

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 2 November 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 Version

Decision on the Defence Request for Order to Disclose Exculpatory Materials

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

Legal representatives of victims

a/0001/06 to a/0003/06

Mr Luc Walley

Mr Franck Mulenda

Legal Representatives of victims

a/0105/06

Ms Carine Bapita Buyangandu

Counsel for the Defense

Mr Jean Flamme

Ms Véronique Pandanzyla

**Office of Public Counsel for the
Defence**

Ms Melinda Taylor

I, Judge Claude Jorda, judge at the International Criminal Court (“the Court”);

NOTING the “Request for Order to Disclose Exculpatory Materials” (“the Defence Request”),¹ filed by the Defence on 1 November 2006, in which the Defence requested the Chamber to order the Prosecution to immediately transmit to the Defence:

- (i) Information regarding criminal record and the suspect status of any of the witnesses whose statements or summaries would be relied upon by the Prosecution at the confirmation hearing (“the First Defence Request”);
- (ii) Information regarding a regional expert of the Democratic Republic of the Congo who has worked at the Office of the Prosecutor (“the Second Defence Request”);
- (iii) The list of any reports of Non-Governmental Organisation (“NGO”) which cite Prosecution witnesses by name or anonymously, and the statements that such witnesses have allegedly given to the such NGOs (“the Third Defence Request”);
- (iv) The list of all items seized from the headquarters of the UPC during a search and seizure operation that was subsequently declared unlawful by the Court of Appeal of Kisangani (“the Fourth Defence Request”);
- (v) The statements given to the Prosecution by REDACTED (“the Fifth Defence Request”);

¹ ICC-01/04-01/06-633-Conf

NOTING the hearing held in closed session on 2 November 2006 with the Prosecution, the Defence and the representatives of the Victims and Witnesses Unit ("the 2 November 2006 hearing");

NOTING articles 61 and 67 of the Rome Statute ("the Statute") and rules 76 to 83 and 121 of the Rules of Procedure and Evidence ("the Rules");

CONSIDERING that, as conceded by the Prosecution at the 2 November 2006 hearing, the information referred to in the First Defence Request may affect to the credibility of those witnesses on whom the Prosecution intends to rely at the confirmation hearing; and that, therefore, such information falls within the scope of article 67 (2) of the Statute;

CONSIDERING, however, that revealing all details of their criminal record may lead to the identification of those witnesses for which the Chamber has authorised, pursuant to rule 81 (4) of the Rules, the non-disclosure of their identity to the Defence; and that, therefore, in relation to such witnesses the Defence must be provided with a summary of their criminal record which shall (i) contain the main elements of their criminal record so as to allow the Defence to challenge the credibility of their statements; (ii) exclude those details that could lead to the identification of the relevant witnesses;

CONSIDERING that the Second Defence Request has been satisfied by the information provided by the Prosecution at the 2 November 2006 hearing.

CONSIDERING that in the view of the Chamber the information given by the witnesses on whom the Prosecution intends to rely at the confirmation hearing to

certain NGOs does not amount to a “prior statement” in the sense of rule 76 (1) of the Rules of Procedure and Evidence;

CONSIDERING, nevertheless, that in the view of the Chamber, the Prosecution must give access to the Defence, pursuant to rule 77 of the Rules, to those NGO reports within the possession or control of the Prosecution which refer by name as one of the sources of the said reports to any of the witnesses (i) on whom the Prosecution intends to rely at the confirmation hearing; and (ii) whose identity has been revealed to the Defence;

CONSIDERING that the list of items referred to in the Defence Fourth Request falls within the scope of rule 77 of the Rules; and that, in particular, the Prosecution must highlight which items included in such a list have also been included in the Prosecution Amended List of Evidence as filed on 20 October 2006;

CONSIDERING that Counsel for the Defence did not know prior to the 2 November 2006 hearing that (i) the Prosecution had included the statements of REDACTED in the Prosecution List of Evidence filed on 28 August 2006 and (ii) the Chamber, pursuant to article 69 (4) of the Statute, had not admitted such statements for the purpose of the confirmation hearing in order to protect their safety; that REDACTED;

CONSIDERING that, in light of this new set of circumstances, the Chamber considers that the statements taken by the Prosecution from REDACTED must be disclosed to the Defence under rule 77 of the Rules with the redactions that the Chamber might authorise under rule 81 of the Rules;

FOR THESE REASONS**ORDER the Prosecution to:**

- Inform the Chamber and the Defence by Friday 3 November 2006 at 15h00 who are the witnesses on whom the Prosecution intends to rely at the confirmation hearing and who were interviewed by the Prosecution with "suspect status" pursuant to article 55 (2) of the Statute - if the Chamber has authorised that the identity of the relevant witness(es) not be disclosed to the Defence, the Prosecution should refer to the code number used for such witnesses when providing the information required by the Final Decision on the E-Court Protocol;
- Provide the Chamber and the Defence by Friday 3 November 2006 at 15h00 with the information within the possession of the Prosecution concerning the criminal record of the those witnesses on whom the Prosecution intends to rely at the confirmation hearing and whose identity has been disclosed to the Defence;
- Provide the Chamber by Monday 6 November 2006 at 9h30 with:

- the information within the possession of the Prosecution concerning the criminal record of those witnesses on whom the Prosecution intends to rely at the confirmation hearing and in relation to whom the Chamber has authorised that their identity not be disclosed to the Defence; and
- a summary of the said information which must contain the main elements of the relevant witness' criminal record and must exclude any detail that could lead to its identification by the Defence;

ORDER the Prosecution to provide to the Defence by Monday 6 November 2006 at 9h30 with:

- (i) a list of all items seized REDACTED during the search and seizure operation which (a) took place at the headquarters of the UPC in Bunia in or around August/September 2005 REDACTED; and (b) has been subsequently declared unlawful by the Court of Appeals of Kisangani REDACTED; and
- (ii) a list of those items seized in the above-mentioned search and seizure operation who have been included in the Prosecution Amended List of Evidence as filed on 20 October 2006.

ORDER the Prosecution to:

- (i) provide to the Defence by Friday 3 November 2006 at 15h00 with a list of all NGO reports within the possession and or control of the Prosecution which refer by name as one of the sources of the said reports to any of the witnesses (i) on whom the Prosecution intends to rely at the confirmation hearing; and (ii) whose identity has been revealed to the Defence; and

- (ii) provide to the Defence by Friday 3 November 2006 at 15h00 with a copy of any such report which has not been provided to Defence pursuant to the Prosecution's disclosure obligations under the Statute and the Rules.

ORDER the Prosecution to provide the Chamber by Friday 3 November 2006 with (i) the statements of REDACTED and (ii) the redactions proposed by the Prosecution pursuant to rule 81 of the Rules for reasons other than the protection of the identity of the said witnesses *vis-à-vis* the Defence.

DECLARE that, in light of the information provided by the Prosecution at the 2 November 2006 hearing, the Second Defence Request has become moot.

REJECT any other request included in the Defence Request.

INFORM the Defence that, as soon as the Chamber decides whether to authorise the redactions proposed by the Prosecution to the statements of REDACTED and the summaries of the criminal record of the witnesses on whom the Prosecution intends to rely at the confirmation hearing and whose identity has not been revealed to the Defence, the Defence shall immediately receive the said materials.

DECIDE that the Defence shall have until Tuesday 7 November 2006 at 16h00 to add to the list of evidence of the Defence any material received by the Defence pursuant to the present decision.

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



Judge Claude Jorda
Single Judge

Done this Thursday, 2 November 2006

At The Hague

The Netherlands