Cour Pénale Internationale

International Criminal Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **9 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
v. Thomas Lubanga Dyilo

Public Redacted Version

Decision on the Motion by the Defence to exclude anonymous hearsay testimony of the Prosecution witness

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence
Mr Jean Flamme
Ms Véronique Pandanzyla

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

NOTING the ex parte hearing of 25th August 2006 during which the Prosecution intimated its intention to call a witness ("the Witness") to testify at the confirmation hearing;[1]

NOTING further that at the aforesaid ex parte hearing the Prosecution stated that the statement of the Witness was obtained on condition of confidentiality pursuant to article 54 (3) of the Rome Statute ("the Statute") and updated the Chamber on the status of its negotiations with the United Nations ("the UN") on the extent to which these restrictions could be lifted;[2]

NOTING the "Information following the Pre-Trial Chamber's Decision on the Prosecution deadline of 12 September 2006 and Defence deadline of 12 September 2006" filed by the Prosecution on 12 September 2006 in which the Prosecutor *inter alia,* requested the Chamber to grant it leave to add the statement of the Witness it intended to rely on at the confirmation hearing, as an additional witness after the consent of the provider of the said statement was obtained in terms of article 54 (3) (e); [3]

NOTING the "Decision on the Arrangements for the Participation of Victims a/0001/06, a/0002/06, a/00003/06 at the Confirmation Hearing" issued by the Chamber on the 22 September 2006;[4]

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[1] ICC-01-04-01-06-T-29-CONF-EN at p 12 lines 9 -14.
[2] ICC-01-04-01-06-T-17-CONF-EN at p 15 line 14 – pg. 18 line 8.
[3] ICC-01/04-01/06-428-Conf-Exp.
[4] ICC-01/04-01/06-462-tEN.

NOTING the "Prosecution's Further Information on Additional Witness and Request" filed by the Prosecution on 6 October 2006 in which the Prosecution requests the admission into evidence for the purpose of the confirmation hearing of a statement of the Witness on which the Prosecution intends to rely at the confirmation subject to the redactions requested by the provider of the statement;[5]

NOTING the "Prosecution Application pursuant to Rule 81 (2)" filed by the Prosecution on 10 October 2006 in which the Prosecution requests for certain redactions in the said Witness statement consistent with redactions made by the provider;[6]

NOTING the "Décision sur la demande du procureur en application de la règle 81(2) du 11 Octobre 2006" whereby the Chamber authorizes the Prosecutor to redact certain elements in the said Witness statement and orders the Prosecution to disclose the redacted statements to the Defence;[7]

NOTING the "Prosecution's Further Information on Additional Witness and Request" and its annexes filed by the Prosecution on the 12 of October in which it reveals the identity of the Witness to the Defence and requests the Chamber for leave to add the Statement of the Witness, REDACTED to the Prosecution's List of Evidence and to call the Witness REDACTED to testify at the confirmation hearing;[8]

NOTING "the Prosecution's Further Information on the UN Position in respect of the Examination of the Witness REDACTED" filed by the Prosecution on the 13 October 2006 in which it quotes the relevant parts of the letter sent by the UN ("the

[5] ICC-01/04-01/06-529-Conf-Exp.
[6] ICC-01/04-01/06- 548-Conf.
[7] ICC-01/04-01/06-556-Conf.
[8] ICC-01/04-01/06-563-Conf.

UN letter"), placing restrictions on the Prosecution's examination of the Witness during her capacity as Witness in the confirmation hearing;[9]

NOTING the "Decision on the Prosecution's Request of 12 October 2006" issued by the Chamber whereby the Chamber, *inter alia* permits the "Prosecution to rely at the confirmation hearing on the unredacted parts of the statement of the Witness referred to in the Prosecution Information and call her to testify at the confirmation hearing";[10]

NOTING the "Motion to exclude anonymous hearsay evidence from the testimony of the Prosectuion"("Defence Request") filed by the Defence on 20 October 2006 in which the Defence requests the Chamber to prohibit the Prosecution from eliciting any evidence from REDACTED that she herself did not witness;[11]

