Cour Pénale Internationale

International Criminal Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **4 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 Redacted Version

Prosecution's Document Addressing Matters that were Discussed at the Confirmation Hearing

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Legal Representatives for the Victims
Mr Luc Walleyn
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"[1] (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. In the course of the Court session of 28 November 2006, the Pre-Trial Chamber requested the Participants to file their additional written observations in French.[2] Furthermore, the Pre-Trial Chamber granted all Participants an extension of the page limit to 40 pages.[3]

3. On 29 November 2006, the Defence filed the "Defence Motion for Clarification and Request for an Extension of the Page Limit"[4] (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"*.[5] In addition, the Defence requested *"[c]larification on the status of the suggestion of the Pre-Trial Chamber that the parties file their briefs in English [sic] ..."* [6]

---

[1] Decision on the schedule and conduct of the confirmation hearing, public, 7 November 2006.
[2] See (English) transcript of the 28 November 2006 Court session, at page 150.
[3] *Ibid.*
[4] Defence Motion for Clarification and Request for an Extension of the Page Limit, public, 29 November 2006
[5] See 29 November 2006 Request, at page 6.
[6] *Ibid*

4. 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'"[7] (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.[8]

5. 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 l'augmentation du nombre de page autorisé"[9] (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"*.[10] In addition, the Single Judge informed the Participants that they can file their additional written observations in English or in French,[11] and decided that the Prosecution must transmit a translation into French by Tuesday, 5 December 2006, at 16:00 hours in the event the additional written observations are submitted in English.

---

[7] Prosecution's Response to "Defence Motion for Clarification and Request for an Extension of the Page Limit", public, 30 November 2006.
[8] See 30 November 2006 Prosecution's Response, at page 5.
[9] Décision sur la requête de la Défense aux fins d'éclaircissement et l'augmentation du nombre de page autorisé, public, 30 November 2006.
[10] See 30 November 2006 Decision, at page 4.
[11] See 30 November 2006 Decision, at page 3.

Submission in English language

6. The Prosecution makes its submission in English. The French translation will be provided by 16:00 hours on Tuesday, 5 December 2006.[12]

Scope of the Prosecution's submissions

7. The Prosecution will address the following issues:

(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;[13]

(ii) The principle of legality;[14]

(iii) The mode of individual criminal responsibility pursuant to Article 25 of the Statute;[15]

(iv) The Defence challenges to the form of the Document Containing the Charges;[16]

[12] The Prosecution notes that this translation is a translation by a Party to the proceedings.
[13] The Prosecution has discussed this matter as part of its Closing Statement, see (English) transcript of 28 November 2006, at pages 5 to 10.
[14] The Prosecution has discussed this matter as part of its examination of the witness Ms Peduto, see (English) transcript of 15 November 2006, at pages 101 to 103.
[15] The Prosecution has discussed this matter as part of its submission in respect of paragraphs 20 to 24 ("Mode of Liability") of the Document Containing the Charges, see (English) transcript of 14 November 2006, at pages 87 to 126, in particular at pages 88 to 90, 124 and 125.

(v) Unsupported factual statements by the Defence;[17] and

(vi) Statements by the Defence that are in conflict with the Code of Professional Conduct for counsel.[18]

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

8. Reference is made to the Prosecution's submissions on the standard of "substantial grounds to believe" as part of its Closing Statement.[19]

9. The Prosecution submits that the standard of *"substantial grounds to believe"* should be defined by comparing it to the standards used for purposes other than the confirmation of charges. Accordingly, the standard of *"substantial grounds to believe"* is higher than the standard in Article 58(1) of the Statute - *"reasonable grounds to believe"* - for the issuance of an arrest warrant and lower than the standard of *"beyond reasonable doubt"* pursuant to Article 66(3), required for a conviction. In this context, the Prosecution recalls the Appeals Chamber's "Judgment on the Prosecutor's appeal against the 13 October 2006 Decision of the Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of

---

[16] The Prosecution makes reference to paragraph 4(ii) in its 30 November 2006 Response, and repeats its submission 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 discussed at length by the Prosecution in the course of the Confirmation Hearing

[17] The Prosecution has presented this matter as part of its discussion of the Defence evidence, see (English) transcript of 27 November 2006, at pages 50 and 51.

[18] The Prosecution has discussed this matter on 28 November 2006; see (English) transcript of 28 November 2006, at page 149.

[19] See footnote 13.

Procedure and Evidence"[20] (13 October 2006 Decision), in which the Appeals Chamber held that *"the threshold for the confirmation of charges ("substantial grounds", article 61(7) of the Statute) is lower than for conviction ("beyond reasonable doubt", article 66(3) of the Statute) ..."*. [21]

10. Furthermore, in the Prosecution's view, in determining the definition of *"substantial grounds to believe"*, due weight must be given to the object and the purpose of the Confirmation Hearing. In the Prosecution's submission, the purpose of the Confirmation Hearing is to make sure that there is sufficient evidence to justify trial proceedings. Support for this approach in measuring the threshold of *"substantial grounds to believe"* can be found in, *inter alia,* Article 61(5) which expressly provides for the possibility to have the charges confirmed on the basis of summary evidence, without any in-depth scrutiny of the evidence at the confirmation stage.

11. This suggested standard comes close to the *"prima facie"* standard that is applicable at the *ad hoc* Tribunals.[22] The *"prima facie"* standard has been defined as: *"...a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge"* [23] and *"being a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused. It is for a*

---

[20] Judgment on the Prosecutor's appeal against the decision of the Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', public, 13 October 2006.

[21] See 13 October 2006 Decision, at para. 56.

[22] See Article 19(1) of the ICTY Statute and Article 18(1) of the ICTR Statute.

[23] *Prosecutor v Dario Kordic et al* , IT-95-14-I, Judge Gabrielle Kirk McDonald, Decision on the Review of the Indictment, 10 Nov 1995, at pages 2-3. Judge McDonald adopted the test formulated by the International Law Commission in its Draft Statute for an International Criminal Court. See Report of the International Law Commission on the work of its 46th Sess., UN GAOR, 49th Sess., at 95, UN Doc A/49/10 (1994).

Trial Chamber to determine whether to accept the facts pleaded in the indictment: this is not the task for the reviewing Judge." [24]

12. Accordingly, the Prosecution submits that this standard is significantly lower than the *"beyond reasonable doubt"* standard, and is logically so, given the stage in the proceeding at which the respective determinations are made.[25]

---

[24] See *The Prosecutor vs Slobodan Milosevic*, IT-02-54, Decision on Review of Indictment, 22 November 2001.

