

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 12 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 LUBANGA DIILO**

Public Document

**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**

**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**

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12 April 2006

Background

1. On 23 March 2006, the Pre-Trial Chamber issued its (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" (23 March 2006 Decision).¹ The Pre-Trial Chamber decided that the Parties "... have until 6 April 2006 to present their observations on what they consider the most appropriate system of disclosure of (a) the evidence which they intend to use at the confirmation hearing and (b) the Exculpatory Evidence gathered by the prosecution before the confirmation hearing."²
2. On 27 March 2006, the Pre-Trial Chamber rendered its "Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure" (27 March 2006 Decision).³ The Pre-Trial Chamber⁴ extended its 23 March 2006 Decision by requesting the parties to in their observations "... refer to (i) The scope and boundaries of the disclosure obligation upon the prosecution and the

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

² See 23 March 2006 Decision, at page 5. – The Pre-Trial Chamber requested the parties to present their observations "... in view of (i) the Statutory framework provided for in the Statute, the Rules, the Regulations of the Court and the Regulations; and (ii) The need to ensure the preservation of evidence, the effectiveness of the disclosure process, the protection of victims and witnesses and the proper safeguarding of the rights of Mr Thomas Lubanga Dyilo."

³ See 27 March 2006 Decision, at pages 5 and 6.

⁴ "Considering that the consistency of the process of disclosure of any type of evidence or materials, which, for the purpose of the confirmation hearing, must be disclosed pursuant to the 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; ..."

defence by rules 76 to 79 and 121 of the Rules which are in addition to the prosecution's disclosure obligations pursuant to article 61(3) of the Statute ... and article 67(2) of the Statute ...; (ii) the most appropriate system for the disclosure of any type of evidence or material, that, for the purpose of the confirmation hearing, must be disclosed by either the prosecution or the defence according to articles 61(3) and 67(2) of the Statute, and rules 76 to 79 and 121."⁶

3. On 6 April 2006, both the Prosecution and Duty Counsel for the Defence (the Parties) submitted their comprehensive observations on the Pre-Trial Chamber's "interim system of disclosure" (6 April 2006 Observations).⁶
4. On Friday, 7 April 2006, the Pre-Trial Chamber issued its (public) "Decision Convening a Hearing on the System of Disclosure for the Purpose of the Confirmation Hearing" (Decision).⁷ The Parties were notified about this Decision on Monday, 10 April 2006. By the Decision, the Pre-Trial Chamber scheduled a hearing -- to be held in public session -- for Monday, 24 April 2006.⁸ The Pre-Trial Chamber furthermore decided that "an agenda with a set of specific questions to be addressed by the

⁶ See 27 March 2006 Decision, at page 5.

⁷ "Prosecution's Observations on Disclosure", 6 April 2006, and "Observations de la défense concernant le système de divulgation, requis par les décisions du 23 and 27 mars 2006", 6 April 2006. - For details, see paragraph 5 of the present joint submission.

⁸ "Decision Convening a Hearing on the System of Disclosure for the Purpose of the Confirmation Hearing", 7 April 2006.

⁹ See Decision, at page 5.

Prosecution and the Defence at the hearing shall be distributed to them”
by Friday, 21 April 2006.⁹

Discussion

5. The Parties in their 6 April 2006 Observations have raised a series of serious concerns re the “interim system of disclosure” as imposed by the Pre-Trial Chamber. The Parties raised a variety of legal concerns, and, in addition, they detailed a number of aspects of the “interim system of disclosure” that are highly problematic in relation of practical aspects of disclosure, including, *inter alia*, IT related elements of disclosure. Many of the elements addressed by the Parties, in their common view, highlight a potentially negative impact of the “interim system for disclosure” on the ability of the Parties to meaningfully prepare for the 27 June 2006 Confirmation Hearing.
6. The Parties explicitly note that to a significant extent these concerns are common concerns of both the Prosecution and the Duty Counsel for the Defence.
7. The Parties are of the common view that providing them with the “agenda with a set of specific questions to be addressed by the Prosecution and the Defence” for the Monday, 24 April 2006, 14:00 hours hearing on Friday, 21

⁹ See Decision, at page 6.

