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

Date: 8 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

Response to order of 7 November 2006

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

1. Introduction:

1. On 7 November 2006, the Pre-Trial Chamber issued the ‘Decision concerning list of issues on jurisdiction, admissibility or proper conduct of the proceedings’, in which, “in order to properly determine pursuant to rule 122 (1) of the Rules how the hearing is to be conduct during the first two days of the confirmation hearing,”, the Chamber ordered the Prosecution and the Defence to file “the list of those issues of jurisdiction, admissibility or concerning the proper conduct of the proceedings leading to the confirmation hearing that the Prosecution” prior to 2pm .

2. Submissions:

2. The Defence is unsure how to interpret the relevance and currency of this order, given the fact that the Chamber subsequently issued a decision allocating time for this purpose.
3. The Defence also notes that whilst the Chamber has allocated time to the legal representatives of the victims to present opening submissions, they have not ordered those representatives to file in advance the list of issues which they intend to raise during their opening submissions.
4. The Defence further refers to the following. In a filing dated 20 September 2006,¹ the Defence requested the Pre-Trial Chamber to order the Prosecution to file any legal argument in advance of the hearings in order to assist the Chamber and the Defence to focus its preparation for the hearing.
5. The Defence reiterated this request in a motion dated 16 October 2006, and further asked in the alternative that the Prosecution be requested to file its legal authorities and skeleton legal arguments in advance. The Defence observes that since the Prosecution had already discussed such aspects as modes of liability with the Pre-Trial Chamber, the obligation to provide information would not be onerous for the Prosecution and would promote a more effective and efficient confirmation hearing. In this connection, the Defence submits that it has a right to legal and procedural certainty: without the requested information, the Defence submits that its right to be informed in detail of the nature of the charge and to have adequate time and facilities to prepare for the confirmation hearing was violated. However, in its decision 20 October 2006, this Chamber held that the is no requirement under the Statute or the

¹ Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo ICC-01/04-01/06-452

Rules that the parties should provide legal argument in advance of the confirmation hearing. The Chamber thus failed to utilise that opportunity to take appropriate measures to secure the right of the Defence to legal and procedural certainty.

6. The Defence further notes that the Single Judge, in a decision dated 15 May 2006, recognises that the Defence is under no obligation to disclose its Defence or tactics in advance of the trial to the Prosecution.
7. The Defence is of the view that filing a list of issues that it intends to raise would amount to filing a skeleton brief, and inappropriate prior disclosure of Defence tactics and strategy.
8. The Defence notes that under Rule 58(4), the Court is required to determine jurisdiction before addressing challenges or questions of admissibility. The Defence challenge to jurisdiction is currently pending before the Appeals Chamber. It is self-evident that the Defence's strategy regarding admissibility will turn on the outcome of the challenge to jurisdiction.
9. The Defence is also of the position that its stance as to whether the crime charged and the attendant mode of liability utilised by the Prosecution fall within the jurisdiction of the Court will necessarily depend on the prosecution's elucidation of the elements of the offence, and the elements of the mode of liability. Given the fact that the Prosecution has failed to provide any substantive arguments thus far on these issues, it has not provided sufficient information which would enable the Defence to determine whether to challenge jurisdiction on these grounds. The Defence therefore submits that it should be entitled to raise any issues pertaining to jurisdiction at any time during the confirmation hearing, and that it should be given appropriate time to do so in order to ensure that its right to raise these issues is real and effective.
10. The Defence further notes that Rule 122(3) provides that the person or Prosecution shall address issues concerning the proper conduct of the proceedings prior to the confirmation hearing. This clearly implies that such submissions should be separate from and in addition to opening submissions relating to the actual confirmation hearing.
11. Rule 122(4) further provides that "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; the Defence thus strenuously objects to the imposition of strict time limits, since to do so would deprive the Defence of the right to record its objection and to elaborate its arguments.

