

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-01/04-01/06
Date: 28 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

Decision on Second 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 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 “Decision on Defence Motion for Leave to Appeal” (“the Decision on the First Defence Motion”),⁶ 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 Decision”),⁷ issued by the single judge on 15 September 2006;

NOTING the “Request for Leave to Appeal the First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (“the Defence Request for Leave to Appeal”),⁸ filed by the Defence on 21 September 2006;

NOTING the “Prosecution’s Substantive Response to Thomas Lubanga Dyilo’s 21 September 2006 Request for Leave to Appeal” (“the Prosecution Response”),⁹ issued by the Prosecution on 27 September 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”);

⁵ Decision on the Prosecution Motion, p. 26.

⁶ ICC-01/04-01/06-338.

⁷ ICC-01/04-01/06-437.

⁸ ICC-01/04-01/06-456.

⁹ ICC-01/04-01/06-481.

CONSIDERING that, according to the Decision on Prosecution Request,¹⁰ the Decision on the Prosecution Motion,¹¹ the Decision on the First Defence Motion¹² and 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 2005,¹³ 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”)¹⁴, issued by the Appeals Chamber on 13 July 2006:

- (i) “only an issue may form the subject-matter of an appealable decision;”¹⁵
- (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”;¹⁶

¹⁰ See in particular para. 28 of the Decision on the Prosecution Request.

¹¹ Decision on the Prosecution Motion, para. 15.

¹² Decision on the First Defence Motion, pp. 5 and 6.

¹³ 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.

¹⁴ ICC-01/04-168.

¹⁵ Appeals Chamber Judgement, para. 9.

¹⁶ Appeals Chamber Judgement, para. 9.

- (iii) “not every issue may constitute the subject of an appeal”,¹⁷ but “it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”¹⁸; 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’”¹⁹;

CONSIDERING that, in the Defence Request for Leave to Appeal, the Defence elaborated on the reasons why the Chamber should grant leave to appeal against the Decision without clearly framing the issues for which leave to appeal is sought;²⁰ and that after carefully revising the Defence Request for Leave to Appeal, the single judge considers that the Defence is seeking leave to appeal in relation to the six following issues:²¹

- (i) whether the Decision lacked factual and/or legal 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 (“the First Issue”);
- (ii) whether the principle of necessity and proportionality was appropriately applied when deciding on the non-disclosure of identity

¹⁷ Appeals Chamber Judgement, para. 9.

¹⁸ Appeals Chamber Judgement, para. 10.

¹⁹ Appeals Chamber Judgement, para. 14.

²⁰ The single judge concurs with the Prosecution in that “the nature of the approach taken by the Applicant makes it difficult to identify the appellable issues on which the Applicants are seeking leave.” (Prosecution Response, para. 4).

²¹ The single judge notices that, at p. 4 of the Prosecution Response, the Prosecution identified four issues for which the Defence is seeking leave to appeal. However, in the view of the single judge the Defence is seeking leave to appeal in relation to six issues, including those four identified by the Prosecution.

of some Prosecution witnesses for the purpose of the confirmation hearing (“the Second Issue”);

- (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 (“the Third Issue”);
- (iv) whether the adequate protection of those witnesses on whom the parties intend to rely at the confirmation hearing is a factor which can be taken into consideration in relation to the admission of evidence for the confirmation hearing (“the Fourth Issue”);
- (v) whether the Decision violates the presumption of innocence of Thomas Lubanga Dyilo (“the Fifth Issue”); and
- (vi) whether a finding made during *inter partes* proceedings can be revised in the context of *ex parte* proceedings (“the Sixth Issue”);

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

CONSIDERING that, in relation to the First Issue, the single judge acknowledges that the factual reasoning did not enter into the specific details of each and every witness covered by the Decision; that the single judge took this approach considering that the Decision was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules; and that, hence, the Decision involves the issue of whether the Decision lacked factual reasoning in light of the fact that it was taken in *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules;

CONSIDERING nevertheless that all the relevant statutory provisions on which the Decision is based were not only noted in the Decision but also elaborated on in detail in several “considerings”; and that for this reason, the single judge considers that the Decision does not involve the issue of whether the Decision lacked legal reasoning;

CONSIDERING that, in respect of the Second Issue, the Decision states (i) that the recent deterioration of the security circumstances in some parts of the Democratic Republic of the Congo has had an impact on the range of available and feasible protective measures;²² and (ii) that, under these exceptional circumstances, “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”;²³

CONSIDERING therefore that the Decision involves the issue of whether, since the confirmation hearing has already been postponed, since Thomas Lubanga Dyilo has been in the detention centre for six months, and since any improvement of the security situation in the DRC in the coming months is unpredictable, the single judge has appropriately applied the principle of necessity and proportionality in deciding on the non-disclosure of identity of some Prosecution witnesses for the purpose of the confirmation hearing;²⁴

CONSIDERING that, in relation to the Third Issue, although the single judge has not yet authorised the Prosecution to rely at the confirmation hearing on summary

²² Decision, p. 7.

