

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-1/06

Date: 2 May 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 Document

Prosecution's Final Observations on Disclosure

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
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Counsel for the Defence
Mr Jean Flamme

Background

1. By Decisions of 23 and 27 March 2006,¹ the Pre-Trial Chamber imposed on the Parties an interim system of disclosure (Pre-Trial Chamber's system). The Prosecution on 3 April 2006² made its first comments on the Pre-Trial Chamber's system, followed by extended observations on 6 April 2006.³ The same day, Defence commented on the Pre-Trial Chamber's system.⁴

2. On 7 April 2006, the Pre-Trial Chamber issued a Decision⁵ scheduling a hearing on disclosure for Monday, 24 April 2006, indicating that the Parties would be provided with an agenda (a set of specific questions) for the hearing by Friday, 21 April 2006 .⁶ Following a Joint Request of the Parties⁷ to provide the agenda for the hearing in sufficient time, namely at least three working days prior to the hearing,⁸ the Pre-Trial Chamber on 19 April 2006⁹ issued its Decision, detailing the set of specific questions - comprised of about 50 agenda items and sub-items - for the 24 April 2006 hearing.

¹ Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, 23 March 2006 (23 March 2006 Decision); Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure, 27 March 2006 (27 March 2006 Decision).

² Filing of Incriminating Evidence and Potentially Exculpatory Evidence, 3 April 2006.

³ Prosecution's Observations on Disclosure, 6 April 2006 (6 April 2006 Prosecution Submission).

⁴ Observations de la defense concernant le system de divulgation, requis par les decisions du 23 et 27 mars 2006 (6 April 2006 Defence Submission).

⁵ Decision Convening a Hearing on the System of Disclosure for the Purpose of the Confirmation Hearing, 7 April 2006 (7 April 2006 Decision).

⁶ See 7 April 2006 Decision, at page 5.

⁷ Joint Request of the Prosecution and Duty Counsel for the Defence for Distribution of the Agenda for the Hearing of 24 April 2006 Three Working Days Prior to the Hearing, 12 April 2006 (Joint Request).

⁸ See Joint Request, at page 7.

⁹ The Parties were notified at 19:04 hours on Wednesday, 19 April 2006.

3. On 24 April 2006, the hearing took place in public session. Both Parties made first general observations in respect of the Pre-Trial Chamber's system and then addressed, to the extent the Single Judge wanted the Parties to address them, the agenda items in detail.
4. Following a request of the Prosecution¹⁰ and the Defence,¹¹ the Single Judge of the Pre-Trial Chamber set both Parties a deadline for 2 May 2006 to submit their final observations on the system of disclosure.¹²

The Pre-Trial Chamber's system

5. The Prosecution refers to both its observations made in the context of its filings as detailed above and its submissions in the course of the 24 April 2006 hearing.¹³ In the instant submission, to avoid repetitive submissions, the Prosecution summarises and highlights its main concerns in respect of the Pre-Trial Chamber's system. The Prosecution's concerns are grounded in both the applicable law and the practical difficulties the Prosecution has already encountered and further anticipates in implementing the Pre-Trial Chamber's system.

¹⁰ The request was made in light of the short period of time the Pre-Trial Chamber had granted to the Parties to prepare for the 24 April 2006 hearing, see transcript of the 24 April 2006 hearing, at page 8.

¹¹ See transcript of the 24 April 2006 hearing, at page 47, lines 5 to 10.

¹² See transcript of the 24 April 2006 hearing, at page 47, lines 18 to 20.

¹³ The Prosecution includes its earlier observations and all references made in respect of applicable jurisprudence by way of reference in the present filing. The Prosecution has noted the observations of the Single Judge in respect of paragraph 8 of the Prosecution's 6 April 2006 Submission during the 24 April 2006 hearing (see transcript, at page 46). The Prosecution reiterates its observations in footnote 14 of the 6 April 2006 Submission.

6. The Prosecution specifically notes that the Parties share serious concerns in relation to key elements of the Pre-Trial Chamber's system.¹⁴ The Parties' common concerns relate to the core of the pre-confirmation hearing disclosure, including (i) the disclosure of the incriminatory evidence on which the Prosecution intends to rely on for the purposes of the confirmation hearing pursuant to Article 61(3)(b) (incriminatory evidence) of the Rome Statute (Statute) and (ii) the disclosure of potentially exculpatory evidence within the parameters of Article 67(2) of the Statute.

