

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

No.: ICC-01/04-01/06  
Date: 5 December 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 THE CONGO  
IN THE CASE OF THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

**Public Document**

**URGENT**

**Prosecution's Response to "Defence Urgent 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 Lawyer

**Legal Representatives of Victims**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu

**Counsel for the Defence**

Mr Jean Flamme  
Ms Véronique Pandanzyla

**Office of Public Counsel  
for the Defence**

Ms Melinda Taylor

## Background

1. On 7 November 2006, the Pre-Trial Chamber issued the "Decision on schedule and conduct of the confirmation hearing"<sup>1</sup> (Scheduling Order). In the Scheduling Order, the Pre-Trial Chamber decided, *inter alia*, that "[T]he 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 any matters that they discussed at the confirmation hearing."
2. On 29 November 2006, the Defence filed the "Defence Motion for Clarification and Request for an Extension of the Page Limit"<sup>2</sup> (29 November 2006 Request), requesting the Pre-Trial Chamber, *inter alia*, to confirm that "*the Prosecution cannot in its brief make written submissions on issues that it did not discuss during the confirmation hearing*".<sup>3</sup>
3. On 30 November 2006, the Prosecution filed the "Prosecution's Response to 'Defence Motion for Clarification and Request for an Extension of the Page Limit'"<sup>4</sup> (30 November 2006 Response), requesting the Pre-Trial Chamber to deny the 29 November 2006 Request to the extent it concerned the scope of the submissions of the Participants.<sup>5</sup>
4. On 30 November 2006, the Single Judge of the Pre-Trial Chamber (Single Judge) rendered the "Décision sur la requête de la Défense aux fins d'éclaircissement et

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<sup>1</sup> Decision on the schedule and conduct of the confirmation hearing, public, 7 November 2006.

<sup>2</sup> Defence Motion for Clarification and Request for an Extension of the Page Limit, public, 29 November 2006.

<sup>3</sup> See 29 November 2006 Request, at page 6.

<sup>4</sup> Prosecution's Response to "Defence Motion for Clarification and Request for an Extension of the Page Limit", public, 30 November 2006.

<sup>5</sup> See 30 November 2006 Prosecution's Response, at page 5.

l'augmentation du nombre de page autorisé"<sup>6</sup> (30 November 2006 Decision). In the 30 November 2006 Decision, the Single Judge recalled "*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*".<sup>7</sup>

5. On 4 December 2006, the Prosecution filed the "Prosecution's Document Addressing Matters that were Discussed at the Confirmation Hearing" (4 December 2006 Submission).<sup>8</sup> In the 4 December 2006 Submission, the Prosecution in detail addressed (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; (ii) the principle of legality; (iii) the mode of individual criminal responsibility pursuant to Article 25 of the Statute; (iv) the Defence challenges to the form of the Document Containing the Charges; (v) unsupported factual statements by the Defence; and (vi) statements by the Defence that are in conflict with the Code of Professional Conduct for counsel.<sup>9</sup> In light of the Scheduling Order and the 30 November 2006 Decision, the Prosecution provided detailed information linking its discussion of the various topics to the corresponding period of the Confirmation Hearing.<sup>10</sup>

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<sup>6</sup> Décision sur la requête de la Défense aux fins d'éclaircissement et l'augmentation du nombre de page autorisé, public, 30 November 2006.

<sup>7</sup> See 30 November 2006 Decision, at page 4.

<sup>8</sup> Prosecution's Document Addressing Matters that were Discussed at the Confirmation Hearing, confidential and public redacted version, 4 December 2006. The Prosecution for the purposes of the present submission refers to the public redacted version.

<sup>9</sup> See 4 December 2006 Submission, at para. 7.

<sup>10</sup> See 4 December 2006 Submission, footnotes 13 to 18.

6. On 4 December 2006, the Defence filed the “Urgent Defence Motion to Strike Prosecution’s Document and Request for an Order of Refiling”<sup>11</sup> (Defence Urgent Request), requesting to strike the 4 December 2006 Submission and to order the Prosecution to re-file its Document without paragraph 7 in part, and paragraphs 15-46 and paragraphs 54-58 in whole.<sup>12</sup>

## Discussion

*The principle of legality, the mode of liability and the Defences challenges to the form of the Document Containing the Charges*

7. For the purposes of responding to the Defence Urgent Request, the Prosecution recalls its earlier submissions, and expands on them as follows:

- (i) The Prosecution has discussed the matters pertaining to the principle of legality as part of its examination of the witness Ms Peduto.<sup>13</sup> The Prosecution notes that it was the Defence who expanded on the answers Ms Peduto provided to the Prosecution’s questions.<sup>14</sup> Accordingly, it was the Prosecution who triggered the discussion of the matter by the Defence. Against this factual background, the Prosecution was entitled to address the principle of legality in the 4 December 2006 Submission in all its aspects, including by drawing the attention of the Pre-Trial Chamber to the document DRC-OTP-0154-

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<sup>11</sup> Urgent Defence Motion to Strike Prosecution’s Document and Request for an Order of Refiling, public, 4 December 2006.

