.<sup>21</sup> It would also require the material means necessary to undertake such investigative work, including the assistance of an investigator who can go to the DRC to investigate, reveal exculpatory information, and contact exculpatory witnesses.<sup>22</sup>
9. The Defence further submits that “preparation of the Defence is clearly an independent exercise, and the obligation bearing upon the Prosecutor to permit inspection is, in fact, the possibility for the Defence to take knowledge of all of the case compiled by the Prosecutor to establish whether there is information which is material in any way to the Defence.”<sup>23</sup>
10. In the view of the single judge, the Defence position is not supported by a literal and contextual interpretation of articles 61 (3), 67 (1) (a) and (b) and 67 (2) of the Statute and rules 76, 77 and 121 (3) of the Rules.
11. According to a literal interpretation, these provisions do not impose on the Prosecution the obligation to disclose to the Defence, or to permit the Defence to inspect, any material which the Prosecution does not intend to

<sup>18</sup> See, for instance, ICC-01/04-01/06-T-4 EN, from p. 18, line 11 to p. 20, line 9. See also the Defence’s Final Observations, pp. 3, 6, 7, 16 and 17.

<sup>19</sup> ICC-01/04-01/06-T-4 EN, p. 27, lines 15 to 18.

<sup>20</sup> ICC-01/04-01/06-T-4 EN, p. 19, lines 2 to 4.

<sup>21</sup> ICC-01/04-01/06-T-4 EN, p. 19, lines 24 and 25, and p. 20, line 1.

<sup>22</sup> ICC-01/04-01/06-T-4 EN, p. 20, lines 2 to 9.

<sup>23</sup> ICC-01/04-01/06-T-4 EN, p. 64, lines 3 to 8. See also the Defence’s Final Observations, pp. 16 and 17.

present at the confirmation hearing and which is neither potentially exculpatory nor material to Defence preparations for the confirmation hearing.<sup>24</sup>

12. According to their contextual interpretation, the provisions on the Prosecution's disclosure obligations regulate the extent, time, and manner in which the Defence can access some of the materials contained in the Prosecution file.<sup>25</sup> They are based on the premise that the criminal procedure before the International Criminal Court does not provide for full access by the Defence to the entire Prosecution file. In the single judge's opinion, to say otherwise would make those provisions meaningless.
13. Therefore, the objective of these provisions is not to give the Defence access to the entire Prosecution file, but to put the Defence in a position to adequately prepare for the confirmation hearing. As the single judge stated in her introductory remarks at the hearing on 24 April 2006, articles 61 (3), 67 (1) (a) and (b) and 67 (2) of the Statute enshrine some of the core rights that Thomas Lubanga Dyilo is entitled to for the purpose of the confirmation hearing.<sup>26</sup>
14. In this regard, the single judge disagrees with the Defence submission that anything short of full Defence access to the Prosecution's file would infringe upon Thomas Lubanga Dyilo's right to a fair trial. This submission, besides lacking support in interpretations by international human rights bodies of the right to a fair trial,<sup>27</sup> would lead to the

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<sup>24</sup> This does not apply to those materials obtained from Thomas Lubanga Dyilo or belonging to him.

<sup>25</sup> Brady, H., *Disclosure of Evidence*, in Lee, R.S.: *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence*, Transnational publishers, 2001, p. 404.

<sup>26</sup> ICC-01/04-01/06-T-4 EN, p. 5, lines 7 to 10.

<sup>27</sup> The European Court of Human Rights in *Edwards v. United Kingdom*, Judgment of 16 December 1992, Application No. 13071/87, para. 36, held that "The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (article 6-1), indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused...." In *Fourcher v. France*,

conclusion that the right to a fair trial, as enshrined in article 14 of the ICCPR, article 6 (1) of the ECHR and article 8(1) of the IACHR, would be violated by jurisdictions as diverse as, for instance, the International Criminal Tribunal for the Former Yugoslavia ("the ICTY")<sup>28</sup> and a number of national jurisdictions<sup>29</sup> where disclosure provides a key tool to guarantee the right to a fair trial.

15. For these reasons, the single judge considers that the Defence request for full access to the entire Prosecution file of the DRC investigation and the case against Thomas Lubanga Dyilo is fundamentally contrary to the system of disclosure set out in the Statute and the Rules, and in particular

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judgment of 18 March 1997, Application No. 22209/93, paras. 36 to 38, the European Court of Human Rights held that, pursuant to article 6 (1) and 6 (3) of the Convention, the Applicant was entitled to access the Prosecution's file. However, this conclusion was reached on the basis of (i) the specific circumstances of the case because the Applicant's conviction was solely based on the game warden's official report, which, according to article 537 of the French Code of Criminal Procedure, was good evidence in the absence of proof to the contrary, and therefore it was important for the Applicant to access his case file so as to challenge the official report concerning him, and (ii) a reversal of the French *Cour de Cassation* case-law concerning communication of documents from a file where the defendant has already been sent for trial. In this regard, the European Court of Human Rights pointed out that while the 15 March 1993 judgment of the *Cour de Cassation* affirmed that the European Convention did not require that the case file be made available to the defendant himself, the 12 June 1996 judgment of the *Cour de Cassation* stated in paragraph 21 that: "Everyone charged with a criminal offence thus has the right, under Article 6 para. 3 (article 6-3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, not to the immediate communication of the documents on the file but to the release, at his expense and, where appropriate, acting through his lawyer, of copies of the documents submitted to the court he has been summoned to appear before."

<sup>28</sup> The right to a fair trial, and the corresponding obligation of the Chambers to ensure a fair trial, is enshrined in arts. 20 and 21 (2) of the ICTY Statute, and as the Appeals Chamber has expressly stated, the rules on disclosure in the ICTY Rules of Procedure and Evidence, and particularly rule 68 of the ICTY Rules of Procedure and Evidence on the Prosecution's obligation to disclose potentially exculpatory materials, are "essential for the conduct of fair trials before the Tribunal." (*Prosecutor v. Radislav Krstic*, Appeal Judgment, Case Num. IT-98-33-T-A, 19 April 2004, para. 211).

<sup>29</sup> For instance, in England and Wales, "the right of every accused to a fair trial is a basic or fundamental right. That means that under our unwritten constitution those rights are deserving of special protection by the courts. However, in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial. That is the framework in which the development of common law rules about disclosure by the Crown must be seen" (*R. v. Brown* [1995] 1 Cr App R 191, p. 198; see also *R. v. Ward*, [1993], 96 Cr App R 1, p. 67 ).

In New Zealand, the Prosecution is compelled under common law to disclose material to the defence before trial where it is necessary to satisfy the Prosecution's duty of fairness in the conduct of the trial, which requires that "material evidence" information be disclosed. ( *R. v. Mason* [1976] 2 NZLR 122 (CA); see also *R v Connell* [1985] 2 NZLR 233 (CA)).

In the United States, the Supreme Court has combined various constitutional standards to create "what might loosely be called the area of the constitutionally guaranteed access to evidence" (*Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). Among them, particular emphasis has been placed on the so-called "Brady rule", according to which the Prosecution has a constitutional obligation (due process right to discovery of exculpatory evidence) to disclose exculpatory materials within its possession when that evidence might be material to the outcome of the case (*Brady v. Maryland*, U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963)).

in articles 61 (3), 67 (1) (a) and (b) and 67 (2) of the Statute and rules 76 and 77 of the Rules.

## **II. The Disclosure Process and Communication to the Pre-Trial Chamber of Evidence on which the Prosecution and the Defence Intend to Rely at the Confirmation Hearing**

16. At the outset, the single judge acknowledged the urgency expressed by the Defence of the need to decide on the main features of the system of disclosure, in light of the fact that the confirmation hearing is scheduled for 27 June 2006. At the same time, the single judge underscores the significant differences found between observations made by the Prosecution, the Defence, and the Registry in relation to a number of aspects of the disclosure process as shown by the following summary of their oral and written observations.

### **II.1. The Prosecution Approach**

17. The Prosecution emphasises that the disclosure process is *inter partes* and must be distinguished from that of communicating certain evidence to the Pre-Trial Chamber. According to the Prosecution, *inter partes* disclosure is supported by a literal interpretation of several provisions of the Statute and the Rules, such as article 67 (2) of the Statute and rule 76 of the Rules.<sup>30</sup>
18. The Prosecution thus submits that disclosure via the Registry, as provided for in the interim system of disclosure, is contrary to the Court's applicable

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<sup>30</sup> ICC-01/04-01/06-T-4 EN, p. 12, lines 20 to 24.

law.<sup>31</sup> In the view of the Prosecution, this is particularly true in relation to inspecting the physical evidence that the Prosecution intends to use at the confirmation hearing or at trial, insofar as the Prosecution would be prevented from proving the chain of custody of such evidence if compelled to transmit it to the Defence or to a third party such as the Registry.<sup>32</sup>

19. The Prosecution also submits that disclosure via the Registry creates obvious practical problems.<sup>33</sup> In particular, it would involve the risk of forcing the Prosecution to rely on a "third party", that is the Registry, to discharge its legal obligations.<sup>34</sup>
20. On the other hand, the Prosecution alleges that under rule 121 (2) (c) of the Rules only the evidence on which the Prosecution intends to rely at the confirmation hearing must be communicated to the Pre-Trial Chamber,<sup>35</sup> and always after it has been previously disclosed to the Defence.<sup>36</sup> In the view of the Prosecution, the only time limit established by the Statute or the Rules for communicating such evidence to the Pre-Trial Chamber is that it must take place at the end of the disclosure process.<sup>37</sup>

## II.2. The Defence Approach

21. The Defence agrees with the Prosecution that *inter partes* disclosure is preferable.<sup>38</sup> The Defence submits that the interim system of disclosure

<sup>31</sup> Prosecution's Final Observations, paras. 8, 9 and 11.