The Pre-Trial Chamber's system is not supported by the applicable law; it is extra-statutory

7. The Pre-Trial Chamber's system, as established by the 23 March 2006 Decision, requests the Prosecution to disclose both incriminatory evidence and potentially exculpatory evidence to the Defence by way of filing such evidence in the record of the case of *The Prosecutor vs. Thomas LUBANGA DYILO*, and the Registry, following the Prosecution's filing, to provide access as soon as practicable¹⁵ to the Defence. By its 27 March 2006 Decision, the Pre-Trial Chamber¹⁶ extended the interim system of

¹⁴ See transcript of the 24 April 2006 hearing, at page 16, lines 6 to 25, and page 17, at lines 1 to 24.

¹⁵ See 23 March 2006 Decision, at page 7.

¹⁶ "**Considering** that the *consistency of the process* of disclosure of any type of evidence or material, which, for the purpose of the confirmation hearing, must be disclosed pursuant to articles 61 (3) and 67 (2) of the Statute and rules 76 to 79 and 121 of the Rules, is fundamental to ensure the preservation of evidence, effectiveness of the disclosure process, protection of victims and witnesses and proper safeguarding of the rights of Mr Thomas Lubanga Dyilo: (emphasis in *Italics* by the Prosecution), see page 4 of the 27 march 2006 Decision.

disclosure via Registry, to also cover all evidence or materials submitted by the prosecution pursuant to rule 77 of the Rules .¹⁷

8. The Prosecution submits that the Pre-Trial Chamber's system violates two fundamental principles of law as set out in the Statute and the Rules of Procedure and Evidence (Rules), namely

- (i) the principle that disclosure is directly between the Prosecution and the Defence and *vice versa*, without the Registry or any other third party being the intermediary; and
- (ii) the principle that there is a fundamental difference between disclosure of incriminatory evidence and potentially exculpatory evidence pursuant to Articles 61(3)(b) and 67(2) of the Statute and the provision of access to inspect materials that fall within the scope of Rules 77 and 78 of the Rules.

9. The Pre-Trial Chamber's system neglects the principle that disclosure is *directly* between the Prosecution and the Defence and *vice versa*, without the Registry (or any other third party) acting as the intermediary:

- (i) The applicable law states that disclosure is between the Parties, and the Parties only: In respect of incriminatory evidence, this view is reflected in Rule 121(2)(c), which states that evidence

¹⁷ See pages 4 to 6 of the 27 March 2006 Decision, in particular at page 6.

disclosed between the Prosecutor and the person shall be communicated to the Pre-Trial Chamber . The language used in Rule 121(2)(c) allows for the sole interpretation that disclosure takes place between the Parties.¹⁸ In respect of potentially exculpatory evidence, this system is reinforced, and becomes even clearer, by Article 67(2) stating that the Prosecutor shall, ..., disclose to the defence The very same system applies in the context of Rules 77 and 78: Rule 77 states that [t]he Prosecutor shall, ..., permit the defence to inspect ... , and Rule 78 regulates that [t]he defence shall permit the Prosecutor to inspect . None of the applicable provisions indicate that in the process of disclosure and/or inspection the Registry is supposed to play a role.

- (ii) The Prosecution's submission is confirmed by Rule 121(10). Rule 121(10) is the only Rule that provides for a role for the Registry in the disclosure process. It defines and limits the Registry's function to the passive role of including in the Court's record all documents transmitted to the Pre-Trial Chamber pursuant to Rule 121. Rule 121(10) does not go beyond that function, and in particular does not assign the Registry any active role in the context of the disclosure process between the Parties. Due to its clear language, Rule 121(10) does not provide for an interpretation expanding the limits of the Registry's role as defined in it. In no circumstance does Rule 121(10) provide that the Registry is assigned the role of an

¹⁸ The Prosecution draws particular attention to the French version of Rule 121(2)(c), which lends further support to the Prosecution's view.

intermediary in the disclosure process between the Parties as currently regulated in the Pre-Trial Chamber's system.

- (iii) The Prosecution stresses that disclosure, and in particular that of potentially exculpatory material, is a specific *duty* of the Prosecution, which has been rightly characterized as being as important as the obligation to prosecute itself.¹⁹ It is submitted that the Prosecution should not be requested to accept a system which would effectively imply a dereliction of its statutory duties of disclosure, in the same manner that it should not be requested to accept any system entailing a delegation of critical investigative or prosecutorial tasks to a different organ of the Court.
- (iv) The Prosecution submits that only a disclosure system of direct disclosure between the Parties maintains the clear allocation of responsibilities and accountability. The disclosure process entails a number of serious responsibilities for the Parties involved in it. The law, by providing for direct disclosure between the Parties, has deliberately and for good reasons assigned these responsibilities - and the related accountability - to the Parties. The Pre-Trial Chamber's system, by establishing

¹⁹ See ICTY Appeals Chamber, *The Prosecutor vs. Radoslav Brdjanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, available at <http://www.un.org/icty/decision-e.041207.htm>; see also *The Prosecutor vs. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, at para. 14, available at <http://www.un.org/icty/kordic/appeal/decision-e/10511EX315605.htm>.

