Cour Pénale Internationale

International Criminal Court

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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

Motion for Reconsideration

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 15 May 2006,[1] the Single Judge of the Pre-Trial Chamber (Single Judge) rendered the "Decision on the Final System of Disclosure and the Establishment of a Timetable"[2] (15 May 2006 Decision). The Decision followed a series of submissions in writing and oral submissions of both Parties,[3] commenting on the "interim system of disclosure" as established by the Single Judge.[4]

Context of the present motion for reconsideration

2. The Prosecution has noted that the Single Judge in the 15 May 2006 Decision has to a high extent considered the Prosecution's main observations on the "interim system of disclosure", and has established a system that to a considerable level takes into account the Prosecution's legal and practical concerns.

3. It is against this background the Prosecution files the present motion for reconsideration. Accordingly, the Prosecution is *not* asking the Pre-Trial Chamber to reconsider the principal, substantive elements of the 15 May 2006 Decision but only very few and limited consequential aspects of it.

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[1] The Parties were notified pursuant to Regulation 31 on 16 May 2006.
[2] Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006.
[3] As further detailed in the 15 May 2006 Decision, at pages 2 and 3.
[4] By the 23 March 2006 "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" and the 27 March 2006 "Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure".

Procedural aspects of the motion for reconsideration

4. The Prosecution submits that the Pre-Trial Chamber has the jurisdiction to reconsider its own interlocutory decisions and orders. The Prosecution recognizes that the Chamber has a discretion in exercising this power.

5. The *ad hoc* Tribunals have repeatedly held that, although there is no explicit provision for reconsideration in their Statute or Rules of Procedure and Evidence, a Chamber has the power to reconsider its own decisions:

   (i) The ICTY Appeals Chamber has stated[5] that "*[i]t must be emphasized that a Trial Chamber may always reconsider a decision it has previously made*".

   (ii) An ICTR Trial Chamber has likewise observed[6] that "... *although the Rules do not explicitly provide for reconsideration, the chamber has an inherent power to reconsider its own decisions.*"

6. The general principle that "*every court may, if justice requires, vary or rescind an earlier order or reconsider an interlocutory decision*" has also been recognized by the Special Court for Sierra Leone (SCSL).[7]

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[5] *Prosecutor v Milosevic*, IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002 at para 17. See also *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses, 17 May 2005 at paras. 6-7; *Prosecutor v Nikolic*, IT-02-60/1-A, Decision on Appellant's Urgent Motion for Reconsideration, 6 April 2005; *Prosecutor v Blaskic*, IT-95-14-A, Decision on "Prosecutor's Preliminary Response and Motion for Clarification", 23 May 2003 at para. 7; *Prosecutor v Galic*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 at para 13.

[6] *The Prosecutor v Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal, 11 October 2005 at para. 8. See also *Nahimana et al v The Prosecutor*, ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration, 4 February 2005; *The Prosecutor v Semanza*, ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002 at paras. 7-8.

7. The power of a court or tribunal to reconsider its own decisions in appropriate circumstances is also consistent with national practices.[8] While the power to reconsider final decisions is usually express, and often subject to prescribed conditions,[9] the power to reconsider and vary interlocutory decisions and orders is more commonly an implicit or inherent power.[10]

8. The power to reconsider is discretionary. The experience of the *ad hoc* Tribunals[11] suggests that a Chamber should reconsider its previous interlocutory

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[7] *Prosecutor v Brima et al*, SCSL-04-16-AR73, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion, 8 December 2005, at para. 24 (see also para. 49). See also *Prosecutor v Norman et al*, SCSL-04-14-T, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence case, 7 December 2005, at paras. 9 to 14.

[8] For example, in the UK, the rule 3.1 of the *Civil Procedure Rules* 1998 ("The court's general powers of management") states that "A power of the court under these Rules to make an order includes a power to vary or revoke the order". In the US, courts recognize "the inherent power of the rendering district court to afford such relief from interlocutory judgements" (*Greene v Union Mutual Life Insurance Company of America*, US Court of Appeals, First Circuit, 6 June 1985 and authorities cited therein - also referring to the *Notes of the Advisory Committee on the Federal Rules of Civil Procedure* noting that "interlocutory judgements are ... left subject to the complete power of the court rendering them to afford such relief as justice requires."). In Germany, jurisprudence (BGH, Decision of 23 March 2001 - 3 STR 389/00, and BGH, Decision of 26 April 2001, IX ZB 25/01, and authorities cited therein) has established the procedure of *Gegenvorstellung*, a non-formal remedy against the conduct, omission, neglect and/or default of the Court. The Court receiving the *Gegenvorstellung* is competent to decide on it. Courts in a range of other civil law jurisdictions also have the power to reconsider or revoke their own decisions, based either on the principle of *"contrario imperium"* (e.g. Argentina, *Código Procesal Penal de la Nación*, Law No. 11179, art. 446, and Uruguay, *Código General del Proceso*, Law No. 15.982, art. 245) or through statutory authority (e.g. Spain, *Ley de Enjuiciamiento Criminal*, 14 September 1882, arts. 217 and 236; Honduras, *Código Procesal Penal*, Decree No. 9-99-E, 30 December 1999, art. 352; Mexico, *Código Federal de Procedimientos Penales*, 30 August 1934, art. 361).

