

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 20 September 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public

URGENT

Prosecution's Request to Schedule a Status Conference by 22 September 2006 the latest on the Starting Date of the Confirmation Hearing and to Provide Information to the Parties concerning the Conduct of the Confirmation Hearing

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Background

1. On 24 May 2006, the Single Judge issued the "Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure"¹ (24 May 2006 Decision). In the 24 May 2006 Decision, the Single Judge postponed the Confirmation Hearing until Thursday, 28 September 2006,² and scheduled, *inter alia*, a status conference for 19 September 2006 at 11:00 hours to address details of the *inter partes* disclosure process.³
2. On 7 September 2006, the (full) Pre-Trial Chamber rendered the "Decision on the Prosecution deadline of 12 September 2006 and the Defence deadline of 12 September 2006"⁴ (7 September 2006 Decision), re-scheduling the 19 September 2006 status conference for 14:00 hours on the same day and adding the following agenda items: "(i) the new deadline for the presentation of the Defence List of Evidence; and (ii) the consequences of this new deadline for the starting date of the confirmation hearing."⁵
3. On 18 September 2006, the Single Judge rendered the "Decision on the Postponement of the Status Conference Scheduled for 19 September 2006"⁶ (18 September 2006

¹ 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. The 24 May 2006 Decision followed the Prosecution's Request pursuant to Rule 121(7) for Postponement of the Date of the Confirmation Hearing, *ex parte*, 22 May 2006, in which the Prosecution had requested the postponement of the date of the Confirmation Hearing due to reasons of protection of victims and witnesses.

² See 24 May 2006 Decision, at page 6.

³ See 24 May 2006 Decision, at page 9. The 19 September 2006 status conference was scheduled as the last one of a series of status conferences on disclosure that would precede the Confirmation Hearing.

⁴ Decision on the Prosecution deadline of 12 September 2006 and the Defence deadline of 12 September 2006, public, 7 September 2006.

⁵ See 7 September 2006 Decision, at page 9.

⁶ Decision on the Postponement of the Status Conference Scheduled for 19 September 2006, public, 18 September 2006.

Decision). In the 18 September 2006 Decision, the Single Judge decided to postpone the status conference scheduled for 19 September 2006 until 26 September 2006.

Discussion

Date of the status conference

4. The Prosecution recalls that the 26 September 2006 is two days prior to the Confirmation Hearing. The agenda for the 26 September 2006 status conference includes, *inter alia*, “the consequences for the confirmation hearing of the suspension of the 12 September 2006 deadline for the filing of the Defence List of Evidence for the starting date.”⁷
5. The Prosecution notes that the Confirmation Hearing is scheduled to commence on Thursday, 28 September 2006. For the reasons detailed below, it is, in the Prosecution’s view, legally infirm to commence the Confirmation Hearing on that day. The Pre-Trial Chamber, however, has neither made use of its *proprio motu* power under Rule 121(7) to postpone the Confirmation Hearing - which in the present circumstances, in the Prosecution’s submission, amounts to a duty of the Pre-Trial Chamber - nor has it indicated to the Parties whether it intends to do so. The Pre-Trial Chamber, despite prior requests to promote clarity,⁸ has left the Parties without adequate guidance about its own views regarding the feasibility of commencing the Confirmation Hearing on 28 September 2006. The “First Decision

⁷ See 18 September 2006 Decision, at pages 2 and 3.

⁸ The Prosecution explicitly refers to the Prosecution’s Request of to order the Defence to inform the Pre-Trial Chamber to by 24 August 2006 the latest whether the Defence will request the postponement of the Confirmation Hearing, public, 18 August 2006.

on the Prosecution Requests and Amended Requests for Redactions under Rule 81”,⁹ setting a deadline for the Prosecution to make a filing on Monday, 25 September, 10:00 hours,¹⁰ appears to allow the possibility that the Single Judge continues to be of the view that it is feasible to maintain 28 September 2006 as the commencement of the Confirmation Hearing.

