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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

**Urgent Defence Motion to Strike Prosecution's Document and Request for an
Order of Refiling**

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
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Counsel for the Defence

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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. In response to the final submissions of the Prosecutor of 28 November, during which Prosecution counsel referred to submissions that would be made in the Prosecution brief which they did not discuss during the confirmation hearing, the Defence filed a motion to seek clarification from the Chamber as to whether the Prosecution was entitled to do so.³ The Pre-Trial Chamber issued its decision on this motion on 30 November 2006⁴ in which it held 'que l'Accusation, la Défense et les représentants légaux des victimes ne peuvent traiter par écrit des seules questions qui ont été discutées oralement par elles durant l'audience de confirmation des charges'.
3. The Prosecution filed its document addressing matters that were discussed at the confirmation hearing on the morning of 4 December 2006.⁵ In that document, explicit mention is made of the fact that the parties would be limited to the issues that they had discussed during the hearing.⁶ However, in reviewing this document the Defence observes that the Prosecution has addressed many issues that it did not discuss during the confirmation hearing and has also inappropriately used the brief to launch personal attacks on members of the Defence team and those associated with it. This is in clear violation of the Rules of Procedure of Evidence and the decision of the Pre-Trial Chamber.
4. The Defence therefore respectfully requests that the Pre-Trial Chamber strike the Prosecution's Document and order the Prosecution to refile a version of the document which complies with the Rules and the Chamber's Decision that the Defence has relied upon in making its submissions during the hearing and in preparing its document to be filed on 6 December.

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

² At pages 4 and 7

³ Defence Motion for Clarification and Request for an Extension of the Page Limit, 29 November 2006, ICC-01/04-01/06-735 (Defence Motion)

⁴ Décision sur la requête de la Défense aux fins d'éclaircissements et 'augmentation du nombre de page autorisé, 30 November 2006, ICC-01/04-01/06-743. (30 November Decision) The Defence notes that the Prosecution was well aware of the limits of the document to be filed after the confirmation hearing as explicit mention is made of this finding.

⁵ ICC-01/04-01/06-749 (Prosecution's Document) Public Redacted Version

⁶ See Prosecution's Document at paragraph 5

Submissions

5. In the Defence Motion of 29 November, the Defence expressed the concern that during the confirmation 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.’⁷ The Defence further submitted 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.’⁸
6. In making these submissions the Defence was concerned that the Prosecution would attempt to circumvent the procedure set down by the Pre-Trial Chamber to gain a tactical advantage over the Defence. The Defence has been proved correct in its concerns by the Prosecution’s Document.
7. The Prosecution announces in paragraph 7 of its Document that it will address the following issues; (i) the principle of legality; (ii) the mode of individual criminal responsibility pursuant to Article 25 of the Statute; (iii) the Defence challenges to the form of the Document Containing the Charges; (iv) Statements by the Defence that are in conflict with the Code of Professional Conduct for counsel. The Defence will address each of these issues in turn.⁹

1) The principle of legality

8. The Prosecution claims in its Document that it ‘discussed this matter as part of its examination of the witness Ms Peduto’.¹⁰ The Defence submits that there is nothing in these references that could be considered as discussing the principle of legality which the Prosecution then proceeds to address in paragraphs 15 to 24. If the Prosecution wishes to discuss this issue, it must be limited to discussion of the factual consequences of the alleged meeting between Mr Lubanga and Ms Peduto. It did not

⁷ See Defence Motion at paragraph 7

⁸ At paragraph 9

⁹ The Prosecution also refers in paragraph 7 to (i) The standard of “substantial grounds to believe that the person committed each of the crimes charged” in terms of Article 61(5) and Article 61(7) of the Statute; and (v) Unsupported factual statements by the Defence. The Defence accepts that the Prosecution has discussed these issues in the oral proceedings and therefore they may be included within the brief. The Defence does however oppose the substance of the submissions made by the Prosecution in these sections

¹⁰ Prosecution’s Document, footnote 14 citing (English) transcript of 15 November 2006, at pages 101 to 103.

discuss the principle of legality from a legal perspective with Ms Peduto and as such is not permitted to discuss this issue in its Document.

9. The Prosecution also makes reference to a document which is on the Prosecution's Amended List of Evidence.¹¹ The Defence firstly notes that this document was not discussed by the Prosecution during its oral submissions. It was only given an evidence number after the end of the hearing.¹² As such, the Prosecution is not permitted to make reference to this document during its Document as it had not discussed it during the hearing.
10. Furthermore, the Prosecution did not dispute during the hearing the Defence contention that Thomas Lubanga was not informed of the illegality of recruiting child soldiers. Therefore, it is prohibited to cite this article as evidence of a positive fact that allegedly contradicts the Defence's submissions in this regard.

