

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 26 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 DYILO**

Public Document

**Prosecution's Response to, *inter alia*, the Request of the Defence for
Unrestricted Access to the Entire Record of the Situation in the Democratic
Republic of the Congo**

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

Background

1. On 6 April 2006, Counsel for the Defence filed the “Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006” (Defence Observations).¹
2. Counsel for the Defence requests the Pre-Trial Chamber to
 - (i) “[d]onner accès à l’inculpé et sa défense aux dossiers complets du procureur concernant la situation en République Démocratique du Congo et concernant l’affaire Procureur c/ Thomas Lubanga Dyilo” (First Request);²
 - (ii) “[d]onner accès à l’inculpé et sa défense à l’intégralité du dossier de procédure en ce compris les pièces de procédure datant d’avant 10.2.2006, tant dans le dossier “situation en République Démocratique du Congo” que dans son dossier individuel” (Second Request).

¹ “Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006”, 6 April 2006.

² The Prosecution, noting that the time-limit set by the Single Judge of the Pre-Trial Chamber relates to the Second Request only, will in the instant filing address both Requests of the Defence.

3. In the context of the Second Request,³ Counsel for the Defence requests the Pre-Trial Chamber to “[l]ever les mesures de sécurité prises dans un délai raisonnable avant l’audience de confirmation des charges, aux fins de communication expurgées à la défense.”
4. On 19 April 2006, the Single Judge of the Pre-Trial Chamber issued the (public) “Decision Establishing a Time Limit for the Prosecution’s Response to the Request of the Defence for Unrestricted Access to the Entire Record of the Situation in the Democratic Republic of the Congo”⁴ (Decision). In the Decision, the Single Judge of the Pre-Trial Chamber decided “to give the prosecution until 16:00 hours on Wednesday 25 April 2006 to file its response to the Request.”⁵

First Request

Prior Defence request and observations of the Pre-Trial Chamber in respect of aspects of the First Request: The Defence Request to get access to the Prosecution’s case file against Thomas LUBANGA DYILO

5. The Prosecution notes that the Pre-Trial Chamber has already made observations in respect of the first aspect of the Defence’s First Request,

³ In the Defence Observations, Defence makes particular reference to the redactions in the Decision of the Pre-Trial Chamber of 2 February 2006.

⁴ “Decision Establishing a Time Limit for the Prosecution’s Response to the Request of the Defence for Unrestricted Access to the Entire Record of the Situation in the Democratic Republic of the Congo”, 19 April 2006.

⁵ The Single Judge of the Pre-Trial Chamber has, in an e-mail to the Parties, clarified that “Wednesday 25 April 2006” should be read as “Wednesday, 26 April 2006.”

namely to get access to the Prosecution's case-file against Thomas LUBANGA DYILO:

- (i) By its "Requête du conseil de permanence de prorogation du délai d'appel et de communication du dossier du Bureau du procureur" (20 March 2006 Defence Application), the Defence had requested access to the Prosecution's entire case-file against Thomas LUBANGA DYILO.⁶
- (ii) Following the Prosecution's Response to the 20 March 2006 Defence Application⁷ (Prosecution 24 March 2006 Filing), requesting denial of the respective Defence request,⁸ the Pre-Trial Chamber by "Decision on Access by Duty Counsel for the Defence to all Documents Relating to the Case Against Mr Thomas Lubanga Dyilo" (30 March 2006 Decision), commented on the Defence request by reiterating the Prosecution's "disclosure obligations",⁹ by making reference to Articles 61(3)(b) and 67(2) of the Statute and Rules 76, 77 and 121 of the Rules.¹⁰

⁶ See page 3 of the 20 March 2006 Defence filing.

⁷ "Prosecution's Response to Requête du conseil de permanence de prorogation du délai d'appel et de communication du dossier du Bureau du Procureur", 24 March 2006.

⁸ See paras. 3 and 4, and para. 7 of the Prosecution 24 March 2006 Filing. The Prosecution includes by reference paras. 3 and 4 of the Prosecution 24 March 2006 Filing in the present filing.

⁹ See page 5 of the 30 March 2006 Decision.

¹⁰ *Ibid.*

6. The Prosecution reiterates¹¹ that neither Thomas LUBANGA DYILO nor his Defence have a right to access evidentiary or other materials that go beyond the Prosecution's disclosure obligations as defined by the respective provisions, such as, *inter alia*, Articles 61(3) and 67(2) of the Statute and Rules 76, 77, 81, 82 and 121(3) of the Rules.