<sup>32</sup> ICC-01/04-01/06-T-4 EN, p. 58, lines 12 to 14; and Prosecution's Final Observations, para. 10.

<sup>33</sup> ICC-01/04-01/06-T-4 EN, p. 15, lines 3 to 8.

<sup>34</sup> ICC-01/04-01/06-T-4 EN, p. 15, lines 6 to 8. and Prosecution's Final Observations, para. 12.

<sup>35</sup> ICC-01/04-01/06-T-4 EN, p. 35, lines 9 to 15, page 59, lines 6 to 12.

<sup>36</sup> ICC-01/04-01/06-T-4 EN, p. 11, lines 24 and 25 and page 12, lines 1 to 17.

<sup>37</sup> At the hearing on 24 April 2006, the Prosecution stated: "The Prosecution, your honour, in the instant case, will communicate the witness statements to the Pre-Trial Chamber as soon as possible, once disclosed to the Defence under Rule 76. For future cases, however, the Prosecution, obviously in agreement with counsel for the Defence, reserves its right to disclose at a later stage in light of the fact that the law envisages communication to the Pre-Trial Chamber at the end, at the end, of the disclosure process only" (ICC-01/04-01/06-T-4 EN, p. 48, lines 21 to 25 and p. 49, lines 1 and 2).

<sup>38</sup> ICC-01/04-01/06-T-4 EN, p. 15, lines 20 to 25 and p. 16, lines 1 to 17.

makes the Registry a “mid-station in communication”<sup>39</sup> which could hinder the parties when they need to communicate and could cause considerable delays at this initial stage of the case proceedings.<sup>40</sup> In the view of the Defence, disclosure via the Registry is likely to create misunderstandings, particularly if the Registry fails to appreciate the urgency of certain communications,<sup>41</sup> and could lead to the parties blaming the Registry for their own failures to comply with their own disclosure obligations.<sup>42</sup> The Defence therefore agrees with the Prosecution that the role of the Registry “must be a passive role largely”<sup>43</sup> in the sense that “the Registry should record *a posteriori* communication which has already been executed between the parties”.<sup>44</sup>

22. In the view of the Defence, all evidence and materials subject to prior exchange among the parties should in principle be filed subsequently with the Registry, no matter whether: (i) it is a Prosecution or Defence disclosure; (ii) the relevant evidence or materials have been subject to disclosure or to inspection; or (iii) the parties intend to rely on the relevant evidence or materials at the confirmation hearing.<sup>45</sup> The Defence submits that this is the only manner in which the Registry can play its role as the “notary” of the case proceedings and the recorder of what has taken place between the parties.<sup>46</sup>
23. Moreover, the Defence alleges that the 30-day and 15-day time limits provided for in rule 121 (3), (4) and (5) of the Rules set the mandatory

<sup>39</sup> ICC-01/04-01/06-T-4 EN, p. 16, line 21.

<sup>40</sup> ICC-01/04-01/06-T-4 EN, p. 16, lines 18 to 23.

<sup>41</sup> ICC-01/04-01/06-T-4 EN, p. 17, lines 9 to 11.

<sup>42</sup> ICC-01/04-01/06-T-4 EN, p. 17, lines 19 to 24.

<sup>43</sup> ICC-01/04-01/06-T-4 EN, p. 17, line 17.

<sup>44</sup> ICC-01/04-01/06-T-4 EN, p. 17, line 18 and 19.

<sup>45</sup> Defence’s Final Observations, pp. 8, 9, 11, 15, 16, 20, 21. However, in relation to inspection under rule 77 of the Rules, the Defence states: “Insofar as parts of the databases are not used by the Defence (nor by the Prosecution), the Defence takes the view that these materials should not be communicated to the Pre-Trial Chamber” (Defence’s Final Observations, p. 18 *in fine*).

<sup>46</sup> ICC-01/04-01/06-T-4 EN, p. 38, lines 1 to 5; and Defence’s Final Observations, p. 9.

deadlines for disclosure by the Prosecution and for communicating to the Registry the evidence and materials exchanged.<sup>47</sup> According to the Defence, “article 121 sets up the procedure for communication which could last for a certain number of weeks, even months, but which finishes, whatever happens, 30 days before the confirmation hearing”.<sup>48</sup>

### II.3. Observations by the Registry

24. The Registry suggests that the system of disclosure should be uniform for the whole Court<sup>49</sup> and include the use of an electronic system as provided for in regulation 26 of the Regulations.<sup>50</sup> According to the Registry, any delay and ineffectiveness of the disclosure process via the Registry alleged by the parties would be resolved if they adhere to a unified system of disclosure based on common software and a specific protocol.<sup>51</sup> The Registry further highlights that if the parties and the Registry use common software, which should also be used for the presentation of evidence in hearings, then all evidence would be centralised in a complete and single file.<sup>52</sup>

25. In the Registry’s view, a single-file system will be possible only if the parties submit evidence and materials in their original format, to be stored by the Registry, as the record keeper of the proceedings before the Court.<sup>53</sup> According to the Registry, the different parties and participants in

<sup>47</sup> ICC-01/04-01/06-T-4 EN, p. 49, lines 15-18

<sup>48</sup> ICC-01/04-01/06-T-4 EN, p. 49, lines 18-21. In the Defence’s Final Observations, p. 8, the Defence adds: “As will be explained, the 30-day and 15-day time frames as provided by rules 121.3 & 4 have nothing to do with the obligation of the Prosecutor to disclose “promptly”. It is thus not acceptable that the Prosecutor is taking the view that this is the case and that he could respond to this obligation by disclosing only on the very edge of the time limit set. This is 30 days before the Confirmation Hearing.”

<sup>49</sup> ICC-01/04-01/06-T-4 EN, p. 21, lines 20 and 21.

<sup>50</sup> ICC-01/04-01/06-T-4 EN, p. 21, lines 22 to 25.

<sup>51</sup> ICC-01/04-01/06-T-4 EN, p. 44, lines 9 to 25, p. 45, lines 1 to 9 and p. 77, lines 9 to 14.

<sup>52</sup> ICC-01/04-01/06-T-4 EN, p. 78, lines 24 to 25 and p. 79, lines 1 and 2.

<sup>53</sup> ICC-01/04-01/06-T-4 EN, p. 53, lines 4 to 13

proceedings would be given different levels of access to ensure the confidentiality of information, under provisions such as article 54 of the Statute.<sup>54</sup> The Registry emphasises that this would be of great benefit to the Defence, which could make searches that go far beyond what is possible using lists of keywords.<sup>55</sup>

26. Moreover, the Registry stresses that disclosure via the Registry presents a number of additional advantages. First, it would enable to identify immediately any problem that the Defence or the victims of the case may have relating to translations.<sup>56</sup> Second, it would avoid last-minute communication of the names of witnesses called to testify at the confirmation hearing. As a consequence, the Victims and Witnesses Unit could make proper arrangements to minimise security risks for witnesses and their families relating to their travel and stay at the seat of the Court in The Hague.<sup>57</sup> Third, it would greatly facilitate the communication of evidence to Thomas Lubanga Dyilo in the Detention Unit insofar as he could access evidence from a computer terminal in the Detention Unit, with due regard to the privilege of his communication with his counsel.<sup>58</sup> Finally, in the Registry's view, although no person or entity has yet been granted the procedural status of victim in the case against Thomas Lubanga Dyilo, the system of disclosure must be able to "conserve options for managing potential victims at a later stage".<sup>59</sup> In other words, "how is the Chamber going to be able to say what is material which the victims can have if [it] can't know what has been communicated?"<sup>60</sup>

<sup>54</sup> ICC-01/04-01/06-T-4 EN, p. 53, lines 14 to 22.

<sup>55</sup> ICC-01/04-01/06-T-4 EN, p. 77, lines 15 to 22.

<sup>56</sup> ICC-01/04-01/06-T-4 EN, p. 78, lines 1 to 14.