[25] In international criminal proceedings, the standard applied by the *ad hoc* Tribunals in Rule 98*bis* proceedings is similarly expressed to be lower than reasonable doubt, although Rule 98*bis* proceedings occur at the advanced stage of the trial. In the Rule 98*bis* proceedings, a Chamber reviews the Prosecution's evidence, then fully developed, with a view to determining whether to proceed with the Defence case. Two standards have been applied in the Rule 98*bis* proceedings, and both speak of the possibility of a valid conviction at trial, were the evidence to be uncontested: (i) " *where there is evidence (if accepted) upon which a reasonable tribunal of fact could convict - that is to say, evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question"; and (ii)* " . *not whether there is evidence which satisfies the Trial Chamber beyond a reasonable doubt of the guilt of the accused, but rather, whether there is evidence on which a reasonable Trial Chamber could convict that standard is not met by any evidence; there must be some evidence which could properly lead to a conviction ", see* See *Prosecutor v. Kunarac et al.*, IT-96-23-T, T.Ch. II, Decision on Motion for Acquittal, 3 July 2000, para 3. This standard has been expressly endorsed by the Appeals Chamber. *See Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, Judgement, 20 Feb. 2001, para. 434 *("The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question "); Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, T.Ch. III, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 26. The same Trial Chamber has subsequently relied on the same test in *Prosecutor v. Dusko Sikirica et al.*, IT-95-8-T, T. Ch. III, Judgement on Defence Motions to Acquit, 3 September 2001, para. 10 *(" the Chamber reaffirms the test set out in Kordic and Cerkez for the application of Rule 98 bis, that is, whether there is evidence on the basis of which a reasonable [t]ribunal could convict ")* and in *Prosecutor v Milosevic*, IT-02-54-T, T Ch III, Decision on Motion for Judgement of Acquittal: Application of Rule 98*bis*, 16 June 2004, para. 13(7) *("there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused")* However, the Appeals Chamber has only endorsed the *Kunarac* test.

13. Similar standards at comparable stages of the proceedings are applied in national jurisdictions:

(i) *Germany:* The German Criminal Procedure Code provides for an intermediate phase *("Zwischenverfahren")* which has a dual aim: to verify the decision to prosecute taken during the preparatory phase and to declare the trial phase open, *"while at the same time checking that there exists a "legitimate suspicion" ("hinreichender Tatverdacht") that an offence has been committed, considering both law and fact".*[26] The accused is entitled to apply for individual evidence to be taken or raise objections to the opening of the main proceedings.[27] The Court that is competent for the main hearing shall decide whether main proceedings are to be opened.[28] It shall decide to open main proceedings *"if in the light of the results of the preparatory proceedings there appear to be sufficient suspicion of the indicted accused having committed a criminal offence".*[29] A *"sufficient suspicion"* as required for the opening of main proceedings exists, *"when the preliminary evaluation of the file results in the conclusion that a conviction will be probable. (...) Probability beyond a reasonable doubt can however not be required, nor does the probability have to be as high as the urgent suspicion necessary for a pre-trial detention order. Probability should be that high, that it will require a decision by the Trial Chamber in the main proceedings to establish whether remaining doubts are justified."* [30]

---

[26] Juy-Birmann, R. et al, The German System, in *European Criminal Procedures*, Cambridge, 2004, p. 314.
[27] Criminal Procedure Code (Strafprozeßordnung, StPO), Sec. 201(1).
[28] *Ibid* , Sec. 199.
[29] *Ibid.*, Sec. 203.
[30] *Treier* in Karlsruher Kommentar, commentary to para. 203, at margin 5.

(ii) *Australia:* The purpose of the committal proceedings in Australia is *"to ascertain whether there was sufficient evidence to warrant an accused being put on trial"*. In this regard the function of the committal proceedings is for the magistrate to ensure that *"no one shall stand trial unless a prima facie case has been made out"*. During the committal proceedings the accused is given the opportunity to cross-examine the Prosecution witnesses and to call evidence in rebuttal.[31] The standard behind the *prima facie* case requirement for committal varies in its formulation depending on the territory, although it may well be the same in substance in several jurisdictions. In South Australia, the justices must determine whether *"the evidence, if accepted, would prove every element of the offence"*,[32] whereas in the Australian Capital Territory, the test is phrased in terms of whether *"the evidence is capable of satisfying a jury beyond reasonable doubt that the accused person has committed an indictable offence"*.[33]

(iii) *Canada:* Prior to the trial of certain indictable offences, a justice of the peace inquires into the charge and determines whether there is *"sufficient evidence to warrant placing the accused on his trial"*. During this proceeding the Prosecution is required to present its case, or at least to present sufficient evidence to establish a *"prima facie case"*.[34] The accused is entitled also to call witnesses or to testify himself. The standard to be applied by the justice of the peace is to *"ascertain whether or not there is sufficient evidence to induce the belief in the mind of a cautious*

---

[31] Carter's Criminal Law of Queensland, 14th ed., 2004, at page 830.
[32] South Australia Summary Procedure Act 1921, Article 107(a).
[33] Australian Capital Territory Magistrates Court Act 1930, Section 92.
[34] Delisle, R *et al*, Learning Canadian Criminal Procedure (Thomson, 2003), at page 593.

man that the accused is probably guilty. Therefore, considerations of reasonable doubt have no application at this stage of the proceedings." [35]

(iv) *United Kingdom:* During the *"committal with consideration of the evidence"* the Prosecutor is entitled to present only written evidence. No witnesses are called and no evidence can be tendered by the Defence. Nevertheless, the Defence is entitled to make a submission of *"no case to answer"*. At the end the Court shall take its decision to commit the accused for trial in the Crown Court *"if it is of the opinion that there is sufficient evidence to put him on trial by jury for any indictable offence."* [36] However, both the Act and the rules are silent as to precisely what test the examining justices are to apply when determining the existence of a *"case to answer"*, and particularly what is meant by *"sufficient"*. In practice, the standard required to be satisfied at committal proceedings is very low and it is commonly expressed as establishing a *"prima facie case"*.[37]

14. The Prosecution submits that against this background the Pre-Trial Chamber can consider issues of credibility within the limited scope of the Confirmation

---

[35] *Ibid.* - It is accepted that the appropriate test for assessing the sufficiency of evidence at a preliminary inquiry is the same as the one applied at trial when at the conclusion of the Crown's case a motion is made for a directed verdict. The standard has been defined further as *"to determine whether, on the evidence that is adduced by the Crown (and by the defence if it wishes), a reasonable jury (or judge where there is no jury) could (if it were believed) - not would - find the accused guilty. It is not the provincial court judge's function to determine whether the accused is guilty or not guilty, but only to determine that on all the evidence she has heard (and only upon that evidence) that it would be possible for a reasonable jury to be satisfied, beyond any reasonable doubt, that the accused was guilty. (..) the burden on the Crown is not, at this stage, therefore actually to prove the guilt of the accused beyond any reasonable doubt, but only to introduce sufficient evidence to make his guilt a reasonable possibility ", see* Mewett, A. *et al, Introduction to the Criminal Process in Canada* (Carswell, 2000), at page 86.