<sup>12</sup> See Defence Urgent Request, at page 9.

<sup>13</sup> See (English) transcript of 15 November 2006, at pages 101 to 103.

<sup>14</sup> See (English) transcript of 24 November 2006, at pages 26 to 28.

0496. The Prosecution recalls the determination of the Pre-Trial Chamber in the Scheduling Order, detailing that *"the Prosecution may, if it so wishes, deal only with part"* of its evidence, and that, however, *"the Chamber may rely on any item included in the Prosecution's Additional List of Evidence."*<sup>15</sup> The Prosecution notes that the document concerned forms part of the Prosecution's Amended List of Evidence.

- (ii) The Prosecution extensively discussed the mode of criminal liability of Thomas LUBANGA DYILO; a full portion of its presentations during the Confirmation Hearing was dedicated solely to this matter.<sup>16</sup> The Prosecution submits that the Defence's artificially limited interpretation<sup>17</sup> of the term "discussed" in the Scheduling Order disregards the gist of the Scheduling Order, namely to only exclude new matters from discussion in the final briefs of the Participants. If the Defence's interpretation were correct, the Participants would be precluded from expanding in any way the submissions they made orally during the Confirmation Hearing. Accordingly, in the Prosecution's view, the Defence's suggestion is unduly restrictive, in particular in light of the fact that it would fetter the Participant's ability to provide additional assistance to the Pre-Trial Chamber in its objective of uncovering the truth.

- (iii) The Prosecution maintains its view that the Document Containing the Charges formed the basis of the Confirmation Hearing, and that

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<sup>15</sup> See Scheduling Order, at pages 8 and 9.

<sup>16</sup> See (English) transcript of 13 November 2006, at pages 87 to 126.

<sup>17</sup> See Defence Urgent Request, at para. 11.

consequently the Prosecution was entitled to in the 4 December 2006 Submission address the Defence's challenges to the form of the Document Containing the Charges.

*The statements by the Defence that are in conflict with the Code of Professional conduct*

8. The Prosecution recalls the following portion of paragraph 54 of the 4 December 2006 Submission: *"The Prosecution regrets even having to answer the baseless comments made by Maître Flamme and Ms Taylor and only does so because in the Prosecution's view it is mandatory that all Participants in this proceeding and future proceedings adhere to standards of fact-based argument."*<sup>18</sup> Consequently, in line with this statement, the Prosecution limits its further submissions on this issue to the absolute minimum.
9. The Prosecution submits that the Participants can raise matters of any other Participant's professional conduct at any time during the proceedings. In the Prosecution's view, the Scheduling Order cannot and does not limit the Prosecution's respective rights in that regard. In any event, in relation to the statement made by Maître Flamme that the Prosecution's Senior Trial Attorney is *"conducting a political case"*, the Prosecution has discussed the Defence's statement during the Confirmation Hearing.<sup>19</sup>
10. The Prosecution notes that the Defence has made the statements concerned in public Court session, and that the statement on the *"political case"* was visibly addressing the Prosecution's Senior Trial Attorney. Accordingly, in the

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<sup>18</sup> See 4 December 2006 Submission, at para. 54.

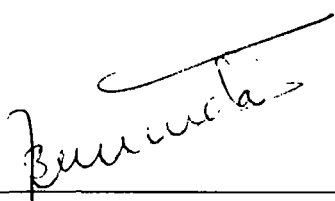
<sup>19</sup> See (English) transcript of 28 November 2006, at page 149.

Prosecution's view, the Defence's complaint that the Prosecution discussed this matter in a public filing, naming the members of the Defence team, is contradicted by the Defence's own conduct.

11. The Defence has chosen to make the statements in public Court session. Thus, in the Prosecution's view, the Defence's logic to forbid the Prosecution to raise its concerns in light of the potential, unsubstantiated consequences of their conduct,<sup>20</sup> would wrongly amount to deprive the Prosecution of its right to address statements made by members of the Defence team that in the Prosecution's submission are in conflict with the Code of Conduct.

### **Request**

12. Accordingly, the Prosecution requests the Pre-Trial Chamber to deny the Defence Urgent Request.




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Luis Moreno-Ocampo  
Prosecutor

Dated this 5<sup>th</sup> day of December 2006  
At The Hague, The Netherlands

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<sup>20</sup> See Defence Urgent Request, at para. 30.