Cour Pénale Internationale

International Criminal Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **17 November 2006**

PRE-TRIAL CHAMBER I

Before: **Judge Claude Jorda, Single Judge**

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
vs. THOMAS LUBANGA DYILO

Public Document with Confidential Annex

Decision on Defence Requests for Disclosure of Materials

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensoouda
Mr Ekkehard Withopf
Legal representatives of victims a/0001/06 to a/0003/06 and a/0105/06
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Byangadu
Office of Public Counsel for the Victims
Ms Paolina Massida

Counsel for the Defense
Mr Jean Flamme
Ms Véronique Pandanzyla
Mr Geoff Roberts
Office of Public Counsel for the Defence
Ms Melinda Taylor

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I, **Judge Claude Jorda,** judge at the International Criminal Court ("the Court");

NOTING the "Request for Order to Obtain and Disclose Materials" ("the Defence Request for Materials"),[1] filed by the Defence on 15 November 2006, in which the Defence requested Pre-Trial Chamber I ("the Chamber") to: (i) "authorise the Prosecution to disclose videos DRC-OTP-0081-0023/0081-0002 and DRC-OTP-0081-0022/0081-0011 to the Defence immediately"; and (ii) order the Prosecution to obtain and disclose a number of NGO's notes and/or transcripts of interviews concerning witnesses on which the Prosecution intends to rely at the confirmation hearing;

NOTING the "Prosecution Application for Direction regarding the Disclosure of Video Materials" ("the Prosecution Application"),[2] filed by the Prosecution on 16 November 2006, in which the Prosecution "requests a direction from the Pre-Trial Chamber on the disclosure of three videos that would render moot the approved redactions to two commentaries and one statement provided for by witnesses relied upon by the Prosecution";

NOTING the request of the Defence for guidance from the Chamber as to whether the 15 November 2006 Defence request and "all subsequent requests for materials during the confirmation hearing" should stay completely *inter partes* , be filed in the record of the case or be copied inteo the correspondence ("the Defence Request for Guidance"), made by the Defence via e-mail on 16 November 2006;

[1] ICC-01/04-01/06-701-Conf.
[2] ICC-01/04-01/06-710-Conf

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NOTING the "Prosecution Response to Defense 'Request for Order to Obtain and Disclose Materials'" ("the Prosecution Response"),[3] filed by the Prosecution on 17 November 2006;

NOTING articles 57 (3) (c), 67, 68 (1) and 87 (6) of the Rome Statute ("the Statute") and rules 76, 77 and 81 of the Rules of Procedure and Evidence ("the Rules");

CONSIDERING that e-mail is not the proper channel to make the Defence Request for Guidance; and that such a Request must be immediately filed in the record of the case of the *Prosecutor vs Thomas Lubanga Dyilo;*

CONSIDERING that, despite the *inter partes* nature of the disclosure process, in order to have legal certainty of the content of the requests of the Defence for materials and of the responses of the Prosecution, a copy of any such request and response made since the issuance of the present decision must be filed in the record of the case of *the Prosecutor vs Thomas Lubanga Dyilo;*

CONSIDERING that in relation to two of the videos requested by the Defence and referred to in paragraph 4 (i) of the Prosecution Application, redacted commentaries by one witness have been disclosed by the Prosecution to the Defence; that, according to the Prosecution, the only reason why these two videos have not been disclosed to the Defence are the redactions contained in page 4 of ICC-01/04-01/06-710-Conf-Exp-Anx1 and in page 3 of ICC-01/04-01/06-Conf-Exp-Anx2; and that in the view of the Chamber such redactions can be lifted and the videos can be immediately disclosed in full to the Defence;

[3] ICC-01/04-01/06-713-Conf-Corr

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CONSIDERING that, according to the Prosecution, the only reason why the video referred to in paragraph 4 (ii) of the Prosecution Application has not been disclosed to the Defence, is that redactions have been authorised under rule 81 (2) of the Rules in paragraph 16 of the statement of witness DRC-OTP-WWWW-0014;

