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No.: ICC-01/04-01/06

Date: 29 November 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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Document

Defence Motion for Clarification and Request for an Extension of the Page Limit

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Ekkehard Withopf, Senior Trial
Attorney

Legal Representatives of Victims

Mr Luc Walley Mr Franck Mulenda
Me Carine Bapita Buyangandu

Counsel for the Defence

Mr. Jean Flamme
Ms. Véronique Pandanzyla
Mr. Geoff Roberts

1. On 7 November 2006, the Pre-Trial Chamber issued its 'Decision on the Schedule and Conduct of the Confirmation Hearing'.¹ In that Decision the Pre-Trial Chamber held that the '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.'²
2. During their final submissions 28 November 2006, Counsel for the Prosecution stated that 'the Prosecution in its written submissions, as you have mentioned, Mr President, and which will be filed by the Prosecution on 4 December, will make detailed submissions on a number of legal matters that pertain, inter alia, to the principle of legality, the mode of liability, and the form of the document containing the charges'.³
3. At the end of the hearing, the Presiding Judge of the Pre-Trial Chamber stated that the Chamber would 'set the page limit at 40 pages for the Legal Representatives of the Victims for the Defence and for the Prosecution' and 'would ask you to make your written observations in French'⁴.
4. The Defence respectfully requests a clarification of the scope of the briefs to be filed, as the submissions of the Prosecution would be outside the scope of the Pre-Trial Chamber's Decision of 7 November. It further requests clarification whether the language of the briefs is a binding decision on the Defence. Finally, the Defence seeks an extension of the page limit for this brief.

Scope of the brief

5. The Pre-Trial Chamber was very clear in its wording regarding the briefs to be submitted at the end of the confirmation hearing. In stating that the participants file a document in which they may address in writing any matters that they 'discussed' at the confirmation hearing, the Chamber allowed the opportunity to the parties to expand upon issues that they had already raised orally. This was clearly the case in relation to citing legal support for propositions put forward during the hearing, or indeed for listing groups of documents to which certain criticisms may apply.

¹ ICC-01/04-01/06-678 (Hereafter 7 November Decision)

² At pages 4 and 7

³ Livenote Realtime Transcript, page 42, lines 4-10

⁴ Page 149, lines 2-3

6. The Defence made substantial efforts to comply with the terms of the order, and ensured that it presented all factual and legal elements of its case to the Chamber and the parties during the hearing itself.
7. The Defence submits that the role of the brief was never to allow any party to seek to respond to arguments of the opposing party that they themselves had not discussed during the hearing. The Prosecution did not discuss the principle of legality nor the form of the document containing the charges. In relation to the mode of liability, the Prosecution discussed this from a factual perspective, namely citing the documents which allegedly supported the allegations against Mr Lubanga. It did not however discuss the three modes of liability discussed at length by the Defence on 24 November 2006 from a legal perspective.
8. The Prosecution presented its oral submissions on 13, 14 and 15 November. It had the right to make legal submissions on the modes of liability outlined in the charging period, the law pertaining to the form of the charging document, and the principle of legality at this time. It deliberately chose not to do so. The Defence relied upon this in formulating its submissions. The Defence understood from the clear text of the 7 November decision that the Prosecution would be then be limited to responding to the Defence's submissions in its final submissions and only if it then did so, would it be able to expand upon these in its brief.
9. The Defence submits that merely referring to issues of the principles of legality or the form of the indictment during the hearing, as was done by Counsel for the Prosecution, does not constitute 'discussing' these issues. In fact the Prosecution is seeking to maximise the time available to respond to the Defence's legal submissions, thus circumventing the procedure established by the Pre-Trial Chamber. Since the Defence presented these submissions on 24 November, the Prosecution would therefore have ten days to formulate its response to these legal submissions in its brief on 4 December.
10. Since the Defence brief is due two days later, in contrast to the 10 days utilised by the Prosecutor, the Defence will only have two days in which to respond to the Prosecution's arguments.
11. Therefore the Defence submits that allowing the Prosecution to address these issues in its brief, without having discussed them at all during the confirmation hearing would violate the 7 November Decision and cause severe prejudice to the Defence.
12. The Defence also notes that the Prosecution has the right under Rule 121(9) to lodge with the Pre-Trial Chamber, written submissions on points of fact and on law no later

than three days before the start of the hearing. The Prosecution did not avail itself of this opportunity, nor did it avail itself of the opportunity to raise these issues during the hearing itself. The Defence therefore submits that the Prosecution should thus be precluded from make those submissions only at the stage of filing the brief.

