

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-01/04-01/06
Date: 15 September 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 with a confidential and ex parte only available to the
Prosecution Annex I**

**First Decision on the Prosecution Requests and Amended Requests for Redactions
under Rule 81**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Legal Representatives of Victims

a/0001/06 to a/0003/06

Mr Luc Walley
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Counsel for the Defence

Mr Jean Flamme
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Ms Melinda Taylor

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

NOTING the decision of Pre-Trial Chamber I (“the Chamber”) during the first appearance of Thomas Lubanga Dyilo on 20 March 2006, according to which the confirmation hearing was initially scheduled for 27 June 2006¹;

NOTING the “Decision on the final system of disclosure and the establishment of a timetable”² (“Final Decision on the System of Disclosure”) issued by the single judge on 15 May 2006; 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”), issued by the single judge on 19 May 2006;³ the “Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure” (“Decision on the Postponement of the Confirmation Hearing”), issued by the single judge on 24 May 2006;⁴ and the “Decision on the Prosecution deadline of 12 September 2006 and the Defence deadline of 12 September 2006”, issued by the Chamber on 7 September 2006;⁵

¹ ICC-01/04-01/06-T-3-EN, page 8.

² ICC-01/04-01/06-102.

³ ICC-01/04-01/06-108. In this decision the single judge stated *inter alia* that the assessment of the Victims and Witnesses Unit on the availability and feasibility of the protective measures for a given witness constitutes a pre-requisite for any motion for non-disclosure of identity under rule 81 (4) of the Rules of Procedure and Evidence (“the Rules”);

⁴ ICC-01/04-01/06-126. In this decision the confirmation hearing was rescheduled for 28 September 2006.

⁵ ICC-01/04-01/06-407. In this decision the 12 September 2006 deadline for the filing of the Defence List of Evidence was suspended and the issue of the new deadline for the presentation of the Defence List of Evidence was included in the agenda of the status conference to be held on 19 September 2006;

NOTING the requests of the Prosecution under rule 81 (2) and (4) between 21 August 2006 and 29 August 2006;⁶

NOTING the “Decision on the Prosecution practice to provide to the Defence redacted versions of evidence and materials without authorisation by the Chamber”, issued by the single judge on 25 August 2006;⁷ and the “Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation During the Confirmation Hearing” (“Final Decision on the E-Court Protocol”) issued by the single judge on 28 August 2006;⁸

⁶ See: (i) the “Prosecution’s Application pursuant to Rule 81 (2) and 81(4)” (“the Prosecution First Request”), ICC-01/04-01/06-341-Conf, filed by the Prosecution on 21 August 2006, in which it requested the authorisation of the Chamber for redactions in some witness statements on which the Prosecution intends to rely at the confirmation hearing; (ii) the “Prosecution’s Application pursuant to Rules 81 (2) and 81 (4)” (“the Prosecution Second Request”), ICC-01/04-01/06-347-Conf, filed by the Prosecution on 23 August 2006, in which it requested the authorisation of the Chamber for redactions in certain witness statements on which the Prosecution intends to rely at the confirmation hearing; (iii) the “Prosecution’s Request for Authorisation of Redactions in Documents” (“the Prosecution Third Request”), ICC-01/04-01/06-357-Conf, filed by the Prosecution on 28 August 2006, in which it requested the authorisation of the Chamber for redactions in some documents on which the Prosecution intends to rely at the confirmation hearing or otherwise subject to inspection pursuant to rule 77 of the Rules of the Procedure and Evidence (“the Rules”); (iv) the “Prosecution’s Application pursuant to Rules 81 (2) and (4)” (“the Prosecution Fourth Request”), filed by the Prosecution on 28 August 2006, ICC-01/04-01/06-358-Conf, in which it requested the authorisation of the Chamber for redactions in a number of witness statements and transcripts of interviews on which the Prosecution intends to rely at the confirmation hearing; (v) the “Prosecution’s Request for Authorization of Redactions in Documents Previously Disclosed to the Defence” (“the Prosecution Fifth Request”), ICC-01/04-01/06-363-Conf-Exp, filed by the Prosecution on 29 August 2006, in which it requested the authorisation of the Chamber for redactions in forty-one documents previously disclosed to the Defence in redacted form without the prior authorisation of the Chamber; and (vi) the “Prosecution Application pursuant to Rules 81 (2) and 81 (4)” (“the Prosecution Sixth Request”), ICC-0104-01/06-367-Conf-Exp, filed by the Prosecution on 30 August 2006, and the corrigendum to Annexes 1 to 5 of the Prosecution Sixth Request filed by the Prosecution on 31 August 2006, whereby the Prosecution requests authorization for redactions to the transcript of interviews of certain witnesses for which the Prosecution had already requested the non-disclosure of their identity.

