

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 7 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
*v. THOMAS LUBANGA DYILO***

**Public Document
Decision on the schedule and conduct of the confirmation hearing**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensoouda
Mr Ekkehard Withopf

**Legal Representatives of Victims
a/0001/06 to a/0003/06 and a/105/06**

Mr Luc Walley
Mr Franck Mulenda
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**The Office of Public Counsel for
Victims**

Ms Paolina Massida

Counsel for the Defense

Mr Jean Flamme
Ms Véronique Pandanzyla

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

Ms Melinda Taylor

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

NOTING the decision scheduling the confirmation hearing for 9 November 2006, rendered by the Chamber on 5 October 2006;¹

NOTING the decision on Modalities of participation of victims in the confirmation hearing, rendered by the Chamber on 22 September 2006 ("the Decision of 22 September 2006");²

NOTING the status conferences held by the Chamber on 26 October³ and on 3 November 2006;⁴

NOTING the Additional List of Evidence filed by the Prosecution on 20 October 2006 ("the Prosecution Additional List of Evidence");⁵

NOTING the List of Evidence filed by the Defence on 2 November 2006 ("the Defence List of Evidence");⁶

NOTING the Submission of list of additional items to be added to the Defence list of evidence ("the Defence Additional List of Evidence"), filed by the Defence on 7 November 2006;⁷

¹ ICC-01/04-01/06-521.

² ICC-01/04-01/06-462.

³ ICC-01/04-01/06-T-26-EN.

ICC-01/04-01-06-T-27-CONF-EN.

⁴ ICC-01/04-01/06-T-29-EN

⁵ ICC-01/04-01-06-T-27-CONF-EN

⁶ ICC-01/04-01/06-595-Conf-Exp.

⁷ ICC-01/04-01/06-673.

NOTING articles 61, 67, 68 and 69 of the Rome Statute of the International Criminal Court ("the Statute") and rules 63, 87, 121, 122(1) and 140 of the Rules of Procedure and Evidence ("the Rules") and regulation 20 of the Regulations of the Court ("the Regulations");

CONSIDERING that at the status conferences of 26 October 2006 and 3 November 2006, the participants had the opportunity to present their views on how the hearing should be conducted;

CONSIDERING that at the status conference of 26 October 2006, the Prosecution requested to be informed whether the Presiding judge intended to put questions to the witness before the witness is examined by the Prosecution pursuant to rule 140(2) of the Rules⁸ and whether the Prosecution would be entitled to re-examine the witness after the defence has completed its examination of the said witness;⁹

CONSIDERING that, pursuant to rule 122(1) of the Rules, "the presiding judge shall determine how the hearing is to be conducted (...)";

CONSIDERING that this rule confers broad discretion on the Presiding judge to determine how a confirmation hearing is to be conducted, including *inter alia*, how a witness shall be examined;

CONSIDERING, further, that rule 140(2) of the Rules falls under Chapter 6 entitled "Trial procedure", but that the Single judge is of the view that this rule also applies *mutatis mutandis* to pre-trial proceedings;

⁸ Transcript, p. 11.

⁹ Transcript, p. 11.

CONSIDERING, therefore, that the Chamber may put questions to a witness before, during or after his or her examination by the Prosecution and the Defence and that, as a result, a re-examination is unwarranted at a confirmation hearing;

CONSIDERING that the Defence has requested to have the opportunity to make written submissions after the confirmation hearing; and that the Chamber considers that the Prosecution, the Defence and the Legal Representatives of the Victims should have the opportunity to present in writing their final submissions on those matters discussed by them during the confirmation hearing;

CONSIDERING, further, that, pursuant to rule 121(9) of the Rules, "the Prosecution and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1, no later than three days before the date of the hearing";

CONSIDERING that, pursuant to the Decision of 22 September 2006, the Legal Representatives of the Victims may make opening and closing statements at the confirmation hearing, in which they may not enlarge upon the evidence or facts in the case of *The Prosecutor v. Thomas Lubanga Dyilo*;

CONSIDERING, therefore, that the Legal Representatives of the Victims may address any points of law, including the legal characterisation of the modes of liability with which the Prosecution has charged Thomas Lubanga Dyilo under article 25 of the Statute;

CONSIDERING that, pursuant to the *chapeau* of article 67(1) of the Statute and regulation 20 of the Regulations of the Court, the confirmation hearing shall, as a general principle, be held in public;