<sup>57</sup> ICC-01/04-01/06-T-4 EN, p. 79, lines 6 to 25.

<sup>58</sup> ICC-01/04-01/06-T-4 EN, p. 80, lines 1 to 20.

<sup>59</sup> ICC-01/04-01/06-T-4 EN, p. 22, lines 5 to 7.

<sup>60</sup> ICC-01/04-01/06-T-4 EN, p. 80, lines 22 to 24.



27. The Registry also suggests that, in deciding on the system of disclosure and on the system of communicating evidence to the Pre-Trial Chamber before the confirmation hearing, some of its statutory obligations should be taken into account. Among them, the Registry highlights its status in the proceedings as the organ of the Court as being: (i) able to give them full faith and credit; and (ii) in charge of the record. This includes its role as channel of communication and its potential to facilitate communication and coordination between the parties.<sup>61</sup> The Registry thus maintains that the communication of evidence must transit through it, although this does not mean that the parties cannot exchange information among themselves or that the Pre-Trial Chamber will have access to all materials filed with the Registry.<sup>62</sup>

#### **II.4. Communication of Certain Evidence to the Pre-Trial Chamber under Rules 121 and 122 (1) of the Rules**

##### **II.4.1. Meaning of the Expression "Communication" and Other Preliminary Matters**

28. As pointed out in the introductory remarks of the single judge at the hearing on 24 April 2006, the uniqueness of the International Criminal Court's criminal procedure lies in the manner of bringing together two features with such different origins as the rules on disclosure and the rules on communication of certain evidence to the Pre-Trial Chamber.<sup>63</sup>

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<sup>61</sup> ICC-01/04-01/06-T-4 EN, p. 21, lines 3 to 6, page 81, lines 11 to 16.

<sup>62</sup> ICC-01/04-01/06-T-4 EN, p. 21, lines 7 to 16.

<sup>63</sup> ICC-01/04-01/06-T-4 EN, p. 3, lines 19 to 25 and p. 4, lines 1 to 4.

29. Disclosure aims at providing the Defence with sufficient information on the Prosecution case and potentially exculpatory materials in order to place the Defence in a position to prepare adequately for the confirmation hearing.
30. Communication to the Pre-Trial Chamber of certain evidence before the confirmation hearing aims at placing the Pre-Trial Chamber in a position to properly organise and conduct the confirmation hearing.<sup>64</sup>
31. In the view of the single judge, the relationship between disclosure and communication of certain evidence to the Pre-Trial Chamber in the Court's criminal procedure is such that a clear understanding of the extent of such communication is needed to properly address the main features of the disclosure system.
32. The single judge considers that interpreting the provisions on communication of certain evidence to the Pre-Trial Chamber must take into consideration a number of elements.
33. First, the parties agree that the expression "shall be communicated to the Pre-Trial" in rule 121 (2) (c) of the Rules means filing certain evidence in the record of the case. In the view of the single judge, this approach is supported not only by a literal interpretation of the expression "shall be communicated", but also by its contextual interpretation in light of rule 122 (1) of the Rules. This last rule is drafted on the premise that the evidence to be presented at the confirmation hearing must previously have been filed in the record of the case, insofar as it establishes that, at the beginning of the confirmation hearing, the Presiding Judge "shall determine how the hearing is to be conducted and, in particular, may establish the order and

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<sup>64</sup> Brady, H., *supra* n. 25, p. 424.

the condition under which he or she intends the evidence contained in the record of the proceedings to be presented".<sup>65</sup>

34. A teleological interpretation of rules 121 (2) (c) and 122 (1) of the Rules also supports this approach. These rules aim at placing the Pre-Trial Chamber in a position to properly organise and conduct the confirmation hearing, which is best achieved by the Chamber having advance access to the evidence to be presented at the hearing. Filing the evidence to be presented at the confirmation hearing in the record of the case will fulfil two additional important functions. First, it puts the victims of the case in a position to adequately exercise their procedural rights during the confirmation hearing by giving them prior access to the evidence that is going to be presented. Second, it ensures that no matter what shortcomings may have occurred in the disclosure process, the parties will have access to the evidence to be presented at the confirmation hearing before it commences.
35. Second, the single judge considers that access to all documents, materials and evidence filed in the record of the case is inherent to the jurisdictional functions of the Pre-Trial Chamber in the case against Thomas Lubanga Dyilo.
36. Finally, the single judge agrees with the Defence and the Registry that the latter is the only organ of the Court which, under rules 15, 121 (10), 131 and 137 of the Rules, can give full faith and credit to the proceedings before the Court, including those in the present case, and is responsible for keeping the record of such proceedings.

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<sup>65</sup> Furthermore, according to regulation 21 of the Regulations of the Registry, the case record against 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)"

37. Under these circumstances, the single judge considers that both parties are obliged, pursuant to rules 121 (2) (c) and 122 (1) of the Rules, to file the original statements, books, documents, photographs and tangible objects in the record of the case. It will then be the responsibility of the Registry, as the record keeper of the Court, to maintain the evidence in its original format, so that the parties shall only have to address matters relating to the chain of custody arising from events prior to the filing of the relevant evidence.

#### **II.4.2. Extent of Communication to the Pre-Trial Chamber**

38. The question arises as to which materials and evidence must be filed by the parties in the record of the case against Thomas Lubanga Dyilo.

##### **II.4.2.1. Evidence on Which the Parties Intend to Rely at the Confirmation Hearing**

39. Rule 121 (3), (4), (5) and (6) of the Rules governs communication to the Pre-Trial Chamber by filing in the record of the case the document containing the charges and the lists of evidence that the parties intend to use at the confirmation hearing.
40. With respect to materials and evidence other than the document containing the charges and the parties' lists of evidence, the relevant part of rule 121 (2) of the Rules states as follows:

In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a

warrant of arrest or a summons to appear has been issued.  
During disclosure:

[...]

(c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.

41. According to its literal interpretation, rule 121 (2) of the Rules expressly refers to evidence under article 61 (3) of the Statute, which is the evidence on which the Prosecution intends to rely at the confirmation hearing. The single judge therefore considers that the reference to “all evidence” in paragraph (c) of rule 121 (2) of the Rules must be understood as all evidence on which the Prosecution intends to rely at the confirmation hearing.
42. According to its contextual interpretation, rule 121 (2) of the Rules must be interpreted in light of rule 122 (1) of the Rules, which also requires that the evidence on which the Defence intends to rely at the confirmation hearing be filed in the record of the case before the hearing commences.
43. Indeed, rule 122 (1) of the Rules grants the Presiding Judge of the Pre-Trial Chamber authority to decide at the beginning of the confirmation hearing how “he or she intends the evidence contained in the record of the proceedings to be presented.” Therefore, in the view of the single judge, what needs to be communicated to the Pre-Trial Chamber prior to the commencement of the confirmation hearing is the evidence that must be presented at such a hearing.
44. As to the format in which the parties must file the evidence on which they intend to rely at the confirmation hearing, the single judge has already concluded that the evidence must be submitted in its original format.

45. The single judge also notes that, under regulation 26 (3) and (4) of the Regulations, whenever possible documents must be filed electronically and evidence other than live testimony must be presented electronically. For these purposes, the Court has purchased software (which is already available to the Prosecution and can be made available to the Defence in the coming days) and prepared a Draft Protocol on the Presentation of Evidence (which requires specific details for each item of evidence to be presented electronically in court, including those relating to the format of the documents, image quality, the numbering system, required metadata and responsibility for the transmission of viruses).
46. Moreover, the single judge also takes note of the willingness shown by the parties to work with this system.<sup>66</sup>
47. Hence, in the view of the single judge, in addition to the originals, the parties must file in the record of the case electronic copies (or electronic photographs for tangible objects) of the evidence on which they intend to rely at the confirmation hearing containing the particulars provided for in the Draft Protocol on the Presentation of Evidence. The single judge considers that, pending approval of the Final Protocol on the Presentation of Evidence, and given the fact that the confirmation hearing has been scheduled for 27 June 2006, the draft protocol, as it stands on 15 May 2006, shall apply in the present case.
48. Regarding the confidentiality of the parties' filings, the single judge agrees with the Prosecution that these should be classified as confidential for the time being. Subsequently, once all the evidence that the parties intend to rely on has been filed, the last status conference before the confirmation

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<sup>66</sup> ICC-01/04-01/06-T-4 EN, p. 54, lines 5 to 25 and p. 55, lines 1 to 23. See also, Defence Final Observations, pp. 23 and 24.

hearing will address with the parties the matters of reclassifying some of the filings and publicity of the confirmation hearing.

49. Moreover, in the view of the single judge, a ruling under rule 81 of the Rules may require that some of the originals of the evidence on which the parties intend to rely at the confirmation hearing be filed *ex parte*, such as full witness statements if either party is authorised to disclose to the other only redacted versions of those statements.

