

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/06

Date: 4 October 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 Third Defence Motion for Leave to Appeal

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

NOTING the “Décision relative à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6” (“the Decision on the Prosecution Request”)¹ issued by the Chamber on 31 March 2006;

NOTING the “Decision on the Final System of Disclosure and the Establishment of a Timetable” (“the Decision on the Final System of Disclosure”),² issued by the single judge on 15 May 2006;

NOTING the “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute” (“the Decision Establishing General Principles”),³ issued by the single judge on 19 May 2006;

NOTING the “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal” (“the Decision on the Prosecution Motion”),⁴ issued by the single judge on 23 June 2006, in which the Prosecution was granted leave to appeal the following issues dealt with in the Decision Establishing General Principles:

- (i) “The issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing;
- (ii) The issue of the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and the consequent temporary nature of those

¹ ICC-01/04-135

² ICC-01/04-01/06-102.

³ ICC-01/04-01/06-108.

⁴ ICC-01/04-01/06-165-Conf-Exp.

redactions granted under rule 81 (2) of the Rules in order not to prejudice that investigation; and

- (iii) The issue of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules;⁵

NOTING the “Recommandations of the Registrar on Protective Measures for Prosecution Witnesses” (“the recommendations of the Registry”),⁶ filed by the Registry on 21 July 2006.

NOTING the “Decision on Defence Motion for Leave to Appeal” (“the Decision on the First Defence Motion”),⁷ issued by the Chamber on 18 August 2006, in which the Defence was denied leave to appeal certain issues related to the 18 May 2006 “Decision Establishing a Deadline for the Prosecution and the Defence to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06”;

NOTING the “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (“the First Decision”),⁸ issued by the single judge on 15 September 2006;

NOTING the “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (“the Decision”),⁹ issued by the single judge on 20 September 2006;

NOTING the “Request for Leave to Appeal the Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (“the Defence Request”),¹⁰ filed by the Defence on 27 September 2006;

⁵ Decision on the Prosecution Motion, p. 26.

⁶ ICC-01/04-01/06-204-US-Exp.

⁷ ICC-01/04-01/06-338.

⁸ ICC-01/04-01/06-437.

⁹ ICC-01/04-01/06-455.

¹⁰ ICC-01/04-01/06-483.

NOTING the “Decision on Second Defence Motion for Leave to Appeal” (“the Decision on the Second Defence Motion”),¹¹ filed by the Single Judge on 28 September 2006, in which the Defence was granted leave to appeal the following issues dealt with in the First Decision on Prosecution Rule 81 Motions:

- (i) “whether the Decision lacked factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules;
- (ii) whether the principle of necessity and proportionality was appropriately applied in deciding on the non-disclosure of identity of some Prosecution witnesses for the purpose of the confirmation hearing;
- (iii) whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court’s applicable law;”¹²

NOTING the “Prosecution’s Response to Thomas Lubanga Dyilo’s 27 September 2006 Request for Leave to Appeal the Second Decision on Prosecution Requests for Redactions” (“the Prosecution Response”),¹³ filed by the Prosecution on 3 October 2006;

NOTING articles 21, 57 (3) (c), 67, 68 and 82 (1)(d) of the Rome Statute (“the Statute”) and rules 87, 88, 89 (1) and 155 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING that, according to the Decision on the Prosecution Request,¹⁴ the Decision on the Prosecution Motion,¹⁵ the Decision on the First Defence Motion¹⁶ and

¹¹ ICC-01/04-01/06-489.

¹² The Decision on the Second Defence Motion, pp. 14 and 15.

¹³ ICC-01/04-01/06-497.

¹⁴ See in particular para. 28 of the Decision on the Prosecution Request.

the “Decision on the Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58” issued by Pre-Trial Chamber II on 19 August 2005,¹⁷ in order to grant leave to appeal under article 82 (1) (d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

CONSIDERING that, according to the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (“the Appeals Chamber Judgement”)¹⁸, issued by the Appeals Chamber on 13 July 2006:

- (i) “only an issue may form the subject-matter of an appealable decision;”¹⁹
- (ii) “an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;²⁰
- (iii) “not every issue may constitute the subject of an appeal”,²¹ but “it must be one apt to ‘significantly affect’, i.e. in a

¹⁵ Decision on the Prosecution Motion, para. 15.

