

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 July 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 Conclusions de la défense quant aux divulgations de documents expurgés faites par le Procureur

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 13 July 2006, the Prosecution disclosed, for the first time, a number of documents to the Defence that contained very limited redactions. Counsel for the Defence was made aware of the redactions in the letters accompanying the various lists of disclosed¹ and provided² materials, and the documents concerned were detailed in these lists.³

2. On 14 July 2006, the Prosecution communicated details of the 13 July 2006 disclosure to the Single Judge.⁴ The confidential Annexes indicate the documents that contain redactions. The Prosecution, in its Communication of Original Evidentiary Materials following Disclosure to the Defence of Incriminating Evidence pursuant to Article 61(3)(b) of the Rome Statute on 13 July 2006, informed the Single Judge that it would submit paper-copies of the documents concerned, instead of originals.⁵

¹ Disclosed under Articles 61(3)(b) and 67(2) of the Rome Statute.

² Provided under Rule 77 and in compliance with the Single Judge's oral Decision of 23 June 2006.

³ The lists of disclosed materials were filed as confidential Annexes to the 14 July 2006 disclosure filings as detailed in footnote 4.

⁴ Communication of Original Evidentiary Materials following Disclosure to the Defence of Incriminating Evidence pursuant to Article 61(3)(b) of the Rome Statute on 13 July 2006, public document with confidential annex, 14 July 2006; Submission of Rule 77 Pre-Inspection Note following the Provision of Materials falling under Rule 77 of the Rules of Procedure and Evidence to the Defence on 13 July 2006, public document with confidential annex, 14 July 2006; Communication of the Disclosure Note following Disclosure to the Defence of Potentially Exculpatory Evidence pursuant to Article 67(2) of the Rome Statute on 13 July 2006, public document with confidential annex, 14 July 2006.

⁵ See Communication of Original Evidentiary Materials following Disclosure to the Defence of Incriminating Evidence pursuant to Article 61(3)(b) of the Rome Statute on 13 July 2006, at para. 3.

3. At the occasion of the status conference on disclosure held on 14 July 2006, the Prosecution in detail informed the Single Judge of the Pre-Trial Chamber (Single Judge) of its practice to disclose redacted documents,⁶ the scope of the redactions⁷ and the reasons for the Prosecution's approach.⁸ Furthermore, the Prosecution again advised - explaining once again the reasons for its approach - the Single Judge that it files copies of redacted documents that fall within the scope of Article 61(3)(b) of the Rome Statute, instead of originals.⁹ Finally, the Prosecution informed the Single Judge that it envisages that the practice of disclosing redacted documents and filing of copies will continue in future.¹⁰
4. In the course of the 14 July 2006 status conference, the Single Judge ordered the Defence to make its observations on the Prosecution's practice to disclose and file redacted documents by 24 July 2006.¹¹
5. On 24 July 2006, the Defence filed the Conclusions de la défense quant aux divulgations de documents expurgés faites par le Procureur¹² (Defense

⁶ See (English) transcript of the 14 July 2006 status conference, at pages 42 to 45.

⁷ See (English) transcript of the 14 July 2006 status conference, at pages 43.

⁸ See (English) transcript of the 14 July 2006 status conference, at pages 43 and 44.

⁹ See (English) transcript of the 14 July 2006 status conference, at page 45.

¹⁰ See (English) transcript of the 14 July 2006 status conference, at page 43. The Prosecution has meanwhile, at the occasion of the disclosure on 21 July 2006, disclosed a number of additional redacted documents.

¹¹ See (English) transcript of the 14 July 2006 status conference, at page 53.

¹² Conclusions de la défense quant aux divulgations de documents expurgés faites par le Procureur, public, 24 July 2006.

Motion), requesting the Court (1) to forbid the Prosecution to disclose redacted documents, and (2) to file originals.¹³

Discussion

6. The Prosecution refers to its submissions in the course of the 14 July 2006 status conference,¹⁴ and fully incorporates its oral submissions in the present filing.

Scope of redactions

7. The redactions concerned are very limited: They concern names of witnesses, names of potential witnesses, and names of other individuals Thomas LUBANGA DYILO may - rightly or wrongly - believe to be Prosecution witnesses. In addition, the redactions concern telephone numbers, fax-numbers, e-mail addresses, and similar potentially identifying elements. Furthermore, in very limited instances, they concern marks, made by investigators of the Office of the Prosecutor (OTP) that include the initials of witnesses or sources that have provided the respective documents.
8. Redactions are not made in respect of the content of the documents concerned.

