

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/06

Date: 24 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
URGENT**

**DECISION ON THE POSTPONEMENT OF THE CONFIRMATION HEARING
AND THE ADJUSTMENT OF THE TIMETABLE SET IN THE DECISION ON
THE FINAL SYSTEM OF DISCLOSURE**

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 taken by Pre-Trial Chamber I during the initial appearance of Thomas Lubanga Dyilo on 20 March 2006, according to which the confirmation hearing was initially scheduled for 27 June 2006;¹

NOTING the Prosecution Submission to inform the Pre-Trial Chamber Regarding Protective Measures (“the Prosecution Submission”),² filed by the Prosecution on 12 May 2006, by which the Prosecution informed Pre-Trial Chamber I (“the Chamber”) that it will not be in a position to disclose to the Defence the identities of certain witnesses on which the Prosecution intends to rely at the confirmation hearing and the unredacted versions of their statements prior to the implementation of protective measures on Friday 28 July 2006;³

NOTING the “Decision on the Final System of Disclosure and the Establishment of a Timetable” (the “Decision on the Final System of Disclosure”),⁴ issued by Judge Sylvia Steiner acting as single judge on 15 May 2006, in which, subject to any eventual postponement, a timetable for disclosure leading to the confirmation hearing was set;⁵

NOTING the “Decision Establishing General Principles Governing Applications to Restrict Disclosure under rules 81 (2) and 81 (4) of the Rules of Procedure and

¹ ICC-01/04-01/06-T-3-EN, page 8.

² ICC-01/04-01/06-101-US-Exp.

³ *Ibid*, para. 13.

⁴ ICC-01/04-01/06-102.

⁵ *Ibid*, p. 8.

Evidence" (the "Decision Establishing General Principles"),⁶ issued by Judge Sylvia Steiner acting as single judge on 19 May 2006;

NOTING the "Prosecution's Request pursuant to Rule 121 (7) for Postponement of the Date of the Confirmation Hearing" ("the Prosecution's Request"),⁷ filed by the Prosecution on 22 May 2006, in which the Prosecution requests to re-schedule the confirmation hearing once the protective measures referred to in the Prosecution Submission are fully implemented "for a date at least 30 days thereafter";⁸

NOTING the *in camera* and *ex parte* hearing held with the Prosecution and the representatives of the Victims and Witnesses Unit on 23 May 2006 ("the Hearing");⁹

NOTING the status conference held on 24 May 2006 ("the Status Conference");¹⁰

NOTING the decision of Pre-Trial Chamber I of 22 March 2006¹¹ 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");

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

⁶ ICC-01/04-01/06-108.

⁷ ICC-01/04-01/06-113-Conf-Exp and ICC-01/04-01/06-114-Conf.

⁸ *Ibid*, para. 14.

⁹ ICC-01/04-01/06-T-7-EXPNODEF-EN, (Realtime Transcript).

¹⁰ ICC-01/04-01/06-T-8-EN, (Realtime Transcript, afternoon session).

¹¹ ICC-01/04-01/06-51.

CONSIDERING that, according to the Prosecution, the Defence must have access to the identities and the unredacted versions of the statements of the witnesses referred to in the Prosecution's Submission and the Prosecution's Request because otherwise "it will not be in a position to adequately consider the evidence of these witnesses";¹²

CONSIDERING that the witnesses referred to in the Prosecution's Submission require that their identities and unredacted versions of their statements be only disclosed to the Defence after the protection measures sought by the Prosecution have been fully implemented;¹³ and that, according to the Victims and Witnesses Unit, the protection measures sought by the Prosecution for the witnesses referred to in the Prosecution's Submission can only be fully implemented towards the end of August 2006 and after thorough evaluation of their necessity by the Unit;¹⁴

CONSIDERING that the single judge agrees with the Prosecution in that the identities of the said witnesses must be included in the Prosecution Charging Document and List of Evidence that the Prosecution must file 30 days before the confirmation hearing pursuant to rule 121 (3) of the Rules;

CONSIDERING further that, according to the Decision Establishing General Principles, "any Prosecution request pursuant to article 68 of the Statute and rule 81 (4) of the Rules for non-disclosure of the identity of Prosecution witnesses at the confirmation hearing to ensure their safety or that of their families shall be granted only if :

- (i) the Prosecution has first sought protect[ion] measures from the Victims and Witnesses Unit concerning the relevant witness; and

¹² The Prosecution's Request, para. 9.

¹³ ICC-01/04-01/06-T-7-EXPNODEF-EN, Realtime Transcript, page 4678, lines 1-9.