¹⁶ Decision on the First Defence Motion, pp. 5 and 6.

¹⁷ ICC-02/04-01/05-20 –US-Exp. Unsealed according to the Decision ICC-02/04-01/05-52, issued on 13 October 2005. See in particular para. 20.

¹⁸ ICC-01/04-168.

¹⁹ Appeals Chamber Judgement, para. 9.

²⁰ Appeals Chamber Judgement, para. 9.

²¹ Appeals Chamber Judgement, para. 9.

material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'"²²; and

- (iv) "identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal" insofar as "the issue must be one 'for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may, materially advance the proceedings'"²³;

CONSIDERING that, in the Defence Request, the Defence seeks leave to appeal in relation to the following four issues:

- (i) "whether the Single Judge was entitled to rely on *ultra vires* submissions of the Registry, which went to the heart of the impartiality of the Registry, and thus the overall fairness of the *ex parte* Rule 81 proceedings" ("the First Issue");²⁴
- (ii) "whether the protection afforded by rule 81 (2) should extend to the protection of confidential materials in *other* investigations (investigations which are not conducted against Thomas Lubanga Dyilo), and whether the Single Judge failed to address how disclosure of such information could in fact cause prejudice to such investigation" ("the Second Issue");²⁵
- (iii) "whether the requirement that the prosecution is prohibited from relying at the confirmation hearing on evidence protected under rules 81 and 82 without adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document",²⁶ and,

²² Appeals Chamber Judgement, para. 10.

²³ Appeals Chamber Judgement, para. 14.

²⁴ Defence Request, p. 4.

²⁵ Defence Request, p. 4.

²⁶ Defence Request, p. 4.

in particular, whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence which has been disclosed only to the Defence in a redacted format ("the Third Issue");²⁷ and

- (iv) "whether the impugned decision creates a form of privilege for the prosecution sources in question which is not provided for in either the Statute or Rules"²⁸ and, in particular, under which conditions restrictions to disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules ("the Fourth Issue");

WHETHER THE DECISION INVOLVES ANY OF THE FOUR ISSUES RAISED BY THE DEFENCE

CONSIDERING that, in relation to the First Issue, the single judge considers that, according to article 43 of the Statute and rule 17 of the Rules, the Victims and Witnesses Unit is the specialised unit of the Registry on matters concerning the protection of victims and witnesses;

CONSIDERING that, in the context of Prosecution or Defence motions for non-disclosure of identity of Prosecution or Defence witnesses, the Victims and Witnesses Unit provides the Chamber, regardless of the position of the parties on the matter, with objective and independent advice on (i) the security situation of the relevant witness, (ii) the range of available and feasible protective measures for the witness and (iii) the need, from the perspective of adequately safeguarding the security of the relevant witness, to rely on procedural measures such as granting the non-disclosure of the identity of Prosecution or Defence witnesses prior to the confirmation hearing; and that, for these reasons, the Victims and Witnesses Unit has not only filed on 21 July 2006 the Recommendations of the Registry but, at the request of the single judge,

²⁷ Defence Request, p. 9.

²⁸ Defence Request, p. 4.

has also actively participated in all the *ex parte* hearings convened by the single judge on the Prosecution rule 81 (4) motions;

CONSIDERING that, in the view of the single judge, the Victims and Witnesses Unit can properly discharge its support functions *vis-à-vis* the Chamber only by distancing itself from the specific positions of the parties in any given matter and by providing the Chamber with objective information regarding the factual circumstances of the relevant witnesses and also specialised advice in respect of their needs in terms of protection; and that the Victims and Witnesses Unit must do so and, to date, has done so, irrespective of whether its conclusions are different from those advanced by the parties;

CONSIDERING that, in the opinion of the single judge, the information and recommendations given by the Victims and Witnesses Unit in the Recommendations of the Registry and during the *ex parte* hearings on the Prosecution rule 81 (4) motions were in no way *ultra vires*; that despite the significant weight given to the recommendations of the Registry and contrary to the claims of the Defence, the Decision does not follow several points of the recommendations; that the single judge agrees with the Prosecution in that the Defence's allegation that the Victims and Witnesses Unit "should not replace the role of the judge as the ultimate arbiter of fact and law"²⁹ is wholly unsupported;³⁰ and that, for this reason, the Decision does not involve the First Issue;

CONSIDERING that the Second Issue is two-fold; that, in relation to the first part of the Second Issue, the Defence bases its requests on the allegation that the Decision relies on an interpretation of the term "ongoing investigations" which appears more

²⁹ Defence Request, p. 6.

