Cour Pénale Internationale

International Criminal Court

Original: **English**

No: **ICC-01/04-01/06**
Date: **19 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
***v.* THOMAS LUBANGA DYILO**

URGENT
Public Document

Decision on the Agenda of the Hearing of 24 April 2006

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence
Mr Jean Flamme

I, Judge Sylvia Steiner, judge at the International Criminal Court (the "Court");

NOTING the "Decision Convening a Hearing on the System of Disclosure for the Purpose of the Confirmation Hearing"[1] (the "Decision"), issued by Judge Sylvia Steiner acting as single judge of Pre-Trial Chamber I, in which a hearing on disclosure related matters was convened for the 24 April 2006 and where it was decided that "an agenda with a set of specific questions to be addressed by the Prosecution and the Defence at the hearing shall be distributed to them by 21 April 2006"[2];

NOTING the "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"[3] (the "Joint Request"), filed by the Prosecution and Duty Counsel for the Defence on 12 April 2006, in which the parties request that the agenda of the hearing be distributed by 19 April 2006 in order to be "fully prepared to assist the Pre-Trial Chamber in its decision" in light of the fact that such a decision "is likely to set the future disclosure standards for the Court"[4];

NOTING the Decision of Pre-Trial Chamber I of 22 March 2006 designating Judge Sylvia Steiner as single judge in the case against Mr Thomas Lubanga Dyilo responsible, under article 57 (2) of the Rome Statute (the "Statute"),[5] for exercising the functions of the Chamber in that case, including those functions provided for in rule 121 (2) (b) of the Rules of Procedure and Evidence (the "Rules");

[1] ICC-01/04-01/06-74.
[2] Idem, p. 5.
[3] ICC-01/04-01/06-76
[4] Idem, p. 5.
[5] ICC-01/04-01/06-33

NOTING articles 57 (3) (c), 61 (3), 67 (1) and (2), and 68 (1) and (5) of the Rome Statute (the "Statute"), rules 15, 76 to 83 and 121 of the Rules of Procedure and Evidence (the "Rules") and regulation 21 of the Regulations of the Registry (the "Regulations");

CONSIDERING the complexity of the questions to be dealt with at the hearing of 24 April 2006, as demonstrated by the lengthy negotiation process in the Working Group on Rules of Procedure and Evidence of the Preparatory Commission for the International Criminal Court[6];

CONSIDERING that proper preparation of the parties is necessary for the purposes of the hearing of 24 April 2006;

FOR THESE REASONS

DECIDE to grant the Joint Request.

DECIDE that the agenda of the hearing of 24 April 2006 shall be as provided for below.

DECIDE that the Prosecution and the Defence shall address all items of the agenda unless otherwise expressly provided for in the agenda.

[6] *Brady, H.*, Disclosure of Evidence, in *Lee, R* The International Criminal Court: Elements of the Crimes and Procedure and Evidence, pp. 403- 423, pp. 403-407.

DECIDE that the Registrar, or his representative, and the representative of the Court Management Section shall be prepared to address any questions related to the role the Registry may play (including practical arrangements) in the system of disclosure.

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

Judge Sylvia Steiner
Single Judge

Dated this Wednesday 19 April 2006

At The Hague

The Netherlands

ANNEX I : AGENDA OF THE HEARING OF 24 APRIL 2006

OPEN SESSION

1- Meaning of the expressions "within a reasonable time before the hearing" and "be informed" under article 61 (3) of the Statute.

2- Scope of application to the disclosure process before the confirmation hearing of the right "to have adequate time and facilities for the preparation of the Defence" under article 67 (1) (b) of the Statute;

3- Questions related to the Prosecution's obligation under article 67 (2) of the Statute to disclose potentially exculpatory evidence before the confirmation hearing:

a. Does the material content of the Prosecution's obligation under article 67 (2) of the Statute depend on the evidence on which the Prosecution decides to rely on at the confirmation hearing?

b. Time table for the Prosecution's discharge of its obligation under article 67 (2) of the Statute before the confirmation hearing;

c. Whether, when and how the evidence disclosed before the confirmation hearing under article 67 (2) of the Statute is to be communicated to the Pre-Trial Chamber under rule 121 (2) (c) of the Rules;

d. Elaborate on the reasons why an *inter partes* system of disclosure of potentially exculpatory material under article 67 (2) of the Statute is, in the view of the Prosecution and the Defence, more appropriate than the interim system of disclosure;

e. If an *inter partes* system of disclosure of exculpatory evidence were to be followed, do the Prosecution and the Defence envision any role for the Registry?

f. If the interim system of disclosure were to be followed for disclosure pursuant to article 67 (2) of the Statute, which adjustments, in the view of the Prosecution and Defence, might minimize some of the practical problems they have identified in their submissions?

    i. Expeditiousness in the exchange;
    ii. Evidence falling within more than one category;
    iii. Assignment of reference numbers ;

iv. Confidential or public nature of the filings.