[9] As it is in the ICC Statute – see Article 84 on revision proceedings.

[10] See *Greene v Union Mutual Life Insurance Company of America*, above, contrasting the inherent power to reconsider interlocutory decisions with the express avenue of seeking relief from a final judgement under Rule 60(b) of the *Federal Rules of Civil Procedure*. See also *Fisher v National Railroad Passenger Corporation*, 152 FRD 145, 2 December 1993.

[11] The ICTY initially found that there was no power to reconsider decisions under the Rules, however subsequent decisions quickly reversed this position and recognized the necessity and utility of reconsideration – see *Prosecutor v Galic*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 at footnote 31. Therefore, while the Prosecution recognizes that Pre-Trial Chamber II has previously found, in one instance, that it

decisions *"because of a change of circumstances [and] also where it realized that the previous decision was erroneous or that it has caused injustice."*[12] The circumstances which can sustain a motion for reconsideration in the *ad hoc* Tribunals include both new facts and new arguments.[13]

9. The Prosecution submits that one circumstance in which reconsideration is the most appropriate course is where the Parties were not put on notice of, and thus did not have an opportunity to present arguments relating to the points for which reconsideration is sought,[14] and in particular where those points are details peripheral to, or relating to the implementation of, the decision rather than the substantive core of the decision. One such set of circumstances may be, as in the instant case, where the decision deals with a range of complex legal issues, on which the Chamber and the Parties are focussed, but the decision also touches on other points of law. In such circumstances, the Prosecution submits that reconsideration of the relevant details by the original chamber is the most orderly, efficient and expeditious way to address the issue.

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did not have jurisdiction to reconsider a previous decision ("Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification", ICC-02/04-01/05-60, 28 October 2005 at paras 18-27), the Prosecution submits that Pre-Trial Chamber I should not follow that approach in this case.

[12] *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses, 17 May 2005 at para 7; *Prosecutor v Galic*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 at para 13.

[13] *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses, 17 May 2005 at para 7; *Prosecutor v Galic*, IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004; *The Prosecutor v Semanza*, ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002 at para 8.

[14] As noted above, the Tribunals have considered new legal arguments as circumstances to be considered in determining whether to reconsider a decision, see footnote 13.

Aspects for reconsideration

10. The Prosecution requests that the Pre-Trial Chamber reconsider the following three aspects: (1) The ruling that the Prosecution has to provide for the translations of witness statements,[15] (2) the ruling that the Registry is the repository of the original witness statements following the *inter partes* disclosure,[16] and (3) limited aspects related to the Draft Protocol on the Presentation of Evidence.

Translations of witness statements

11. The Prosecution submits that it is for the Registry - and not for the Prosecution - to provide for the translation of witness statements.[17]

12. Rule 76 of the Rules merely states that *"The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks."* It does not, however, detail the organ of the Court that has to provide for the translation of statements. Equally, the respective provisions in the Regulations of the Court (Regulations) and the Regulations of the Registry (Registry's Regulations) provide only limited further guidance.

13. In the view of the Prosecution, both general principles of "neutrality" of the organ of the Court providing for translations of documents that form part of the Court proceedings ("official"[18] translations) and that are, as the translations in question,

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[15] See 15 May 2006 Decision, at para. 9. Whilst the 15 May 2006 Decision does not clearly state that it is for the Prosecution to provide for the translations of witness statements, it conversely does not clearly state that it is for the Registry to do so.

[16] See 15 May 2006 Decision, at para. 9.

[17] The Prosecution acknowledges that the Single Judge due to the unclear language of Rule 76 may have assumed that Rule 76 requires translation by the Prosecution.

[18] The Prosecution refers to Regulation 72 of the Registry's Regulations, which put additional weight on "official" translations by marking them with a watermark "Official Translation of the Court".

essential for the Defence, and practical considerations warrant translation of witness statements by the Registry:

(1) Language services of the Registry are "neutral" in the sense that the Registry is not a party to the proceedings. As such, translations of the Registry are more likely to be accepted by the Defence and Thomas LUBANGA DYILO.[19]

(2) Neither the Rules nor the Regulations do indicate that it is for the Office of the Prosecutor (OTP) to provide for "official" translations. Whilst the OTP has a Language Services Unit (OTP-LSU) that is supposed to provide for internal translations, the OTP-LSU is neither staffed nor does it have the possibility to provide for "official" translations in terms of Regulation 72 of the Registry's Regulations. As shown by Regulation 72(1) of the Registry's Regulations, it is up to the Registry only to mark translations as "official" translations.