³⁰ Prosecution Response, para. 19.

expansive than the interpretation of that term in the Decision on the Final System of Disclosure and in the Decision Establishing General Principles;

CONSIDERING that rule 81 (2) of the Rules refers not only to “ongoing investigations” but also to “further investigations”; that, as it is highlighted in the Prosecution Response,³¹ according to the Decision, “none of the redactions proposed by the Prosecution under rule 81 (2) of the Rules is based on the need to protect information related to the ongoing investigation in the current case against Thomas Lubanga Dyilo”; and that therefore the Decision does not involve the issue raised by the Defence in the first part of the Second Issue;

CONSIDERING that the second part of the Second Issue refers to the issue of whether the part of the Decision based on rule 81 (2) of the Rules lacks factual reasoning in light of the fact that it was issued during *ex parte* proceedings on requests for redactions so as not to prejudice further investigations; that the single judge acknowledges that the factual reasoning does not enter into the specific details of the further investigations covered by the Decision; that the single judge took this approach in view of the fact that the Decision was issued during *ex parte* proceedings on requests for redactions so as not to prejudice further investigations under rule 81 (2) of the Rules; and that the Decision thus involves the issue raised by the Defence in the second part of the Second Issue;

CONSIDERING that, in relation to the Third Issue, the Decision states that (i) “without prior adequate disclosure to Thomas Lubanga Dyilo, the Prosecution cannot rely on those parts of the documents, witness statements and transcripts of witness interviews for which redactions are authorised in the present decision”;³² and (ii) “the probative value of the unredacted parts of the said documents, witness

³¹ Prosecution Response, para. 24.

³² Decision, p. 10.

statements and transcripts of witness interviews may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber”;³³ and that the Decision therefore involves the Third Issue;

CONSIDERING that, in relation to the Fourth Issue, the Decision authorises the redactions proposed by the Prosecution in relation to the Prosecution sources in a variety of different scenarios; and that the Decision therefore also involves the issue of whether the impugned decision creates a form of privilege for the Prosecution sources in question which is not provided for in the Statute or the Rules and, in particular, the issue of under which conditions restrictions to disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules;

**WHETHER THE SECOND PART OF THE SECOND ISSUE, THE THIRD ISSUE
AND THE FOURTH ISSUE WOULD SIGNIFICANTLY AFFECT BOTH THE
FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE
OUTCOME OF THE TRIAL**

CONSIDERING that the second part of the Second Issue is closely related to the issue currently before the Appeals Chamber of whether the First Decision lacks factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules;³⁴ that the reasons given in the Decision on the Second Defence Motion explaining why the issue before the Appeals Chamber would significantly affect the fair and expeditious conduct of the proceedings in the case of *The Prosecutor vs. Thomas Lubanga Dyilo* are also applicable to the second part of the Second Issue; and that

³³ Decision, p. 10.

³⁴ Decision on the Second Defence Motion, p. 14.

therefore, in the view of the single judge, the second part of the Second Issue is an issue which would significantly affect the fair and expeditious conduct of the proceedings in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*;

CONSIDERING that the Third Issue touches on the fundamental issue of whether the Prosecution may rely at the confirmation hearing on evidence which has been disclosed to the Defence only in a redacted form; that rules 81 and 82 of the Rules refer to “material” and “information” as opposed to documents, witness statements, transcripts of witness interviews or investigators’ notes or reports of witness interviews; and that the interpretation of the Defence would limit the use of these rules at the confirmation hearing to potentially exculpatory materials or materials falling under rule 77 of the Rules because the Prosecution would be precluded from relying at the confirmation hearing on : (i) statements, transcripts of interviews or investigators’ notes or reports of interviews in relation to those witnesses for whom non-disclosure of identity is granted; and (ii) documents for which any type of redaction is granted.

