

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

No.: ICC-01/04-01/06  
Date: 25 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 vs. THOMAS LUBANGA DYILO**

**Public with Confidential - *Ex Parte* - Prosecution Only Annexes**

**Provision of Summary Evidence to the Pre-Trial Chamber**

**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  
Mr Franck Mulenda

**Counsel for the Defence**

Mr Jean Flamme  
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**Office of Public Counsel  
for the Defence**

Ms Melinda Taylor

## Background

1. On Friday, 15 September 2006, the Single Judge of the Pre-Trial Chamber (Single Judge) issued the "First Decision on the Prosecution Request and Amended Requests for Redactions under Rule 81"<sup>1</sup> (First Decision).
2. In the First Decision, the Prosecution was ordered to inform the Chamber by Monday, "25 September 2006 at 10h00 whether it: (i) withdraws from the Prosecution List of Evidence any of the witness statement and investigators' notes and reports of witness interviews included in Annex I to the present decision, along with the documents attached to those statement, 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."<sup>2</sup>
3. In respect of those materials the Prosecution decided to provide summaries, the First Decision gave the Prosecution until Monday, "25 September 2006 at 10h00 to file proposed summary evidence in a language which Thomas Lubanga Dyilo fully understands and speaks" witness statements, transcripts of witness interviews and investigator's notes and reports of witness interviews, in which all

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<sup>1</sup> First Decision on the Prosecution request and Amended Requests for Redactions under Rule 81, public, 15 September 2006.

<sup>2</sup> See First Decision, at pages 9 and 10.

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."

4. Furthermore, in the First Decision, the Single Judge gave the Prosecution until Monday, "25 September 2006 at 10h00 to re-file the documents attached to those witness statements, transcripts of witness interviews and investigator's 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 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."

#### **Prosecution's decision on the alternatives**

5. The Prosecution has decided to provide summary evidence in respect of all witness statements, transcripts of witness interviews and investigator's notes and reports of the witnesses interviewed as detailed in Annex I attached to the First Decision.

### **Request for extension of time**

6. On 22 September 2006, the Prosecution sought an extension of time in order to prepare adequately for the provision of summary evidence to the Pre-Trial Chamber.<sup>3</sup> The Prosecution advised the Pre-Trial Chamber that it would make every effort to provide for the summaries as soon as possible, and anticipated filing a number of summaries on Monday, 25 September 2006.
  
7. On 22 September 2006, the Pre-Trial Chamber granted the Prosecution's request and extended the deadline for provision of summary evidence to 29 September 2006 at 10h00.<sup>4</sup>

### **Present Submission**

#### *Preliminary remark on the Rule 81 applications*

8. The Prosecution notes that the First Decision explicitly states 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 ..."<sup>5</sup>

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<sup>3</sup> Request for Extension of Time, 22 September 2006.

<sup>4</sup> Decision on the Prosecution's Application for Extension of Time, 22 September 2006.

<sup>5</sup> See First Decision, at page 6. – The same language has been also used in other Decisions.

9. Whilst this statement is correct, it does not provide for the full picture. In particular, it does not provide for the factual reasons that made it legally impossible for the Prosecution to file its respective Applications any earlier.

10. The Prosecution therefore adds to the facts as follows:

- (i) On 21 April 2006, the Prosecution filed its first Application pursuant to Rule 81(2) and Rule 81(4). The Prosecution attached a number of witness statements with proposed redactions and sought rulings of the Pre-Trial Chamber pursuant to Rules 81(2) and 81(4).
- (ii) On 26 April 2006, the Single Judge scheduled an *in camera* hearing for 2 May 2006, in order to discuss, *inter alia*, the 21 April 2006 Application. During the 2 May 2006 hearing, the Single Judge raised various concerns regarding the 21 April 2006 Application.
- (iii) In light of these concerns, the Prosecution reviewed the proposed redactions to witness statements attached to the 21 April 2006 Application and made changes to the proposed redactions. On 9 May 2006, the Prosecution submitted its Supplemental Briefing Provided in Respect of the Application pursuant to Rule 81(2) and Rule 81(4) of 21

April 2006<sup>6</sup> seeking the same relief but attaching amended proposed redactions to the witness statements originally submitted.

- (iv) On 19 May 2006, the Single Judge issued the Decision establishing General Principles governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute<sup>7</sup> (19 May 2006 Decision). In the 19 May 2006 Decision, the Single Judge determined the general procedure to be applied by either Party seeking non-disclosure of information under Rules 81(2) and (4). In paragraph 31 of the 19 May 2006 Decision, the Single Judge decided that “non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing can be authorised only exceptionally when, due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered infeasible or insufficient.”<sup>8</sup>
- (v) On 22 May 2006, the Single Judge issued the “Decision on the Prosecution Filing of 19 April 2006 and Application of 24 April 2006”<sup>9</sup> (22 May 2006 Decision). The Single Judge decided that the Prosecution

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<sup>6</sup> Supplemental Briefing Provided in Respect of the Application pursuant to Rule 81(2) and Rule 81(4) of 21 April 2006, 9 May 2006.