12. Rule 122(5) also provides that irrespective of the order in which the Judge invites the Prosecution or the Defence to present their objections or observations, the Defence “shall have the right to reply”. The Defence also notes that Rule 122(5) expressly limits the right to reply to the Defence.
13. Thus, the time allocated should be sufficient to enable the Defence to present its own submissions, and to reply to any submissions raised by the Prosecution. It is therefore clear that the time allocated to the time should be much greater than that which is allocated to the Prosecution, and should be independent of the right of the Defence to present opening submissions once the confirmation hearing (proper) has commenced, and to have adequate time in its opening submissions to respond to the prosecution and the victims’ representatives.
14. The fact that in its order of 7 November 2006, the Chamber has conflated the procedure for opening submissions with the right of the Defence to challenge jurisdiction, admissibility, and to raise issues pertaining to the proper conduct of the proceedings implies that any submissions that the Defence raises in relation to the latter issues are a foregone conclusion since the confirmation hearing will have already commenced, and the Prosecution will have had the opportunity to publicly impugn and issue highly prejudicial statements in relation to Thomas Lubanga Dyilo.
15. The Defence is also of the view that it is not possible for the Defence to provide a definitive list of ‘improper conduct’ since the instances of impropriety seem to continue unabated and, given the manner in which decisions are taken at the last possible minute, the Defence believes that there may be many more decisions issued in the late hours of the day which affect the propriety of the proceedings. The Defence therefore submits the following, non-exhaustive list, and states that this is without prejudice to its right, as enshrined under rules 122(3)-(5), to raise any objections or observations regarding the proper conduct of the proceedings, and to seek appropriate time to do so.

3. Preliminary and non-exhaustive list of issues:

- There are four pending appeals, which, according to the conclusion of the Single Judge, pertain to issues which affect the fair and expeditious conduct of the proceedings.
- The proceedings have in general violated the principle of equality of arms in light of *inter alia* the clearly inequality of resources, the fact that the Chamber

has vested the victims with the role of a second prosecutor, and the inability of the Defence to conduct investigations *in situ*;

- The fact that the Prosecution has flagrantly breached its disclosure obligations in a manner which has been highly prejudicial to the ability of the Defence to have sufficient time and facilities to prepare its case.
- The fact that the Chamber has failed to compel the Prosecution to comply with key disclosure deadlines, while at the same time, refusing reasoned requests for extensions of time from the Defence.
- The fact that the Chamber's decision of 7 November 2006 regarding the translations of the videotapes ignores and clearly contravenes the right of Thomas Lubanga Dyilo to effective legal assistance;
- The fact that the Prosecution has spun a web of confidentiality agreements, which operate to preclude the Defence from accessing exculpatory materials, and has refused to contact information provider to lift ex parte measures pertaining to exculpatory material on the highly superficial basis that it would damage its relations with these entities;²
- The fact that the use (and abuse) of redactions and summaries has been utilised by the Prosecution to prevent the Defence from accessing highly exculpatory information and potential witnesses, and from being adequately informed of the nature (and inherent inconsistencies) of the Prosecution case;
- The fact that the Prosecution has consistently collaborated with illegal operations conducted by certain authorities from the DRC, such as the illegal search and seizure operation which the Defence brought to the attention of the Chamber;
- The fact that the Chamber was aware of the above, but has consistently failed to address this issue, either in the Defence challenge to jurisdiction or the Defence motion to exclude evidence;
- The failure of the Prosecution to disclose its obligations under article 54(1) in a fair and impartial manner as a result *inter alia* of the lack of impartiality of persons within the Prosecution.
- The decision of 7 November 2006,³ which violates *inter alia*: firstly, equality of arms by allowing the representatives of the victims, who are far better resourced than the Defence, to function as a 'second prosecutor' by rendering

² See Prosecution Information dated 6 November 2006

³ Decision on the Schedule and Conduct of the Confirmation Hearing

submissions on the modes of liability; secondly, the right of the Defence to determine which evidence it wishes to rely on during the confirmation hearing (by automatically admitting all evidence included on the Defence list of evidence without allowing the Defence to make the ultimate determination as to whether it wishes to rely on the evidence), thirdly, the requirement that the Chamber base its decision on evidence presented during the confirmation hearing in accordance with article 61(3) and 61(7) of the Statute.⁴

⁴ Article 61(5), “At the hearing, the Prosecutor shall support each charge with sufficient evidence [...]”; article 61(7), “The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence [...]”.

A handwritten signature in dark ink, consisting of a stylized, cursive script. The signature is enclosed within a faint rectangular border.

Jean Flamme, Counsel for Thomas Lubanga Dyilo

Dated this 8th day of November, 2006

At The Hague