CONSIDERING that the single judge has already stated in the Decision on the Prosecution Motion and in the Decision on the Second Defence Motion that “non-disclosure could affect the ability of the Defence to fully challenge the evidence of the relevant Prosecution witnesses and has an impact on the rights of the Defence pursuant to articles 61 (3) and (6) (b) and 67 (1) of the Statute”;³⁵ and that therefore the Third Issue is directly related to the fairness of the proceedings in the case of *The Prosecution vs. Thomas Lubanga Dyilo*;

³⁵ Decision on the Prosecution Motion, para. 32; and Decision on the Second Defence Motion, p. 12.

CONSIDERING further that the Third Issue is also directly related to the expeditious conduct of the proceedings because of its potential consequences in terms of the evidence on which the Prosecution may rely at the confirmation hearing;

CONSIDERING therefore that the Third Issue is an issue which would significantly affect the fair and expeditious conduct of the proceedings in the case of *The Prosecutor vs. Thomas Luganga Dyilo*;

CONSIDERING that the Fourth Issue concerns the redactions granted by the single judge in relation to Prosecution sources in a number of documents, witness statements and investigators' notes or reports of witness interviews; that, contrary to the allegations of the Defence, the Decision does not grant blank authorisation for redactions of all Prosecution sources but sets out in detail the specific circumstances under which redactions for Prosecution sources are authorised;

CONSIDERING nevertheless that the single judge agrees with the Defence that the redaction of the names of Prosecution sources could affect the ability of the Defence to fully challenge the Prosecution evidence at the confirmation hearing, and in particular may affect the Defence ability to raise issues concerning the authenticity of the Prosecution evidence; and that therefore the Fourth Issue is directly related to the fairness of the proceedings;

CONSIDERING further that the Fourth Issue is also directly related to the expeditious conduct of the proceedings in view of the number of Prosecution sources for which redactions have been authorised in the Decision;

CONSIDERING therefore that the Fourth Issue is an issue which would significantly affect the fair and expeditious conduct of the proceedings in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*;

WHETHER THE SECOND PART OF THE SECOND ISSUE, THE THIRD ISSUE AND THE FOURTH ISSUE ARE ISSUES FOR WHICH, IN THE OPINION OF THE CHAMBER, AN IMMEDIATE RESOLUTION BY THE APPEALS CHAMBER MAY MATERIALLY ADVANCE THE PROCEEDINGS

CONSIDERING the reasons given in the Decision on the Second Defence Motion to explain why an immediate resolution by the Appeals Chamber of the issue of whether the First Decision lacks factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules would materially advance the proceedings in the present case; that the said reasons are also applicable to the second part of the Second Issue; and that therefore its immediate resolution by the Appeals Chamber may materially advance the proceedings in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*;

CONSIDERING that given the potential implications of the Third Issue and the Fourth Issue, their immediate resolution by the Appeals Chamber may materially advance the proceedings in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*;

CONSIDERING the urgency of a ruling by the Appeals Chamber on the issues for which leave to appeal is granted in the present Decision in light of the advanced stage of the proceedings leading to the confirmation hearing in the present case;

FOR THESE REASONS


GRANT the Defence Request in relation to the following issues:

- (i) whether the part of Decision based on rule 81 (2) of the Rules lacks factual reasoning in light of the fact that it was issued during *ex parte* proceedings on requests for redactions so as not to prejudice further investigations;
- (ii) whether the requirement that the Prosecution is prohibited from relying at the confirmation hearing on evidence protected under rules 81 (2) and (4) without adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document, and particularly whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence that has been disclosed to the Defence in only a redacted form;
- (iii) whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules

and, in particular, under which conditions restrictions to the disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules;

REJECT the Defence Request in relation to the other issues for which leave to appeal is sought.

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



Judge Sylvia Steiner
Single Judge

Done this Wednesday 4 October 2006

At The Hague

The Netherlands