

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 18 August 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, 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 Redacted Document

URGENT

Prosecution's request to order the Defence to inform the Pre-Trial Chamber by 24 August 2006 at the latest whether the Defence will request the postponement of the Confirmation Hearing

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

Legal Representatives for the Victims

a/0001/06 to a/0003/06

Mr Luc Walley
Mr Franck Mulenda

Background

1. On 20 March 2006, at the occasion of the first appearance of Thomas LUBANGA DYILO pursuant to Article 60 of the Rome Statute (Statute) and Rule 121(1) of the Rules of Procedure and Evidence (Rules), the Pre-Trial Chamber pursuant to Rule 121(1) set the date for the Confirmation Hearing for 27 June 2006.¹
2. On 22 May 2006, the Prosecution filed the "Prosecution's Request pursuant to Rule 121(7) for Postponement of the Date of the Confirmation Hearing",² requesting the Pre-Trial Chamber to re-schedule the date of the Confirmation Hearing once certain protective measures REDACTED³ were fully implemented.
3. Following an *ex parte* Hearing before the Pre-Trial Chamber on 23 May 2006, the Single Judge of the Pre-Trial Chamber (Single Judge), on 24 May 2006, rendered the "Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Time Table set in the Decision on the Final System of Disclosure"⁴ (24 May 2006 Decision). In the 24 May 2006 Decision, the Single Judge decided to postpone the Confirmation Hearing until Thursday, 28 September 2006 and set a timetable (Timetable) for disclosure.
4. Pursuant to the Timetable, the Prosecution on 28 August 2006 "shall make available to the Defence and file in the record of the case against Thomas Lubanga Dyilo, pursuant to rule 121(3) of the Rules, a comprehensive document

¹ See the (English) transcript of the Court Hearing of 20 March 2006, at page 8, lines 9 to 12.

² Prosecution's Request pursuant to Rule 121(7) for Postponement of the Date of the Confirmation Hearing, 22 May 2006.

³ REDACTED.

⁴ Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure, public, 24 May 2006.

... containing a detailed description of the charges together with the list of evidence which the Prosecution intends to present at the hearing.”⁵

5. Pursuant to the 24 May 2006 Decision,⁶ disclosure of the names and statements of the witnesses on which the Prosecution intends to rely at the Confirmation Hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements, shall be provided to the Defence in a language that Thomas LUBANGA DYILO understands and speaks in un-redacted form once the Prosecution has decided to rely on a given witness (if it is of the view that redactions are not necessary) or in redacted form after the Pre-Trial Chamber has authorised redactions pursuant to Rule 81. In accordance with the Timetable, the Prosecution is obliged to disclose the names of its witnesses to the Defence by 28 August 2006.

Prosecution’s position in respect of the date of the Confirmation Hearing

6. The Prosecution has decided to not request a further postponement of the Confirmation Hearing provided that all pending and all potential future issues related to the protection of victims and witnesses are satisfactorily dealt with.⁷

⁵ See 24 May 2006 Decision, at pages 7 and 8.

⁶ See 24 May 2006 Decision, at page 7, making reference to the Single Judge’s “Decision on the Final System of Disclosure and the Establishment of a Timetable”, public, 15 May 2006, at pages 9 and 10.

⁷ At this stage, pending further information by the Registry’s Victims and Witnesses Unit (VWU), the information currently at the disposal of the Prosecution does *not* provide for such a conclusion.

Defence situation

7. The Prosecution has noted - with growing concern – that the Defence has repeatedly, as a pattern, in both filings and during Court Hearings raised issues that have a direct or indirect impact on the Defence's ability to adequately prepare for the Confirmation Hearing.
8. In the Prosecution's view, these matters do indeed have a direct impact on the ability of the Defence to adequately prepare for and participate in the Confirmation Hearing.
9. The Defence's various concerns can be summarised⁸ as follows:
 - (i) The Defence is overburdened by the many issues being litigated in the present case, which have prevented it from turning its attention to the preparation of the actual defence of Thomas LUBANGA DYILO:

Already on 3 July 2006, in the context of the Defence's "Requête aux fins de faire courir tous les délais à compter de la date de réception de la version française des documents,"⁹ Defence articulated their difficulties in outlining:¹⁰ *"Tandis que l'Accusation dispose d'un certain nombre de fonctionnaires (dont la majorité parlent couramment l'une ou l'autre des langues de travail de*

⁸ The Prosecution focuses on the main aspects only. For example, the Prosecution does not in detail address the statements made by Defence regarding the delays in assigning Interns to the Defence Team.