#### **II.4.2.2. Materials on Which the Parties Do Not Intend to Rely at the Confirmation Hearing**

50. The question arises as to whether, in addition to the evidence on which the parties intend to rely, any other materials that the Prosecution must disclose to the Defence before the confirmation hearing must also be presented and therefore need to be previously filed in the record of the case. These would include e.g. potentially exculpatory materials (article 67 (2) of the Statute) or those otherwise material for the Defence's preparation for the confirmation hearing (article 67 (1) (b) of the Statute and rule 77 of the Rules).
51. In the view of the single judge, this question must be answered in the negative for a number of reasons.
52. First, according to article 61 (5), (6) and (7) of the Statute, at the confirmation hearing, "the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged". The Defence then "may: (a) object to

the charges; (b) challenge the evidence presented by the Prosecutor; and (c) present evidence” Finally, the Pre-Trial Chamber, “on the basis of the hearing”, shall confirm the charges, decline to confirm the charges or “adjourn the hearing and request the Prosecutor to consider: (i) providing further evidence or conducting further investigation with respect to a particular charge; or (ii) amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.”

53. Furthermore, rule 79 of the Rules makes it clear that the Defence may raise any alibi or any other defence, under article 31 (1) of the Statute, either at the confirmation hearing or at the trial. Likewise, under article 61 (5) of the Statute and rule 121 (6) of the Rules, the Defence need not present any evidence at the confirmation hearing. Hence, while articles 67 (1) (b) and 67 (2) of the Statute and rule 77 of the Rules impose on the Prosecution the obligation to disclose to the Defence before the confirmation hearing those materials that are potentially exculpatory or are otherwise material for the Defence’s preparation for the confirmation hearing, the Defence need not rely on those materials at the confirmation hearing if it considers that this option will be advantageous to its success at trial.
54. In the view of the single judge, if all materials disclosed by the Prosecution before the confirmation hearing, on which neither party intends to rely, were filed in the record of the case and presented thereat, the nature of the confirmation hearing would be significantly altered and the right of the Defence to decide whether to rely on such materials at the hearing would be infringed on.
55. Second, according to article 61 (7) of the Statute, at the confirmation hearing the Pre-Trial Chamber must determine “whether there is sufficient



evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” Therefore, the Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued.

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56. In the opinion of the single judge, it is not the role of the Pre-Trial Chamber to find the truth concerning the guilt or innocence of Thomas Lubanga Dyilo, but to determine whether sufficient evidence exists to establish substantial grounds to believe that he is criminally liable for the crimes alleged by the Prosecution.<sup>68</sup> The single judge considers that it would be contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing.
57. Third, according to their teleological interpretation, rules 121 (2) and 122 (1) of the Rules serve several purposes. These include enabling the Pre-Trial Chamber to properly organise and conduct the confirmation hearing; ensuring that the parties will have access to the evidence to be presented at the confirmation hearing before it commences, regardless of problems arising during the disclosure process; and enabling the victims to properly exercise their procedural rights during that hearing. In the view of the single judge, these goals will be achieved if, following the literal and contextual interpretation of rules 121 (2) and 122 (1) of the Rules referred to above, only the evidence on which the parties intend to rely at the

<sup>67</sup> Shibahara, K., *Confirmation of the Charges before Trial*, in: Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court*, Nomos, 1999, p. 790.

<sup>68</sup> Marchesiello, M., *Proceedings before the Pre-Trial Chambers*, in: Cassese, A., Gaeta, P. and Jones, J.R.W.D., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. II, p. 1245.

confirmation hearing is communicated to the Pre-Trial Chamber by filing it in the record of the case.

58. Fourth, release from the obligation to communicate to the Pre-Trial Chamber all materials disclosed by the Prosecution to the Defence before the confirmation hearing, and which neither party intends to use at the hearing, is fully consistent with internationally recognised standards regarding the right to a fair trial. In the view of the single judge, under the Court's criminal procedure, to be consistent with those standards what matters is that the Defence can access and analyse the materials far enough in advance to be in a position to decide whether to rely on them at the confirmation hearing.

#### **II.4.2.3. Prosecution Charging Document and List of Evidence and Prosecution Amended Charging Document and/or List of Evidence**

59. In the view of the single judge, in order better to guarantee Thomas Lubanga Dyilo's right to a fair trial, the Prosecution must not only discharge its disclosure obligations promptly but also communicate the documents containing the charges and lists of evidence (the "Prosecution Charging Document and List of Evidence" and the "Prosecution Amended Charging Document and/or List of Evidence"), pursuant to rule 121 (3), (4) and (5) of the Rules, so that the Defence can learn as soon and as fully as possible about the Prosecution's case at the confirmation hearing. This can best be achieved by organising the Prosecution Charging Document and List of Evidence and the Prosecution Amended Charging Document and/or List of Evidence so that (i) each item of evidence is linked to the factual statement it intends to prove, and (ii) each factual statement is linked to the

specific element of the crime or mode of liability, or both, with which Thomas Lubanga Dyilo has been charged.

60. In the view of the single judge, this interpretation of rule 121 (3), (4) and (5) of the Statute not only falls within the boundaries of the literal and contextual interpretation of that rule, but it is strongly supported by its teleological interpretation insofar as it will place the Pre-Trial Chamber in the best position to properly organise and conduct the confirmation hearing and will help the Defence and the victims of the case to better understand the scope and intricacies of the Prosecution case at the confirmation hearing.

## **II.5. Whether the Disclosure Process Should Be *Inter Partes* or through the Registry**

### **II.5.1. *Inter Partes* Disclosure Process**

61. The question of whether the broader disclosure process should be *inter partes* or carried out via the Registry must be addressed, once it has been concluded that what needs to be communicated to the Pre-Trial Chamber by their filing in the record of the case is (i) the Prosecution Charging Document and List of Evidence and the Prosecution Amended Charging Document and/or List of Evidence, (ii) the Defence list of evidence provided for in rule 121 (6) of the Rules, and (iii) the actual evidence on which the parties intend to rely at the confirmation hearing.
62. From a literal perspective, the single judge agrees with the Prosecution and the Defence that the expression “all evidence disclosed between the Prosecution and the person” (“*tous les moyens de preuve ayant fait l’objet d’un*

*échange entre le Procureur et la personne concernée*" in the French version and "*todas las pruebas que el Fiscal haya puesto en conocimiento del imputado*" in the Spanish version) in rule 121 (2) (c) of the Rules, which is the main provision on the communication of evidence to the Pre-Trial Chamber, refers to a previous *inter partes* exchange between the parties. Moreover, the single judge observes that a number of provisions dealing with the Prosecution and Defence disclosure obligations, such as article 67 (2) and rules 76 to 79 of the Rules, refer to a direct exchange between the parties.

63. In the view of the single judge, a contextual interpretation of the relevant provisions also leads to the conclusion that the disclosure process can only be *inter partes* and prior to any communication of evidence to the Pre-Trial Chamber through its filing in the record of the case.
64. In this regard, the single judge considers that disclosure via the Registry is not fully consistent either with the legal framework provided for in the Statute, the Rules, and the Regulations or the nature of the confirmation hearing, insofar as it would require filing (no matter whether the parties intend to rely on them at the hearing) all evidence and materials subject to disclosure in the record of the case, maintaining all such materials and evidence accessible to the Pre-Trial Chamber, and presenting them at the confirmation hearing, under rule 122 (1) of the Rules.
65. Consequently, in the view of the single judge, the consistency of the disclosure process and the need to safeguard the Court's unique criminal procedure require that disclosure be carried out *inter partes* with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the Defence before the

confirmation hearing but that neither party intends to present at that hearing.

66. From a teleological perspective, the rules on disclosure seek to guarantee Thomas Lubanga Dyilo's right to a fair trial by ensuring that the Defence can properly prepare for the confirmation hearing.<sup>69</sup> The single judge concurs with both the Prosecution and the Defence that this overriding goal will be best achieved if the disclosure process takes place directly between the parties in order to ensure that it is expeditious and effective. Doing this will permit the Defence, as soon as possible before the confirmation hearing, to be in a position to decide on the scope of defence and to select the evidence on which it intends to rely at the hearing.
67. Concerning the format of the *inter partes* exchanges during the disclosure process, the single judge considers that the parties must make every effort to reach an agreement on the format in order to ensure that the ultimate purpose of the disclosure process is fulfilled.
68. In this regard, the single judge observes that both parties agree that the electronic format would be the most convenient if security and practical arrangements do not prevent Thomas Lubanga Dyilo from having unrestricted access to the electronic versions of the evidence and materials subject to exchange by the parties before the confirmation hearing.<sup>70</sup> Hence, the Registry must provide for these arrangements as soon as practicable or must inform the single judge of any obstacle to the implementation of the system at the latest at the status conference on 24 May 2006.

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<sup>69</sup> See *supra* n 27, 28 and 29

<sup>70</sup> ICC-01/04-01/06-T-4 EN, p. 54, lines 5 to 25 and p. 55, lines 1 to 23. See also, Defence Final Observations, pp 23 and 24.

