

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/06

Date: 4 October 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
v. THOMAS LUBANGA DYILO**

Public Redacted Version

Decision concerning the Prosecution Proposed Summary Evidence

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

**The Legal Representatives of the
Victims**

Mr Luc Walley

Mr Franck Mulenda

Counsel for the Defence

Mr Jean Flamme

Ms Veronique Pandanzyla

**The Office of Public Counsel for the
Defence**

Ms Melinda Taylor

I, Judge Sylvia Steiner, judge at the International Criminal Court ("the Court");

NOTING the "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ("the Decision"),¹ issued by the single judge on 15 September 2006;

NOTING the "Decision on Second Defence Motion for Leave to Appeal",² issued by the single judge on 28 September 2006;

NOTING the "Provision of Summary Evidence to the Pre-Trial Chamber" ("the First Prosecution Application"),³ filed by the Prosecution on 26 September 2006, in which the Prosecution requests the authorisation of the Chamber to rely on the proposed summary evidence of a number of witness statements as well as transcripts and investigators' notes and reports of witness interviews at the confirmation hearing;

NOTING the "Provision of Summary Evidence to the Pre-Trial Chamber" ("the Second Prosecution Application"),⁴ filed by the Prosecution on 29 September 2006, in which the Prosecution requests the authorisation of the Chamber to rely on the proposed summary evidence of a number of additional statements as well as transcripts and investigators' notes and reports of witness interviews at the confirmation hearing;

NOTING the "Decision convening an *ex parte* hearing for 3 October 2006",⁵ issued by the single judge on 29 September 2006, which (i) convenes an *ex parte* hearing with the Prosecution and representatives of the Victims and Witnesses Unit to deal with the Prosecution First Application and the Prosecution Second Application; and (ii) advances an agenda for the hearing;

¹ ICC-01/04-01/06-437.

² ICC-01/04-01/06-489.

³ ICC-01/04-01/06-479.

⁴ ICC-01/04-01/06-491.

⁵ ICC-01/04-01/06-495.

NOTING the submissions of the Prosecution and the observations of the representatives of the Victims and Witnesses Unit at the 3 October 2006 *ex parte* hearing;

NOTING the "Amended Provision of Summary Evidence to the Pre-Trial Chamber" ("the Third Prosecution Application"),⁶ filed by the Prosecution on 4 October 2006;

NOTING articles 57 (3) (c), 61 (3) (b) and (5), 67 (2) and 68 (1) and (5) of the Rome Statute ("the Statute") and rules 76 to 83 of the Rules of Procedure and Evidence ("the Rules");

CONSIDERING that in the Decision the single judge has already affirmed (i) that non-disclosure of identity *vis-à-vis* the Defence is the only available and feasible measure for the necessary protection of the Prosecution witnesses referred to in the First Prosecution Application, the Second Prosecution Application and the Third Prosecution Application;⁷ and (ii) that disclosure to the Defence of redacted versions of their statements, transcripts of their interviews and investigators' notes and reports of their interviews "would amount to defeating the purpose of such redactions, that is to preserve the non-disclosure of the identity of the relevant witnesses";⁸

CONSIDERING that it is only against this backdrop and given the exceptional circumstances faced in the present case as a result of the recent deterioration of the security situation in certain parts of the Democratic Republic of the Congo and the impact of such a deterioration on the range of available and feasible protective measures that the single judge has decided in the present decision to authorise the

⁶ ICC-01/04-01/06-513.

⁷ Decision, p. 7.

⁸ Decision, p. 8.

Prosecution to rely, pursuant to articles 61 (5) and 68 (5) of the Statute, on some of the summary evidence proposed by the Prosecution in the Third Prosecution Application at the confirmation hearing;

CONSIDERING that in the Prosecution Third Application, the Prosecution requests that a number of documents be redacted or non-disclosed to the Defence in conjunction with the summary evidence authorised in the present decision, and without prejudice to the fact that some of these documents have been previously disclosed to the Defence as separate documents with the redactions previously authorised by the single judge; that the single judge considers that in most instances the Prosecution request is justified because the joint disclosure of the said documents with the summary evidence authorised in the present decision will lead to the identification of the relevant Prosecution witnesses; and that accordingly the redactions or non-disclosure authorised in the present decision are without prejudice to the redactions authorised in previous decisions issued by the single judge for the purpose of disclosing the relevant documents as separate documents;