⁹ Requête aux fins de faire courir tous les délais à compter de la date de réception de la version française des documents, public, 3 July 2006.

¹⁰ See Requête aux fins de faire courir tous les délais à compter de la date de réception de la version française des documents, at para. 4 (*emphasis* by the Prosecution).

la Cour), les intérêts de M. Thomas Lubanga Dyilo sont défendus par un seul conseil, aidé par une seule assistante judiciaire, que sont tous les deux actuellement submergés par les exigences liées à la préparation de la défense pour l'audience de confirmation des charges, plus spécifiquement, et d'une manière constante, par rapport à des questions concernant la procédure en général, qui les gardent éloignés de la défense en tant que telle."

At the occasion of the 14 July 2006 Status Conference, Counsel for the Defence stated:¹¹ *"And we are constantly drafting requests and applications concerning general interpretation and procedure problems about the different texts. We have two appeal proceedings under way and your Honour, up until now, we have only been able to deal with the factual defence of this file, because we constantly have to deal with these other duties which are of a general nature in very short deadlines before this Chamber and the Appeals Chamber and constantly have to study the texts, respond to the Prosecutor's submissions, et cetera, and I have limited means in the Defence."*

Very recently, the Defence repeated the same concern: On 7 August 2006, in its "Request for Leave to Appeal the 'Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga

¹¹ Transcript (English version) of the 14 July 2006 Status Conference, at page 21 (*emphasis by the Prosecution*).

et de l'enquête en République démocratique du Congo,"¹² the Defence stated: *"The charging process is an extremely important and sensitive procedure. If confirmed, the charges will form the crux of all future proceedings against Thomas Lubanga Dyilo. Given the limited time and resources available to the Defence before the confirmation hearing, it [sic] imperative that the Defence completely devote itself to considering the Prosecution case, rather than diverting its resources to shadow-box the (redacted or ex parte) allegations and submission of anonymous Victims."*, and emphasised the following: *"In addition, the hearing for the confirmation of charges represents an extremely valuable opportunity for the Defence to seek the release of their client on the basis that there are not sufficient grounds to believe that he committed a crime under the jurisdiction of the court. It would be extremely unfair, not to mention a waste of resources to continue the proceedings and keep Thomas Lubanga Dyilo in custody if the test for confirming charges is not properly met due to the fact that the impartiality of the Chamber was compromised, the ability of the Defence to provide effective representation was impeded by the influx of Victim participants and attendant filings, or the Defence was deprived of the ability to challenge these anonymous accusation."*

¹² Request for Leave to Appeal the 'Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga et de l'enquête en République démocratique du Congo, public, 7 August 2006, at paras. 73 and 74 (*emphasis by the Prosecution*).

Highlighting the same concern, the Defence in its most recent - 14 August 2006 - "Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/00046/06, a/0047/06 to a/0052/06, and for an Extension of Time"¹³ informed the Single Judge about the following:¹⁴ *"The Defence team is only comprised of one counsel and one legal assistant. Thus far, the Defence has been so busy addressing the influx of procedural motions that it has been unable to devote any meaningful time to reviewing the thousands of pages disclosed by the Prosecution, or to devising its investigative strategy for the confirmation hearing (...). The Defence would like to underscore that it should not have to choose between defending its client from possible procedural prejudice and addressing the actual merits of the Prosecution case. Nor should the Defence have to choose between having sufficient time and resources to adequately prepare its case, and Thomas Lubanga Dyilo's right to speedy proceedings. Article 68(3) is clear – victims participation should be exercised in a manner which is consistent with the rights of the Defence – this includes both the right to a speedy trial and the right to adequate time and resources."*

- (ii) The Defence is hampered from investigating the Defence case because of the delays in the assignment of a Defence Investigator:

¹³ Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/00046/06, a/0047/06 to a/0052/06, and for an Extension of Time, public, 14 August 2006, at paras. 38 and 39 (*emphasis* by the Prosecution).