[36] Magistrates' Courts Act 1980, s 6(1)(a).

[37] Blackstone's Criminal Practice, 2005, Oxford, at page 1317.

Hearing. In the Prosecution's view, if the charges are confirmed, the full assessment of credibility and reliability of the evidence is a matter for the future Trial Chamber.

The principle of legality

15. The Prosecution submits that the principle of legality, as defined in Article 22 of the Statute, is not violated by the Prosecution's Document Containing the Charges.

16. The Prosecution recalls Article 32(2) of the Statute which details that a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. Accordingly, the Prosecution submits that it is sufficient to establish that Thomas LUBANGA DYILO had knowledge of the constituent facts of the crimes with which he is charged. Thus, it is irrelevant whether Thomas LUBANGA DYILO was aware that the Statute criminalizes the conduct in question.

Factual observations

17. In any event, the Defence's assertion that Thomas LUBANGA DYILO was unaware of the applicable law,[38] is factually incorrect. In the Prosecution's submission, Thomas LUBANGA DYILO knew that the crimes he is charged with constitute crimes under the Statute.

[38] See (English) transcript of 24 November 2006, at pages 11 and 12.

18. The Prosecution draws the attention of the Pre-Trial Chamber to the document DRC-OTP-0154-0496,[39] which forms part of the Prosecution's Amended List of Evidence. At page 587 of the document, the following is written:

> *"In late October 2003, approximately 45 days after the Prosecutor's announcement of his plans to investigate Ituri, an extensive interview with Lubanga indicated that he was aware of the ICC and concerned by the prospect of a possible indictment. Lubanga was subsequently arrested in March 2005 by government forces and awaits potential trial in Kinshasa. For the 2003 interview, Lubanga arrived at the Grand Hotel Kinshasa with his lawyer, a Congolese-trained former Judge. In the conversation, Lubanga argued that the ICC must stay out of Congo, as any prosecutions would break the fragile peace. But he went on to request a copy of the Rome Statute in French, observing that he had yet to see its specific provisions. In consultation with his lawyer, he carefully analyzed both the jurisdiction of the Court and the legal requirements for crimes against humanity. Though protesting his own innocence and asserting that the ICC could have little effect on him or his organization, Lubanga noted the Court's potential power: 'the Court has been a pressure on the political actors who were killing people ... these people are very afraid today to commit such slaughter'. He went on to note that with the Prosecutor's announcement, 'there is a palpable pressure not to do certain things' and 'those responsible are now very worried'. Whether Lubanga*

[39] William W. Burke-White, *"Complementarity in Practice The International Criminal Court as part of a System of Multi-Level Global Governance in the Democratic Republic of Congo"*, in Leiden Journal of International Law, 18 (2005).

was obliquely referencing his own behaviour or merely reporting his observations of the Court's effect in Ituri is unclear."

19. Against this background, the Prosecution submits that the Defence submission that *"during the time period set out in the charges the law setting out the offence of the recruitment and enlistment of child soldiers, and their active use in hostilities, was neither foreseeable, accessible, or defined in certain terms for Thomas Lubanga Dyilo"* [40] is factually incorrect. Even assuming, contrary to Article 32(2) of the Statute, that the Rome Statute required such awareness, Thomas LUBANGA DYILO, in the Prosecution's submission, was indeed aware[41] that the criminal conduct he is charged with constitutes crimes under the applicable law.[42]

Legal observations

20. In light of these factual submissions, the Prosecution limits its legal submissions to the following observations.

21. The principle of legality, in its various facets, provides for a legal system's legitimacy by limiting the interventions of its criminal process to those which have been clearly prescribed by law in advance.[43] In particular, the principle of

---

[40] See (English) transcript of 24 November 2006, at page 15.

[41] The Prosecution realizes that Thomas LUBANGA DYILO *"... analyzed ... the legal requirements for crimes against humanity"*, and thus not explicitly the requirements of the crimes falling under Article 8 of the Statute. The Prosecution, however, notes that it is a reasonable conclusion to draw that Thomas LUBANGA DYILO was also aware that the criminal conduct he is charged with constitutes crimes under the applicable law.

[42] Furthermore, the witness Ms Peduto testified that she, in the context of a meeting on 30 May 2003 with Thomas LUBANGA DYILO, addressing matters related to child protection, informed him that the DRC had ratified the Rome Statute; see (English) transcript of 15 November 2006, at page 103.

[43] See Bruce Broomhall, *General Principles of Criminal Law*, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, commentary 9 at page 450.

legality requires that at the time the crime was committed, a written or unwritten norm must have existed upon which to base criminality under international law.[44]

22. The Prosecution is charging Thomas LUBANGA DYILO with crimes that were clearly defined by the Rome Statute. The Prosecution submits, contrary to the Defence's assertion,[45] that the Rome Statute has neither defined a crime nor criminalized an act which was not a criminal act at the time Thomas LUBANGA DYILO committed it.

23. Contrary to the *ad hoc* Tribunals, where the Chambers, in exercising their jurisdiction, have usually sought to be satisfied that a given act is a criminal act under customary international law by examining, *inter alia,* state practice, the Prosecution submits that in the context of the ICC it is not required that a certain conduct is criminalized under domestic law.[46]

24. Article 22 of the Statute obligates the Prosecution - and the Pre-Trial Chamber - to appeal directly to the language of the Statute. By detailing the "Elements of Crimes" referred to in Article 9 of the Statute, the applicable law provides further guidance on the criminal conduct with sufficient clarity. This applies in particular to the crimes for which Thomas LUBANGA DYILO is charged.

---

[44] See Gerhard Werle, *Principles of International Criminal Law*, 2005, commentary 91.
[45] See (English) transcript of 24 November 2006, at pages 10 to 18, in particular at page 11.
[46] See Bruce Bromhall, *General Principles of Criminal Law*, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, commentaries 16 and 32 at pages 452 and 456 respectively.