the Registry as an intermediary having to ensure that ... Counsel for the Defence is given access as soon as practicable to each piece of Incriminating Evidence or Exculpatory Evidence ²⁰ destroys that system of clear responsibilities and accountability. Disclosure of both incriminatory evidence and potentially exculpatory evidence is highly sensitive by the very nature of the contents of the disclosed evidentiary materials. Due to the complexities of the disclosure process, it is subject to mistakes and oversights that have the potential, *inter alia*, to impact on the safety and security of victims and witnesses. By adding the Registry as an intermediary to the disclosure process, the Pre-Trial Chamber's system consequently increases the possibility that mistakes will in fact occur,²¹ and it significantly increases the possibility that such mistakes cannot be attributed to either the Prosecution, the Defence or the Registry. The Prosecution prefers to be held accountable for its own mistakes rather than for mistakes of others, and tries to avoid arguing about in which area of responsibility - the Prosecution's, the Defence's or the Registry's - a mistake has occurred.

- (v) Finally, in the context of disclosure, both the Prosecution and the Defence are subject to deadlines governing the disclosure

²⁰ See 23 March 2006 Decision, at page 7.

²¹ The Prosecution wishes to again emphasize, as it has done at the occasion of the 24 April 2006 hearing, that it has no doubts in respect of the high competence of the Registry's staff. The Prosecution in its submission describes the objective possibilities of mistakes and oversights, *despite* highly competent staff being involved in the process.

process.²² If disclosure is delegated to the Registry to provide access as soon as practicable,²³ the Party who is bound by the deadlines is no longer effectively in control of such deadlines.

10. The Pre-Trial Chamber's system, in emphasizing the consistency of the process of disclosure of any type of evidence or materials,²⁴ neglects the fundamental difference between disclosure of incriminatory and potentially exculpatory evidence pursuant to Articles 61(3)(b) and 67(2) of the Statute and the provision of access to materials for inspection that fall within the scope of Rules 77 and 78.²⁵

- (i) Article 61(3)(b) - read together with Rule 121(2) - and Article 67(2) provide for disclosure in the sense of handing over by the Prosecution to the Defence (copies of) evidentiary materials. Rules 77 and 78, in contrast, provide for inspection of tangible objects only. In the Prosecution's submission, the notion of inspection means that the Prosecution, on its premises, provides the Defence access to the materials as detailed in Rule 77 (and, in respect of Rule 78, *vice versa*).
- (ii) Whilst the Prosecution agrees that Rules 77 and 78 fall under the broad notion of disclosure,²⁶ the very existence of Rules 77 and 78 support the distinction made by the Prosecution. If there

²² See Articles 61(3), 67(2) and Rules 76, 77, 78, 79, 83, 121.

²³ See 23 March 2006 Decision, at page 7.

²⁴ See 27 March 2006 Decision, at page 4. Footnote 7 details the full quote.

²⁵ As made already clear in prior filings by the Prosecution, this difference of regime is firmly established by the same international criminal practice that provided the direct source of the relevant ICC provisions.

²⁶ As can be seen from the title of Section II of Chapter IV of the Rules of Procedure and Evidence.

were no difference between disclosure in the sense of handing over (copies of) evidentiary materials and inspection of tangible objects, these provisions would be redundant.

- (iii) This view is supported by the different purposes of disclosure pursuant to Article 61(3)(b) and Article 67(2) and inspection in terms of Rules 77 and 78. Whereas in respect of materials disclosed under Articles 61(3)(b) and 67(2) the evidentiary value lies in the content of such materials (as, primarily, documents and witness statements), Rules 77 and 78 refer to tangible objects, thus physical evidence, in allowing the respective other Party to examine the physical integrity of materials.

11. The Prosecution notes that The Pre-Trial Chamber's system comes close to creating a "dossier" system via disclosure. The Prosecution submits that a "dossier" system is not supported by the applicable law.²⁷ Accordingly, in the event that the Pre-Trial Chamber's system becomes the final system of disclosure, the Prosecution envisages serious consequences in respect of both the scope and the selection of information it would disclose to the Pre-Trial Chamber.

²⁷ Commentators agree that the Prosecutor "has no general disclosure obligation insofar as the Prosecutor is not obliged to disclose in advance of the confirmation hearing all of the inculpatory evidence in his or her possession, but rather only the evidence on which he or she intends to rely at the hearing (Art. 61(5)). These commentaries emphasize that the Prosecutor retains discretion in the presentation and disclosure of evidence at this stage and, accordingly, that the legal and procedural framework applicable to the Court does not reflect a "dossier" system. See Helen Brady, "Disclosure of Evidence", Ch. 5, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ed. Roy S. Lee (2001, Transnational Publishers, Inc.), p. 407 and *The Rome Statute of the International Criminal Court: A Commentary*, Volume II, Ed. A. Cassese (Oxford University Press), pp. 1242-1243 and 1483.