¹³ See Defence Motion, at page 4.

¹⁴ See (English) transcript of the 14 July 2006 status conference, at pages 42 to 45.

Duty of the Prosecution to redact

9. The Prosecution submits that it is redacting documents in compliance with its statutory duty - and its corresponding independent right - pursuant to Articles 68(1) and 54(3)(f) of the Rome Statute. Pursuant to Article 68(1) of the Rome Statute, the Prosecution - as an organ of the Court - is duty-bound to take appropriate measures to provide for the protection of the safety, physical and psychological well-being, dignity and *privacy*¹⁵ of victims and witnesses. Article 54(3)(f) of the Rome Statute provides for the Prosecution, *inter alia*, to take necessary measures to ensure the confidentiality of information and the protection of *any*¹⁶ person.

10. The Prosecution submits that the limited redactions are, at this stage, the only remedy available to comply with its statutory duties.¹⁷ In respect of its witnesses, it would have to refer additional witnesses to the Registry's Victims and Witnesses Unit (VWU), thus adding to their burden to provide for the protection of Prosecution's witnesses. In respect of its potential witnesses and sources, the Prosecution has to rely on its resources alone; VWU takes the approach that it is not obligated to provide for the protection of potential witnesses. In respect of other individuals, the Prosecution is not in a position to assess the risk to their lives and well-being. They may be exposed to a situation where Thomas

¹⁵ *Emphasis* by the Prosecution.

¹⁶ *Emphasis* by the Prosecution.

¹⁷ The Prosecution has limited the number of documents concerned to the extent possible. In particular, the Prosecution, whilst at this stage of the proceedings not required to do so, reveals the source of documents in all instances it has received documents from the DRC authorities, thus letting Thomas LUBANGA DYILO know that they have not been received from any of the individuals named in the documents.

LUBANGA DYILO wrongly assumes that they fall within the range of Prosecution witnesses. In such a situation, the Prosecution is required to take the most cautious approach possible.

Rule 81(4) of the Rules of Procedure and Evidence

11. In the Prosecution's view, Rule 81(4) of the Rules of Procedure and Evidence (Rules) does not apply for the redactions as described in paragraphs 7 and 8 above. Rule 81(4) provides for the protection of the safety of witnesses and victims. Accordingly, the Prosecution will seek the authorisation of the Single Judge to redact identifying features contained in statements of Prosecution witnesses. Rule 81(4) is, however, not applicable to potential witnesses, sources or other individuals named in documents.

Suggestions

12. The Prosecution, mindful of the principle detailed in Article 68(1) of the Rome Statute, that protective measures shall not be prejudicial to or inconsistent with the rights of Thomas LUBANGA DYILO, suggests proceeding as follows: The Prosecution will continue to disclose redacted documents pursuant to paragraphs 7 and 8. The Defence may, if it deems it necessary, identify to the Prosecution the documents it wishes to consult without redactions, and explain its reasoning for such request. In the event the Prosecution assesses that there is a need to maintain the redactions as a precautionary measure, the Defence must show good

cause supporting its need to have access to the redacted portion of the documents concerned. The Single Judge may, after reviewing the documents concerned, determine whether good cause has been shown.

13. The Prosecution emphasises that, in the Prosecution's view, the Single Judge's decision should take into account whether the Defence's right to fair and impartial proceedings is prejudiced by the limited redactions, in light of the stage of the proceedings, and in particular against the background of the limited scope of the confirmation hearing. The Prosecution submits that the very limited scope of its redactions, at this stage of the proceedings, do not prejudice Thomas LUBANGA DYILO's right to fair and impartial proceedings.

14. In respect of the filing of originals, the Prosecution suggests that it should file the un-redacted documents in their original version "Under seal - *ex parte* - Prosecution only", thus ensuring compliance with the Court's order to file originals. Such an approach also ensures that the Defence, as long as the disclosed documents are disclosed in a redacted version only, does not access the originals of the un-redacted documents.


 Hatou Bensouda
 Deputy Prosecutor (Prosecutions)

Dated this 28th day of July 2006
 At The Hague, The Netherlands