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

25. The Prosecution refers to its submissions on this matter contained in the "Prosecutor's Application for Warrant of Arrest, Article 58",[47] the filing of 28 August 2006[48] and during the Confirmation Hearing.[49] The Prosecution includes these submissions by reference.

Defence's complaint re notice and ambiguous pleading

26. From the beginning[50] and continuing throughout the proceedings,[51] the Prosecution has pleaded one form of individual criminal responsibility, namely co-perpetration pursuant to Article 25(3)(a) of the Statute. The Prosecution made references to other potential forms of criminal responsibility as a possible modes of liability,[52] including in light of the considerations of the Pre-Trial Chamber in the 10 February 2006 "Decision on the Prosecutor's Application for a warrant of arrest, Article 58"[53] (10 February 2006 Decision).[54]

---

[47] See "Prosecutor's Application for a Warrant of Arrest, Article 58" (Arrest Warrant Application), formatted and redacted version filed on 9 March 2006, at paras. 92 to 95, and 188.

[48] See "Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and the List of Evidence pursuant to Rule 121(3)" (28 August 2006 Submission), public, 28 August 2006, at para. 12(ii).

[49] See for more details at footnote 15.

[50] See Arrest Warrant Application, at paras. 92 to 95

[51] See 28 August 2006 Submission, at para. 12(ii), and (English) transcript of 14 November 2006, at page 89, lines 5 to 7.

[52] REDACTED.

[53] See Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, public formatted and redacted version contained in Annex I to ICC-01/04-01/06-8-US-Corr, at para. 96. 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 ..."*

[54] See 28 August 2006 Submission, at para 12(ii). The Prosecution recalls the following statement: *"In the Document Containing the Charges, the Prosecution submits that Thomas LUBANGA DYILO is criminally responsible as joint perpetrator pursuant to Article 25(3)(a) The Pre-Trial Chamber found, upon review of the*

27. These facts show that the Prosecution has not, as the Defence suggests, pleaded ambiguously,[55] or laid out an array of modes of liability.[56] To the contrary, the Prosecution throughout the proceedings has pursued co-perpetration as the mode of liability, as specifically foreseen in Article 25(3)(a) of the Statute. In the Prosecution's view, co-perpetration best represents the criminal responsibility for the crimes with which Thomas LUBANGA DYILO is charged.

28. To the extent that the Prosecution, whilst not pleading these other forms of criminal liability, has made reference to *"indirect co-perpetration"* and *"common purpose"* as possible other forms of criminal responsibility, the Prosecution has acknowledged that depending on the evidence eventually admitted at trial, Thomas LUBANGA DYILO could be criminally responsible under these forms of criminal liability, for the same conduct. The Prosecution submits that this is entirely consistent with the powers of the future Trial Chamber under Regulation 55 of the Regulations of the Court to change the legal characterization, including, *inter alia*, in respect of the form of criminal responsibility pursuant to Article 25, *"without exceeding the facts and circumstances described in the charges and any amendments to the charges"*.

Arrest Warrant Application ... that indirect co-perpetration was also potentially a viable theory of criminal responsibility. Based on the facts as detailed in the Document Containing the Charges, the Office of the Prosecutor believes that 'common purpose' in terms of Article 25(3)(d) could properly be considered as a third applicable mode of criminal liability " The Prosecution's submissions during the Confirmation Hearing reflect that position; see (English) transcript of 24 November 2006, at pages 89 and 122. The *"alternative argument"* (see the [English] transcript at page 122) was made against the background of the 28 August 2006 Submission: *"However, the Prosecution holds that, as it wrote in its application of 25 August, that indirect perpetration could also be applicable"* (see the [English] transcript at page 89; the Prosecution notes that the *"application of 25 August"* is the 28 August 2006 Submission).

[55] See (English) transcript of 24 November 2006, at pages 32, 33 and 36.

[56] See (English) transcript of 24 November 2006, at pages 31 and 33

29. Accordingly, in the Prosecution's submission, the Defence was put on notice, early on, of the Prosecution's charging theory.

Defence's challenges in respect of the theory of co-perpetration

30. The Prosecution submits that the Prosecution's 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.

31. The Defence's argument[57] that co-perpetration, lacking support in customary international law, was not recognized in the jurisprudence of the *ad hoc* Tribunals and cannot accordingly be recognized at ICC, is flawed. It does not consider the fundamental differences between the *ad hoc* Tribunals and the ICC. Contrary to the *ad hoc* Tribunals, the ICC is operating under a Statute which sets out the modes of criminal liability in great detail. This includes the conscious decision, as reflected in Article 25 of the Statute, to create separate modes of liability, which significantly differ from the more global definitions in, for example, Article 7(1) of the ICTY Statute.

32. Against this background, no weight can be given to the fact that the ICTY Appeals Chamber rejected the notion of *"co-perpetratorship"*.[58] This rejection was solely based on the fact that the notion of *"co-perpetratorship"* was not supported by customary international law.[59]

---

[57] See (English) transcript of 24 November 2006, at page 46.
[58] See *The Prosecutor vs Stakic*, IT-97-24-A, Appeals Judgement, 22 March 2006, at paras. 58 to 104.
[59] *Ibid*, at para. 62.

33. Contrary to the Defence's assertion that the Prosecution is *"expanding the notion ... well beyond the clear terms of the Statute"*, [60] the Prosecution is giving full effect to co-perpetration as a form of criminal responsibility expressly recognized by the Statute.

Defence's challenges in respect of the contours of co-perpetration under the Statute

34. From the outset, the Prosecution submits that challenges relating to the contours of a substantive crime and challenges concerning the contours of a form of criminal responsibility are matters to be addressed at trial.[61] Accordingly, the Defence's challenge should not be considered by the Pre-Trial Chamber.

35. In any event, however, the Prosecution submits that in light of the underpinning facts of the case, co-perpetration best represents the criminal responsibility of Thomas LUBANGA DYILO.