### II.5.2. Role of the Registry

69. The single judge considers that the fact that the disclosure process takes place among the parties does not mean that the Registry plays no role in such a process. On the contrary, the Registry must also perform during the disclosure process its unique functions as provider of full faith and credit of the proceedings before the Court and record keeper.
70. Concerning the evidence on which the parties intend to rely at the confirmation hearing, the Registry plays its role as a result of the mandatory filing of such evidence in the record of the case pursuant to rules 121 (2) and 122 (1) of the Rules.
71. The single judge observes that these rules do not establish any specific time limit for the parties to file such evidence but merely set out that this must be done before the start of the confirmation hearing. Furthermore, in the view of the single judge, any such filing may occur only after the relevant party has decided to rely on a given piece of evidence and has exchanged the content of that evidence with the other party.
72. However, the single judge does not agree with the Prosecution's position that the parties are obliged to make such filings only after the disclosure process has been completed. In the opinion of the single judge, the interrelation between the disclosure process and the system for communicating evidence to the Pre-Trial Chamber, and the fulfilment of the various objectives of the latter system, require that, as submitted by the Defence, the parties file in the record of the case any piece of evidence on which they intend to rely at the confirmation hearing as soon as practicable after having exchanged its content with the other party.

73. In respect of the materials which the Prosecution must disclose to the Defence under articles 67 (1) (b) and 67 (2) of the Statute and rule 77 of the Rules and which neither party intends to use at the confirmation hearing, the single judge considers that, given the key role that the exchange of these materials plays in guaranteeing Thomas Lubanga Dyilo's right to a fair trial, a record of the *inter partes* exchanges pursuant to these provisions must be filed by the Prosecution in the record of the case as soon as practicable after any such exchange has taken place.
74. The record relating to exchanges under article 67 (2) of the Statute must consist of "disclosure notes" signed by both parties, which must include a list of the items subject to any given act of disclosure under this provision and their reference numbers.
75. The record relating to exchanges pursuant to rule 77 of the Rules must consist of "inspection reports" signed by both parties, which must include a list of the items subject to inspection, their reference numbers and a brief account of how the act of inspection took place and whether the Defence received the copies which it requested during the inspection.
76. In the view of the single judge, the filing of "disclosure notes" and "inspection reports" is necessary for the Registry to ensure legal certainty as to which materials have been exchanged between the parties without infringing on the interest of the Defence to have access to such materials as soon as practicable. Furthermore, it will ensure consistency in the disclosure process by ensuring that, at the very least, a record of every item subject to such a process is part of the record of the case.

### III. Disclosure *Stricto Sensu* and Inspection as the Two Modalities through which the Disclosure Process Must Take Place.

77. Once the single judge has found that the disclosure process is *inter partes*, the question arises as to the time, manner and the scope of the Prosecution's obligations under articles 61 (3) and 67 (1) (a) and (b) and rules 76, 77 and 121 (3), (4) and (5) to disclose or to permit the Defence to inspect the evidence on which it intends to rely at the confirmation hearing or the materials obtained from or belonging to Thomas Lubanga Dyilo or which are otherwise material to the Defence's preparation for the confirmation hearing.

#### III.1. The Position of the Prosecution

78. In the view of the Prosecution, the objective of article 61 (3) of the Statute, which imposes on the Prosecution the obligation to provide, within a reasonable period of time, a copy of the document containing the charges and to inform the Defence "of the evidence on which the Prosecutor intends to rely at the hearing", is to allow the Defence to prepare properly for the confirmation hearing.<sup>71</sup> The Prosecution submits that this is achieved primarily through rule 121 (3) of the Rules which imposes on the Prosecution the obligation to provide the Defence no later than 30 days before the date of the confirmation hearing with "a detailed description of the charges with a list of the evidence which he or she intends to present at the hearing".<sup>72</sup>
79. The Prosecution also refers to rule 121 (4) and (5) of the Rules, according to which the Prosecution must notify the Defence no later than 15 days before

<sup>71</sup> ICC-01/04-01/06-T-4 EN, p. 24, lines 23 and 24.

<sup>72</sup> ICC-01/04-01/06-T-4 EN, p. 25, lines 2 to 5.



the date of the confirmation hearing of: (i) any amended charges together with a list of evidence it intends to bring in support of those charges at the hearing; and (ii) a list of any new evidence it intends to rely on at the confirmation hearing.<sup>73</sup>

80. The Prosecution also submits that it is important to bear in mind that the Defence has already been informed of the current charges against Thomas Lubanga Dyilo and of "the main lines of the evidence the Prosecution intends to rely on at the occasion of the confirmation hearing" insofar as the latter were summarised in the Prosecution's application for an arrest warrant, a copy of which has already been provided to the Defence.<sup>74</sup>
81. The Prosecution contends, however, that the above-mentioned time limits, and in particular the 30-day deadline provided for in rule 121 (3) of the Rules, only "appl[y] to the list of evidence"<sup>75</sup> and not to : (i) the disclosure to the Defence of the statements of the witnesses whom the Prosecution intends to call to testify at the confirmation hearing pursuant to rule 76 of the Rules<sup>76</sup>; and (ii) the inspection by the Defence of any books, documents, photographs or tangible objects on which the Prosecution intends to rely at the confirmation hearing pursuant to rule 77 of the Rules.<sup>77</sup>
82. The Prosecution does not specifically address the question of the time limits for disclosure and inspection under rules 76 and 77 of the Rules if the 30-day and 15-day time limits provided for in rule 121 (3), (4) and (5) are applicable only to the Prosecution Charging Document and List of

<sup>73</sup> ICC-01/04-01/06-T-4 EN, p. 25, line 26, and page 26, lines 1 and 2.

<sup>74</sup> ICC-01/04-01/06-T-4 EN, p. 25, lines 10 to 15.

<sup>75</sup> ICC-01/04-01/06-T-4 EN, p. 48, lines 14.

<sup>76</sup> ICC-01/04-01/06-T-4 EN, p. 48, lines 15 and 16.

<sup>77</sup> ICC-01/04-01/06-T-4 EN, p. 56, lines 22 and 23 Although, some confusion about the exact position of the Prosecution was introduced subsequently on page 57, lines 1 to 5.

Evidence and the Prosecution's Amended Charging Document and/or List of Evidence. However, the Prosecution acknowledges that, in addition to article 61 (3) of the Statute, article 67 (1) (b) of the Statute is also applicable at the confirmation hearing, which means that the Defence must be given adequate time and facilities to prepare for the confirmation hearing.<sup>78</sup>

83. Concerning those materials subject to inspection under rule 77 of the Rules which the Prosecution does not intend to present as evidence at the confirmation hearing, the Prosecution submits that, at this stage, it is not in a position to fully determine the scope of application of rule 77. In the view of the Prosecution, this can be achieved only if the Defence is prepared to inform the Prosecution of what it considers to be material to its preparation.<sup>79</sup>
84. Moreover, the Prosecution makes a distinction between its *stricto sensu* disclosure obligation under rule 76 of the Rules and its obligation to permit the Defence to inspect pursuant to rule 77 of the Rules.<sup>80</sup>
85. Under rule 76 of the Rules, the Prosecution submits that it is obliged to provide the Defence with the list of the witnesses whom it intends to call to testify at the confirmation hearing and copies of the statements of those witnesses.<sup>81</sup> However, the Prosecution also submits that if it intends to rely on summary evidence of witness statements at the confirmation hearing, its obligation would be confined to providing the Defence with such summary evidence.<sup>82</sup>

<sup>78</sup> ICC-01/04-01/06-T-4 EN, p. 24, lines 18-21.

<sup>79</sup> ICC-01/04-01/06-T-4 EN, p. 63, lines 4 to 12.

<sup>80</sup> Prosecution's Final Observations, para. 10

<sup>81</sup> ICC-01/04-01/06-T-4 EN, p. 57, lines 12 to 14, and Prosecution Final Observations, para. 10

<sup>82</sup> ICC-01/04-01/06-T-4 EN, p. 25, lines 22 to 25 and page 26, lines 8 to 11.