⁷ ICC-01/04-01/06-355. In this decision the Prosecution *inter alia* (i) was ordered “to file *ex parte* only available to the Prosecution by 29 August 2006 the originals of the forty-one redacted documents which the Prosecution has already disclosed to the Defence, redactions not previously authorised by the Chamber”; and (ii) was given “until 29 August 2006 at 16.00 hours to file applications for authorisation for redactions in evidence other than witness statements included in the Prosecution Charging Document and List of Evidence”;

⁸ ICC-01/04-01/06-360.

NOTING the “Submission of the Document Containing the Charges pursuant to Article 61 (3) (a) and of the List of Evidence pursuant to Rule 121 (3)”,⁹ filed by the Prosecution on 28 August 2006, which included the Prosecution Charging Document and List of Evidence;

NOTING the “Decision on the Agenda of the Hearing of 1 September 2006” (“the Decision on the Agenda”),¹⁰ issued by the single judge on 30 August 2006, and the “Decision on the Supplementary Agenda of the Hearing of 1 September 2006” (“the Decision on the Supplementary Agenda”),¹¹ issued by the single judge on 31 August 2006;

NOTING the *ex parte* hearing with the Prosecution and the representatives of the Victims and Witnesses Unit held in closed session on 1 September 2006, whereby the single judge (i) ordered the Prosecution to re-file the annexes to the Prosecution First Request, the Prosecution Second Request, the Prosecution Third Request, the Prosecution Fourth Request and the Prosecution Sixth Request, and to address the questions posed and the concerns raised in the Decision on the Supplementary Agenda in relation to the Prosecution Fifth Request; and (ii) decided to postpone the *ex parte* hearing of 4 September 2006 and to set a new date for such a hearing only after the Prosecution has complied with the order for re-filing by 11 September 2006;

NOTING the “Decision on the Prosecution Request for Extension of Time, Clarification and Provision of Information”,¹² issued by the single judge on 1 September 2006; and the “Decision concerning the Prosecution’s Requests for Redactions”, issued by the single judge on 1 September 2006;¹³

⁹ ICC-01/04-01/06-356.

¹⁰ ICC-01/04-01/06-368-Conf-Exp.

¹¹ ICC-01/04-01/06-374-Conf-Exp.

¹² ICC-01/04-01/06-376-Corr.

¹³ ICC-01/04-01/06-377-Conf-Exp

NOTING the amended requests of the Prosecution under rule 81 (2) and (4) between 4 September 2006 and 12 September 2006 in compliance with the oral order of the single judge at the *ex parte* hearing of 1 September 2006;¹⁴

NOTING the "Decision concerning the compliance by the Prosecution with the pre-requisites to file rule 81 (4) motions" ("the Decision concerning the Prosecution