NOTING the "Décision sur la requête du Procureur du 9 octobre 2006" issued by the Single Judge on the 20 October 2006 in which it authorises a representative of the Secretary General of the United Nations to assist REDACTED, during the presentation of her evidence at the confirmation hearing;[12]

NOTING the "Decision inviting the Prosecution to present its Observations on the Motion by the Defence to Exclude Anonymous Hearsay Testimony of the Prosecution Witness"("Prosecution's Response") issued by the Single Judge on 25 October 2006;[13]

[9] ICC-01/04-01/06-587-Conf.
[10] ICC-01/04-01/06-593-Conf.
[11] ICC-01/04-01/06-596-Conf.
[12] ICC-01/04-01/06-602-Conf.
[13] ICC-01/04-01/06-615-Conf.

NOTING the "Prosecution's Response to the Defence's Motion to Exclude Anonymous Hearsay from Testimony of the Prosecution Witness" filed on the 1st of November 2006;[14]

NOTING the "Request for Leave to Reply to Prosecution's Response to the Defence's Motion to Exclude Anonymous Hearsay Testimony from the Testimony of the Prosecution Witness" filed by the Defence on 2 November 2006;[15]

NOTING articles 54, 64 (9), 69 (4) and 69 (7) of the Rome Statute ("the Statute") and rule 63(2) and 82 of the Rules of Evidence and Procedure ("the Rules");

CONSIDERING that rule 82 (3) of the Rules states that if the Prosecutor calls a witness to introduce into evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on "grounds of confidentiality";

CONSIDERING that the statement of the Witness and a number of other documents given by the same provider were originally covered by article 54 (3) (e) of the Statute, that is to say given to the Prosecution on the condition of confidentiality and solely for the purpose of generating new evidence; that subsequently the provider of the information has consented to disclose with certain redactions of the statement of the Witness and some other documents and has authorised the Witness to testify before the Court; and that the Chamber has authorised (i) the redactions requested by the Prosecution at the behest of the provider and (ii) the presence of a representative of the UN Secretary General during the testimony of the Witness to assist her;

[14] ICC-01/04-01/06-639-Conf.
[15] ICC-01/04-01/06-641-Conf.

CONSIDERING, therefore, that the conditions of rule 82 (3) of the Rule are met, that is to say that the Prosecution has called a witness to introduce into evidence information which has been protected under article 54, paragraph 3 (e); and that, for that reason, the Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness objects to answer on grounds of confidentiality;

CONSIDERING further that the portion of the UN letter requesting that certain restrictions be imposed on the testimony of REDACTED as reiterated by the Prosecution in its submission in "Further Information on the UN position in respect of the Examination of the Witness REDACTED" reads as follows:

"the Prosecutor, when examining REDACTED *in her capacity as a witness before the Pre-Trial Chamber, shall not ask any questions the answering of which would require that she divulge:*

- *the identity of persons, groups or organizations that provided information either to her or to the United Nations on the condition that their identities remain confidential and not disclosed;*
- *information provided either to her or the United Nations in confidence by a third party the disclosure of which would place the personal safety of that third party or of his or her family members at risk;*
- *information the disclosure of which would place the personal safety of any current or former member of MONUC or any member of the personnel of the United Nations at risk.";*

CONSIDERING that, while the UN letter expressly prevents the Prosecution from posing questions to the Witness that fall within one of the three above-mentioned grounds, the Defence and the Chamber are not in principle precluded from posing any question to the Witness;

CONSIDERING, however, that, in the view of the Chamber, the three grounds contained in the UN letter fall within the scope of the notion of "grounds of confidentiality" in rule 82 (3) of the Rules; and that therefore if the Witness objects to answer a question on any of the said grounds, "the Chamber may not compel that witness to answer";

CONSIDERING, further, that, in application of article 69 (4) of the Statute[16], "the Chamber may rule on the relevance or admissibility of any evidence, taking into account, *inter alia,* the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness"; and that, according to rule 63 (1) and (3), the Chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69 of the Statute;

CONSIDERING hence that if in application of rule 82 (3) of the Rules, the Witness does not answer some of the questions posed to her, and in particular those concerning the sources of her information about events that she did not directly witness, the Chamber shall subsequently either (i) decide to declare inadmissible in whole or in part the testimony of the Witness or (ii) assess the weight given to her evidence in light of such a factor; [17]

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[16] This is reinforced by 64(9) and rule 63(2) of the Rules.