¹⁴ Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/00046/06, a/0047/06 to a/0052/06, and for an Extension of Time, at paras. 38 and 39 (*emphasis* by the Prosecution).

Already on 24 April 2006, Defence made the following statement:¹⁵ *“And then secondly, the Defence needs to go about organising the defence for the trial before. We have the assistance of a legal assistant now, but we also need to take on an investigator to go to the DRC to investigate and reveal exculpatory information. Having carried out that research, studies will be necessary in the field. It will be necessary to contact exculpatory witnesses. And therefore, I would insist upon the fact, your Honour, that we are running out of time at this point.”*

At the same occasion, the Defence re-emphasized the same point in saying:¹⁶ *“It will be necessary, given the confirmation hearing, to designate or appoint - have appointed an investigator. And I should make this investigator come to The Hague. This - in The Hague. This investigator will have to follow training in The Hague. The investigator will have to follow training before starting operations in the field. If we want to respond to the rights of the accused in the confirmation hearing to challenge these charges and to already bring at this stage as the Rules and the Statutes - the Rules of Procedure and Evidence and the Statute says, then we have to carry out research and investigation operations in this regard. And we can really say that we’re nowhere in this regard.”*

¹⁵ Transcript (English Version) of the 24 April 2006 Hearing, at page 20 (*emphasis by the Prosecution*).

¹⁶ Transcript (English Version) of the 24 April 2006 Hearing, at page 68 (*emphasis by the Prosecution*).

The Defence repeated the same concern during the 24 May 2006 Court Hearing, stating:¹⁷ REDACTED

Defence explicitly raised this matter in light of the preparation of the Confirmation Hearing at the occasion of the 14 July 2006 Status Conference, in outlining:¹⁸ *“However, I’ve got my back against the wall and I need to have this person this month in The Hague or else I’ll never be ready for the confirmation hearing, because the Defence is composed of two persons, and if you look at the adversaries against me, they have IT people, many more -- much more staff which we don’t have.”*

Most recently, on 14 August 2006, the Defence has confirmed that this situation continues, by submitting:¹⁹ *“Moreover, an additional member of the defence team will not be in a position to commence investigative actions until at least 21 August 2006, due to delays in the assignment of an appropriate investigator, which were beyond the control of the Defence. The present application thus has the potential to both delay the proceedings and to divert the scarce resources of the Defence from the integral task of focusing on the Prosecution case.”*

¹⁷ REDACTED

¹⁸ Transcript (English Version) of the 14 July 2006 Status Conference, at page 21 (*emphasis* by the Prosecution).

¹⁹ See Defence “Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/00046/06, a/0047/06 to a/0052/06, and for an Extension of Time, public, 14 August 2006, at para. 38 (*emphasis* by the Prosecution).

- (iii) The Defence has had significant problems in getting access to electronic resources required by the Defence team, in receiving the necessary training, and in familiarising itself with the use of the equipment:

At the occasion of the 23 June 2006 Status Conference, the Defence made the following statement:²⁰ *"I was informed myself, because I was quite concerned about this matter. In relation to the computer and the training, I have been told - and this confirms what Mr Dubuisson has said - the organisers were waiting for French language information in order to be able to provide French language training to Mr Lubanga. Mr Lubanga needs basic training in the French - through French before specific training on use of the Ringtail programme. So I was concerned that basic training had not yet been provided, but if I have understood the Registrar correctly, the document in French or the training in French will be available in order to allow us to begin next week."*

During the same Status Conference,²¹ the Defence advised the Single Judge: *"This also supposes that our client, who has not yet even begun to study the file of evidence that is to underpin the charges brought against him - our client has not yet begun that work, and it is from him that suggestions will come regarding material which may potentially be exonerating. So, quite simply, we are not yet in a position to make suggestions in this connection. ..."*, and also

²⁰ Transcript (English version) of the 23 June 2006 Hearing, at page 7 (*emphasis by the Prosecution*).