36. Contrary to the Defence's approach to divide the Prosecution's case into discrete, disconnected portions,[62] in the Prosecution's submission, the criminal acts of Thomas LUBANGA DYILO must be viewed in their totality: Many of the individual criminal acts of Thomas LUBANGA DYILO fulfil the requirements of separate limbs of criminal liability pursuant to Article 25 of the Statute: In some instances Thomas LUBANGA DYILO directly committed the crimes, in other instances he instigated and in yet other instances he aided and abetted. As the Prosecution's evidence shows, Thomas LUBANGA DYILO utilized his position

[60] See (English) transcript of 24 November 2006, at page 46.
[61] See *The Prosecutor vs Odjanic*, IT-05-87-PT, Decision on Odjanic's Motion Challenging Jurisdiction: Indirect co-perpetration, 22 March 2006, at para. 23.
[62] See (English) transcript of 24 November 2006, at pages 33, 37 and 38.

as both President of the UPC and Commander-in-Chief of the FPLC in a variety of ways to promote and ensure that the enlistment, the conscription and the use of children to participate actively in hostilities took place, based on the intent shared by Thomas LUBANGA DYILO and the other joint perpetrators.

37. Whilst the Prosecution is not required to identify each and every co-perpetrator individually,[63] in the Document Containing the Charges it has extensively identified alleged co-perpetrators of Thomas LUBANGA DYILO:

(i) In paragraph 23 of the Document Containing the Charges, the Prosecution has identified, *"inter alia"*, Bosco NTAGANDA, commander TCHALIGONZA, and Yves KAHWA. In paragraph 24 of the Document Containing the Charges, the Prosecution has detailed the groups of persons the Prosecution considers as co-perpetrators, in stating: *"Others transported the children or arranged for their transportation to the FPLC military training camps, whilst others provided military training to the children and/or equipped them with weapons. Then, the FPLC combat unit commanders placed the children into their respective military units and ordered them into combat."*

(ii) The Prosecution has provided further names of co-perpetrators in the portion of the "individual cases": The Prosecution refers to paragraphs

[63] See *The Prosecutor vs Boskovski*, IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment, 1 November 2005, at para. 30; *The Prosecutor vs Martic*, IT-95-11-PT, Decision on Preliminary Motion against the Amended Indictment, 2 June 2003, at para. 12: *"As regards the identification of participants in the joint criminal enterprise, the chamber has already stated that the nature of the case and the position of the Accused allow the prosecution to identify only the most prominent participants and to refer to the others as members of groups of persons participating in the enterprise."*

42, 43, 44, 51, 52, 53, 54, 55, 60, 66, 69, 73, 78, 79, 80, 81, 82, 83 and 84 of the Document Containing the Charges, where the following additional co-perpetrators are identified: Commander TSHITSA, Floribert KISEMBO, commander KASANGAKI, commander PITCHEN, commander PEPE, commander Salumu MULENDA, and commander KIBLO.

38. Finally, the Prosecution's case meets the requirements of co-perpetration under the Statute; it in particular, and contrary to the Defence's assertion,[64] correctly interprets the preconditions of *"joint control"* and *"essential contribution"* to the crimes.

39. The Prosecution submits that the conduct of Thomas LUBANGA DYILO must be essential to the commission of the crime. In the Prosecution's view, the contribution, however, must be essential at the relevant level only, in the present context of the case against Thomas LUBANGA DYILO at the top of both the FPLC military structure and the UPC.

40. The Prosecution furthermore submits that, whilst each contribution of the co-perpetrators must be essential for the commission of the crime, and intended to secure the commission of the crime, it does not need to be a *conditio sine qua non.*

41. In the Prosecution's view, the contribution of a co-perpetrator is *"essential"* when it amounts to a significant contribution in the realization of the common plan.[65] Co-perpetration, however, does not require that the contribution of each co-

[64] See (English) transcript of 24 November 2006, at pages 46 to 48.
[65] See Hans-Heinrich Jescheck and Thomas Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil, Fünfte Auflage, at pages 674 and 680.

perpetrator is a *conditio sine qua non* for the execution of the common plan.[66] It is sufficient that the co-perpetrator's contribution is more than marginal or merely accidental.[67]

42. In this context, the Prosecution notes that the pre-condition that each co-perpetrator *"could individually have frustrated the plan by refusing to play his part"* as outlined in the Stakic Trial Judgement,[68] must be seen in the context of the facts pertaining to the Stakic case and interpreted in light of the particularities of that case: The co-perpetrators in this case were all at the top of the three branches of the organized structure of power, meaning that the leaders of the respective branches were dependent on one another to implement the campaign of persecution. The Prosecution notes that this situation differs from the particularities of the case against Thomas LUBANGA DYILO.

Challenges to the form of the Document Containing the Charges

43. The purpose of the Document Containing the Charges is to sufficiently inform Thomas LUBANGA DYILO of the charges against him in order to timely and adequately prepare his defence.

44. Against this background, the Document Containing the Charges must contain information as to the identity of the victims, the place and the approximate date

---

[66] See Kai Ambos, Der Allgemeine Teil des Völkerstrafrechts, Ansätze einer Dogmatisierung, 2. Auflage, at pages 562 and 564/565.
[67] See Albin Eser, *Individual Criminal Responsibility*, in Cassesse *et al*, The Rome Statute of the International Criminal Court, at page 793.
[68] See *The Prosecutor vs Stakic*, IT-97-24-T, Trial Judgement, at para. 490.

of the alleged offence and the means by which the offence was committed.[69] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularize the facts of its case in the Document Containing the Charges is the nature of the alleged criminal conduct with which the person concerned is charged.[70] The specificity of the information necessarily depends upon the alleged proximity of the person to the events.[71]

Defence's general challenges to the form of the Document Containing the Charges

45. The Prosecution submits that the Document Containing the Charges meets the following criteria:

(i) In paragraphs 41, 45, 58, 64 and 77, the Document Containing the Charges details the identities of the victims: The names of the victims and further identifying features are provided, in particular the dates of birth of the children.

(ii) Significant detail is provided in the Document Containing the Charges in respect of the places and the approximate dates of the crimes. *Inter alia,* the Prosecution makes reference to paragraphs 41 to 84 of the Document Containing the Charges, which detail the places where the children were recruited - either by means of force or on a "voluntary" basis, the dates of their recruitment, the military training camps where

[69] See *The Prosecutor vs Krnojelac,* IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000.
[70] See *The Prosecutor vs Kupreskic,* IT-95-16, Appeals Judgement, 23 October 2001.
[71] See *The Prosecutor vs Krnojelac,* IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000.

the children were trained, the duration of the training, and the approximate dates and places where the children were used to participate actively in hostilities. In addition, the portion in the Document Containing the Charges covering the "individual cases" provides great detail on the identities of the commanders who trained the children, who used them as bodyguards and who ordered them into battle.