[17] This approach is consistent with International human rights and criminal law jurisprudence. See *Prosecutor* v *Mladen Natetilic & Vinko Martino Vic*, Case No.IT-98-34-T, Judgment of the Trial Chamber of 31 March 2003 para. 11, "The Chamber has accepted hearsay evidence as being generally admissible under the Rules. It has however taken into account that the weight or probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined"; See also *Prosecutor v. Aleksovski,* Case No.: IT-95-14/1-AR, Decision on Prosecutor's Appeal on

CONSIDERING that the Defence Request for an order to prohibit the Prosecution from eliciting any evidence that the Witness herself has not witnessed is only based on a Defence assumption, that is to say the Defence belief that in application of rule 82 (3) of the Rules the Witness will not answer any question concerning her sources of information about those events that she did not directly witness;

CONSIDERING further that, as stated in the Decision on the Prosecution's Request of 12 October 2006, it is pursuant to rule 121 (5) of the Rules, as opposed to rule 121 (3) of the Rules, that the Prosecution is authorised to rely at the confirmation hearing on the unredacted parts of the statement of the Witness and to call her to testify; that the time-limit provided for in rule 121 (5) of the Rules is of fifteen days; and that, therefore, even if the Defence was only put on notice of the conditions provided for in the UN letter on 17 October 2006 , that is to say 22 days before the commencement of the confirmation hearing, the fifteen days deadline provided for in rule 121 (5) of the Rules has been fully respected;

CONSIDERING that the Chamber has received sufficient observations from both the Defence and the Prosecution on the Defence Request;

Admissibility of Evidence, 16 February 1999, para 15, "... the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence"; *See* also *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996 and *Tadic* Trial Judgement, para 555; *Prosecutor. v. Tihomir Blaskic*, Case No.: IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 26 January 1998; Prosecutor v Akayensu, Case No. ICTR-96-4-T-2, 2 Septeber 1998; *The Prosecutor v. Alfred Musema*, ICTR Case No. 96-13-T, Judgement and Sentence, 27 January 2000 para. 56.

FOR THESE REASONS

REJECT the Defence "Request for Leave to Reply to Prosecution's Response to the Defence's Motion to Exclude Anonymous Hearsay Testimony from the Testimony of the Prosecution Witness";

REJECTS the request of the Defence for an order of the Chamber prior to the testimony of the Witness to prohibit the Prosecution from eliciting any evidence that the Witness herself has not witnessed;

DECIDE that, while the UN letter expressly prevents the Prosecution from posing questions to the Witness that fall within one of the three grounds included in the UN letter, the Defence and the Chamber are not in principle precluded from posing any such questions to the Witness;

DECIDE that all three grounds invoked in the UN letter fall within the scope of the expression "grounds of confidentiality" under rule 82 (3) of the Rules; and that therefore if they are invoked by the Witness or by representative of the Secretary General in order not to answer any of the questions posed by the Defence and the

Chamber pursuant to the "Décision sur la requête du Procureur du 9 octobre 2006"[18], the Witness shall be entitled not to answer those questions;

INFORM that if as a result of invoking rule 82 (3) of the Rules, the Witness does not answer some of the questions posed by the Chamber or by the Defence, the Chamber shall subsequently either (i) decide to declare inadmissible in whole or in part the testimony of the Witness or (ii) assess the weight given to her evidence in light of such a factor.

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

Judge Claude Jorda
Single Judge

Dated this Wednesday 9 November 2006
At The Hague
The Netherlands

[18] ICC-01/04-01/06-602-Conf.