6. Against this background, the Prosecution is deeply concerned about the 18 September 2006 Decision, leaving the key issue of the date of the Confirmation Hearing unaddressed until two days prior to its scheduled starting day. The only reason outlined in the 18 September 2006 Decision - “the 25 September 2006 deadline given to the Prosecution in the First Decision”¹¹ - does not, in the Prosecution’s submission, provide a compelling reason to postpone the 19 September 2006 status conference: the underlying issue did not change, neither by the First Decision itself or by its anticipated consequences on the timeline.
7. Beyond the question of the re-scheduling of the final status conference, the Prosecution is highly concerned about the approach the Pre-Trial Chamber¹² has taken in dealing with the issue of a possible postponement of the Confirmation

⁹ First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, public, 15 September 2006.

¹⁰ See 15 September 2006 Decision, at pages 10 and 11. *Emphasis* by the Prosecution. - Whilst the Prosecution will again make each and every effort to comply with the deadline, it notes that the deadlines of the Single Judge become more and more unrealistic, thus adding to the likelihood that mistakes are made.

¹¹ The First Decision is the “First Decision on the Prosecution’s Requests and Amended Requests for Redactions under Rule 81”, public with confidential and *ex parte* Annex I available only to the Prosecution, 15 September 2006.

¹² The Prosecution notes that the 7 September 2006 Decision was rendered by the full Chamber whereas the 18 September 2006 Decision was issued by the Single Judge.

Hearing.¹³ The Single Judge appears to fail to take into account that in order to make meaningful use of their resources in the lead-up to the Confirmation Hearing, the Parties, both the Prosecution and the Defence, need to know, in time, whether the Confirmation Hearing will be postponed or not.

8. In addition, the Prosecution wishes to inform the Single Judge that it is known to the Office of the Prosecutor that the media and the interested public are preparing to attend the Confirmation Hearing.¹⁴ Such preparations include, *inter alia*, making staff available to travel to The Hague and the related logistical preparations. These preparations will be frustrated, to the detriment of the public perception of the Court, if a Decision on the start date of the Confirmation Hearing is rendered only two days prior to the currently scheduled Confirmation Hearing.
9. Accordingly, the Prosecution submits that it is necessary to discuss the start date of the Confirmation Hearing as soon as possible, by Friday, 22 September 2006 at the very latest, rather than waiting until only two days prior to the Confirmation Hearing.

¹³ The Prosecution notes that in the past the Single Judge has often addressed in a very detailed manner issues of comparatively less importance, such as the interim system of disclosure (having resulted in weeks of, in the Prosecution's view, unnecessary litigation) but has left unaddressed matters that are of crucial importance to the Parties in terms of both meaningful use of their resources and ensuring a smooth running of the proceedings.

¹⁴ The public shows a particular interest in attending the Confirmation Hearing because it is the first ever Confirmation Hearing.

Legal considerations

10. The Prosecution outlines the legal reasons for its submission as follows:

- (i) Rule 121 very elaborately details time limits for each step of the pre-confirmation stage. The clear purpose of these time limits is, as intended by the Legislator, to enable the Parties to prepare for the Confirmation Hearing.¹⁵ Accordingly, the main purpose of the detailed provisions in Rule 121 is, obviously, to protect the rights of the Parties.¹⁶ The Legislator has, despite some obvious disadvantages of a system as detailed in Rule 121, deliberately chosen to make it the ICC law, in order to guarantee that all necessary preparations and submissions can be made in advance of the Confirmation Hearing. As a consequence, to compensate for the lack of flexibility, sub-rule 121(7) was included in Rule 121, providing for a liberal provision for the postponement of the Confirmation Hearing.¹⁷
- (ii) Rule 121(3) states that the Defence shall be provided with the Document Containing the Charges and the Prosecution's List of Evidence "no later than 30 days before the date of the confirmation hearing". Rule 121(3) regulates the notion of "reasonable time" as provided for in Article 61(3). A combined reading of these provisions makes it clear, in the Prosecution's view, that the 30-day deadline is only meaningful if it includes not only the "List of Evidence" but the evidence the Prosecution intends to rely upon at the Confirmation Hearing itself. This flows from