²³ Decision, p. 7.

²⁴ The Defence argues that, given the exceptional circumstances of this case, declaring an indefinite suspension of the confirmation hearing would have been more in line with the principle of necessity and proportionality. See, Defence Request for Leave to Appeal, pp. 9 to 11.

evidence of witnesses for which non-disclosure of identity is granted, the Decision was drafted on the premise that this is an option available in circumstances as exceptional as those in the present case;²⁵ and that, hence, the Decision involves the issue of 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;²⁶

CONSIDERING that, in relation to the Fourth Issue, the Defence alleges (i) that it is not clear what the single judge means when she states that adequate protection of witnesses is a factor which the Chamber can rely on when deciding on the admissibility of evidence under article 69 (4) of the Statute;²⁷ and (ii) that "it appears to suggest that the Chamber can consider admitting evidence in a particular format, which might generally be inadmissible, if the use of that format is necessary to protect the witness."²⁸

CONSIDERING that by the referring to "adequate protection of witnesses" in the context of article 69 (4) of the Statute, the single judge meant that, in light of the limited scope of the confirmation hearing and the exceptional circumstances in the present case, evidence²⁹, which might otherwise be admissible,³⁰ can be not admitted for the purpose of the confirmation hearing if adequate protection of the relevant witnesses so requires;

²⁵ The single judge disagrees with the submission of the Prosecution that the Defence Request for Leave to Appeal is premature in relation to this issue.

²⁶ In the view of the single judge, this option is expressly provided for in articles 61 (5) and 68 (5) of the Statute. Moreover, if, as stated in the Defence Request for Leave to Appeal, such an option were *per se* incompatible with Thomas Lubanga Dyilo's right to a fair trial, it would not have been expressly included in two provisions of the Statute.

²⁷ Defence Request for Leave to Appeal, paras. 41 and 42.

²⁸ Defence Request for Leave to Appeal, para. 42.

²⁹ In particular Prosecution witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews.

³⁰ And this regardless of the format of such evidence, which according to the Statute and the Rules could also include, if the circumstances so require, redacted versions or even summary evidence.

CONSIDERING that the Defence has fundamentally misunderstood the Decision on this point; and that the Decision does not involve the Fourth Issue as portrayed by the Defence;

CONSIDERING that the Fifth Issue refers to the statement in the Decision that delaying until a few days before the confirmation hearing the disclosure of redacted versions of Prosecution witness statements and transcripts of witness interviews would be an inadequate solution because *inter alia* "should the charges be confirmed [...] the identity of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial."³¹

CONSIDERING that, in the view of the single judge, the confirmation hearing is a stage of the overall criminal procedure provided for in the Statute and the Rules and should not be analysed in isolation; that, as a result, some of the issues brought before the single judge might also affect proceedings after the confirmation hearing should the charges be confirmed; and that the said issues can be properly addressed by the single judge only if she is mindful of the consequences that the solutions proposed by the parties might have in proceedings that would take place only if the charges are confirmed;

CONSIDERING, in particular, that when deciding on the disclosure to the Defence of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing and who are currently living in risk areas within the DRC, the single judge cannot, as requested by the Defence, completely disregard the problem posed by the time between the moment the identity of the relevant witness is

³¹ Decision, p. 8. This is in light of the fact that the use of the said redacted versions would not prevent the Defence from learning the identity of the relevant witnesses.

disclosed to the Defence and the moment the witness testifies at trial, if the charges are confirmed;

CONSIDERING further that under articles 57 (3) (c) and 68 (1) of the Statute, the single judge is duty-bound to take such a factor into consideration, particularly in light of (i) the Registry's assertion that the longer the time between the disclosure of identity and testimony, the greater the risk to the relevant witness; (ii) the applicable law before this Court which, in principle, allows non-disclosure of the identity of Prosecution witnesses prior to the commencement of the trial, if exceptional circumstances so require;³² and (iii) the exceptional circumstances in respect of the ongoing security situation in some parts of the DRC;

CONSIDERING that, unless the procedural framework provided for in the Statute and the Rules is considered an infringement *per se* of the presumption of innocence of Thomas Lubanga Dyilo, no issue related to the presumption of his innocence is raised by the fact that the single judge took the above-mentioned factor into account when she made her decision; and that therefore the Decision does not involve any issue regarding the presumption of innocence of Thomas Lubanga Dyilo;