CONSIDERING, however, that, in order to provide for the adequate protection of certain witnesses under article 68(1) of the Statute, the confirmation hearing may be conducted partly in closed session;

CONSIDERING that, pursuant to article 69(4) of the Statute, the Chamber “may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”; and that, pursuant to rules 63(1) and (2) of the Rules, a Chamber of the Court shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69 of the Statute;

CONSIDERING that any evidence referred to in the Prosecution List of Evidence filed on 20 October 2006 and in the Defence List of Evidence filed on 2 November 2006 and in the Defence Additional List of Evidence filed on 7 November 2006 shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by the Prosecution or the Defence, as the case may be;

CONSIDERING, further, that the Chamber may rely on any evidence admitted for the purpose of the confirmation hearing whether or not the party proposing such evidence presents it at the confirmation hearing as long as the other party had the opportunity to respond to it at the hearing;

CONSIDERING that, in the view of the Chamber, the Defence request to be provided with the list of questions that the Prosecution intends to put to the witness at the confirmation hearing prior to the testimony of the said witness has no basis in law in light of article 21 of the Statute;

CONSIDERING that, regarding the only witness who will be called by the Prosecution at the confirmation hearing and on whose evidence the Prosecution intends to rely, the Defence must have time to prepare for the examination of the witness after the witness is examined by the Prosecution;

CONSIDERING that at a hearing held by the Chamber on 3 November 2006, the Registrar stated that exceptionally, for the duration of the confirmation hearing in this case, the Defence Team will be authorised to have access to Thomas Lubanga Dyilo after each session for 30 to 45 minutes, if the session concludes before 16:00 and/or every evening from 18:00 to 19:45 at the Detention Centre, as well as on Saturdays between 09:00 and 16:45 at the Detention Centre;¹⁰ and that the Defence stated that the solution proposed by the Registry covers the Defence needs in relation to the preparation of the confirmation hearing

CONSIDERING that neither the Prosecution nor the Defence raised any objection to the fact that under rule 87(3)(d) of the Rules, pseudonyms may be used for all witnesses appearing or referred to in public session at the confirmation hearing¹¹,

¹⁰ ICC-01/04-01/06-T-29-EN, page 31.

¹¹ ICC-01/04-01/06-T-29-EN, page 43.

with the exception of the Prosecution's witness who will testify before the Court; and that the Victims and Witnesses Unit supported the adoption of this measure;¹²

FOR THESE REASONS

DECIDE that the Prosecution, the Legal Representatives of the Victims and the Defence shall follow the schedule of the confirmation hearing set forth in Annex I to this decision;

DECIDE that the Prosecution, the Legal Representatives of the Victims and the Defence shall be entitled to file a document in which they may address any matters that they discussed at the confirmation hearing, subject to the deadline set in Annex I to this decision;

DECIDE that the Chamber may put questions to a witness before, during or after the witness is examined by the Defence or the Prosecutor, as the case may be;

DECIDE that the Legal Representatives of the Victims may, in their opening and closing statements, *inter alia*, address points of law, including the legal characterisation of the modes of liability with which the Prosecution has charged Thomas Lubanga Dyilo under article 25 of the Statute;

DECIDE that the confirmation hearing shall be held in public session unless otherwise ordered by the Chamber or specified in Annex I to this decision;

¹² TO BE COMPLETED WITH FOOTNOTE FROM TRANSCRIPT.

DECIDE that for the purpose of the discussion of the evidence in public session: during the confirmation hearing:

- (i) all witnesses on which the Prosecution or the Defence intend to rely at the confirmation hearing and who are not going to testify before the Chamber shall be given a pseudonym;
- (ii) the pseudonyms given to those witnesses for which non-disclosure of identity *vis-à-vis* the Defence has been granted shall be the code number used by the Prosecution in compliance with the Final Decision on the E-Court Protocol;
- (iii) the Registry shall immediately assign pseudonyms to those other witnesses who are not going to testify at the confirmation hearing and whose identity has already been revealed to the Defence;

ORDER the Prosecution and the Defence to group together any points that they intend to address in closed session at the confirmation hearing;

DECIDE that any item included in the Prosecution Additional List of Evidence filed on 20 October 2006 shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing;

DECIDE that in relation to the evidence included in the Prosecution Additional List of Evidence as filed on 20 October 2006:

- a. the Prosecution may, if it so wishes, deal only with part of such evidence at the confirmation hearing;