(3) It is important that neutral, "official" translations of the witness statements in question be provided, as the 15 May 2006 Decision requires that they be filed in the record of the Court.

14. These principles were recognised by the *ad hoc* Tribunals. The practice and the case-law[20] of the ICTY - in the context of a provision[21] similar to Rule 76(3) - and

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[19] The Prosecution draws the attention of the Single Judge to Regulations 66 and 70 of the Registry's Regulations, which specifically address the accuracy of translations.

[20] See, e.g., in the ICTY context *The Prosecutor vs. Zejnil Delalic et al,* Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, at page 5. See, e.g., in the ICTR context *The Prosecutor vs. Casimir Bizimungu,* Decision on Extremely Urgent Motion to Compel the Production of All the Supporting Material in English and to Suspend the Beginning of the Time within which Preliminary Motions are to be Filed until all of the English Translations are Produced, 11 May 2000, at page 2.

[21] Rule 66(A)(ii) of the ICTY's Rules of Procedure and Evidence.

the ICTR show that the Registry is the organ of the Tribunals that furnishes the Parties with translations of witness statements.

Registry as the repository of the original witness statements following the inter partes disclosure

15. The Prosecution submits that the applicable law does not support the ruling that the Prosecution has to file the original witness statements and other evidence following the *inter partes* disclosure.

16. To the contrary, Rule 10 of the Rules determines the Prosecutor as the organ of the Court being *"... responsible for the retention, storage and security of information and physical evidence obtained in the course of the investigations by his ... Office."* This rule enables the Prosecutor to have full supervision of crucial information and evidence obtained in the course of an investigation.[22]

17. Furthermore, the ruling on the submission of the original evidence and witness statements does not sufficiently[23] take into account that providing the original evidence and witness statements to the Registry disrupts the chain of custody. The Prosecution,[24] once it has submitted original evidence to the Registry, will loose - contrary to its responsibility pursuant to Rule 10 of the Rules - its control of the chain of custody. Based on its view that the evidentiary value of any document depends, *inter alia*, on its ability to prove the chain of custody, the Prosecution fears possible future problems if and when the chain of custody is challenged. In such a situation, once materials have been submitted to the Registry, the Prosecution will depend on the Registry as a witness to the chain of

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[22] The Prosecution specifically refers to Merdard Rwelamira in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence,* at pages 260/261.

[23] The Decision does not provide for guidance and direction as to how the chain of custody can be maintained.

[24] This would also apply to any other participant submitting originals of documents or any other original evidence.

custody to prove the chain of custody in respect of materials the Prosecution relies on as evidence.[25]

18. Finally, the ruling on the submission of the original evidence and statements does not sufficiently consider the fact that the Prosecution may use the very same evidentiary materials, including witness statements in different but parallel proceedings.[26] It can be anticipated that in such a situation, the possible problems detailed in paragraph 17 are likely to be aggravated.

19. Accordingly, the Prosecution is of the view that for both legal and practical reasons the OTP should store all possibly evidentiary materials, including the originals of witness statements.

Draft Protocol on the Presentation of Evidence

20. In respect of aspects that relate to the Draft Protocol on the Presentation of Evidence (Protocol), the Prosecution submits the following considerations:[27] The Prosecution for practical reasons cannot comply with paragraphs 29 and 30 of the Protocol. The Prosecution is of the view that the document identifier should not contain metadata other than level based information as detailed in paragraph 27 of the Protocol. Evidence processing software and physical storage techniques are based on the rule that only page counting data and page based information are recorded into the document identifier.

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[25] The same principle as detailed in footnote 24 applies.

[26] This applies in particular in so-called "flip-side" cases where the Prosecution investigates into allegations of crimes committed by various armed groups in the same geographical region during the same time frame.

[27] In respect of the Draft Protocol on the Presentation of Evidence, the Prosecution emphasises that in the context of the present filing it only addresses matters that are linked to the scope of the 15 May 2006 Decision. The Prosecution explicitly reserves its right to address any other matters in a different context. Furthermore, to avoid any misunderstanding that may be triggered by para. 45 of Annex I to the 15 May 2006 Decision, the Prosecution emphasises that it has not agreed to the present version of the Draft Protocol on the Presentation of Evidence.