2) The mode of individual criminal responsibility pursuant to Article 25 of the Statute

11. The Prosecution submits that it has discussed the mode of individual criminal responsibility during the oral hearings of 14 November.¹³ The Defence submits that this discussion was limited to highlighting the evidence which allegedly supported the form of liability put forward by the Prosecution in its charging document. Therefore any mention of the legal basis of the various modes of liability put forward by the Prosecution, or indeed the contours of the offence, may not be included in the Prosecution's Document. However, this is exactly what the Prosecution seeks to do.
12. It seeks firstly to rebut the Defence claim that the charging document was ambiguous¹⁴ despite having made no reference to this during the hearing.
13. The Prosecution then proceeds to address the Defence's challenges to the theory of co-perpetration, again despite making no reference in its oral proceedings to why its 'theory of criminal responsibility set forth in the Document Containing the Charges meets the criteria of co-perpetration as defined in Article 25(3)(a) of the Statute'.¹⁵
14. Finally, in paragraphs 34 to 42 the Prosecution again seeks to rebut the Defence's arguments in relation to the contours of co-perpetration. Again this is done without

¹¹ DRC-OTP-0154-0496

¹² EVD-OTP-00278

¹³ See footnote 15 of the Prosecution's Document

¹⁴ See Prosecution's Document, paragraphs 26-29

¹⁵ Prosecution's Document, paragraph 30

any reference to the oral proceedings as the Prosecution did not make any observations in relation to this issue.

15. The Defence submits that the Prosecution has clearly again attempted to gain a tactical advantage by failing to respond to the Defence submissions on modes of liability during the oral proceedings and yet seeking to make extensive submissions on this very subject in the brief, in contravention of the Decision of the Pre-Trial Chamber.

3) The Defence challenges to the form of the Document Containing the Charges

16. The Prosecution seeks to justify why it should be permitted to answer the Defence submissions on this point by reference to its response to the Defence Motion for Clarification.¹⁶ In that Response the Prosecution claimed that ‘the Defence's legal submissions were triggered in their entirety by the Prosecution's Document Containing the Charges. Thus, these legal submissions are linked to a document, indeed the key document that was at length discussed by the Prosecution in the course of the Confirmation Hearing.’
17. The Defence submits that even if the charging document was discussed at length, it never addressed the actual form of the document nor the specific Defence allegations regarding the vagueness of certain allegations contained therein. Indeed it is noticeable that whilst in relation to the other sections in the Prosecution's Document, an effort is made to link the written submissions with the prior oral submissions,¹⁷ whereas in relation to this section however, there is no attempt to link the submissions made in paragraphs 43 to 46.
18. The Prosecution had ample opportunity to refer to the level of detail required in the charging document during the oral proceedings. They again decided not to do so. The Defence submits that it is improper for the Prosecution to only respond to the Defence's submissions at this stage and seek to circumvent the clear wording of the Pre-Trial Chamber's Decision of 30 November.

4) Statements by the Defence that are in conflict with the Code of Professional Conduct for counsel

¹⁶ See Prosecution's Response to "Defence Motion for Clarification and Request for an Extension of the Page Limit", 30 November 2006, ICC-01/04-01/06-741

¹⁷ See for example, footnotes 49 and 90 of the Prosecution's Document

19. The final element that the Prosecution seeks to include in its Document is that certain statements were made by the Defence that were allegedly in conflict with the Code of Professional Conduct for counsel.
20. The Defence firstly submits that this is an inappropriate use of the brief which was granted by the Pre-Trial Chamber. The Defence submits that the rationale for the brief was to allow the parties to expand upon issues that it raised during the oral proceedings on matters of substance as to whether or not the charges against Thomas Lubanga should be confirmed by the Pre-Trial Chamber. Instead, the Prosecution has sought to use the brief to make personal attacks against members of the defence team who were simply attempting to defend their client. The Defence notes that these personal attacks have also included naming the specific members of the Defence team in a public filing. The Prosecution has therefore sought to personalise the dispute rather than maintaining a professional relationship with the Defence. This behaviour contrasts markedly with the Defence attempts during the hearing not to mention the names of a Prosecution investigator who the Defence alleged took part in an illegal search and seizure operation,¹⁸ nor of Prosecution staff members who were mentioned in disclosure correspondence.¹⁹
21. The Defence also notes, as with the majority of the submissions included within the Prosecution brief, that the Prosecution did not raise these allegations during the oral proceedings and therefore must be prohibited from doing so now. Reference is made in the Prosecution's Document to the oral proceedings on 28 November.²⁰ However, according to the transcript the Prosecution counsel simply states that 'Mr President, your Honours, on behalf of the Prosecutor, I oppose such a statement'. The Defence submits that this cannot translate into having discussed the issue in the confirmation hearing. The Prosecutor may well oppose the statements made by the Defence but this cannot translate into then considering that he has discussed alleged violations of their code of conduct.
22. This statement was also made after the final pleadings of the Defence and as such the Prosecution had no right to further address the Chamber at that point.
23. Furthermore, directly after the intervention by the Prosecution on 28 November, the Presiding Judge stated that he 'will put a stop to this, Mr Withopf. The Defence has a fundamental right here. There will be no defamation within this courtroom. The

¹⁸ See transcript 15 November 2006 at page 23 'to comply with Mr Withopf's request I won't mention his name'

¹⁹ See transcript 24 November 2006 at page 17 when Defence Counsel referred to Prosecution disclosure correspondence without reading the name of the Prosecution staff member mentioned therein.