- b. the Defence may challenge or deal with any item included in the Prosecution List of Additional Evidence; and
- c. the Chamber may rely on any item included in the Prosecution Additional List of Evidence;

DECIDE that any item included in the Defence List of Evidence filed on 2 November 2006 and the Defence Additional List of Evidence filed on 7 November 2006 shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing;

DECIDE that, in relation to the evidence included in the Defence List of Evidence and the Defence Additional List of Evidence ;

- a. the Defence may, if it so wishes, deal only with part of such evidence at the confirmation hearing;
- b. the Prosecution may challenge or deal with any item included in the Defence List of Evidence and the Defence Additional List of Additional Evidence;
- c. the Chamber may rely on any item included in the Defence List of Evidence and Defence Additional List of Evidence;

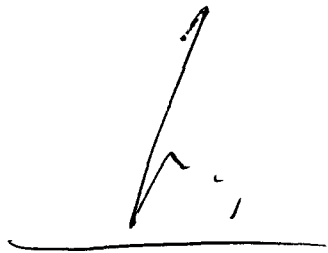
REJECT the Defence request seeking to be provided with a list of the questions that the Prosecution intends to put to the witness prior to the testimony of the said witness;

DECIDE that rule 140(2) of the Rules shall apply *mutatis mutandis* to the testimony of the witness who shall be called to testify at the confirmation hearing;

DECIDE that the confirmation hearing shall be conducted in accordance with the schedule set forth in Annex I to this decision;

INSTRUCT the Registrar that exceptionally, for the duration of the confirmation hearing in this case, the Defence Team will be authorised to have access to Thomas Lubanga Dyilo after each session for 30 to 45 minutes, if the session concludes before 16:00 and/or every evening from 18:00 to 19:45 at the Detention Centre, as well as on Saturdays between 09:00 and 16:45 at the Detention Centre.

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

A handwritten signature in black ink, consisting of a stylized 'J' and 'C' followed by a horizontal line.

Judge Claude Jorda
Presiding Judge

Dated this Tuesday 7 November 2006

At The Hague,

The Netherlands

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**ANNEX I: SCHEDULE OF THE CONFIRMATION HEARING IN THE CASE OF
THE PROSECUTOR V. THOMAS LUBANGA DYILO**

1- Opening of the hearing

- a. Thursday 9 November 2006, Public Session: from 09:30 to 13:00
 - i. After the opening of the hearing by the Presiding judge, the charges shall be read out pursuant to rule 122(1) of the Rules of Evidence and Procedure ("the Rules");
 - ii. The Prosecution shall then have an hour and thirty minutes to make its opening statement. In its opening statement, the Prosecution may, pursuant to rules 122(2) and (3) of the Rules, address any matter related to jurisdiction, admissibility or other procedural issues concerning the proceedings prior to the confirmation hearing;
 - iii. The Legal Representatives of Victims 0001 to 0003 shall then have forty-five minutes to make their opening statements.
- b. Thursday 9 November 2006, Public Session: from 14:30 to 17:30
 - i. The Legal Representative of Victim 0105 shall have forty-five minutes to make his opening statement;
 - ii. The Defence shall then have two hours and fifteen minutes to make its opening statement. In its opening statement, the Defence may, pursuant to rules 122(2) and (3) of the Rules, address any matter related to jurisdiction, admissibility or other procedural issues concerning the proceedings prior to the confirmation hearing.
- c. Friday 10 November 2006. Morning public session. Consideration of any matters related to jurisdiction, admissibility or other procedural issues raised by the Prosecution and/or the Defence in their opening statements.

2- Presentation by the Prosecution of the evidence included in the Prosecution Additional List of Evidence

- d. Friday 10 November 2006 (afternoon) and Monday 13 November 2006, from 9:30 to 16:00, and Tuesday 14 November 2006, from 9:30 to 16:00 (if necessary, a session may be scheduled from 16:30 to 17:30 on Monday 13 and Tuesday 14 November 2006).

