



Original : English

No.: ICC-01/04-01/06  
Date: 16 October 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 Request for an Order of the Pre-Trial Chamber to the Prosecution to  
provide legal argument to the Defence in advance of the confirmation hearing and  
for a variation of the time limit**

**The Office of the Prosecutor**

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

**Counsel for the Victims a/0001/06 to  
a/003/06**

Mr. Luc Walley, n,  
Mr. Frank Mulenda

**Counsel for the Defence**

Mr. Jean Flamme  
Ms. Véronique Pandanzyla



1. On 20 September 2006, the Defence filed its 'Request for Further Information Regarding the Confirmation Hearing and for appropriate relief to safeguard the rights of Defence and Thomas Lubanga Dylio'.<sup>1</sup> In this Request the Defence specifically asked the Pre-Trial Chamber to 'issue an order, that if the Office of the Prosecutor intends to make legal submissions, these should be filed in a written format in advance of the confirmation hearing. In the view of the Defence, such legal arguments should have been filed contemporaneously with the charge, since without them, the relevance of certain factual allegations is opaque at best, and thus violates the right of the Defence to be informed of the nature and details of the charge.'<sup>2</sup>
2. The Pre-Trial Chamber issued its Decision delaying the confirmation hearing to an unspecified date in the future on 20 September 2006.<sup>3</sup> In a later Decision of 5 October 2006, the Pre-Trial Chamber specified that the confirmation hearing would take place on 9 November 2006.<sup>4</sup> In neither the 20 September Decision, nor the 5 October Decision, did the Pre-Trial Chamber rule on the Defence's Request highlighted at paragraph 1 of this motion. This absence is understandable in relation to the 20 September Decision as it merely delayed the confirmation hearing without entering into specifics on the obligations of the parties before the hearing would take place. However, the Defence submits that in its 5 October Decision the Pre-Trial Chamber should have addressed the request filed by the Defence especially as it set out in detail all of the deadlines that would apply to both parties before the hearing.
3. Therefore, the Defence re-iterates its Request to the Pre-Trial Chamber to issue an order that all and any legal argument that the Prosecution seeks to rely on in the confirmation hearing, be provided to the Defence at least twenty days before the hearing.

**1) Providing legal argument by the Prosecution is necessary for a fair trial and for the Defence to adequately be able to challenge the Prosecution charges**

4. The Defence submits that if its right to challenge the Prosecution charges is to be given any weight, it must be provided with the materials requested. These must be provided in

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<sup>1</sup> ICC-01/04-01/06-452 ("Request for Information")

<sup>2</sup> Request for Information, paragraph 32

<sup>3</sup> 'Décision sur le rapport de l'audience de confirmation des charges', 20 September 2006, ICC-01/04-01/06-454 ("20 September Decision")

<sup>4</sup> 'Décision sur la date de l'audience de confirmation des charges', 5 October 2006, ICC-01/04-01/06-521, at page 4 ("5 October Decision")

adequate time for the Defence to be able to study them and verify the context and weight of any case cited in support of the Prosecution's argument. The Defence submits that twenty days before the date of the confirmation hearing is a reasonable request given the many other tasks that have to be carried out by the Defence which are outline in the 5 October Decision.

5. Providing legal argument to the opposing party is a well-known rule of criminal procedure at the domestic level. At the international level, it has also been ordered by the relevant Trial Chamber in relation to oral Rule 98Bis motions at the ICTY which is the situation which is most analogous to the confirmation hearing.

**2) The obligation to provide information would not be onerous for the Prosecution and would promote a more effective and efficient confirmation hearing**

6. As was noted by the Prosecution in its "Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)"<sup>5</sup> it has discussed the issue of forms of liability since at least 10 February 2006,<sup>6</sup> therefore well before Defence Counsel for Mr. Lubanga was assigned. Consequently, the Defence submits that the Prosecution should have no difficulty in providing the detailed legal argument to the Defence.

**3) The next status conference to discuss the modalities of the confirmation hearing is too late to adequately discuss the issue and risks delaying the confirmation hearing**

7. In the 5 October Decision, the Pre-Trial Chamber set the date of the next status conference to discuss the modalities of the confirmation hearing as 26 October 2006 at 10am.<sup>7</sup> Consequently, as the Defence in this motion has requested that any legal authority and a skeleton legal argument be provided by the Prosecution at least 20 days before the start of the hearing, by not discussing the issue until 26 October, merely 14 days before the hearing, the Defence's request will effectively be denied if the Chamber waits until then to discuss the issue. The Defence submits that there will also be many other important issues

<sup>5</sup> ICC-01/04-01/06-356, 28 August 2006

<sup>6</sup> See footnote 17 of 28 August Submission referring to the "Decision on the Prosecutor's Application for Warrant of Arrest, Article 58", 10 February 2006, formatted and redacted version, public, at para. 96. The Prosecution notes that the Pre-Trial Chamber used the following language: "... the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime ..."

<sup>7</sup> 5 October Decision, at page 5

to discuss at that conference without using precious time discussing an issue that can be resolved well before.

**4) This issue needs to be resolved on an expedited basis and as such the time limits for filing a response should be reduced to 5 days to avoid it becoming a fait accompli.**

8. Under Regulation 34(b) of the Regulations of the Court a response referred to in Regulation 24 shall be filed within 21 days of notification. However, under Regulation 35 ‘applications to extend or reduce any time limit as prescribed in these Regulations [...] shall be made in writing’ and that the ‘Chamber may extend or reduce a time limit if good cause is shown’. The Defence submits that the pressing date of the confirmation hearing and the fact that granting the Prosecution the full 21 days to file a response would effectively deny the Defence the relief it seeks, amounts to good cause as understood by the aforementioned Regulation. Therefore the Defence requests the Chamber to order the Prosecution to respond to this Request, or inform the Chamber that it will not oppose the Defence Motion, by Thursday 19<sup>th</sup> October at the latest.

**RELIEF SOUGHT**

9. The Defence respectfully requests the Pre-Trial Chamber to order the Prosecution to provide the following information to the Defence at least twenty days before the confirmation hearing

- 1) A copy of the skeleton legal argument that will be used by the Prosecution
- 2) A list of any cases, laws, conventions, books or articles cited by the Prosecution
- 3) Copies of any cases, laws, conventions, books or articles cited by the Prosecution (including the section referred to and the entire decision or case to verify the context in which it is used)



Defence counsel

Jean FLAMME

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Dated this 16th day of October, 2006

At The Hague