86. Conversely, the Prosecution submits that under rule 77 of the Rules it is obliged only to give the Defence an opportunity to have access on the premises of the Office of the Prosecutor to any book, document, photograph and tangible object on which it intends to rely at the confirmation hearing.<sup>83</sup> In the view of the Prosecution, "if there were no difference between disclosure in terms of handling over evidentiary materials and inspection in terms of providing access to such materials, there would not be the need of the law to use different terms".<sup>84</sup>

### III.2. The Defence Position

87. The Defence submits that article 67 of the Statute is applicable since an arrest has taken place and that, for the purpose of the subject under discussion here, articles 61 (3), 67 (1) (a) and (b) and 67 (2) of the Statute constitute some sort of constitutional rights for the Defence.<sup>85</sup> The Defence further submits that it must have access, "as happens in most systems with regards to criminal procedure",<sup>86</sup> to the entire Prosecution file from the moment of the arrest or as soon as possible thereafter so as to be in a position to analyse the legality of the arrest and to establish whether there is information which is in any way material to the Defence.<sup>87</sup>
88. In relation to the content of rule 76 of the Rules, the Defence submits that irrespective of whether the Prosecution intends to call a witness to testify at the confirmation hearing or whether it intends to rely on summary evidence as provided for in article 61 (5) of the Statute, the Prosecution is

<sup>83</sup> ICC-01/04-01/06-T-4 EN, p. 57, lines 15 to 25; and Prosecution Final Observations, para. 10

<sup>84</sup> ICC-01/04-01/06-T-4 EN, p. 58, lines 2 to 5.

<sup>85</sup> ICC-01/04-01/06-T-4 EN, p. 26, lines 20 to 25, and page 27, lines 1 to 10. See also Defence Final Observations, p. 2, 3 and 10.

<sup>86</sup> ICC-01/04-01/06-T-4 EN, p. 28, lines 1 and 2.

<sup>87</sup> ICC-01/04-01/06-T-4 EN, p. 28, lines 3 and 4; and Defence Final Observations, pp. 2, 3 and 10.

obliged to disclose to the Defence the name of the witness and his or her "entire" statement".<sup>88</sup>

89. Furthermore, in the view of the Defence, the statements of the Prosecution's witnesses must be provided in unredacted form<sup>89</sup> because the conflict between the protection of witnesses and the rights of the Defence is resolved in articles 68 (1) and (5) of the Statute which set out that protective measures may not be prejudicial to the rights of the Defence.<sup>90</sup> The Defence thus concludes that "we can't push the security measures to extreme limits saying that they -- the rights of these victims and witnesses are possibly so important that we can't at any stage disclose the protected evidence that we've decided on, the redacted elements."<sup>91</sup> The Defence holds that this will be the case if the names of the witnesses or any other information which might reveal their identity is kept from the Defence because this measure would prevent the Defence from preparing to impeach the credibility of Prosecution witnesses.<sup>92</sup>
90. The Defence disagrees with the distinction made by the Prosecution between the content of the Prosecution's obligation of *stricto sensu* disclosure under rule 76 of the Rules and the content of the Prosecution's obligation to permit the Defence to inspect under rule 77 of the Rules.<sup>93</sup>
91. In the view of the Defence, although rules 76 and 77 of the Rules refer to different types of evidence, they are both included in the section of the Rules entitled "Disclosure".<sup>94</sup> Hence, the obligation of the Prosecution towards the Defence is the same under both rules, regardless of the type of

<sup>88</sup> ICC-01/04-01/06-T-4 EN, p. 28, lines 21 and 22; and Defence Final Observations, pp. 12 and 13.

<sup>89</sup> ICC-01/04-01/06-T-4 EN, p. 29, lines 15 to 18 ; and Defence Final Observations, pp. 12 and 13.

<sup>90</sup> ICC-01/04-01/06-T-4 EN, p. 29, lines 1 to 8 ; and Defence Final Observations, pp. 12 and 13.

<sup>91</sup> ICC-01/04-01/06-T-4 EN, p. 29, lines 9 to 12.

<sup>92</sup> ICC-01/04-01/06-T-4 EN, p. 29, lines 12 to 15.

<sup>93</sup> Defence Final Observations, pp. 14 and 15.

<sup>94</sup> ICC-01/04-01/06-T-4 EN, page 60, lines 11 to 26 and page 61, lines 1.

evidence, that is to say, the Prosecution must give the Defence a copy of any evidence, be it witness statements, books, documents, photographs or tangible objects, on which the Prosecution intends to rely on at the confirmation hearing.<sup>95</sup>

### **III.3. Basic *Stricto Sensu* Disclosure to the Defence under Article 61 (3) of the Statute and Rules 121 (3), (4) and (5) of the Rules**

92. The single judge notes that article 61 (3) obliges the Prosecution to provide the Defence with a detailed description of the charges and to inform it of the evidence on which it intends to rely at the confirmation hearing within a reasonable period of time. In the view of the single judge, the content and time limits of the Prosecution's *stricto sensu* disclosure obligations under article 61 (3) of the statute are elaborated on by rule 121 (3), (4) and (5) of the Rules. The latter sets specific time limits (no later than 30 days and no later than 15 days before the date of the confirmation hearing) for the Prosecution to provide the Prosecution Charging Document and List of Evidence and the Prosecution Amended Charging Document and/or List of Evidence. These obligations must be discharged as set out above in paragraphs 59 and 60 and constitute, first and foremost, the Prosecution's obligation of *stricto sensu* disclosure to the extent that these documents will reveal to the Defence the key information about the Prosecution's case at the confirmation hearing.

### **III.4. *Stricto Sensu* Disclosure pursuant to Rule 76 of the Rules**

93. Rule 76 (1) of the Rules imposes on the Prosecution the obligation to "provide the defence the names of the witnesses whom the Prosecutor

<sup>95</sup> ICC-01/04-01/06-T-4 EN, page 61, lines 2 to 9 ; and Defence Final Submissions, p. 15.

intends to call to testify and copies of any prior statements made by those witnesses“. Furthermore, according to rule 76 (1) of the Rules, the Prosecution “shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.”

94. Regarding the Prosecution’s obligation of disclosure to the Defence, the single judge does not agree with the distinction the Prosecution draws between the names and statements of certain types of witnesses. That is: (i) witnesses that it intends to call to testify, and (ii) those on which it intends to rely at the confirmation hearing by way of non-redacted or redacted versions of their statements or summaries thereof. In the view of the single judge, a number of reasons explain why the Prosecution’s disclosure obligation, under rule 76 of the Rules, extends to all witnesses on whom the Prosecution intends to rely at the confirmation hearing. This holds true regardless of whether the Prosecution (i) intends to call them to testify or (ii) to rely on the non-redacted or redacted versions of their statements, or summaries thereof.
95. A literal interpretation of article 61 (5) *in fine* and 68 (5) of the Statute suggests that the Prosecution’s right to rely at the confirmation hearing on witnesses’ written evidence (either witness statements or summary evidence) instead of their oral testimony “shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.
96. Furthermore, articles 61 (5) *in fine* and 68 (5) of the Statute must be interpreted in light of:
- a. article 61 (3) of the Statute and rule 121 (3) and (5) of the Rules, which require the Prosecution to disclose to the Defence the Prosecution Charging Document and List of Evidence and the Prosecution Amended Charging Document and/or List of Evidence, which, in principle, must include the

names of any witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing; and

- b. articles 61 (6) (b) and 67 (1) (b) of the Statute, which grant Thomas Lubanga Dyilo the right to challenge evidence presented by the Prosecution at the confirmation hearing and adequate time and facilities to prepare for such a hearing.

97. Furthermore, in the view of the single judge, protection of the right to a fair hearing, pursuant to article 67 (1) of the Statute, in appropriate circumstances may require that the competent Chamber exceed the specific terms of article 67 of the Statute. This is clear from the express reference to “minimum guarantees” in the *chapeau* of article 67 (1) of the Statute.<sup>96</sup> It is also consistent with the interpretation of the European Court of Human Rights of the general right to a “fair hearing” with a view to filling some of the gaps in article 6 (3) of the European Convention on Human Rights and Fundamental Freedoms.<sup>97</sup>

98. Therefore, a contextual interpretation of articles 61 (5) *in fine* and 68 (5) of the Statute in light of article 61 (3) and (6) (b), the *chapeau* of article 67 (1), and article 67 (1) (b) of the Statute requires, in principle, that the Defence have access to non-redacted versions of the prior statements of any witness on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing.

99. A teleological interpretation of articles 61 (5) *in fine* and 68 (5) of the Statute suggests that they aim first and foremost to ensure the safety of Prosecution witnesses, and minimise the potentially traumatic effects of giving testimony in court by exempting witnesses from the requirement to do so twice, first before the Pre-Trial Chamber and again before the Trial Chamber;

<sup>96</sup> Schabas, W A , An Introduction to the International Criminal Court, Cambridge University Press, 2002, pp. 98 and 99.

<sup>97</sup> Harris, D J., O'Boyle, M, and Warbrick, C, Law of the European Convention on Human Rights, Butterworths, 1995, pp. 202 to 203.

100. Hence, in the view of the single judge, although rule 76 (1) of the Rules expressly refers to “witnesses whom the Prosecutor intends to call to testify”, it can only be considered to cover any witness on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing<sup>98</sup> in light of:

- (i) article 61 (3), (5) and (6), the *chapeau* of article 67 (1), and articles 67(1) (b) and 68 (5) of the Statute ; and
- (ii) the fact that rule 77 of the Rules includes the evidence on which the Prosecution intends to rely at the confirmation hearing other than the names and statements of the Prosecution’s witnesses.<sup>99</sup>

101. The single judge considers that, as a general rule, statements must be disclosed to the Defence in full. Any restriction on disclosure to the Defence of the names or portions, or both, of the statements of the witnesses on which the Prosecution intends to rely at the confirmation hearing must be authorised by the single judge under the procedure provided for in rule 81 of the Rules.