¹⁵ See Roy S. Lee (Editor), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, at page 523.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at page 524.

the fact that the “reasonable time” in Article 61(3) refers to “the *evidence* on which the Prosecutor intends to rely at the hearing”.¹⁸

- (iii) Rule 121(6) states that between the provision of the Defence List of Evidence and the date of the Confirmation Hearing 15 days must elapse. As shown by the fact that the “Pre-Trial Chamber shall transmit the list to the Prosecutor without delay”,¹⁹ the 15-day deadline has been spelled out in order to protect the right of the Parties, this time of the Prosecution, to properly prepare for the Confirmation Hearing.

11. Applied to the present situation, these provisions in the Prosecution’s view result in the fact that - despite extreme efforts on the part of the Parties and the Single Judge to manage disclosure and related issues efficiently, all of which is reflected in the record - not even the 30-day time limit of Rule 121(3) has started to run: Due to the pending decisions of the Single Judge on the Prosecution’s Rule 81 applications, the Defence has not yet received significant portions of Prosecution’s key evidentiary materials, thousands of pages of key witness statements and transcripts of “insider” interviews, or summaries thereof. Consequently, the Defence is not in a position to analyse these materials, which is a pre-condition for the Defence to determine the evidentiary materials it wants to present, and that will have to be detailed in the Defence List of Evidence pursuant to Rule 121(6). As it stands now, these materials will be available, in an optimistic assessment, only by end of September 2006. Realistically, also taking into account the Single Judge’s Decisions on the E-Court Protocol,²⁰ this will be after 28 September 2006 only. Only then will the 30-day

¹⁸ *Emphasis* by the Prosecution.

¹⁹ See Rule 121(6), second sentence. *Emphasis* by the Prosecution.

²⁰ See Final Decision on the E-Court protocol for the Provision of Evidence, Material and Witness Information in Electronic Version for their Presentation during the Confirmation Hearing, public, 28

deadline start to run and automatically trigger the 15-day deadline for the presentation of the Defence List of Evidence.

12. The Prosecution submits that even this assumption is optimistic. It is optimistic in light of the many logistical problems the Defence team was facing throughout the months following the surrender of Thomas LUBANGA DYILO, and continues to face. The Prosecution²¹ mentions, as examples, the following ones only:²²

- (i) the Defence²³ has been overburdened by the many issues being (unnecessarily) litigated in the present case, which have prevented it from turning its attention to the preparation of the actual defence of Thomas LUBANGA DYILO;
- (ii) the Defence has been hampered from investigating the Defence case because of delays in the assignment of a Defence investigator;
- (iii) the Defence had up until very recent times significant problems in getting access to required electronic resources, receiving the necessary training, and familiarising itself with the use of the equipment; and

August 2006. See also Decision of the Prosecution Request for Extension of Time, Clarification and Provision of Information, public, 1 September 2006.

²¹ The Prosecution adds that, in this particular instance, due to the very specific circumstances, it agrees with the Defence. The Prosecution will, however, every time closely scrutinize the reasons put forward by the Defence.

²² The Prosecution refers to the Prosecution's request to order the Defence to inform the Pre-Trial Chamber to by 24 August 2006 the latest whether the Defence will request the postponement of the Confirmation Hearing, public, 18 August 2006.

²³ The Prosecution is exposed to a similar situation.