CONSIDERING that, in relation to the summary evidence on which the Prosecution is authorised to rely at the confirmation hearing in the present decision, the Prosecution cannot at the confirmation hearing rely on any information which does not appear in the summary evidence, such as the identity, position and other identifying features of the relevant Prosecution witnesses; that, moreover, summary evidence – as opposed to redacted versions of witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews – is drafted by the Prosecution; and that these factors shall necessarily have an impact on the probative value of the summary evidence authorised in the present decision;

CONSIDERING further that the single judge has already pointed out that:

- (i) “according to article 69 (4) of the Statute, the Chamber may rule on the admissibility of the evidence on which the parties intend to rely at the confirmation hearing taking into account other factors in addition to relevance, probative value and prejudice to a fair trial or to a fair evaluation of the testimony of a witness; and that, in the view of the Chamber, in a scenario like the one described above, and considering the limited scope of the confirmation hearing, adequate protection of the witnesses on whom the parties intend to rely at the confirmation hearing is one of those additional factors;”⁹
- (ii) “that by the referring to “adequate protection of witnesses” in the context of article 69 (4) of the Statute, the single judge meant that, in light of the limited scope of the confirmation hearing and the exceptional circumstances in the present case, evidence, which might otherwise be admissible, can be not admitted for the purpose of the confirmation hearing if adequate protection of the relevant witnesses so requires;”¹⁰

CONSIDERING that the Prosecution acknowledges that some of the summary evidence proposed by the Prosecution in the Third Prosecution Application will lead to the identification of four Prosecution witnesses; and that therefore it is the view of the single judge that authorising the use of summary evidence in relation to their statements and to the transcripts and investigators’ notes and reports of their interviews would amount to defeating the purpose of using such summary evidence, that is to say to preserve the non-disclosure of their identity;

CONSIDERING that, as provided for in the Decision, the Prosecution has not assured the Chamber that the said four Prosecution witnesses have freely consented to the immediate disclosure of their identities to the Defence after having been adequately informed of the risks to their security inherent to such disclosure;

CONSIDERING therefore that, according to article 69 (4) of the Statute, the single judge must balance (i) the probative value that the Chamber could give to the

⁹ Decision, p. 8.

¹⁰ Decision on the Second Defence Motion for Leave to Appeal, p. 8.

summary evidence proposed by the Prosecution of these four witnesses, against (ii) the grave risks to their security that according to the Prosecution itself, and as the single judge has already found, are inherent to the disclosure of their identity to the Defence given the exceptional circumstances in the present case;

CONSIDERING further that in balancing the two above-mentioned factors the single judge is mindful of the role of the confirmation hearing within the framework of the criminal procedure provided for in the Statute and the Rules, and in particular of the limited scope of the confirmation hearing;

CONSIDERING that, in the view of the single judge, under the exceptional circumstances faced in the present case, and in light of the impact of the factors referred to above on the probative value of the summary evidence authorised in the present decision, the adequate protection of the four Prosecution witnesses must prevail; and that therefore in application of article 69 (4) of the Statute, the single judge considers (i) that, regardless of the format (unredacted versions, redacted versions or summary evidence), their statements, transcripts of their interviews and investigator's reports and notes of their interviews must be declared inadmissible for the purpose of the confirmation hearing; and (ii) that consequently the Prosecution cannot rely on them at the confirmation hearing;

CONSIDERING further that those documents which in the Third Prosecution Application are annexed to the proposed summary evidence which is declared inadmissible in the present decision must also be declared inadmissible if the Prosecution intends to rely on them at the confirmation hearing only in relation to such proposed summary evidence;

CONSIDERING, however, that, pursuant to article 67 (2) of the Statute and Rule 77 of the Rules, the Prosecution must as soon as practicable disclose to the Defence as filed in the Third Prosecution Application:

- (i) the part of the proposed summary evidence declared inadmissible in the present decision which could contain information of a potentially exculpatory nature or otherwise could be material for the Defence's preparation for the confirmation hearing; and
- (ii) those documents declared inadmissible in the present decision which could contain information of a potentially exculpatory nature or otherwise could be material for the Defence's preparation for the confirmation hearing;

FOR THESE REASONS

AUTHORISE the use by the Prosecution of the summary evidence contained the following annexes to the Third Prosecution Application:

- (i) Annex 1 (relating to Witness REDACTED);
- (ii) Annex 2 (relating to Witness REDACTED);
- (iii) Annex 3 (relating to Witness REDACTED);
- (iv) Annex 4 (relating to the statement of Witness REDACTED);
- (v) Annex 5 (relating to Witness REDACTED);
- (vi) Annex 6 (relating to Witness REDACTED);
- (vii) Annex 7 (relating to Witness REDACTED);