²¹ Transcript (English version) of the 23 June 2006 Hearing, at page 58 (*emphasis by the Prosecution*).

said:²² *"Where it concerns the easiest of them, the computers, laptops have arrived **today...**"* and²³ *"Your Honour, of course **the Ringtail for us at the moment is like Chinese**, if I can put it like that, despite the fact that Chinese is an official language of the court as well, **but I don't speak it, so I don't understand it. For us, Ringtail really is just another planet for us**, despite the fact that we've had initial training which does give us an idea of the possibilities of the system, which is quite impressive. **The Defence therefore cannot note the technicalities, and certainly not the technicalities with regards to introducing documents into this system.**"*

- (iv) The Defence is limited in its ability to prepare for the Confirmation Hearing by not being able to travel to the DRC:

On 24 May 2006, Counsel for the Defence stated:²⁴ **REDACTED**

The Defence raised the same point again at the occasion of the 23 June 2006 Status Conference, emphasizing:²⁵ *"We have, firstly, asked -- well, because it was a period which seemed to us to be appropriate, we asked to carry out a trip to DRC in the last part of the month of July, because we envisage that, given the hearing on 27 August and 28 September, we don't think it will be perhaps appropriate to go and we will probably be confronted with a lot of work*

²² Transcript (English version) of the 23 June 2006 Hearing, at page 12 (*emphasis by the Prosecution*).

²³ Transcript (English version) of the 23 June 2006 Hearing, at pages 71 and 72 (*emphasis by the Prosecution*).

²⁴ REDACTED.

²⁵ Transcript (English version) of the 23 June 2006 Status Conference, at pages 14 and 15 (*emphasis by the Prosecution*).

to carry out here in The Hague when it comes to preparing the hearing and drafting motions, so work which essentially has to be done in the office. So we had contact with the person responsible for travel and logistics there, and we were told that between 15 July and 15 August it was out of the question to travel to DRC because of logistical reasons - purely logistical reasons related to the elections. So we immediately, at the same time, carried out a request to leave tomorrow, so that was 24 June, until 5 July, and we have made this request. We have had confirmation that probably it won't be a problem at that time to organise our trip, with all the logistics that go with it in the field, but we have very quickly received a letter from the Defence section saying that it wasn't possible either for us to travel at that time, which causes a problem - a very serious problem for us, that is to say, that we don't know when it will be possible to travel there, if it will be possible to travel there, and when it will be possible to travel. And we see that, as was said very well by the -- in a -- tempus irreparabile fugit, as they say in Latin, we know that we're going to -- there's this hearing coming up on 27 September, time is passing, and we are confronted with a situation where perhaps we won't be able to go to the DRC before that date. While we really have to see people in the field, and there are people who can't move and they have information which is very important to the Defence, and that is the problem that we're confronted with."

This issue had not been resolved until the 14 July 2006 Status Conference, resulting in the following statement of the

Defence:²⁶ *"Now that I have said this, I would like to add **that I would like to keep my request to travel to the DRC, even if it was just to go to Kinshasa, but I do understand that, for now, that probably won't be possible before 15 August.**"*

Defence has recently - on 14 August 2006 - again brought up this matter, stating:²⁷ *"In addition, due to security restrictions, which were brought to the attention of the Chamber during the last two Status Conferences, **the Defence was not permitted to conduct its mission to the DRC at an earlier time.**"*

Disclosure of witness statements

10. The disclosure of witness statements is determined by the outcome of the Prosecution's Rule 81(2) and Rule 81(4) Applications.
11. Following the recent authorisation by the Single Judge of redactions pursuant Rule 81(2), the Prosecution will disclose a very limited number of witness statements on Tuesday, 22 August 2006. The number of these statements will be limited because in respect of the vast majority of them the Prosecution will have

²⁶ Transcript (English version) of the 14 July 2006 Status Conference, at page 27 (*emphasis by the Prosecution*).