<sup>7</sup> Decision Establishing General Principles governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, 19 May 2006.

<sup>8</sup> See 19 May 2006 Decision, at para. 31.

<sup>9</sup> Decision on the Prosecution Filing of 19 April 2006 and Application of 24 April 2006, 22 May 2006. The Pre-Trial Chamber referred to the Prosecution’s 21 April 2006 as the “24 April 2006” Application.

must proceed with any applications under Rules 81(2) and (4) in the manner ordered in the 19 May 2006 Decision.<sup>10</sup>

- (vi) In compliance with the 19 May 2006 Decision, the Prosecution on 14 June 2006, after a meeting with VWU on 7 June 2006 to discuss the parameters of the Prosecution's information, submitted its list with the names of the witnesses concerned to Victims and Witnesses Unit (VWU).
  
- (vii) On 24 July 2006, the VWU submitted its Recommendations of the Registrar on Protective Measures for Prosecution Witnesses (the Registry Recommendations), in an *ex parte* filing, not accessible to the Prosecution.<sup>11</sup> On 26 July 2006, the Prosecution filed the Prosecution's Request for Access to *Ex Parte* Filings<sup>12</sup> in which the Prosecution requested access to the Registry's Recommendations on the basis that the Prosecution required the information in order to determine the necessity to request authorization of redactions pursuant to Rule 81(4) and to comment on the VWU's views. On 31 July 2006, the Single Judge granted the Prosecution's request and instructed the Registry to notify the Registry Recommendations to the Prosecution.<sup>13</sup> On 1 August 2006, the Prosecution received the Registry Recommendations.

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<sup>10</sup> See 22 May 2006 Decision, at page 5.

<sup>11</sup> Recommendations of the Registrar on Protective Measures for Prosecution Witnesses (Under Seal, *Ex Parte*), 24 July 2006.

<sup>12</sup> Prosecution's Request for Access to *Ex Parte* Filings (Under Seal, *Ex Parte*), 26 July 2006.

<sup>13</sup> Decision on the Prosecution Request for Access to the Registry Recommendations (Under Seal, *Ex Parte* only available to the Prosecution), 31 July 2006.

(viii) On 14 August 2006, the Prosecution filed its urgent “Request for *Ex Parte* Hearing” (14 August 2006 Request). In the 14 August 2006 Request, the Prosecution in detail raised its concerns in respect of the Registry Recommendations and requested the Single Judge “- in light of the deadlines for the Prosecution’s Rule 81(4) applications - to urgently schedule an *ex parte* hearing with the Prosecution and the VWU in order to address in detail the VWU Recommendations.” On 18 August 2006, the Single Judge rendered the “Decision on the Prosecution Urgent Request for *Ex Parte* Hearing”, and scheduled a hearing for 23 August 2006, at 15:00 hours. The hearing took place as scheduled.

11. In light of these facts, the Prosecution for legal reasons was not in a position to file its respective Applications any earlier.

*Submission of eight summaries*

12. The Prosecution attaches to the present submission an initial set of eight summaries representing seven witness statements and two transcripts of interviews taken pursuant to Article 55(2).<sup>14</sup> The Prosecution also attaches a number of documents that are attached to the summaries for which the Prosecution seeks redactions or authorization for complete non-disclosure.<sup>15</sup>

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<sup>14</sup> There are 9 confidential – *ex parte* – Prosecution only statements/ transcripts but only 8 summaries due to the fact that one witness provided one statement and one transcript and both have been summarized in one summary document.

<sup>15</sup> Please see a chart of related documents attached hereto as confidential – *ex parte* – Prosecution only Annex 9.



## Request

13. The Prosecution requests authorization<sup>16</sup> to disclose to the Defence the summaries of witness statements and transcripts, with pseudonyms to protect the identities of the witnesses, as annexed hereto.<sup>17</sup>

  
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Luis Moreno-Ocampo  
Prosecutor

Dated this 25<sup>th</sup> day of September 2006  
At The Hague, The Netherlands

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<sup>16</sup> The Prosecution adds, however, that it makes the present request in the context of its Rule 81(4) Applications. By doing so, the Prosecution does not concede that it falls within the powers of the Pre-Trial Chamber to request for summaries pursuant to Article 68(5).

<sup>17</sup> The summaries are attached as confidential – *ex parte* – Prosecution only Annexes 1-9.