102. In the view of the single judge, a literal interpretation of rule 76 (1), (2) and (3) leads to the conclusion that the Prosecution’s obligation to disclose under rule 76 consists of “providing” the Defence with the names and statements of the Prosecution’s witnesses both “in original and in a language which the accused fully understands and speaks”.

<sup>98</sup> In a different context, such as the ICTY, where the Defence is not expected to participate before an indictment is confirmed, it has been highlighted that the obligation to disclose witnesses statements “is intended to assist the Defence in its understanding of the case against the accused (...) and should be provided to the Defence as far in advance of the trial as possible, even if it means that statements are disclosed sequentially or that some of the witnesses whose statements are disclosed are never called (*May, R and Wierde, M.*, International Criminal Evidence. Transnational Publishers, 2002, p. 75).

<sup>99</sup> At the hearing on 24 April 2006, the parties agreed that rule 76 of the Rules deals with disclosure of statements of the Prosecution witnesses, whereas rule 77 of the Rules refers to inspection of books, maps, photographs and other tangible objects on which the Prosecution intends to rely at the confirmation hearing. See ICC-01/04-01/06-T-4 EN, p. 57, lines 12 to 16 and p. 60, lines 16 to 22.



103. Under rule 76, the Prosecution has the obligation only to provide the Defence with "copies" of the relevant statements and not the originals. However, as previously mentioned, the originals must be filed by the Prosecution in the record of the case as soon as practicable after copies have been provided to the Defence as part of the process for communicating to the Pre-Trial Chamber the evidence which the Prosecution intends to use at the confirmation hearing. Upon request, and subject to any ruling under rule 81 of the Rules, the Registry must ensure that the Defence and any natural or legal entity that might in the future be granted the procedural status of victim in the case have access to them.
104. On the issue of timing, rule 76 (1) of the Rules provides that the Prosecution must disclose the statements of the witnesses on which it intends to rely at the confirmation hearing "sufficiently in advance to enable the adequate preparation of the defence". In the view of the single judge, the time limit provided for in rule 76 is a concrete application of the broader right enshrined in article 67 (1) (b) "to have adequate time [...] for the preparation of the defence", which both the Prosecution and the Defence have agreed also applies to the confirmation hearing.
105. However, the single judge also recalls that article 61 (4) of the Statute provides that the Prosecution may continue the investigation until the start of the confirmation hearing. Accordingly, the mandatory time limit for the Prosecution to decide on which evidence it intends to rely at the confirmation hearing and to provide the Defence with the Prosecution Charging Document and List of Evidence is no later than 30 days before the date of the hearing, this being extended to no later than 15 days before the date of the hearing in cases of "new evidence" or amended charges.

106. The single judge considers therefore that in order to satisfy the interest of the Defence to be informed as soon and as fully as possible of the Prosecution's case to be presented at the confirmation hearing, the Prosecution must proceed according to paragraphs 7, 8 and 9 of the timetable set out in the disposition of this Decision.

### III.5. Inspection pursuant to Rule 77 of the Rules

107. In the view of the single judge, rule 77 of the Rules covers evidence, other than the statements of the Prosecution's witnesses, on which the Prosecution intends to rely at the confirmation hearing. It also covers those materials in the possession or control of the Prosecution that were obtained from or belong to Thomas Lubanga Dyilo or are otherwise material to the Defence's preparation for the confirmation hearing.
108. The single judge considers that a literal interpretation of rules 76 and 77 of the Rules shows that while rule 76 requires the Prosecution to "provide" the Defence with the names and copies of the prior statements of the Prosecution witnesses, rule 77 requires the Prosecution only to "permit the defence to inspect" the evidence and materials covered by this rule.
109. Furthermore, the single judge considers that the inclusion of these two provisions in Chapter 4, Section II, "Disclosure", on the "provisions related to various stages of the proceedings" of the Rules is fully consistent with the fact that the disclosure process is carried out by recourse to two different modalities, that is, *stricto sensu* disclosure and inspection.
110. The distinction between these two modalities is hardly new, as it can be traced back, *inter alia*, to Rule 66 (A) and (B) of the Rules and Procedure

and Evidence of the International Criminal Tribunal for the Former Yugoslavia and to several national jurisdictions.<sup>100</sup>

111. In the view of the single judge, the Prosecution has defined its obligation as narrowly as possible under rule 77 of the Rules by asserting that its obligation is limited to giving access to the Defence to the relevant evidence or materials on the premises of the Office of the Prosecutor.
112. However, the single judge considers that other interpretations of rule 77 of the Rules, which are as reasonable as the one embraced by the Prosecution from a literal approach, are far more consistent with the key role of the disclosure process, which is to guarantee Thomas Lubanga Dyilo's right to a fair trial and to ensure that the Defence has adequate time and facilities to prepare for the confirmation hearing.
113. The single judge considers that the Prosecution's obligation "to permit the Defence to inspect" is two-fold. On the one hand, the Prosecution must permit the Defence to carry out an inspection on the premises of the Office of the Prosecution of the originals of the books, documents, photographs and tangible objects in its possession or control and on which it intends to rely at the confirmation hearing or which are material to the Defence's preparation for the confirmation hearing or which were obtained from or belong to Thomas Lubanga Dyilo.

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<sup>100</sup> For instance, in relation to the law on disclosure in England and Wales, the distinction between these two modalities has been explained in the following terms:

"The A-G's Guidelines [Attorney General Guidelines] stated that if the used material to be made available to the defence did not exceed about 50 pages, disclosure should be by way of provision of a copy. If the material exceeded 50 pages, the defence solicitor should be given an opportunity to inspect it at a convenient police station or at the office of the prosecuting solicitor. The procedure adopted by the CPS [Crown Prosecution Services] in most cases is to provide copies of statements and records of interviews together with a schedule which lists the document held by the police. If the defence wishes to examine the documents, they may do so at the police station; and if they require copies of certain documents, then, provided the request is reasonable, it will be complied with in accordance paragraph 5 of the Guidelines." (Niblett, J., *Disclosure in Criminal Proceedings*, Blackstone Press Limited, 2004, p 105)

114. On the other hand, during or immediately after inspection, upon request of the Defence, the Prosecution must provide it with an electronic copy of any book, document and photograph, or an electronic photograph of any tangible object which is subject to inspection.
115. In addition, as soon as practicable after the Prosecution has discharged its inspection obligation *vis-à-vis* the Defence, it must, as previously stated in paragraphs 44 to 47, file in the record of the case the originals and an electronic copy (or an electronic photograph in the case of tangible objects) of those items which it intends to introduce into evidence at the confirmation hearing.
116. With regard to the timing of the inspection, the single judge notes that rule 77 of the Rules, unlike rule 76, does not provide for any specific time-limit. However, the single judge considers that both rules 76 and 77 seek to satisfy the ultimate interest of the Defence to be informed as soon and as fully as possible of the Prosecution's case to be presented at the confirmation hearing. On the issue of materials which the Prosecution does not intend to present at the confirmation hearing, rule 77 of the Rules, like article 67 (1) (b) of the Statute, seeks to ensure that the Defence is in a position to prepare adequately for the confirmation hearing.
117. Accordingly, the single judge holds that as soon as it decides to rely on any book, document, photograph or tangible object at the confirmation hearing, the Prosecution must permit the Defence to inspect them in accordance with paragraphs 4 and 5 of the timetable set out in the disposition of this Decision. In relation to materials on which it does not intend to rely at the confirmation hearing, the Prosecution must proceed in accordance with paragraphs 4 and 6 of the timetable.

118. In the view of the single judge, under rules 79 and 80 of the Rules, the Defence has the right not to reveal before the confirmation hearing any of the defences on which it intends to rely at trial. However, because of its current knowledge of its case against Thomas Lubanga Dyilo, the Prosecution must be already in a position to identify most of the books, documents, photographs or other tangible objects in its possession or control which are material to the Defence's preparation.

#### **IV. Disclosure of Potentially Exculpatory Materials pursuant to article 67 (2) of the Statute**

119. Under article 67 (2) of the Statute and rule 77 of the Rules, the Prosecution must disclose three types of materials to the Defence before the confirmation hearing even if it does not intend to rely on them at the hearing. In the view of the single judge, none of these materials can be considered evidence *stricto sensu* insofar as they will not, in principle, be presented at the confirmation hearing unless the Defence decides to propose them in its list of evidence pursuant to rule 121 (6) of the Rules.
120. The Prosecution submits that its obligation under article 67 (2) of the Statute is of an ongoing nature,<sup>101</sup> that it intends to disclose potentially exculpatory materials to the Defence every two weeks,<sup>102</sup> and that the boundaries of such an obligation are limited to the charges and the facts supporting such charges at the time the relevant searches are made.<sup>103</sup> However, the Prosecution submits that it will be in a position to fully identify which materials are potentially exculpatory only when the Defence has revealed which defence it intends to use and that, as a first

<sup>101</sup> ICC-01/04-01/06-T-4 EN, p. 32, lines 2 to 4.