No access to the Prosecution's file on the DRC situation

7. The Prosecution submits that the Statute and the Rules do not provide for Thomas LUBANGA DYILO or Counsel for the Defence to access the Prosecution's materials related to the situation in the DRC:

- (i) The underlying principles of Article 67(1) of the Statute provide for access to the Court's case-file against Thomas LUBANGA DYILO only.
- (ii) In addition, Thomas LUBANGA DYILO, depending on the stage of the proceedings, is or will be entitled to receive disclosure materials and to inspect tangible objects in the possession or control of the Prosecution. The law on disclosure does not provide for the creation of a situation-"*dossier*" and a case-"*dossier*", thus the Prosecution's disclosure obligations are not tailored, in the law, after those notions.

¹¹ See paragraph 4 of the Prosecution 24 March 2006 Filing.

(iii) The Prosecution in investigating a situation gathers evidentiary materials from a variety of sources. These materials, including evidence of both incriminatory and exculpatory nature, form the basis of cases that result from the universe of materials gathered by the Prosecution in a given situation. The law does not make a difference between the Prosecution's case-file and the Prosecution's situation-file. It considers, as Article 67(2) of the Statute shows, all evidentiary materials gathered in a situation subjected to the Prosecution's disclosure obligations.

(iv) The scope of such disclosure obligations and duties to provide evidence is, however, defined and *limited* by the respective provisions, including, *inter alia*, Articles 61(3)(b) and 67(2) of the Statute, and Rules 76, 77, 81, 82 and 121(3) of the Rules.

8. The Prosecution submits that this system of Defence access to the universe of the Prosecution's materials complies with International Human Rights standards and thus does sufficiently safeguard the rights guaranteed by Article 6(3) of the European Convention on Human Rights.

Second Request

Request to get access to the entire record of the situation in the DRC

9. The Prosecution first draws the attention of the Pre-Trial Chamber and the Defence to the fact that, in any event, substantial portions of the DRC situation file are publicly available, and thus accessible to both Thomas LUBANGA DYILO and Counsel for the Defence.

10. In respect of the portions of the DRC situation file that are not public, the Prosecution submits the following:
 - (i) The Statute and the Rules do not provide for Thomas LUBANGA DYILO or Counsel for the Defence to have access to the entire Court record of the situation in the DRC.

 - (ii) The underlying principles of Article 67(1) of the Statute provide for access to the Court's case-file against Thomas LUBANGA DYILO only. The determining criteria is, as Article 67(1)(a) of the Statute shows, the charges.

 - (iii) The charges are determined by the legal elements of the crimes concerned and the form of individual criminal responsibility pursuant to Articles 25 and 28 of the Statute. Contextual

elements, as the Defence refers to in its submissions requesting access to the entire Court record of the situation in the DRC, and as the Defence, in relation to the materials “compiled by the Prosecutor”,¹² has repeated at the occasion of the 24 April 2006 public hearing before the Single Judge by defining them, *inter alia*, as “historic”, “geopolitical”, “political”, and “material related to a war which spreads beyond Ituri”,¹³ in the Prosecution’s submission can only be considered if and when relevant. The distinction between the Court’s case-file against Thomas LUBANGA DYILO and the Court’s record of the situation in the DRC very strictly follows that logic, resulting in the DRC situation-file in the Prosecution’s view not containing any element that is of relevance to the Defence of Thomas LUBANGA DYILO.

Lifting of security measures in the Court’s case-file against Thomas LUBANGA DYILO and the DRC situation file

11. The Prosecution first notes that Defence is speculating in respect of the reasons as to why certain materials in the Court’s case-file against Thomas LUBANGA DYILO and in the DRC situation file are redacted. The Defence, at this juncture, is trying to do what is commonly referred to as a “fishing expedition”. The applicable law does not support the lifting of security classifications to allow the Defence access to redacted materials,

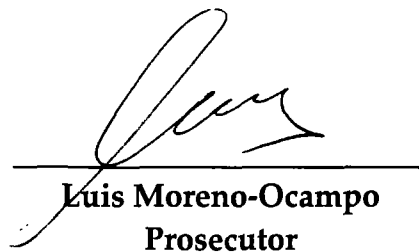
¹² The Prosecution refers to the “Realtime” transcript of the Court hearing of 24 April 2006, at page 62.

¹³ The Prosecution refers to the “Realtime” transcript of the Court hearing of 24 April 2006, at page 63.

without the Defence (i) having identified particular facts relevant to the defence justifying a respective request, that is, a legitimate forensic purpose, and (ii) having shown that the underlying reasons for redactions - such as, *inter alia*, reasons of safety of victims and witnesses - do not continue to apply.

Prosecution's request

12. For the foregoing reasons, the Prosecution requests the Pre-Trial Chamber to reject both, the First Request and the Second Request.



Luis Moreno-Ocampo
Prosecutor

Dated this 26th day of April 2006
At The Hague, The Netherlands