4- Questions related to the Prosecution's obligation under rule 76 of the Rules to disclose the names of the witnesses it intends to call to testify at the confirmation hearing and the copies of prior statements of those witnesses:

a. What is the relationship between the Prosecution's obligation to inform within a reasonable time before the confirmation hearing under article 61 (3) of the Statute and the Prosecution's obligation to provide sufficiently in advance in order to allow adequate preparation by the Defence under rule 76 of the Rules?

b. What are the implications of the 30-day and 15-day deadlines provided for in rule 121 (3) and (4) of the Rules for discharge by the Prosecution of its obligation under rule 76 of the Rules?

c. When and how the evidence disclosed under rule 76 of the Rules for the purpose of the confirmation hearing is to be communicated to the Pre-Trial Chamber under rule 121 (2)(c) of the Rules;

d. What is the scope of the Prosecution's disclosure obligation under rule 76 of the Rules should the Prosecution decide to rely on summary evidence of a witness statement as opposed to calling that witness to testify at the confirmation hearing?

e. Elaborate on the reasons why an *inter partes* system of disclosure of the evidence provided for in rule 76 of the Rules is, in the view of the Prosecution and the Defence, more appropriate than the interim system of disclosure;

f. If an *inter partes* system of disclosure of the evidence provided for in rule 76 of the Rules were to be followed, do the Prosecution and the Defence envision any role for the Registry?

g. If the interim system of disclosure were to be followed for disclosure under rule 76 of the Rules, which adjustments might, in the view of the Prosecution and the Defence, minimize some of the problems they have identified in their submissions?

5- Questions related to the Prosecution's obligation under rule 77 of the Rules to permit the Defence to inspect any books, documents, photographs, and other tangible objects in the possession or control of the Prosecution which the latter intends to use at the confirmation hearing:

a. What is the relationship between the Prosecution's obligation to inform within a reasonable time before the confirmation hearing under article 61 (3) of the Statute and the Prosecution's obligation under rule 77 of the Rules to permit inspection by the Defence of the evidence the Prosecution intends to use at the confirmation hearing?

b. What are the implications of the 30-day and 15-day deadlines provided for in rule 121 (3) and (4) of the Rules with regard to discharge by the Prosecution of its obligation under rule 77 of the Rules?

c. Elaborate on any differences between the content of the Prosecution's obligation to disclose under rule 76 of the Rules and the content of the Prosecution's obligation to permit inspection under rule 77 of the Rules in relation to the evidence the Prosecution intends to use at the confirmation hearing;

d. Whether, when and how the evidence the Prosecution intends to use at the confirmation hearing and which is subject to inspection under rule 77 of the Rules is to be communicated to the Pre-Trial Chamber under rule 121 (2)(c) of the Rules;

e. Elaborate on the reasons why an *inter partes* system of inspection of the evidence the Prosecution intends to use at the confirmation hearing under rule 77 of the Rules is, in the view of the Prosecution and the Defence, more appropriate than the interim system of disclosure;

f. If an *inter partes* system of inspection of the evidence which the Prosecution intends to use at the confirmation hearing pursuant to rule 77 of the Rules were to be followed, do the Prosecution and the Defence envision any role for the Registry?

g. If the interim system of disclosure were to be followed for the discharge of the Prosecution's obligation pursuant to rule 77 of the Rules concerning the evidence it intends to use at the confirmation hearing, which adjustments might, in the view of the Prosecution and the Defence, minimize some of the problems they have identified in their submissions?