At the sessions of 10, 13 and 14 November 2006, the Prosecution may address:

- (i) the evidence relating to the Prosecution contextual general and/or background allegations underpinning the charges against Thomas Lubanga Dyilo, including the existence and character of the armed conflict and background information on Thomas Lubanga Dyilo;
 - (ii) the evidence relating to the UPC;
 - (iii) the evidence relating to the FPLC;
 - (iv) the evidence relating to the alleged enlistment into the FPLC, conscription by the FPLC and active use in hostilities of children under the age of fifteen;
 - (v) the evidence relating to the alleged role of Thomas Lubanga Dyilo, including the modes of liability under which he is charged; and
 - (vi) evidence relating to individual cases.
- e. Wednesday 15 November 2006 and Thursday 16 November 2006, from 9:30 to 16:00. Prosecution examination of one witness in public session. If necessary, a session may be scheduled from 16:30 to 17:30.
- f. The Defence shall have from the close of the session on Thursday 16 November 2006 to the opening of the session on Monday 20 November 2006 to prepare for the examination of the said.

This part of the confirmation hearing shall be held in public session, unless otherwise ordered by the Chamber. Accordingly, to ensure that it is conducted expeditiously, each group of points mentioned above shall be dealt with in public session, followed by a closed session at which any confidential matters shall be addressed. In any event, the evidence relating to the individual cases of the six alleged child soldiers included in the Prosecution Charging Document shall be dealt with in closed session.

3- Presentation by the Defence of the evidence on which it intends to rely at the confirmation hearing and Defence discussion of the evidence included in the Prosecution List of Evidence and Additional List of Evidence

- g. Monday 20 November 2006 and Tuesday 21 November 2006, from 9:30 to 16:00 (if necessary, a session may be scheduled from 16:30 to 17:30). Defence examination in public session of the only witness examined by the Prosecution.

- h. Wednesday 22 November 2006 to Friday 24 November 2006, from 9:30 to 16:00, and Monday 27 November 2006 from 9:30 to 13:00 (if necessary, a session may be scheduled from 16:30 to 17:30 on Wednesday 22, Thursday 23 and Friday 24). The hearing shall be held in public session, unless otherwise ordered by the Chamber.

At the sessions of 22, 23, 24 November 2006 and in the morning of 27 November 2006, the Defence may address:

- (i) the evidence relating to the Prosecution contextual general and/or background allegations underpinning the charges against Thomas Lubanga Dyilo, including the existence and character of the armed conflict and background information on Thomas Lubanga Dyilo;
- (ii) the evidence relating to the UPC;
- (iii) the evidence relating to the FPLC;
- (iv) the evidence relating to the alleged enlistment into the FPLC, conscription by the FPLC and active use in hostilities of children under the age of fifteen;
- (v) the evidence relating to the alleged role of Thomas Lubanga Dyilo, including the modes of liability under which he is charged; and
- (vi) evidence relating to individual cases.

This part of the confirmation hearing shall be held in public session, unless otherwise ordered by the Chamber. Accordingly, to ensure that it is conducted expeditiously, each group of items mentioned above shall be dealt with in public session, followed by a closed session at which any confidential matters shall be addressed. In any event, the evidence relating to the individual cases of the six alleged child soldiers included in the Prosecution Charging Document shall be dealt with in closed session.

4- Prosecution Discussion of the evidence on which the Defence intends to rely at the confirmation hearing

Monday 27 November 2006 from 14:30 to 17:30: Prosecution response to the evidence on which the Defence intends to rely at the confirmation hearing. The Prosecution shall be strictly limited to the evidence on which the Defence intends to rely at the confirmation hearing, and, hence, shall not use this time (i) to reply to the Defence discussion of the evidence included in the Prosecution Additional List of Evidence filed on 20 October 2006, nor (ii) to discuss anew any item included in the Prosecution Additional List of Evidence filed on 20 October 2006.

5- Closing statements

- i. Tuesday 28 November 2006. Public Session, from 09:30 to 13:00

- i. 09:30 to 11:00 Prosecution closing statement;
 - ii. 11:30 to 12:15 Closing statements of the Legal Representatives of Victims 0001 to 0003;
 - iii. 12:15 to 13:00 Closing statement of the Legal Representative of Victim 0105;
 - iv. 14:30 to 16:00 and
16:30 to 17:00 Defence closing statement.
- j. The Prosecution and the Legal Representatives of the Victims shall have until Monday 4 December 2006 at 9:30 to file a document in which they may address in writing any matters that they discussed at the confirmation hearing. The documents filed pursuant to this sub-paragraph shall be transmitted immediately to the Defence.
- k. The Defence shall have until Wednesday 6 December 2006 at 16:00 to file a document in which it may address in writing any matters that it discussed at the confirmation hearing.