April 2006¹⁰ does not provide for sufficient time for adequate preparation of the 24 April 2006 hearing.

- (i) As can be seen from the many aspects covered by the "interim system of disclosure" as imposed by the Pre-Trial Chamber, and even more by the 6 April 2006 Observations of the Parties, identifying further highly complex elements that are not even considered in the "interim system of disclosure", disclosure is a complex and highly resource intensive matter involving various aspects of legal issues, IT related matters and further practical aspects. Whilst each one of these aspects is in itself highly complicated, they in their combination are even more.
- (ii) It can be anticipated that the decision of the Pre-Trial Chamber on disclosure following the 24 April 2006 hearing will have significant impact not only on the system of disclosure in the case of *The Prosecutor vs. Thomas LUBANGA DYILO* but far beyond. The decision of the Pre-Trial Chamber is likely to set the future disclosure standards for the Court.

8. Against this background, the Parties have a common interest to be fully prepared to assist the Pre-Trial Chamber in its decision. Both, Duty Counsel for the Defence and the Prosecution's Senior Trial Lawyer have

¹⁰ The Parties are aware that "by" 21 April 2006 could also include "prior to" 21 April 2006. Since there is, however, no clarity, the Parties are forced to file the instant request.

made significant practical experiences in respect of disclosure at the *ad hoc* Tribunals. They are well aware to what extent a disclosure system impacts on the adequate preparation of the Parties for Court proceedings. Their related experience is likely to contribute to a decision of the Pre-Trial Chamber that ensures both fair and expeditious Court proceedings.

9. Whilst the Parties at this point in time, lacking an agenda for the 24 April 2006 hearing can only guess what the "specific questions to be addressed" are about and did allocate their limited resources for the preparation of the hearing, they would prefer to be in detail informed about the detailed agenda at the earliest possible opportunity. The Parties consider three working days prior to the 24 April 2006 hearing – 19 April 2006 – the absolute shortest deadline for distribution of the agenda.

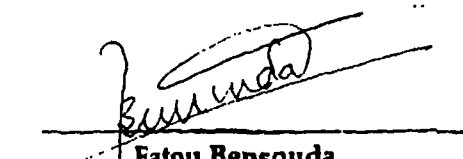
- (i) The Parties are in close contact in relation to disclosure related matters and envisage discussing the "specific questions" amongst themselves prior to the 24 April 2006 hearing.
- (ii) In addition, due to the IT related aspects of the "interim system of disclosure", the Parties, depending on the "specific questions", anticipate that they have a need either together and/or separately consult IT experts - Court experts and/or external experts - in respect of the feasibility of certain

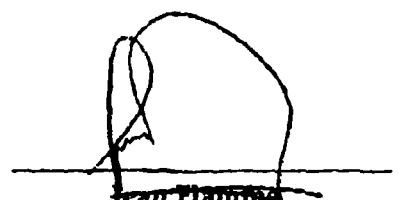
procedures. The "specific questions" may or may not require the Parties to initiate "test-runs" of certain IT systems.¹¹

- (iii) Due to the fact that any decision of the Pre-Trial Chamber on the disclosure system is likely to for all future shape the Court's disclosure system, the Parties do also want to have sufficient time to reflect on the future impact - beyond the case of *The Prosecutor vs Thomas LUBANGA DYILO* - of the answers they will provide to the "specific questions" in the course of the 24 April 2006 hearing.

Request

10. The Parties, in a *joint request* of the Prosecution and the Duty Counsel for the Defence, request the Pre-Trial Chamber to by Wednesday, 19 April 2006 the latest provide them with the "agenda with a set of specific questions" as referred to in the Decision.


Fatou Bensouda
 Deputy Prosecutor (Prosecutions)


Jean Flamme
 Duty Counsel for the Defence

Dated this 12th day of April 2006
 At The Hague, The Netherlands

¹¹ The Parties note that it took the Registry more than three days to process the first disclosure (of six documents) by the Prosecution of potentially exculpatory materials.