(iii) In this context, the Prosecution has repeatedly detailed concrete acts directly related to Thomas LUBANGA DYILO and the other co-perpetrators. In respect of Thomas LUBANGA DYILO, reference is made to paragraphs 49 and 69, detailing Thomas LUBANGA DYILO's repeated inspections of the FPLC military training camps in Irumu and Rwampara and his instructions to the children. In respect of the other co-perpetrators, the Prosecution refers to paragraphs 42, 43, 44, 51, 52, 53, 54, 55, 60, 62, 66, 69, 70, 71, 73, 75, 76, 78, 79, 80, 81, 82, 83 and 84.

(iv) Furthermore, on 28 August 2006, the date on which the Prosecution filed the Document Containing the Charges, it simultaneously filed[72] the List of Evidence, containing all evidence the Prosecution to be relied upon during the Confirmation Hearing. By 28 August 2006,[73] the Prosecution had disclosed the evidentiary materials, thus allowing the Defence to supplement its information about the Prosecution's case against Thomas LUBANGA DYILO.

---

[72] In addition, the Prosecution on the same day provided the Defence with the List of Evidence.

[73] A significant amount of the Prosecution's evidentiary materials were disclosed to the Defence months before 28 August 2006.

(v) Finally, the Prosecution is neither required nor permitted to plead evidence. The material facts are pleaded, separate from the evidence; the underlying evidence was disclosed to the Defence in the form of the List of Evidence and appropriately intended for presentation during the course of the Confirmation Hearing.

Defence's specific challenges on the form of the Document Containing the Charges

46. The Prosecution addresses the Defence's specific challenges:[74]

(i) Paragraph 5[75] forms part of the section on "The Accused"; it is therefore only a preliminary, general paragraph on Thomas LUBANGA DYILO's background. Detailed information on the foundation of the FPLC, its composition and size, its structure, its means of communication, and Thomas LUBANGA DYILO's *de iure* and *de facto* role in it is provided in paragraphs 14 to 17.

(ii) The same observations apply to paragraph 7.[76] Full details of the identity of the main armed groups fighting the UPC/FPLC are provided in paragraphs 13, 19 and 84, including, *inter alia*, in respect of the Lendu armed forces, the FNI and the FRPI.

---

[74] The Prosecution addresses the Defence's specific challenges in the order they were discussed by the Defence on 24 November 2006; see (English) transcript of 24 November 2006, at pages 64 to 73.
[75] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at pages 64 and 65
[76] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 65.

(iii) In respect of paragraph 11,[77] the Prosecution submits that the aim of the information provided is to show that Thomas LUBANGA DYILO's subordinates were subordinate to him in all respects. Accordingly, in this context, it is sufficient to plead the material fact of nomination, suspension, dismissal and expulsion without reference to the underlying evidence of such facts. Whilst the evidence contained in the Prosecution's Amended List of Evidence provides for additional details, the purpose of the Document Containing the Charges is not to plead the evidence.

(iv) Paragraph 12[78] provides necessary contextual information. It shows that the UPC under Thomas LUBANGA DYILO had certain objectives, including *inter alia* the control of Ituri and the establishment of Hema dominance. Paragraph 12 serves in addition the purpose of establishing that there was an inter-ethnic armed conflict not of an international character.

(v) Paragraph 13[79] provides for an essential factual element of the armed conflict not of an international character.

(vi) The Prosecution has included paragraph 14[80] in the Document Containing the Charges to show the development of the Hema militia subordinate to Thomas LUBANGA DYILO into the FPLC. Furthermore, the information contained in paragraph 14 provides

[77] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 67.
[78] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at pages 67 and 68.
[79] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 68.
[80] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 68.

further information relevant to the armed conflict not of an international character.

(vii) Paragraph 23[81] is directly related to the charges. To the extent that the Defence has a different point of view, this is a matter for legal argument at trial but does not otherwise constitute a valid objection to the form of the Document Containing the Charges.

(viii) Paragraph 25[82] provides necessary contextual elements. Read together with paragraph 26, it allows for the Defence to understand the time period covered by paragraph 25. Greater specificity of the times during which the alleged crimes were committed are pleaded specifically in paragraphs 27, 29, 30, 32, and in the paragraphs related to the individual cases, *inter alia* in paragraphs 41, 45, 58, 64 and 77.

(ix) The Prosecution has included the information in paragraph 26[83] in order to provide pertinent background information on Thomas LUBANGA DYILO, namely that he since 2001 was involved in the recruitment of children.

(x) In respect of the Defence's observation concerning paragraph 27,[84] the Prosecution notes that it has specified the names of subordinate commanders, who are considered co-perpetrators, in paragraph 23. A number of further subordinate commanders are identified in the

[81] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 68.
[82] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 69.
[83] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 69.
[84] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at pages 69 and 70.

portion of the Document Containing the Charges on the "individual cases".

(xi) Paragraphs 30, 32, 37 and 40[85] form part of the "pattern" portion of the Document Containing the Charges and thus do not need to provide the same level of detail as the portion on the "individual cases". The necessary detailed information is provided in the portion on the "individual cases", namely in paragraphs 42, 43, 44, 51, 52, 53, 54, 55, 60, 66, 69, 73, 78, 79, 80, 81, 82, 83 and 84.

(xii) In respect of paragraphs 41, 45, 58 and 64,[86] the Prosecution is restricted from pleading evidence. A number of co-perpetrators are identified in paragraph 23 and in a series of paragraphs in the portion on the "individual cases", namely paragraphs 42, 43, 44, 51, 52, 53, 54, 55, 60, 66, 69, 73, 78, 79, 80, 81, 82, 83 and 84.

(xiii) In the Prosecution's submission, the Prosecution does not need to plead in paragraphs 49 and 69[87] the detail as requested by the Defence. In addition, the materials contained in the Prosecution's Amended List of Evidence, in particular the video materials, allow for the Defence to learn more details of the inspection of the training camps by Thomas LUBANGA DYILO.

---

[85] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 70.
[86] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at pages 71 and 72
[87] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at pages 71 and 72.

(xiv) The reference in paragraph 77[88] to the "second half of 2002" can logically only be after 1 July 2002, and thus within the temporal jurisdiction of the Court.

(xv) The reference in paragraph 84[89] to the UPDF does not *per se* make the conflict an "international" conflict.

Unsupported factual statements by the Defence

47. The Prosecution refers to its submissions on this matter during the Confirmation Hearing,[90] and includes them by reference.