21. The Prosecution submits that both the language of a translation and the fact that a document contains one or several redactions should be recorded in a database field.[28]

Request

22. For the foregoing reasons, the Prosecution requests the Single Judge to reconsider and/or clarify the rulings of the 15 May 2006 Decision as specifically identified by the Prosecution in the present filing.

Luis Moreno-Ocampo
Prosecutor

Dated this 22nd day of May 2006
At The Hague, The Netherlands

[28] The Prosecution is in contact with the Registry to solve these issues.

LIST OF AUTHORITIES

A. JURISPRUDENCE

(a) ICTY

Prosecutor v Milosevic, IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002
http://www.un.org/icty/milosevic/appeal/decision-e/16052002.htm

Prosecutor v Milosevic, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses, 17 May 2005
http://www.un.org/icty/milosevic/trialc/decision-e/050517-3.htm

Prosecutor v Nikolic, IT-02-60/1-A, Decision on Appellant's Urgent Motion for Reconsideration, 6 April 2005
http://www.un.org/icty/mnikolic/appeal/decision-e/050406.htm

Prosecutor v Blaskic, IT-95-14-A, Decision on "Prosecutor's Preliminary Response and Motion for Clarification", 23 May 2003
http://www.un.org/icty/blaskic/appeal/decision-e/030523.htm

Prosecutor v Galic, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001
http://www.un.org/icty/galic/appeal/decision-e/11214DE317061.htm

Prosecutor v Galic, IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004
http://www.un.org/icty/galic/appeal/decision-e/040716.htm

Prosecutor v Delalic et al, IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996
http://www.un.org/icty/celebici/trialc2/decision-e/60925PN2.htm

(b) ICTR

The Prosecutor v Karemera et al, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal, 11 October 2005
http://69.94.11.53/ENGLISH/cases/Karemera/decisions/111005.htm

Nahimana et al v The Prosecutor, ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration, 4 February 2005
http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/040205.htm

The Prosecutor v Semanza, ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002
http://69.94.11.53/ENGLISH/cases/Semanza/decisions/090502.htm

The Prosecutor v Bizimungu, ICTR-ICTR-99-50-I, Decision on Extremely Urgent Motion to Compel the Production of All the Supporting Material in English and to Suspend the Beginning of the Time within which Preliminary Motions are to be Filed until all of the English Translations are Produced, 11 May 2000

(c) SCSL

Prosecutor v Brima et al, SCSL-04-16-AR73, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion, 8 December 2005
http://www.sc-sl.org/Documents/SCSL-04-16-AR73-441-1.pdf
http://www.sc-sl.org/Documents/SCSL-04-16-AR73-441-2.pdf

Prosecutor v Norman et al, SCSL-04-14-T, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005

(d) Domestic Courts

Germany, Bgh, Decision of 23 March 2001 – 3 STR 389/00
http://www.recht.com/heymanns/start.xav?bk=heymanns_bgh_ed_bghrst&startbk=heymanns_bgh_ed_bghrst&start=%2F%2F*%5B%40attr_id%3D'StPO%2F349%2F2%2FBeschlus_4'%5D&hls=gegenvorstellung

Germany, Bgh, Decision of 26 April 2001, IX ZB 25/01
http://lexetius.com/2001,875

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2001-4&nr=19052&anz=172&pos=28&Frame=2

United States, *Greene v Union Mutual Life Insurance Company of America*, US Court of Appeals, 764 F.2d 19, 22 (1st Cir. 1985)

United States, *Fisher v National Railroad Passenger Corporation*, 152 FRD 145 (1993)

B. LEGISLATION

(a) International

Rules of Procedure and Evidence of the International Criminal Court for the former Yugoslavia
http://69.94.11.53/ENGLISH/rules/070605/070605.pdf

(b) Domestic

Argentina, *Código Procesal Penal de la Nación*, Law No. 11179
http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/383/texact.htm

Honduras, *Código Procesal Penal*, Decree No. 9-99-E, 30 December 1999
http://www.mp.lex.gob.gt/descargar/CodigoProcesalPenal.pdf

Mexico, *Código Federal de Procedimientos Penales*, 30 August 1934
http://www.cddhcu.gob.mx/leyinfo/pdf/7.pdf

Spain, *Ley de Enjuiciamiento Criminal*, 14 September 1882
http://www.juridicas.com/base_datos/Penal/lecr.html

United Kingdom, *Civil Procedure Rules* 1998
http://www.opsi.gov.uk/si/si1998/19983132.htm

Uruguay, *Código General del Proceso*, Law No. 15.982
http://www.parlamento.gub.uy/Leyes/Ley15982.htm

B. SECONDARY MATERIALS

(a) Books

Merdard Rwelamira, "Composition and Administration of the Court", in R. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc., Ardsley, NY: 2001)