6- Questions related to the Prosecution's obligation under rule 77 of the Rules to permit the Defence to inspect any books, documents, photographs, and other tangible objects in the possession or control of the Prosecution which are material to the preparation of the Defence at the confirmation hearing or have been obtained from or belong to Mr Thomas Lubanga Dyilo:

a. Is this Prosecution's obligation related to either article 61 (3)(b) of the Statute or article 67 (1) (b) of the Statute ? Or does this obligation stand on its own?

b. Elaborate on the type of materials and evidence which might not fall within the category of potentially exculpatory evidence but might fall within the category of evidence which is material for the Defence's preparation for the confirmation hearing;

c. Do the materials and evidence which are material for the preparation of the confirmation hearing by the Defence depend on the evidence selected by the Prosecution to rely on at that hearing?

d. Whether, when and how the materials and evidence subject to inspection under rule 77 of the Rules because they are material for the preparation of the confirmation hearing by the Defence or have been obtained from or belong to Mr Thomas Lubanga Dyilo are to be communicated to the Pre-Trial Chamber under rule 121 (2) (c) of the Rules;

e. Elaborate on the reasons why an *inter partes* system of inspection of materials and evidence which are material for the preparation of the confirmation hearing by the Defence or have been obtained from or belong to Mr Thomas Lubanga Dyilo is, in the view of the Prosecution and Defence Counsel, more appropriate than the interim system of disclosure.

f. If an *inter parties* system of inspection pursuant to rule 77 of the Rules of materials and evidence which are material for the Defence's preparation for the confirmation hearing or have been obtained from or belong to Mr Thomas Lubanga Dyilo were to be followed, do the Prosecution and the Defence envision any role for the Registry?

g. If the interim system of disclosure were to be followed for the discharge of the Prosecution's obligations under rule 77 of the Rules concerning materials and evidence which are material for the Defence's preparation for the confirmation hearing or have been obtained from or belong to Mr Thomas Lubanga Dyilo, which adjustments, in the Prosecution and Defence view, might minimize some of the problems they have identified in their submissions?

7- Questions related to the Defence's obligation to permit the Prosecution to inspect any books, documents, photographs, and other tangible objects in the possession or control of the Defence which the latter intends to use at the confirmation hearing:

a. What is the scope of the Defence's obligation under rule 78 of the Rules?

b. Does the obligation of the Defence under rule 78 of the Rules include the disclosure of the prior statements of those witnesses the Defence intends to call at the confirmation hearing? What if the Defence decides to rely on summary evidence of a witness statement as opposed to calling that witness to testify at the confirmation hearing ?

c. When is the Defence's obligation under rule 78 triggered?

d. What are the implications of the time limit provided for in rule 121 (5) of the Rules with regard to discharge by the Defence of its obligation under rule 78 of the Rules?

e. Whether, when and how the evidence subject to inspection under rule 78 of the Rules is to be communicated to the Pre-Trial Chamber under rule 121 (2)(c) of the Rules;

f. Elaborate on the reasons why an *inter partes* system of inspection under rule 78 of the Rules is, in the view of the Prosecution and the Defence, more appropriate than the interim system of disclosure;

g. If an *inter partes* system of inspection under rule 78 of the Rules were to be followed, do the Prosecution and the Defence envision any role for the Registry?

h. If the interim system of disclosure were to be followed for the discharge of the Defence's obligation under rule 78 of the Rules, which adjustments might, in the Prosecution and Defence view, minimize some of the problems they have identified in their submissions?

8- Defence's Disclosure Obligations under Rule 79

a. For the purpose of the confirmation hearing, until when may the Defence raise the existence of an alibi or a ground for excluding criminal responsibility provided for in article 31 (1) of the Statute?

b. What is the exact content of the Defence's obligation under rule 79 (1) (a) and (b) of the Rules ?

c. Whether, when and how the evidence disclosed under rule 79 is to be communicated to the Pre-Trial Chamber under rule 121 (2)(c) of the Rules;

d. Elaborate on the reasons why an *inter partes* system of disclosure under rule 79 of the Rules is, in the view of the Prosecution and Defence Counsel, more appropriate than the interim system of disclosure;

e. If an *inter parties* system of disclosure of evidence under rule 79 of the Rules were to be followed, do the Prosecution and the Defence envision any role for the Registry?

f. If the interim system of disclosure were to be followed for disclosure under rule 79 of the Rules, which adjustments might, in the view of the Prosecution and the Defence, minimize some of the problems they have identified in their submissions?

CLOSED SESSION

9- In its filing, the Prosecution refers to the need to use Rule 81 (2) of the Rules concerning information the disclosure of which might prejudice the ongoing investigation against Mr Thomas Lubanga Dyilo in relation to charges other than those included in the arrest warrant:

a. When does the Prosecution intend to make a formal application under rule 81 (2) of the Rules? (to be addressed only by the Prosecution)

10- In its filing, the Prosecution refers to the need to take steps under article 68 (1) and (5) of the Statute and rule 81 (4) of the Rules to protect the safety of victims and witnesses and members of their families.

a. When does the Prosecution intend to make a formal application under rule 81 (4) of the Rules? (to be addressed only by the Prosecution)?