- (viii) Annex 8 (relating to Witness REDACTED);
- (ix) Annex 9 (relating to Witness REDACTED);
- (x) Annex 12 (relating to Witness REDACTED);
- (xi) Annex 13 (relating to Witness REDACTED);
- (xii) Annex 14 (relating to the transcript of the interview of Witness REDACTED);
- (xiii) Annex 15 (relating to Witness REDACTED);
- (xiv) Annex 18 (relating to Witness REDACTED);
- (xv) Annex 19 (relating to Witness REDACTED);
- (xvi) Annex 20 (relating to Witness REDACTED);
- (xvii) Annex 21 (relating to Witness REDACTED);

AUTHORISE, save the exceptions set out below, the redactions or the non-disclosure of the documents contained in annexes 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 18, 19, 20 and 21 to the Third Prosecution Application as proposed by the Prosecution in the Third Prosecution Application; and **DECIDE** that this authorisation is given for the sole purpose of disclosing the said documents in conjunction with the summary evidence authorised in the present decision, and without prejudice to the fact that some of these documents have been previously disclosed to the Defence as separate documents with the redactions previously authorised by the single judge;

ORDER the Prosecution REDACTED

DECIDE to declare inadmissible for the purpose of the confirmation hearing the statements and the transcripts and investigator's notes and reports of the interviews of REDACTED regardless of their format (unredacted versions, redacted versions or summary evidence);

DECIDE that any of the documents contained in annexes 10 (relating to Witness REDACTED), 11 (relating to Witness REDACTED), 16 (relating to Witness REDACTED) and 17 (relating to Witness REDACTED) to the Third Prosecution Application shall be declared inadmissible if the Prosecution intends to rely on the said documents at the confirmation hearing in relation only to the statements and the transcripts and investigator's notes and reports of the interviews of REDACTED;

DECIDE that in relation to the remaining documents contained in annexes 10 (relating to witness REDACTED), 11 (relating to witness REDACTED), 16 (relating to witness REDACTED) and 17 (relating to witness REDACTED) to the Third Prosecution Application:

:

- (i) the redactions or non-disclosure of such documents proposed by the Prosecution in the Third Prosecution Application shall be authorised if the said documents have not been previously disclosed to the Defence as separate documents with the redactions previously authorised by the single judge;
- (ii) the redactions or non-disclosure of such documents proposed by the Prosecution in the Third Prosecution Application shall not be authorised if the said documents have been previously disclosed to the

Defence as separate documents with the redactions previously authorised by the single judge;

DECIDE that, in order to avoid the identification of the relevant Prosecution witnesses, the following documents, which in the view of the single judge do not seem to contain any material of potentially exculpatory nature or which could otherwise be material for the Defence's preparation for the confirmation hearing, shall not be disclosed to the Defence:

- (i) REDACTED (contained in Annex 15 to the Third Prosecution Application);
- (ii) REDACTED (contained in Annex 17 to the Third Prosecution Application);
- (iii) REDACTED (contained in Annex 20 to the Third Prosecution Application);

ORDER the Prosecution:

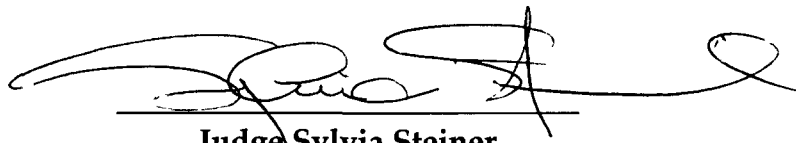
- (i) immediately to disclose to the Defence: (a) the summary evidence and redacted documents authorised in the present decision; and
- (ii) to comply with the Final Decision on the E-Court Protocol¹¹ by 9 October 2006 at 16h00;

¹¹ "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", issued by the single judge on 28 August 2006, ICC-01/04-01/06-360.

ORDER the Prosecution to disclose to the Defence as soon as practicable as filed in the Third Prosecution Application:

- (i) the part of the proposed summary evidence declared inadmissible in the present decision which could contain information of a potentially exculpatory nature or otherwise could be material for the Defence's preparation for the confirmation hearing; and
- (ii) those documents declared inadmissible in the present decision which could contain information of a potentially exculpatory nature or otherwise could be material for the Defence's preparation for the confirmation hearing;

Done in English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Done this Wednesday 4 October 2006

At The Hague

The Netherlands