

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 3 April 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 LUBANGO DYILO**

Public Document

Filing of Incriminating Evidence and Potentially Exculpatory Evidence

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Ekkehard Withopf, Senior Trial Lawyer

Duty Counsel for the Defence

Mr Jean Flamme

Background

1. The Prosecution refers to the “interim system of disclosure” as set out by the Pre-Trial Chamber’s (public) “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” of 23 March 2006 (23 March 2006 Decision),¹ reinforced by the Pre-Trial Chamber’s (public) “Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure” of 27 March 2006 (27 March 2006 Decision).²

Preliminary observations in respect to Article 67(2) of the Rome Statute and disclosure of potentially exonerating evidence

2. On 6 April 2006, the Prosecution will, as requested by the Pre-Trial Chamber,³ comprehensively submit its observations on the system of disclosure the Prosecution considers envisaged by the respective provisions in the Rome Statute (Statute) and the Rules of Procedure and Evidence (Rules).⁴

¹ See 23 March 2006 Decision, at pages 5 to 7.

² See 27 March 2006 Decision, at pages 5 and 6.

³ See 23 March 2006 Decision, at page 5, and 27 March 2006 Decision, at page 5.

⁴ The Prosecution will also address its concerns in respect of a number of practical aspects of disclosure as currently set out in the Pre-Trial Chamber’s “interim system of disclosure.”

3. For the time being,⁵ the Prosecution informs the Pre-Trial Chamber about the following:

- (i) In respect of Article 67(2) of the Statute, the Prosecution does not consider itself being legally obliged to disclose *at this stage* of the proceedings materials that fall within the parameters of potentially exculpatory evidence. It will, however, in the instant case, whilst reserving its right to take a different approach in future cases, disclose such materials.⁶
- (ii) The Prosecution submits that a combined reading of Article 67(2) of the Statute and Rule 121(2)(c) provides for disclosure to the Defence first and for communication to the Pre-Trial Chamber afterwards only.⁷
- (iii) The Prosecution is of the view that making public materials considered as falling within the scope of potentially exculpatory evidence constitutes a decision of the Defence. Accordingly, the Prosecution will file the respective documents in a confidential Annex.

⁵ The Prosecution will expand its respective observations in the envisaged 6 April 2006 filing.

⁶ In a letter dated 31 March 2006, the Prosecution has informed the Duty Counsel for the Defence accordingly.

⁷ Whilst it could be argued that the 30 days deadline as detailed in Rule 121(3) does also apply for the communication to the Pre-Trial Chamber of evidence disclosed to the Defence, the Prosecution in the instant case will communicate evidence disclosed to the Defence soon afterwards to the Pre-Trial Chamber. The Prosecution reserves its right to take a different approach in future cases.

Disclosure of potentially exonerating evidence to the Duty Counsel for the Defence

4. The Prosecution on Friday, 31 March 2006, has disclosed electronic copies of six documents containing potentially exonerating evidence to the Duty Counsel for the Defence.⁸

Filing of incriminating evidence and potentially exculpatory evidence

5. Being bound by the Decision on the “interim system of disclosure” as imposed by the Pre-Trial Chamber by its 23 March 2006 and 27 March 2006 Decisions, including in respect of the filing of potentially exculpatory evidence,⁹ the Prosecution herewith files - pending its further observations on the appropriate system of disclosure and the Court’s final decision on such a system - in the record of the case of *The Prosecutor vs. Thomas LUBANGA DYILO* the documents containing potentially exculpatory evidence that were disclosed to the Duty Counsel for the Defence for Thomas LUBANGA DYILO on Friday, 31 March 2006.¹⁰

⁸ The Prosecution, despite its serious concerns in respect of the “interim system of disclosure” as set out by the Pre-Trial Chamber, due to the importance of timely disclosure, did not want to delay disclosure of potentially exonerating evidence to the Defence until the time the Court has finally decided on the parties’ observations on the appropriate system of disclosure.

⁹ See in particular the 23 March 2006 Decision, at page 5.

¹⁰ The documents are attached as confidential Annexes 1 to 6. The list identifying incriminating evidence and/or potentially exculpatory evidence is attached as confidential Annex 7. - The Prosecution notes, as can be seen from the list, that it considers the contents of some documents constituting both evidence of incriminating and of potentially exculpatory nature. The Prosecution will expand on this aspect and its impact on the disclosure system as deemed appropriate by the Prosecution in its 6 April 2006 filing.

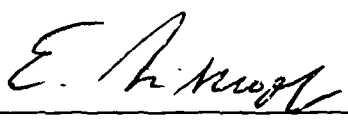
Inspection of materials pursuant to Rule 77

6. The Prosecution, following the respective request of the Duty Counsel for the Defence of 23 March 2006, has informed the Duty Counsel for the Defence by letter of 31 March 2006 *inter alia* of the following:

"[I]n the meantime, the Pre-Trial Chamber has rendered its 27 March 2006 "Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure", making specific reference to your request pursuant to Rule 77. By this Decision, the Pre-Trial Chamber has imposed an "interim system of disclosure" that encompasses filing of materials that fall within the parameters of Rule 77. The Prosecution fundamentally disagrees with this aspect of the "interim system of disclosure" and will make its respective observations in its filing envisaged for 6 April 2006. Whilst the Prosecution does not want to breach a Court order by providing for inspection of materials that fall within the scope of Rule 77 without simultaneously submitting such materials to the Court, it is currently for legal reasons unfortunately not in a position to provide for inspection of respective materials up until the time the Court has finally decided on the meaning of "inspection" in terms of Rule 77. We can, however, without compromising our position, offer - if you agree - to provide you with a first list detailing a number of documents that fall within the parameters of Rule 77."

To date, Duty Counsel for the Defence has not yet responded to the Prosecution's 31 March 2006 letter.

7. As part of its anticipated 6 April 2006 observations on the appropriate disclosure system, the Prosecution will also expand on these arguments.



for Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of April 2006
At The Hague, The Netherlands