

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 25 October 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 Document with Confidential Annexes

**Prosecution's Information pursuant to the 28 September 2006 Decision on the
Prosecution Information in respect of the Second Decision on Rule 81 Motions**

The Office of the Prosecutor

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Background

1. On 20 September 2006, the then Single Judge of the Pre-Trial Chamber ("Single Judge") issued the "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81".¹
2. On 25 September 2006, the Prosecution filed a document entitled "Prosecution's Information in respect of the Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ("the Prosecution Request"), in which the Prosecution submitted two documents which were previously disclosed to the Defence pursuant to Article 67(2) of the Rome Statute ("Statute") with certain redactions requested by the information provider of the documents under Article 54(3)(e).²
3. At the Status Conference on 26 September 2006, the Prosecution stated that, in addition to the documents attached to the Prosecution Request, it has, pursuant to Article 67(2), disclosed further documents with certain redactions requested by the information providers under Article 54(3)(e). The Prosecution also stated that it had not yet obtained the consent of the information providers to disclose to the Defence some Article 54(3)(e) documents which the Prosecution had identified as falling under Article 67(2) or Rule 77 of the Rules ("Rules").

¹ ICC-01/04-01/06-455.

² ICC-01/04-01/06-477-Conf-Exp.

4. On 28 September 2006, the then Single Judge issued the “Decision on the Prosecution Information in respect of the Second Decision on Rule 81 Motions”³ (“28 September 2006 Decision”), ordering the following:

- (i) *The Prosecution is ordered to do its utmost prior to the confirmation hearing to: a. obtain the consent of the providers to disclose to the Defence in an unredacted form those article 54(3)(e) documents already identified by the Prosecution as falling within the scope of article 67(2) of the Statute or rule 77 of the Rules (“Single Judge’s Order (i)(a)”); b. obtain the agreement of the providers on the transmission to the Defence of the unredacted versions of those documents already disclosed to the Defence in a redacted form at the request of the providers and without the prior authorisation of the Chamber (“Single Judge’s Order (i)(b)”);*
- (ii) *The Prosecution is ordered to file no later than 15 days before the confirmation hearing: a. detailed report indicating all article 54(3)(e) documents disclosed in an unredacted and/or redacted form to the Defence under article 67(2) of the Statute or rule 77 of the Rules (“Single Judge’s Order (ii)(a)”; b. detailed report indicating how many article 54(3)(e) documents have not been disclosed to the Defence because the Prosecution has been unable to secure the consent of the providers despite having been identified by the Prosecution as falling under article 67(2) of the Statute or rule 77 of the Rules (“Single Judge’s Order (ii)(b)”);*
- (iii) *The Prosecution is ordered to file no later than 15 days before the confirmation hearing in the same format in which they have been disclosed to the Defence all*

³ ICC-01/04-01/06-490.

article 54(3)(e) documents which meet the following two conditions ("Single Judge's Order (iii)"): a. the documents have been disclosed to the Defence pursuant to article 67(2) of the Statute or rule 77 of the Rules; and b. such disclosure has taken place in a redacted form at the request of the providers and without the prior authorisation of the Chamber.

5. On 5 October 2006, the Pre-Trial Chamber issued the "Décision sur la date de l'audience de confirmation des charges"⁴ ("5 October 2006 Decision") and ordered the Prosecution to submit the information and the documents as requested in the 28 September 2006 Decision by 25 October 2006 at the latest.⁵

Discussion

Obtaining the consent of the information providers to disclose in an un-redacted form those Article 54(3)(e) documents already identified by the Prosecution as falling within Article 67(2) or Rule 77 (Single Judge's Order (i)(a))

6. The Prosecution has recently identified twenty-nine documents that were provided pursuant to Article 54(3)(e) that fall under the scope of Article 67(2) or Rule 77. The Prosecution is currently finalising the internal process to transmit requests to lift the confidentiality restriction to the respective information providers. The Prosecution anticipates transmitting the respective requests in the course of the week of 30 October 2006.

⁴ ICC-01/04-01/06-521.

⁵ See 5 October 2006 Decision, at page 5.