²⁰ See footnote 18 of Prosecution's Document citing page 149 of the transcript

Defence took the floor; spoke in the terms in which it wished. I think that the submissions were perfectly clear. I think that we should now conclude. And I wouldn't like these proceedings to end on an incident which seems to be not to be proper.²¹ As a consequence, the Defence submits that the issue was already disposed of by the Pre-Trial Chamber and the Prosecution has no right to further raise it in its Document.

24. The same observation applies to the comments made on 9 November by Defence Counsel. The Prosecution did not even oppose this statement or discuss it during the oral proceedings and therefore has no right to make submissions on the alleged conduct of Defence counsel on that occasion.
25. In any event, as with the latter submissions on 28 November, the Presiding Judge adequately addressed the issue during the oral proceedings on 10 November. On that occasion the Presiding Judge stated that he was “not prepared to open a debate on this.” He later confirmed that in relation to that issue “The Chamber has decided that we close this matter.”²² The Prosecution therefore has no right to address this issue in its Document as it has already been ruled upon and closed by the Pre-Trial Chamber
26. The Defence also objects to the Prosecution making submissions on this issue as they have not sought any relief in relation to this issue. The Prosecution claims that it ‘regrets even having to answer the baseless comments’ made by Defence Counsel but then proceeds to do so, although it is not seeking any sanction or relief for these alleged violations. As a consequence, the Defence submits that the submissions in paragraphs 54 to 58 of the Prosecution’s Document have no part in the brief which is supposed to relate to issues of whether or not to confirm the charges against Thomas Lubanga Dyilo.
27. Under Rule 122(3) the Defence may make objections or make observations concerning an issue related to the proper conduct of proceedings prior to the confirmation hearing. This is the basis for the Defence submissions of 9 November. The Defence was exercising its right to record any objections which it had in relation to the propriety of the proceedings preceding the confirmation hearing. At no stage has the Defence ever sought to trivialise the importance of the confirmation hearing – to the contrary – the Defence has consistently maintained that the confirmation hearing is of central importance to the right of the defence to challenge whether the case should proceed to trial. To that end, the Defence has consistently submitted that the right of

²¹ See transcript of 28 November 2006 at page 149

²² See transcripts of 10 November, at pages 7-8

the defence to adequate time and facilities, and to be informed of the nature of the prosecution case should be interpreted in a meaningful manner, to ensure that its right to challenge the Prosecution evidence at the confirmation hearing is real and effective, and not illusory. It is in the context of this rule that the submissions of 9 November were made. Indeed, under Rule 122(4) ‘at no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings.’ Therefore if the Defence had not made those submissions at that point it would have been prohibited from ever raising them again. The Chamber duly ruled on the Defence submissions, and in doing so, also granted corollary relief to ensure the rights of the Defence for the purposes of the confirmation hearing.

28. The Prosecution’s characterisation of the Defence allegation as being that the ‘Prosecutor’s decision to request the Pre-Trial Chamber to confirm the charges against Thomas Lubanga is frivolous’, completely misses the point put forward by the Defence, and the legal basis for its submissions.
29. The Prosecution further alleges that the Defence has no legitimate interest in claiming that the decision of the Prosecutor to request the confirmation of the charges is determined by political considerations. With all due respect to the Prosecution, they have no right to dictate the Defence strategy or to intimidate the Defence into not putting forward certain arguments. The Defence’s fundamental duty is to their client and the Defence is perfectly within its rights to request that the proceedings should be free from the taint of political expediency.
30. The Defence is further concerned that the fact that the Prosecution has utilised its brief as a public forum to make baseless and personal attacks on the integrity and professionalism of the Defence could have a chilling effect on the ability of the Defence to obtain cooperation, and in particular, on the views of information providers, in terms of whether they consent to the lifting of confidentiality agreements negotiated under Article 54(3)(e) agreements.²³ Any public allegations to the effect that Defence has breached the code of conduct could give the impression that the Defence cannot be trusted and logically by extension, the providers of this information should not give their consent to the materials being disclosed to the Defence.
31. The Defence therefore submits that the submissions in paragraphs 54 to 58 of the Prosecution’s Document are inappropriate, violate a Decision of the Court, and could

²³ See for example, Prosecution's Information on the Defence's Inquiry on the Current Status of Documents Obtained by the Prosecution under the Condition of Confidentiality pursuant to Article 54(3) (e) of the Rome Statute, 1 December 2006, ICC-01/04-01/06-747

interfere with the future ability of the Defence to effectively defend their client with the necessary independence and cooperation

Relief sought

32. For the forgoing reasons, the Defence respectfully requests the Pre-Trial Chamber to;
- i. Strike the Prosecution's Document filed on 4 December 2006; and
 - ii. Order the Prosecution to refile its Document without paragraph 7 in part, and paragraphs 15-46 and paragraphs 54-58 in whole.



Jean Flamme, Counsel for Thomas Lubanga Dyilo

Dated this 4th day of December, 2006

At The Hague