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

13. In addition, there are many issues that are pending decision of the Pre-Trial Chamber or the Single Judge that in the Prosecution's view have an immediate impact on the scheduling of the date of the Confirmation Hearing, including, *inter alia*:²⁴

- (i) The Defence Request for Release, as filed on 23 May 2006: Following a respective submission of the Prosecution,²⁵ the Pre-Trial Chamber has qualified this request as a challenge to jurisdiction and admissibility, and has dealt with it accordingly.²⁶ Thus, in the Prosecution's submission, the Article 19 and Rule 58 proceedings do apply, meaning that the Article 19(2) challenge has to be decided upon prior to the commencement of the Confirmation Hearing. The Pre-Trial Chamber has explicitly acknowledged this order in the recent - 28 August 2006 - "Decision on the Defence's Request to file a Reply"²⁷ by outlining "[t]hat a decision of the Chamber on a challenge to the jurisdiction of the Court must be issued *before the beginning* of such hearing."²⁸ The Prosecution notes, in this context, that, to date, there is neither a decision on the Application for Release nor is a hearing scheduled.

²⁴ The Prosecution limits its submission to the main issues only.

²⁵ See Prosecution's Response to Application for Release, confidential, 13 June 2006, at paras. 6 and 7.

²⁶ See Décision invitant la République démocratique du Congo et les victimes de l'affaire en cause à présenter leurs observations sur les procédures menées en vertu de l'article 19 du Statut, public, 24 July 2006

²⁷ Decision on the Defence's Request to file a Reply, public, 28 August 2006, at page 4.

²⁸ The "hearing" concerned is the Confirmation Hearing. *Emphasis* by the Prosecution.

- (ii) Various requests of the Legal Representatives of the Victims a/0001/06 to a/0003/06 on the scope of their participation in the Confirmation Hearing. Both, the Defence approach and the Prosecution approach to the Confirmation Hearing will depend on the future decision of the Pre-Trial Chamber on these requests.²⁹
- (iii) The "Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding The Case:"³⁰ In the Prosecution's view, this Application - because of its potentially far reaching implications as detailed in the Request on the present proceedings - needs to be decided upon prior to the start of the Confirmation Hearing.
- (iv) The "Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings."³¹ This matter in the Prosecution's view needs also to be decided upon by the Pre-Trial Chamber prior to the Confirmation Hearing.³²

14. The Prosecution is truly appreciative of the efforts of the Single Judge and the enormous amount of work undertaken to resolve the many issues raised in connection with the Court's first-ever Confirmation Hearing. Nonetheless, under the

²⁹ The Prosecution and the Defence have submitted, extensively, their views on this matter.

³⁰ The Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding The Case, public, 30 August 2006.

³¹ Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings, public, 7 September 2006.

³² The Prosecution has noted the 19 September 2006 Defence Submission. The Prosecution will file its submission within the next few days.

Statute and the Rules, there are legal limits which cannot be exceeded by the Parties or the Court. It is undoubted that the Parties and the Pre-Trial Chamber share the objective of a Confirmation Hearing which adequately balances expeditiousness and fairness.

Determination pursuant to Rule 122(1)

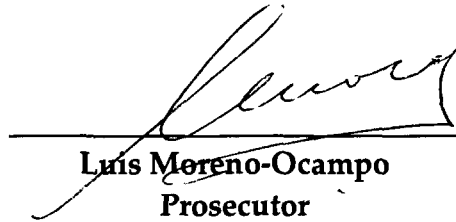
15. The Prosecution is awaiting, in order to be able to meaningfully prepare for the Confirmation Hearing and to avoid any surprises, the guidance of the Presiding Judge pursuant to Rule 122(1), namely *"how the hearing is to be conducted, and, in particular, on the order and the conditions under which he intends the evidence contained in the record of the proceedings to be presented."* In the absence of a determination by the Presiding Judge, the Prosecution is preparing for a certain manner in which to present its evidence in support of the charges to establish substantial grounds to believe that Thomas LUBANGA DYILO committed the crimes charged.

Request

16. The Prosecution requests, on an urgent basis,

- (i) the Single Judge to re-schedule the status conference that was previously scheduled for 19 September 2006 by Friday, 22 September 2006 at the latest; and
- (ii) the Presiding Judge to provide information to the Parties pursuant to Rule 122(1) on how the Confirmation Hearing is to be conducted and, in

particular, the order and the conditions under which he intends the evidence contained in the record of the proceedings to be presented.



Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of September 2006
At The Hague, The Netherlands