CONSIDERING that, in relation to the Sixth Issue, the single judge concurs with the Prosecution³³ in that the Decision merely applied the principles established in the previous decisions of the single judge, including the Decision on the Final System of

³² Rule 81 (4) of the Rules. A similar approach has been adopted in other international criminal tribunals in which the disclosure of the identity of Prosecution witnesses can be delayed until 30 days before the commencement of the trial, if exceptional circumstances so require. See, for instance, *Prosecutor v Mrksic et al* Case No. IT-95-13/1-T Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005 para 13, 14, 21 and 22; *Prosecutor v Perisic* Case No. IT-04-81-PT Decision on Prosecution Motion for Protective Measures for Witnesses, 27 May 2005 page. 3, Considering No. 7; *Prosecutor v Théoneste Bagosora* ICTR-98-41-I Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001, para 15 and 22-24.

³³ Prosecution Response, paras. 25 to 27.

Disclosure and the Decision Establishing General Principles; and that hence the Decision does not involve the issue of whether a finding made during *inter partes* proceedings can be revised in the context of *ex parte* proceedings;

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

CONSIDERING that the First Issue is closely related to the broader question currently before the Appeals Chamber of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules;³⁴ and that, in granting leave to appeal in the Decision on the Prosecution Motion, the single judge found that the broader question currently before the Appeals Chamber is “directly related” to:

- (i) “the fairness of the proceedings, insofar as what is at stake is the Defence procedural right to be aware and, as far as possible, to have a say in the disposition of the Prosecution motions seeking to restrict the disclosure prior to the confirmation hearing of evidence and materials, to which, as a general rule according to the Statute and the Rules, the Defence is entitled to have access;”³⁵
- (ii) “the expeditious conduct of the proceedings because, as shown by the above-mentioned jurisprudence of the European Court of Human Rights, the regime encompassed by the term *ex parte* is connected to the shaping of a regime under which the Defence can get notice and

³⁴ Decision on the Prosecution Motion, p. 26.

³⁵ Decision on the Prosecution Motion, para. 55.

participate as far as possible in the decision-making process of the Prosecution applications.”³⁶

CONSIDERING that these reasons are also applicable to the part of the First Issue concerning the alleged lack of factual reasoning; and that therefore, in the view of the single judge, this is an issue which would significantly affect the fair and expeditious conduct of the proceedings in the Thomas Luganga Dyilo;

CONSIDERING that the Second Issue is closely related to the question currently before the Appeals Chamber 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”;³⁷ and that, in granting leave to appeal in the Decision on the Prosecution Motion, the single judge found that the latter question is “directly related” to:

- (i) “the fairness of the proceedings insofar as 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”;³⁸
- (ii) “the single judge also considers that this issue is directly related to the expeditious conduct of the proceedings insofar as it is intimately connected to the process of seeking and implementing other less restrictive measures for the protection of those witnesses on which the Prosecution intends to rely at the confirmation hearing.”³⁹

³⁶ Decision on the Prosecution Motion, para. 56.

³⁷ Decision on the Prosecution Motion, p. 26.

³⁸ Decision on the Prosecution Motion, para. 32.

³⁹ Decision on the Prosecution Motion, para. 33.

CONSIDERING that these reasons are also applicable to the Second Issue, which is therefore 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 single judge concurs with the Defence⁴⁰ that the above-mentioned reasons are also applicable to the Third Issue, which is therefore also an issue that would significantly affect the fair and expeditious conduct of the proceedings in the case of the Prosecutor *vs.* Thomas Lubanga Dyilo;

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

CONSIDERING, further, that, as pointed out above, the First Issue and the Second Issue are closely related to questions currently before the Appeals Chamber; and that in the view of the single judge, an immediate resolution by the Appeals Chamber of the part of the First Issue related to the alleged lack of factual reasoning and of the Second Issue may materially advance the proceedings in the case of The Prosecutor *vs.* Thomas Lubanga Dyilo;

CONSIDERING that, in relation to the Third Issue, a number of *ex parte* Prosecution requests to rely on summary evidence of witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews are still

⁴⁰ Defence Request for Leave to Appeal, paras. 24 and 25.

pending before the Chamber;⁴¹ and that therefore, in the opinion of the single judge, an immediate resolution of the Third Issue 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 for Leave to Appeal in relation to the following issues:


- (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;

⁴¹ See for instance ICC-01/04-01/06-479-Conf-Exp, filed by the Prosecution on 26 September 2006.

- (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;

REJECT the Defence Request for Leave to Appeal 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 Thursday 28 September 2006

At The Hague

The Netherlands