Language of the brief

13. On the last day of the confirmation hearing, the Presiding Judge requested that the Victims' Representatives, the Prosecution and Defence all file their briefs in French. The Defence seeks clarification as to whether this is an Order of the Pre-Trial Chamber or merely a suggestion. If it is an Order, the Defence respectfully requests to be permitted to file a combined brief in French and English.
14. The Defence submits that the phrase used by the Presiding Judge, namely 'would ask you to make your written observations in French' indicates that this is a preference by the Presiding Judge but cannot be construed as an Order binding upon the Defence. The Defence would request confirmation of the nature of this direction.
15. If the Pre-Trial Chamber considers that this is an Order, the Defence would respectfully request to be able to file a combined brief, approximately half of which will be in English and half in French.
16. As the Chamber is also aware, the submissions of the Defence at the confirmation hearing were delivered in English and French. The submissions generally related to the law were delivered in English and the submissions in relation to Prosecution and Defence evidence was submitted in French. The Defence therefore envisaged its brief following the same structure with discussion of legal issues in English and discussion of factual issues in French. The Defence has already commenced working on the brief before the suggestion of the Presiding Judge. The Defence submits that this suggestion would therefore cause prejudice to the Defence in that it would have to spend valuable time interpreting the submissions from English to French rather than focusing on the actual content of the submissions.
17. In contrast the Defence submits that this will cause no prejudice to the Prosecution or the Legal Representatives of the Victims as they will have no opportunity to respond to the submissions of the Defence. These will be filed two days after the filing of their briefs and therefore the fact that the Defence brief is in two languages will not complicate any reply they wish to file as there will have no right to file a reply.

18. The Defence further submits that there is a distinction between the right of the Defence, in particular, Thomas Lubanga Dyilo, to receive key documents pertaining to the charges in the language of Thomas Lubanga Dyilo, and the question as to whether Defence legal arguments directed to the Chamber and the parties should be filed in his language. The Defence has discussed its legal arguments and strategy with Thomas Lubanga Dyilo: filing in English would therefore cause no prejudice to him.

Length of the brief

19. The Pre-Trial Chamber ordered that the briefs for the Victims' Representatives, the Prosecution and the Defence would be limited to 40 pages. The Defence respectfully requests an extension of this page limit to be able to file a brief of 60 pages.
20. Under Regulation 37(2) of the Regulations of the Court, the Chamber may 'at the request of a participant extend the page limit in exceptional circumstances'. The Defence submits that these exceptional circumstances exist in the present case.
21. By granting the Defence two hours to make its final submissions on 28 November and therefore more time than either the Prosecution or the Legal Representatives, the Pre-Trial Chamber recognised that the Defence had to respond to two sets of arguments and therefore needed more time than either of the other participants. The Defence addressed many of the points put forward by the Prosecution and Victims Representatives during the oral proceedings but needs to be able to adequately elaborate on these submissions in the brief. The Defence has previously highlighted why it needs to reply separately to the submissions of the Victims Representatives⁵ and is of the view that the same considerations apply to the brief.
22. The Defence submits that having commenced working on the brief, it clear that it will need far more than 40 pages to adequately address the issues it has discussed at the confirmation hearing. The Defence brief will endeavour to keep its submissions concise and focused and submits that an extension to 60 pages would be sufficient. The Defence wishes to highlight however, that any extension of the page limit should apply solely to the Defence: any extension in the size of the Prosecutor's or Legal Representatives' briefs would have a further correlative impact on the page limit necessary for the Defence brief. Thus, the page limit applicable to the Prosecution brief and the brief submitted by the Legal Representatives should remain at 40 pages.

⁵ Requête demandant l'autorisation de répondre au Bureau du Procureur et aux représentants des victimes a/0001/06 à a/0003/06, 13 Octobre 2006, ICC-01/04-01/06-571

Relief sought

23. The Defence therefore respectfully requests;
- a) Confirmation that the Prosecution cannot in its brief, make written submissions on issues that it did not discuss during the confirmation hearing;
 - b) Clarification on the status of the suggestion of the Pre-Trial Chamber that the parties file their briefs in English and whether the Defence is permitted to file a brief which is written in both English and French;
 - c) An extension of the page limit for the Defence brief to 60 pages; and
 - d) In light of the fact that these issues fundamentally impacts on the form and substance of the brief, that the above requests be decided upon on an urgent basis.



Jean Flamme, Counsel for Thomas Lubanga Dyilo

Dated this 29th day of November, 2006

At The Hague