¹⁴ ICC-01/04-01/06-T-7-EXPNODEF-EN, Realtime Transcript, page 4689, lines 15-17, page 4691, lines 12-14 and page 4694, lines 6-13.

- (ii) the Prosecution shows that, due to exceptional circumstances surrounding the relevant witness, non-disclosure of identity remains necessary due to infeasibility of protect[ion] measures sought or insufficiency of protective measures adopted within the framework of the protection program of the Victims and Witnesses Unit as a result of the Prosecution request.”¹⁵

CONSIDERING, that, in compliance with the Decision Establishing General Principles, the Prosecution has indicated that it intends to seek from the Victims and Witnesses Unit protection measures in relation to a number of other witnesses on which the Prosecution intends to rely at the confirmation hearing;¹⁶

CONSIDERING that, according to articles 61 (3) and (6) and 67 of the Statute the Defence must have adequate time to prepare for the confirmation hearing in order to be in a position to effectively exercise its right to challenge the evidence presented by the Prosecution at such a hearing;

CONSIDERING that although the Defence does not “see any grounds, certainly not coming from the Prosecutor, to request for a postponement of the confirmation hearing”¹⁷, there is substantial amount of work which the Defence team will have to do in order to prepare the Defence; and that it is impossible for two persons in the Defence team who are already occupied with drafting motions, requests and submissions to take on that task by themselves¹⁸.

¹⁵ The Decision Establishing General Principles, pp. 22 and 23.

¹⁶ ICC-01/04-01/06-T-7-EXPNODEF-EN, Realtime Transcript, page 4698, lines 1-12.

¹⁷ ICC-01/04-01/06-T-8-EN, Realtime Transcript, afternoon session, page 4675, lines 6-8.

¹⁸ ICC-01/04-01/06-T-8-EN, Realtime Transcript, afternoon session, page 4686, lines 15-23.

FOR THESE REASONS

DECIDE to postpone the confirmation hearing until Thursday 28 September 2006;

DECIDE that the disclosure process for the purpose of the confirmation hearing on 28 September 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 continue as provided for in paragraphs 1 and 2 of the provisional timetable set in the Decision on the Final System of Disclosure;
- 2- 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 28 August 2006;
- 3- Inspection of the evidence that the Prosecution 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 shall continue as provided for in paragraph 4 of the provisional timetable set in the Decision on the Final System of Disclosure;
- 4- Subject to a determination under rule 81, the Prosecution shall allow the Defence to inspect no later than 31 August 2006 the evidence which is subject to inspection under rule 77 of the Rules and which the Prosecution will

indicate in the document filed pursuant to rule 121 (3) of the Rules that it intends to use at the confirmation hearing;

- 5- The parties shall make every effort to agree on the frequency of inspection under rule 77 of the Rules with a view to ensure that the Defence is allowed to inspect as soon as practicable and no later than 31 August 2006 most of the materials obtained from or belonging to Thomas Lubanga Dyilo or material to the Defence preparation;
- 6- Disclosure of the names and statements of the witnesses on which the Prosecution 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, shall continue as provided for in paragraphs 7 and 9 of the timetable set in the Decision on the Final System of Disclosure;
- 7- 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 28 August 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;
- 8- Status Conferences on the process of disclosure 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 23 June 2006 at 11.00 hours, 14 July 2006 at 11.00 hours and 17 August 2006 at 11.00 hours;
- 9- On 28 August 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;

10- 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 be made as soon as practicable and no later than 28 August 2006;

11- On 4 September 2006 at 11.00 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;

12- The Defence shall have until 12 September 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 28 August 2006;

13- Requests for exceptions to disclosure, under rule 81 of the Rules, concerning evidence included in the Defence’s List of Evidence shall be made as soon as practicable and no later than 12 September 2006;

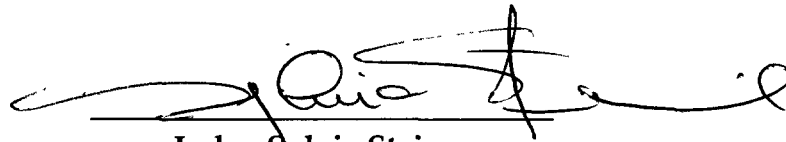
14- Subject to a determination under rule 81 of the Rules, the Defence shall as soon as practicable after 12 September 2006 and no later than 18 September 2006

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;

15- 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 19 September 2006 at 11.00 hours;

DECIDE that the Decision on the Final System of Disclosure shall apply on any matter not expressly regulated in this decision.

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



Judge Sylvia Steiner
Single Judge

Dated this Wednesday 24 May 2006

At The Hague

The Netherlands