¹⁴ See: (i) "Prosecution's Amended Application pursuant to Rules 81 (2) and 81 (4)" ("the Prosecution First Amended Request"), ICC-01/04-01/06-381-Conf, and the Addendum to such Application ("the Addendum to the First Amended Request"), ICC-01/04-01/06-382-Conf, both filed by the Prosecution on 4 September 2006, in which the Prosecution requested authorisation for additional redactions to six witness statements which were the subject of the Prosecution First Request and the Prosecution Second Request; (ii) the "Prosecution's Request for Authorisation of Revised Redactions in Documents" ("the Prosecution Second Amended Request"), ICC-01/04-01/06-384-Conf., filed by the Prosecution on 4 September 2006, in which the Prosecution requested revised redactions to the 14 documents that were the subject of the Prosecution Third Request; (iii) the "Re-submission of Confidential-*Ex Parte*-Prosecution Only Annex 9 to the 4 September 2006 Prosecution's Request for Authorisation of Revised Redactions in Documents" ("the Re-submission of Annex 9 to the Prosecution Second Amended Request"), ICC-01/04-01/06-391-Conf-Exp, filed by the Prosecution on 6 September 2006, in which the Prosecution re-submitted Annex 9 to the Prosecution Second Amended Request; (iv) the "Prosecution's Application pursuant to Rules 81 (2) and 81 (4)" ("the Prosecution Third Amended Request"), ICC-01/04-01/06-392-Conf, filed by the Prosecution on 6 September 2006, in which the Prosecution requested authorisation for additional redactions to certain witness statements which were the subject of the Prosecution First Request and the Prosecution Second Request; (v) the "Prosecution's Application pursuant to Rules 81 (2) and 81 (4)" ("the Prosecution Fourth Amended Request"), ICC-01/04-01/06-395-Conf, filed by the Prosecution on 7 September 2006, in which the Prosecution requested additional redactions to a number of witness statements, transcripts of witness interviews and documents which were the subject of the Prosecution Fourth Request; (vi) the "Prosecution's Request for Authorisation of Revised Redactions in Documents" ("the Prosecution Fifth Amended Request"), ICC-01/04-01/06-409-Conf-Exp, filed by the Prosecution on 11 September 2006, in which the Prosecution requested revised redactions to the documents that were the subject of the Prosecution Fifth Request; (vii) the "Prosecution's Application pursuant to Rules 81 (2) and 81(4)" ("the Prosecution Sixth Amended Request"), filed by the Prosecution on 11 September 2006, ICC-01/04-01/06-410-Conf, in which the Prosecution requested additional redactions to the remaining witness statements, transcripts of witness interviews and documents which were the subject of the Prosecution Fourth Request and the Prosecution Sixth Request; (viii) the "Prosecution's Application pursuant to Rules 81 (2) and 81 (4)" ("the Prosecution Amendment to the Prosecution First Amended Request"), ICC-01/04-01-06-431-Conf, filed by the Prosecution on 12 September 2006, in which the Prosecution requested additional redactions to the statement of one witness which was the subject of the Prosecution First Amended Request; and (ix) the "Prosecution's Application pursuant to Rules 81 (2) and 81 (4)" ("the Prosecution Amendment to the Prosecution Fourth Amended Request"), ICC-01/04-01/06-434-Conf-Exp, filed by the Prosecution on 13 September 2006, in which the Prosecution requested additional redactions to the statement of one witness which was the subject of the Prosecution Fourth Amended Request.

Compliance”), issued by the single judge on 5 September 2006;¹⁵ the “Prosecution’s Response to the Decision concerning the compliance by the Prosecution with the pre-requisites to file rule 81 (4) motions”,¹⁶ filed by the Prosecution on 7 September 2006, in which the Prosecution informed the single judge that, as required by the Decision on the Prosecution Compliance, it had referred two witnesses to the Victims and Witnesses Unit; and the “Submission of the Registrar on Assessments of the feasibility and availability of protective measures in terms of the order of Pre-Trial Chamber I on 5 September 2006”,¹⁷ filed by the Registry on 11 September 2006;

NOTING the *ex parte* hearings with the Prosecution and the representatives of the Victims and Witnesses Unit held by the single judge on 8 September 2006 and 12 September 2006 on the Prosecution amended requests filed by the Prosecution between 4 and 12 September 2006;

NOTING articles 57 (3) (c), 61, 67, 68 and 69 of the Rome Statute (“the Statute”); and rules 81, 87 and 88 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING that, despite the considerable amount of material and the fact that the filings were made by the Prosecution in the last seven days of the three-month period pursuant to the Decision on the Postponement of the Confirmation Hearing, the single judge has carefully examined the redactions proposed by the Prosecution in each of the hundreds of documents, witness statements and transcripts of witness interviews contained in the Prosecution requests and the Prosecution amended requests filed under rule 81 (2) and (4) of the Rules between 21 August and 12 September 2006; and that, as a result of that examination, several *ex parte* hearings for

¹⁵ ICC-01/04-01/06-389. In this decision the single judge ordered the Prosecution to refer to the Victims and Witnesses Unit all those witnesses for which the Prosecution has filed a rule 81 (4) motion without having first received the assessment of the Victims and Witnesses Unit on the availability and feasibility of protective measures.

¹⁶ ICC-01/04-01/06-399-Conf.

¹⁷ ICC-01/04-01/06-411-Conf-Exp.

which agendas were submitted in advance to the Prosecution and the representatives of the Victims and Witnesses Unit have been held since 1 September 2006 on the said requests and amended requests;

CONSIDERING that the ultimate purpose of the redactions proposed by the Prosecution is to preserve the non-disclosure of the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing because (i) their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage; and (ii) no other protective measure that could significantly minimise such a danger is currently available and feasible;

CONSIDERING that the recent deterioration of the security situation in some parts of the Democratic Republic of the Congo ("the DRC") has had an impact on the range of protective measures currently available to and feasible for witnesses on whom the Prosecution or the Defence intends to rely at the confirmation hearing; and that, in this scenario, and after having carefully examined each individual case, non-disclosure of identity *vis-à-vis* the Defence for the purpose of the confirmation hearing is currently the only available and feasible measure for the necessary protection of many Prosecution witnesses;