The Pre-Trial Chamber's system hampers effective disclosure

12. The Pre-Trial Chamber's system seriously hampers effective disclosure. It thus contradicts the purpose of disclosure in preparation of the confirmation hearing:

- (i) The experience of the Parties to date, in an effort to comply with the Pre-Trial Chamber's system, shows that the Registry is not in a position to provide for effective disclosure: In order to allow for disclosure at the earliest possible opportunity, the Prosecution, despite its fundamental disagreement in relation to the Registry being the intermediary in the disclosure process, has complied with the interim system of disclosure : On two occasions - after having disclosed the very same materials to the Defence – the Prosecution filed disclosure materials. On 3 April 2006, the Prosecution filed the first set of disclosure materials, comprised of six documents only. Counsel for the Defence was notified on 6 April 2006. Accordingly, it took the Registry more than three working days to disclose six documents. On Friday, 21 April 2006, the Prosecution filed the second set of disclosure materials, this time comprised of 24 documents. Counsel for the Defence was notified on Monday, 1 May 2006. Accordingly, it took the Registry almost six working days to disclose these

documents to Counsel for the Defence.²⁸ In fact, between disclosure by the Prosecution of the very same materials directly to the Defence and disclosure via the Registry as the intermediary, more than ten calendar days had passed.

- (ii) The Prosecution submits that the experience to date demonstrating the practical difficulties and impediments of the Pre-Trial Chamber's system gives a clear indication that the Registry in future will not be in a position to provide for effective disclosure. This will in particular be the case when the Parties disclose sets of materials that will be comprised of significantly more materials and which, in light of Article 61(3)(b) and Rule 121(3), will involve tight deadlines.

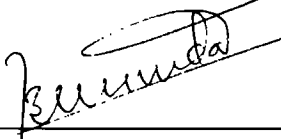
13. To summarise, the Prosecution submits that (i) the Pre-Trial Chamber's system in its key components is not supported by the applicable law, it is thus extra-statutory, and (ii) the difficulties of implementing it into practice defeats the purposes of effective disclosure.

²⁸ The Prosecution notes the significant discrepancy between the statements made by the Registry in the context of the 24 April 2006 hearing and the current realities. The Prosecution refers, in particular, to the transcript of the 24 April 2006 hearing, at page 44, lines 9 to 12; at page 77, at lines 23 to 25; and at page 78, at lines 15 to 21. The Prosecution notes, in this context, that its disclosure obligations are *now* governed by tight deadlines. The Prosecution, therefore, at this stage, cannot rely on assurances that, at an uncertain point in time in the future, the Registry may be in a position to provide for the technical means to discharge its duties under the Pre-Trial Chamber's system. The Prosecution wishes to emphasize again that it has full confidence in the Registry's staff and makes this observation for the sole reason of showing the practical difficulties that the Pre-Trial Chamber's system causes for all parties and organs of the Court involved in it.

Request

14. The Prosecution requests the Pre-Trial Chamber²⁹ to abandon its interim system of disclosure and to instead adopt a disclosure system that, in compliance with the law and thus ensuring effective disclosure, meets the following criteria:

- (i) Direct disclosure between the Parties, without the Registry or any other third party being the intermediary;
- (ii) Clear distinction between disclosure of incriminatory and potentially exculpatory evidence by handing over (copies of) such materials and inspection of materials that fall within the scope of Rules 77 and 78 by providing access to such materials;
- (iii) Communication of disclosed materials to the Pre-Trial Chamber within the boundaries of Rule 121(2)(c),³⁰ and refraining from creating a "dossier" system via disclosure.



 f. Luis Moreno-Ocampo
 Prosecutor

Dated this 2nd day of May 2006
 At The Hague, The Netherlands

²⁹ The Prosecution in the past has made, in cooperation with Counsel for the Defence, substantial efforts in order to discharge its respective disclosure obligations within the deadlines as foreseen in the applicable law. The Prosecution refers to its detailed oral submissions in the course of the 24 April 2006 hearing (see at page 13, lines 17 to 25, and at page 14, lines 1 to 12). At this stage, in view of the Prosecution, both Parties would benefit from a final decision being rendered by the Pre-Trial Chamber within a time-frame that allows the Prosecution - and possibly the Defence - to take the possible necessary steps at a time that coincides with the legal deadlines.

³⁰ The Prosecution may, in the one or the other instance, within its discretion, communicate additional evidentiary materials to the Pre-Trial Chamber.