Obtaining the agreement of the information providers to transmit un-redacted versions of the documents already disclosed under Article 67(2) or Rule 77 in a redacted form at the request of the providers (Single Judge's Order (i)(b))

7. In line with the Single Judge's Order (i)(b), the Prosecution has analysed the redacted portions within seven documents that comprise the whole set of documents disclosed under Article 67(2) or Rule 77 in a redacted form as of 25 October 2006. The purpose of this review was to assess the potential probative value of the redacted portions from the Defence's viewpoint.⁶
8. After review of the seven documents, the Prosecution has identified one document in respect of which the redacted portion is considered to be at least "material to the preparation of the defence" in terms of Rule 77. On 25 October 2006, the Prosecution sent a letter to the information provider asking it to reconsider the need for the redaction on an urgent basis and to consent to disclose an un-redacted version of the document to the Defence. Simultaneously, the Prosecution is trying to identify alternative evidence that provides for the same information.
9. In respect of the redactions made to the other six documents, the Prosecution is of the view that the redactions, which conceal identifying information, are of a nature that makes it very unlikely that the information providers will consent to reverse their position. Thus, the Prosecution refrained from re-contacting the information providers.

⁶ The Prosecution reiterates that to date the Defence has not provided any information on what it considers being of potentially exculpatory nature or what it considers falling within the parameters of "material to the preparation of the defence" pursuant to Rule 77.

Report on all Article 54(3)(e) documents disclosed under Article 67(2) or Rule 77 (Single Judge's Order (ii)(a))

10. The Prosecution hereby reports that, as of 25 October 2006, it has disclosed under Article 67(2) fourteen Article 54(3)(e) documents after having obtained the lifting of confidentiality restrictions from the respective information providers.⁷ Three documents out of those fourteen documents contain redactions as requested by the respective information providers.

11. In relation to Article 54(3)(e) documents identified by the Prosecution as falling under Rule 77, the Prosecution has disclosed sixteen documents as of 25 October 2006 after having obtained the lifting of confidentiality restrictions from the respective information providers.⁸ Four documents out of those sixteen documents contain redactions as requested by the respective information provider.

Report on the number of Article 54(3)(e) documents that have not been disclosed despite having been identified by the Prosecution as falling under Article 67(2) or Rule 77 (Single Judge's Order (ii)(b))

12. As of 25 October 2006, the Prosecution has identified thirty-three Article 54(3)(e) documents that have not been disclosed to the Defence as the Prosecution has unable to secure the consent of the information providers despite having been

⁷ For more details, see Confidential Annex 1. -- In addition, the Prosecution notes the item of potentially exculpatory nature disclosed to the Defence on 10 August 2006 after securing the consent of the information provider to lift the confidentiality restriction, as detailed in the "Prosecution's Communication in respect of Potentially Exculpatory Evidence", dated 11 August 2006.

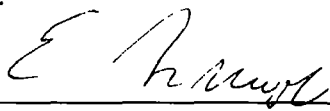
⁸ For more details, see Confidential Annex 2.

classified as falling under Article 67(2) or Rule 77. More specifically, the Prosecution has identified:

- (i) two Article 54(3)(e) documents in respect of which the information provider has refused to lift the confidentiality restrictions;
- (ii) two Article 54(3)(e) documents in respect of which the information provider has not yet responded to the Prosecution's requests to lift the confidentiality restrictions;
- (iii) twenty-nine Article 54(3)(e) documents in respect of which the Prosecution has not yet transmitted requests to lift the confidentiality restrictions to the respective information providers.⁹

Filing of all Article 54(3)(e) documents disclosed pursuant to Article 67(2) or Rule 77 with redactions at the request of the information providers (Single Judge's Order (iii))

13. In compliance with the Single Judge's Order (iii), the Prosecution herewith files a CD that includes all Article 54(3)(e) documents disclosed pursuant to Article 67(2) or Rule 77 in a redacted form as requested by the information providers. The documents included in the CD are in the same format in which they have been disclosed to the Defence.


 Luis Moreno-Ocampo
 Prosecutor

Dated this 25th day of October 2006
 At The Hague, The Netherlands

⁹ The Prosecution draws the attention of the Single Judge and the Defence to the fact that these twenty-nine documents are the documents as referred to in paragraph 6.