²⁷ See Defence "Request for Access to the Unredacted Versions of the Applications of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/00046/06, a/0047/06 to a/0052/06, and for an Extension of Time, public, 14 August 2006, at para. 42 (*emphasis by the Prosecution*).

to, once the pre-conditions are met, in addition apply for redactions pursuant to Rule 81(4).²⁸

12. The Prosecution in very near future will apply for the authorisation of redactions to a limited number of witness statements pursuant to Rule 81(4). In respect of the majority of its witness statements, however, pending decision of the Pre-Trial Chamber in respect of matters that are a precondition to the Prosecution applying for redactions to these witness statements pursuant to Rule 81(4),²⁹ the Prosecution, at this stage, cannot even apply for such redactions.
13. Accordingly, it can be anticipated that the Defence only at a point in time close to the Confirmation Hearing will receive the majority of the Prosecution's witness statements.
14. The Prosecution notes in this context that the Defence at the occasion of the 24 April 2006 Hearing made the following statement:³⁰

"And it has to be clearly -- we have to clearly go to the Rule 121(7), which does make it possible for the Chamber to postpone, perhaps because the Chamber notes at the ultimate date, the last deadline of 30 days, the Prosecutor still communicated a significant amount of information, that there would be the possible for the Chamber to

²⁸ See para. 12.

²⁹ The Prosecution makes specific reference to para. 31 of the Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, public, 19 May 2006.

³⁰ Transcript (English version) of the 24 April 2006 Hearing, at page 50 (*emphasis* by the Prosecution).

postpone the date of the confirmation hearing. So we can't consider that these 30 days are something sacred, as it were, and final, as it were."

Prosecution's concerns

15. In light of the many statements of the Defence that suggest that the Defence may be inclined to request the further postponement of the date of the Confirmation Hearing, and that in the Prosecution's view it would be very difficult to deny such a request, the Prosecution's concerns are manifold:³¹

- (i) The Prosecution is of the view that in the conditions as described above, it can be anticipated that the Defence will not be in a position to adequately participate in the Confirmation Hearing, covering all aspects of Article 61(6) of the Statute and Rule 122.
- (ii) In addition, and in particular, the Prosecution expresses its grave concern about the safety and security of its witnesses: It is commonly accepted that the risks to their safety and well-being rise when the time between the disclosure of their identity and the time of their testimony increases. If the date of the Confirmation Hearing were re-scheduled after the Prosecution has disclosed the names of its witnesses in the

³¹ In the present filing, the Prosecution limits its observations to its main concerns.

“List of Evidence” in addition to their statements,³² their safety and security situation will be unnecessarily jeopardised further.

- (iii) A Defence request for postponement of the Confirmation Hearing close to its actual date as currently scheduled would frustrate the Prosecution’s intensive preparation - including logistical preparation relying on the support of external actors - for the Confirmation Hearing but also the equally intensive preparation of the other organs of the Court.

Communication between Prosecution and Defence in respect of the present filing

- 16. As a matter of professional courtesy, and in light of the tight Court deadlines, the Prosecution has on 16 August 2006 informed the Defence about its intention to by 18 August 2006 file the instant request.

Public filing

- 17. Whilst mainly relying on statements made by the Defence in public Hearings and public filings, the Prosecution in the present filing is also making reference to confidential Defence filings and statements made by the Defence in closed session

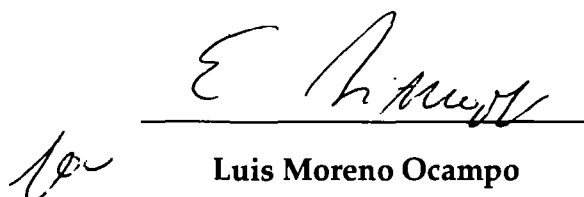
³² In either un-redacted or redacted version.

Court Hearings. Accordingly, the Prosecution makes the instant submissions in a confidential filing.

18. The Prosecution will submit, however, a redacted public filing in due course. That filing will also be made available to the representatives of the victims.

Request

19. The Prosecution requests the Single Judge to order the Defence to by 24 August 2006 the latest - prior to the deadline for the filing of the Document Containing the Charges and the Prosecution's List of Evidence on 28 August 2006 - inform the Pre-Trial Chamber whether it will request a postponement of the date of the Confirmation Hearing.



Luis Moreno Ocampo
Prosecutor

Dated this 18th day of August 2006
At The Hague, The Netherlands