48. At numerous occasions during the Confirmation Hearing, the Defence made factual statements, baldly denying the Prosecution's submissions, without substantiating or providing evidence to support these assertions.[91]

49. Whilst doing so, the Defence has repeatedly stated that the burden of proof rests with the Prosecution, thereby eliminating any need on its part to substantiate or support the numerous factual challenges it has submitted in response to the Prosecution's evidence.[92]

---

[88] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at page 72.
[89] The Defence challenge is detailed in the (English) transcript of 24 November 2006, at pages 72 and 73.
[90] See for more details footnote 17.
[91] REDACTED.
[92] See (French) transcript of 28 November 2006, at page 66, lines 7 to 11, at page 84, lines 10 to 13, at page 81, lines 9 to 13, and at page 106, at lines 10 to 14.

50. Whilst Article 61(6) suggests that the Defence is not obliged to present evidence,[93] the Prosecution submits that the Pre-Trial Chamber, for the reasons outlined below, should take into account the lack of substantiation when evaluating and assessing the challenges made by the Defence.

51. Whereas the Prosecution agrees that the burden of proof falls upon the Prosecution,[94] the Prosecution submits that this principle has no implication on the obligations of the Defence to substantiate its own factual assertions, otherwise the Pre-Trial Chamber cannot assess the legitimacy of the Defence's challenge and, accordingly, any such statement of the Defence must carry little or no weight.[95]

52. In the Prosecution's view, a distinction needs to be made between the *"legal"* burden of proof, and the *"evidential"* burden of proof. Whereas the *"legal"* burden of proof obligates the Prosecution to prove all the facts necessary to establish substantial grounds in terms of Article 61(5) and Article 61(7), the *"evidential"* burden of proof provides for an obligation on either the Prosecution or the Defence to establish the facts on a particular issue.[96]

53. The *"evidential"* burden of proof, whilst not a true burden at all, refers to the practical requirement for a Party to call evidence or raise an issue on the evidence

---

[93] See also Kuniji Shibahara, *Article 61 Confirmation of the charges before trial"* in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (1999), at page 790.

[94] This principle has been incorporated in the Rome Statute and the Rules of Procedure and Evidence. Article 61(5) states that the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.

[95] The Prosecution notes that the Defence has invoked the principle *reus in exceptione fit actor*, see (French) transcript of 28 November 2006, at page 81, lines 11 to 13.

[96] See May and Wierda, *International Criminal Evidence, Burden and Standard of Proof*, at 4.62; see also Waight and Williams, *Evidence Commentary and Materials*, Lawbook Co , Six Edition, 2002, at page 56.

already called, in order to establish certain defences; the onus is on the Defence to raise it, and the Defence must establish it on the balance of probabilities.[97] In the present context, the Defence has failed to discharge its *"evidential"* burden of proof.

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

54. The Prosecution is of the view that it has fully established in the Confirmation Hearing that the present case was brought on the basis of facts and law and by virtue of Thomas LUBANGA DYILO's position as one of the most responsible persons for serious crimes in Ituri. 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 Court in this proceeding and future proceedings adhere to standards of fact-based argument.

55. Against this background, the Prosecution recalls the following statements made by members of the Defence team:

(i) On 9 November 2006,[98] Ms Melinda Taylor from Office of Public Counsel for the Defence, whilst discharging her responsibilities under

[97] *Ibid,* at 4.65 In addition, the Prosecution refers to *The Prosecutor vs Bizimungu,* ICTR-00-56-T, "Decision on Sagahutu's Request for Certification to Appeal the Decision dated 13 May 2005 Dismissing Applicant's Request for Exclusion of Witnesses LMC, DX, BB, GS, CJ, and GFO", 9 June 2005, at paras. 16 and 17.
[98] See (English) transcript of 9 November 2006, at page 193, lines 6 to 18

Regulations 76 and 77 of the Regulations of the Court, made the following statement in public session:[99]

"So rather than the Prosecution having to explain to the general public what these heavily redacted statements mean and why the documents with no name and no source should be considered reliable and admissible, the Defence must try and first make sense of them, and for some documents it's like trying to break the Da Vinci code, and then try to convince the Chamber -- which has had access to the full unredacted version and therefore has an idea where the Prosecution is coming from -- not to admit them. So we have to ask ourselves is this hearing an entertaining show, or is it a hearing in which Thomas Lubanga Dyilo has the right to defend himself? Because under the current conditions, he may be just as well –"[100]

At this stage, the Presiding Judge intervened, and reminded Ms Taylor of the Code of Professional Conduct for counsel as follows:

"Ms Taylor, I cannot accept -- I refer to the Professional Code of Conduct -- I cannot accept that you say that your question whether the confirmation hearing is right or wrong, or wrongly conducted. I ask you to withdraw that expression."

[99] The Prosecution recalls that Ms Taylor, when she made that statement, was visibly addressing the public in the public gallery, and only rarely addressed the Judges of the Pre-Trial Chamber.
[100] Emphasis by the Prosecution

Maître Flamme, Lead Counsel for the Defence, took the floor and stated:

"Ms Taylor is not talking about the Court but of the Prosecutor." [101]

Ms Taylor did not object to Maître Flamme's clarification.

(ii) Maître Flamme, Lead Counsel for the Defence, on 28 November 2006, made the following statement in public session, visibly addressing the Prosecution's Senior Trial Attorney:[102]

> *Mr Prosecutor, I accuse you of conducting a political case and entangling the International Criminal Court in a political -- in political proceedings. This is entirely unacceptable for us, because the man you have imprisoned is an innocent man, but you will go down in history for giving Congo its Nelson Mandela. ... Already two years have been spent on these proceedings; huge financial means have been expended by the Prosecutor. Justice must be seen to be done, and that means that this high court must ensure that it is not misused for political ends in a prolongation of States."*[103]

56. The Prosecution, at this time,[104] refrains from submitting a formal complaint to the Registry pursuant to Article 34(1)(a) of the Code of Professional Conduct for

---

[101] Emphasis by the Prosecution.
[102] See (English) transcript of 28 November 2006, at page 146, lines 4 to 9 and 14 to 19.
[103] Emphasis by the Prosecution
[104] In the event that this conduct is repeated in future proceedings, the Prosecutor will submit a formal complaint to the Registry

counsel[105] (Code of Conduct). The Prosecution wishes, however, to state that the statements of both, Ms Taylor[106] and Maître Flamme in its view are in conflict with Articles 7(1) and 24(2) of the Code of Conduct and would justify a complaint pursuant to its Article 34.