<sup>102</sup> ICC-01/04-01/06-T-4 EN, p. 34, lines 17 to 20.

<sup>103</sup> ICC-01/04-01/06-T-4 EN, p. 33, lines 11 to 14.

step, it has sent to the Defence a possible list of terms of reference to conduct its searches.<sup>104</sup>

121. The Prosecution also submits that, despite being obliged to disclose potentially exculpatory materials "as soon as practicable", the bulk of the disclosure must take place between the confirmation hearing and trial.<sup>105</sup> Moreover, the Prosecution acknowledges that it has not yet disclosed materials that may be both incriminating and potentially exculpatory.<sup>106</sup>
122. According to the Defence, the Prosecution's obligation to disclose potentially exculpatory materials is an ongoing obligation which must be discharged as soon as the Prosecution is in possession of such materials.<sup>107</sup> In this regard, the Defence submits that the Prosecution's practice of not disclosing potentially exculpatory materials which might also be incriminating contravenes its obligation under article 67 (2) to disclose such materials "as soon as practicable".<sup>108</sup> The Defence also submits that it is in its interests to have access to "exculpatory information and materials of the widest possible type".<sup>109</sup>
123. In the view of the single judge, the scope of the Prosecution's obligation under article 67 (2) of the Statute does not depend on the evidence the Prosecution intends to use at the confirmation. Instead, it depends only on the charges against Thomas Lubanga Dyilo and the factual allegations which support them. Hence, the single judge considers that whenever new charges, or new factual allegations supporting the current charges, are

<sup>104</sup> ICC-01/04-01/06-T-4 EN, p. 34, lines 20 to 25 and p. 35, lines 1 to 3.

<sup>105</sup> ICC-01/04-01/06-T-4 EN, p. 9, lines 3 to 16 and p. 34, lines 7 to 9.

<sup>106</sup> ICC-01/04-01/06-T-4 EN, p. 32, lines 8 to 25 and p. 33, lines 1 to 5.

<sup>107</sup> ICC-01/04-01/06-T-4 EN, p. 37, lines 10 to 16.

<sup>108</sup> *Defence Final Observations*, p. 4.

<sup>109</sup> ICC-01/04-01/06-T-4 EN, p. 36, lines 17 to 19.

alleged, the scope of the Prosecution's obligation to disclose potentially exculpatory materials will widen.

124. The single judge disagrees with the Prosecution's view that the bulk of the disclosure of potentially exculpatory materials must take place after the confirmation hearing.
125. Considering that the Prosecution acknowledges that, unless the charges are amended, the material scope of its obligation to disclose potentially exculpatory materials is the same before and after the confirmation hearing, the single judge is of the view that a literal interpretation of article 67 (2) of the Statute leaves no doubt as to the requirement for the Prosecution to discharge this obligation "as soon as practicable". The fact that, as a result of the Defence's decision not to reveal its defence before the confirmation hearing, the Prosecution might identify some materials as exculpatory after such a hearing can only be an exception and not the general rule.
126. Furthermore, in the view of the single judge, the period between the initial appearance of Thomas Lubanga Dyilo on 20 March 2006 and 27 June 2006, the date scheduled for the confirmation hearing, makes it fully practicable to disclose most of the potentially exculpatory materials in the Prosecution's possession or control before the confirmation hearing.
127. Moreover, although following the procedure provided for in articles 54 (3) (e), 72 or 93 of the Statute might delay disclosure of some potentially exculpatory materials, the single judge considers that (i) such instances can only amount to a fraction of the overall potentially exculpatory materials in the possession or control of the Prosecution; and (ii) the period between the initial appearance of Thomas Lubanga Dyilo and the above-scheduled date

of the confirmation hearing enables the Prosecution to undertake the necessary efforts to undergo such a procedure and, if necessary, to file applications pursuant to rule 81 (4) of the Rules.

128. The contextual and teleological interpretations of article 67 (2) of the Statute lead to the same conclusion: the intention of articles 61 (3), 67 (1) (b) and 67 (2) of the Statute is that the Defence should be in a position to prepare adequately for the confirmation hearing as soon as practicable. This includes the decision on the scope of its defence and the selection of the evidence on which it intends to rely at the hearing.
129. The single judge considers that in order to achieve the above it is not only necessary that the Defence be informed within a reasonable time before the confirmation hearing of the case the Prosecution intends to make, but also that the Prosecution disclose the potentially exculpatory materials in its possession or control as soon as practicable before the hearing. Only at that point the Defence will be in a position to decide which of these materials it will present as evidence at the confirmation hearing.
130. On the other hand, the single judge notes that article 61 (4) of the Statute is clear that prior to the confirmation hearing "the Prosecutor may continue the investigation and may amend or withdraw any charges". The single judge also notes that no other provision of the Statute or the Rules expressly confers upon the Prosecution the right to continue with the investigation after the confirmation hearing. Indeed, despite setting up a procedure for amendment or withdrawal of the charges after the confirmation hearing, article 61 (9) of the Statute does not extend the Prosecutor's power to investigate beyond the confirmation hearing.



131. Therefore, except for exceptional circumstances which might justify subsequent isolated acts of investigation, the investigation must be completed by the time the confirmation hearing starts, and the Prosecution must be in possession or control of most, if not all, the potentially exculpatory materials which it must disclose under article 67 (2) of the Statute before the start of the confirmation hearing.
132. The single judge considers that the Prosecution's practice of not disclosing material which is both incriminating and potentially exculpatory runs contrary to the Prosecution's obligation to disclose the potentially exculpatory material in its possession or control as soon as practicable.
133. In the view of the single judge, the Prosecution might be obliged to disclose such material under two different sets of provisions of the Statute and the Rules. The fact that the Prosecution may not yet be obliged to disclose the evidence on which it intends to rely at the confirmation hearing – pursuant to the provisions regulating the Prosecution's obligations in this respect – has no impact on the Prosecution's obligation to disclose "as soon as practicable" any material which might fall within the ambit of article 67 (2) of the Statute. Were this not so, the fundamental guarantee offered to the Defence by this provision would be deprived of its content.

#### **V. Defence Disclosure and Inspection Obligations under Rules 78 and 79 of the Rules**

134. Rule 78 states that the Defence is obliged "to 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 by the defence as evidence for the purposes of the confirmation hearing." The single judge finds that, save for the question of timing and the absence of

any need for the Defence to file inspection reports in the record of the case, the system of inspection provided for under rule 78 of the Rules must follow the system described in III.5 for inspection under rule 77 of the Rules.

135. The single judge considers that, because rule 78 of the Rules mirrors the content of rule 77 of the Rules, the obligation of the Defence under Rule 78 of the Rules does not extend to the witness statements on which the Defence intends to rely at the confirmation hearing.
136. However, according to rule 122 (1) of the Rules, the Defence must file the original statements of such witnesses, along with electronic copies as explained above in paragraphs 44 to 47, in the record of the case before the start of the confirmation hearing. Accordingly the Prosecution must have access to those statements before the start of the hearing unless, pursuant to rule 81 of the Rules, the Defence is authorised to file such statements "*ex parte* only available to the Defence" along with redacted versions for the Prosecution.
137. The single judge considers that the inspection of the evidence on which the parties intend to rely at the confirmation hearing pursuant to rules 77 and 78 could be facilitated if the parties agree: (i) to gain access to the relevant evidence via the Registry after the proposing party has filed it in the record of the case; or, at the very least, (ii) to obtain from the Registry, rather than from the proposing party, the electronic copies (or photographs in the case of tangible objects) of the relevant evidence after inspection and after such evidence has been filed in the record of the case. However, in the view of the single judge, this practice, which will closely mirror the interim disclosure system, must be agreed by the parties and cannot be imposed on them by the single judge.

138. As for the timing of the inspection, the single judge notes that according to rule 121 (6) of the Rules, if the Defence "intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing." Moreover, the Defence "shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor."
139. Therefore, in the view of the single judge, the Defence is obliged only to permit the Prosecution to inspect any book, document, photograph or tangible object on which the Defence intends to rely at the confirmation hearing as soon as practicable after the Defence has filed its list of evidence as provided for in rule 121 (6) of the Rules.
140. Finally, the single judge considers that, insofar as the Defence has not yet raised the existence of an alibi under rule 79 of the Rules, nor any of the defences provided for under article 31 (1) of the Statute, there is no need to address in this Decision the questions of the scope, timing and format of the Defence disclosure obligation under rule 79 of the Rules.