CONSIDERING that in the Prosecution Application, the Prosecution states that "in light of the Defence Request and in this particular context only, the Prosecution is not opposed to lifting the redactions in paragraph 16 only"; and that, in this context, it is the view of the Chamber, that such redactions can be lifted and the relevant video can be immediately disclosed to the Defence;

CONSIDERING that in the view of the single judge the notion of "prior statements" in rule 76 of the Rules includes statements taken by entities other than the Prosecution; that rule 76 of the Rules does not limit the Prosecution's disclosure obligations to prior statements "in the possession or control of the Prosecutor"; and that, therefore, the Prosecution is under an obligation to make its utmost effort to obtain the prior statements of those witnesses on whom the Prosecution intends to rely at the confirmation hearing which have been taken by other entities;

CONSIDERING, however, that the Defence Request for Materials does not refer to "prior statements" within the meaning of rule 76 of the Rules because: (i) it refers to notes taken by certain journalists, non-govermental organisations and MONUC officials of their interviews with witnesses included in the Prosecution Amended List of Evidence as filed on 20 October 2006; and (ii) the relevant witnesses did not have an opportunity to re-read such notes and did not sign them;

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CONSIDERING that, insofar as such notes refer to interviews with witnesses included in the Prosecution Amended List of Evidence as filed on 20 October 2006, the Chamber considers that they could be material for the Defence's preparation of the confirmation hearing;

CONSIDERING however that the said notes do not fall within the scope of article 67 (2) of the Statute or rule 77 of the Rules because, as required by the said provisions, they are not "in the possession or control of the Prosecutor";

CONSIDERING that some of the notes referred to in the Defence Request for Materials concern interviews between MONUC officials and Prosecution witnesses whose identity has been revealed to the Defence; and that there is currently in place a specific cooperation regime between the United Nations and the Court comprised of article 2 of the Statute, the Cooperation Agreement between the United Nations and the Court and the Memorandum of Understanding between the MONUC and the Court;

CONSIDERING that the Chamber, as the ultimate guarantor of the rights of the Defence provided for in the Statute and the Rules, can pursuant to articles 57 (3) (c), 67 (1) and 87 (6) of the Statute resort to the cooperation regime between the United Nations and the Court to obtain materials which, as in the present case, can be material for the Defence's preparation of the confirmation hearing even if they do not fall within the Prosecution's disclosure obligations pursuant to article 67 (2) of the Statute and rules 76 and 77 of the Rules;

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FOR THESE REASONS,

DECIDE that the Defence Request for Guidance, which is attached as Annex I to the present decision, shall be filed in the record of the case.

ORDER the Defence to file in the record of the case a copy of any request for materials made to the Prosecution since the issuance of the present decision;

ORDER the Prosecution to file in the record of the case a copy of any response to any request for materials made by the Defence after the issuance of the present decision;

DECLARE the lifting of the redactions in page 4 of ICC-01/04-01/06-710-Conf-Exp-Anx1 and in page 3 of ICC-01/04-01/06-Conf-Exp-Anx2; and **ORDER** the Prosecution to transmit to the Defence no later than 17 November 2006:

(i) a new redacted version of these two documents without the redactions lifted in the present decision; and

(ii) the two videos referred to in paragraph 4 (i) of the Prosecution Response.

DECLARE the lifting of the redactions in paragraph 16 of the statement of witness DRC-OTP-WWWW-0014; and **ORDER** the Prosecution to transmit to the Defence no later than 17 November 2006:

(i) a new redacted version of the statement of witness DRC-OTP-WWWW-0014 without the redactions lifted in the present decision;

(ii) the video referred to in paragraph 4 (ii) of the Prosecution Response.

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ORDER the Registrar to:

(i) immediately send a cooperation request to the United Nations in order to obtain notes of those interviews of MONUC officials with witnesses DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0011 referred to in pages 3 and 4 of the Defence Request;

(ii) request to the United Nations that the said cooperation request be treated in a confidential manner and that an answer be provided as soon as practicable and no later than 23 November 2006;

(iii) immediately transmit a copy of this decision to the Representative of the Secretary General of the United Nations that has been authorised to assist witness Kristine Peduto during her testimony;

Judge Claude Jorda
Single Judge

Dated this Friday 17 November 2006

At The Hague

The Netherlands

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