CONSIDERING, however, that after having thoroughly examined all the witness statements, transcripts of witness interviews and documents for which authorisation for redactions has been requested by the Prosecution under rule 81 (4) of the Rules, the Chamber has found that, even if heavily redacted, the unredacted parts of certain witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews would lead to the identification of the relevant Prosecution witnesses;

CONSIDERING that the Prosecution proposal of delaying the transmission to the Defence of the redacted versions of the said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews until a few days before the commencement of the confirmation hearing (i) would be prejudicial to the Defence's preparation of the confirmation hearing due to the number of witness statements and transcripts of witness interviews involved; and (ii) would be an inadequate solution should the charges be confirmed because the identity of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial;

CONSIDERING therefore that authorising the redactions proposed by the Prosecution in relation to the said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews would amount to defeating the purpose of such redactions, that is to preserve the non-disclosure of the identity of the relevant witnesses;

CONSIDERING the functions of the Chamber in respect of the protection of witnesses and the admission of evidence for the purpose of the confirmation hearing, as provided for in articles 57 (3)(c) and 68 (1) of the Statute and rules 81, 87 and 88 of the Rules; that according to article 69 (4) of the Statute, the Chamber may rule on the admissibility of the evidence on which the parties intend to rely at the confirmation hearing taking into account other factors in addition to relevance, probative value and prejudice to a fair trial or to a fair evaluation of the testimony of a witness; and that, in the view of the Chamber, in a scenario like the one described above, and considering the limited scope of the confirmation hearing, adequate protection of the witnesses on whom the parties intend to rely at the confirmation hearing is one of those additional factors;

CONSIDERING that, under these conditions, the Chamber cannot authorise the disclosure to the Defence of the said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews with the redactions proposed by the Prosecution;

CONSIDERING, nevertheless, that articles 61 (5) and 68 (5) of the Statute and rule 81 (4) of the Rules allows the Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely at the confirmation hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators' notes and reports of their interviews;

CONSIDERING that, unless the Prosecution assures the Chamber by 25 September 2006 at 10h00 that the said witnesses, or some of those witnesses, have freely consented to the immediate disclosure of their identities to the Defence after having been adequately informed of the risks for their security inherent to such disclosure, the Prosecution shall be able to rely on the said witnesses at the confirmation hearing only with the authorisation of the Chamber after it has examined the summaries proposed by the Prosecution in relation to their statements, transcripts of their interviews and/or the investigators' notes and reports of their interviews;

FOR THESE REASONS

ORDER the Prosecution to inform the Chamber by 25 September 2006 at 10h00 whether it:

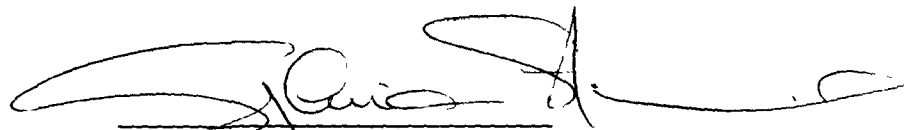
- (i) withdraws from the Prosecution List of Evidence any of the witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews included in Annex I to the present decision, along with the documents attached to those statements, transcripts, notes and reports; or
- (ii) assures the Chamber that the relevant witnesses, or some of those witnesses, have freely consented to the immediate disclosure of their identities to the Defence after having been adequately informed of the risks for their security inherent to such disclosure; or
- (iii) seeks the authorisation of the Chamber to rely on summary evidence of the above mentioned witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews;

GIVE the Prosecution until 25 September 2006 at 10h00 to file proposed summary evidence in a language which Thomas Lubanga Dyilo fully understands and speaks of the said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews, in which all identifying information of the relevant witnesses shall be excluded and in which the following information shall be included:

- (i) a brief introduction of the relevance and probative value of the summary evidence without identifying the witness;
- (ii) any information on which the Prosecution intends to rely at the confirmation hearing, in particularly the information included in the paragraphs referred to in the Prosecution Charging Document and List of Evidence; and
- (iii) any information that could be potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing;

GIVE the Prosecution until 25 September 2006 at 10h00 to re-file the documents attached to those witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews for which the Prosecution intends to request the authorisation of the Chamber to rely in summary evidence pursuant to the present decision. The redactions proposed for those documents should be revised in light of the concerns raised by the single judge at the hearings held on 8 September 2006 and 12 September 2006.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday 15 September 2006

At The Hague

The Netherlands