57. Article 7(1) of the Code of Conduct states that *"Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor ..."*. In addition, Article 24(2) of the Code of Conduct regulates that *"Counsel ... shall exercise personal judgement on the substance and purpose of statements made ..."*

58. In the Prosecution's submission, the high threshold[107] to establish professional misconduct under Article 31 of the Code of Conduct is met: In stating that the Prosecutor having initiated the Confirmation Hearing as *"an entertaining show"* and accusing the Prosecution's Senior Trial Attorney *"of conducting a political case and entangling the International Criminal Court ... in political proceedings"*, both Ms Taylor and Maître Flamme suggested to the Court - and to the public - that the Prosecutor's decision to request the Pre-Trial Chamber to confirm the charges against Thomas LUBANGA DYILO is frivolous and determined by political intentions that fall outside the duties and powers of the Prosecutor as set forth in Article 54 of the Statute rather than by evidentiary considerations. By no means are these unsubstantiated allegations justified by a legitimate interest of Ms Taylor and Maître Flamme to defend Thomas LUBANGA DYILO.

---

[105] Code of Professional Conduct for counsel, Annex to the ASP Resolution ICC-ASP/4/Res.2, adopted by the ASP's 3rd Plenary meeting on 2 December 2005.

[106] The Prosecution notes that Ms Taylor, as a member of the Office of Public Counsel for the Defence, is bound by the Code of Conduct pursuant to Regulation 144(2) of the Regulations of the Registry.

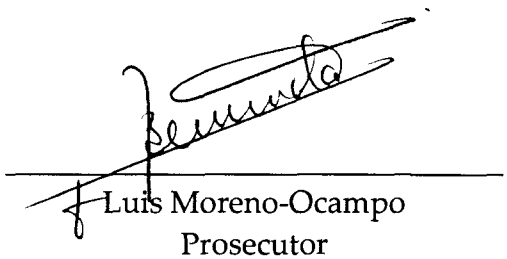
[107] Article 31 of the Code of Conduct imposes on counsel *"a substantial ethical or professional duty"*

Public redacted version

59. Since the Prosecution in the present submission in a few instances quotes from transcripts of closed sessions, it files this submission as a confidential filing. The Prosecution will file a public redacted version as soon as possible.

Request

60. The Prosecution requests the Pre-Trial Chamber to confirm the charges against Thomas LUBANGA DYILO as set out in the Document Containing the Charges and to commit Thomas LUBANGA DYILO to a Trial Chamber for trial on these charges.



Luis Moreno-Ocampo
Prosecutor

Dated this 4th day of December 2006
At The Hague, The Netherlands

Book of authorities

1. Jurisprudence of international criminal tribunals

ICTY

Prosecutor v. Kordic et al., IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995;

The Prosecutor vs Milosevic, IT-02-54, Decision on Review of Indictment, 22 November 2001;
http://www.un.org/icty/milosevic/trialc/decision-e/11122RIE16898.htm

Prosecutor v. Kunarac et al., IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000;
http://www.un.org/icty/kunarac/trialc2/decision-e/00703DC213246.htm

Prosecutor v. Delalic et al., IT-96-21-A, Appeals Judgement, 20 February 2001;
http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf

Prosecutor v. Kordic et al, IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000;
http://www.un.org/icty/kordic/trialc/decision-e/00406DC512861.htm

Prosecutor v. Sikirica et al., IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001;
http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf

Prosecutor v. Milosevic, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004;
http://www.un.org/icty/milosevic/trialc/judgement/index.htm

The Prosecutor vs Stakic, IT-97-24-A, Appeals Judgement, 22 March 2006;
http://www.un.org/icty/stakic/appeal/judgement/sta-aj060322e.pdf

The Prosecutor vs Odjanic, IT-05-87-PT, Decision on Odjanic's Motion Challenging Jurisdiction: Indirect co-perpetration, 22 March 2006;
http://www.un.org/icty/milutino87/trialc/decision-e/060322.htm

The Prosecutor vs Boskovski, IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment, 1 November 2005;
http://www.un.org/icty/boskoski/trialc/decision-e/051101.pdf

The Prosecutor vs Martic, IT-95-11-PT, Decision on Preliminary Motion against the Amended Indictment, 2 June 2003;
http://www.un.org/icty/martic/trialc/decision-e/030602.htm

The Prosecutor vs Stakic, IT-97-24-T, Trial Judgement, 31 July 2003;
http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf

The Prosecutor vs Krnojelac, IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000;
http://www.un.org/icty/krnojelac/trialc2/decision-e/00211AI212639.htm

The Prosecutor vs Kupreskic, IT-95-16, Appeals Judgement, 23 October 2001
http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf

ICTR

The Prosecutor vs Bizimungu, ICTR-00-56-T "Decision on Sagahutu's Request for Certification to Appeal the Decision dated 13 May 2005 Dismissing Applicant's Request for Exclusion of Witnesses LMC, DX, BB, GS, CJ, and GFO", 9 June 2005
http://69.94.11.53/ENGLISH/cases/BizimunguA/decisions/090605.htm

2. Commentaries

Bruce Broomhall, *General Principles of Criminal Law*, in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (1999);

Kuniji Shibahara, *Article 61: Confirmation of the charges before trial*, in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (1999);

Albin Eser, *Individual Criminal Responsibility*, in Cassesse *et al* (eds.), The Rome Statute of the International Criminal Court

3. Books / Journal articles

Carter's Criminal Law of Queensland, 14th ed., 2004

Delisle, R. *et al*, Learning Canadian Criminal Procedure (Thomson, 2003);

Mewett, A. *et al*, *Introduction to the Criminal Process in Canada* (Carswell, 2000);

Juy-Birmann, R. *et al*, The German System, in European Criminal Procedures, Cambridge, 2004;

Treier in Karlsruher Kommentar, Commentary to para. 203, RdNr. 5;

Blackstone's Criminal Practice, 2005, Oxford;

William W. Burke-White, *"Complementarity in Practice. The International Criminal Court as part of as System of Multi-Level Global Governance in the Democratic Republic of Congo"*, in Leiden Journal of International Law, 18 (2005);

Gerhard Werle, *Principles of International Criminal Law*, 2005;

Hans-Heinrich Jescheck and Thomas Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil, Fünfte Auflage;

Kai Ambos, Der Allgemeine Teil des Völkerstrafrechts, Ansätze einer Dogmatisierung, 2. Auflage;

May and Wierda, *International Criminal Evidence*;

Waight and Williams, *Evidence: Commentary and Materials*, Lawbook Co., Sixth Edition, 2002

4. National legislation

South Australia Summary Procedure Act 1921;

Australian Capital Territory Magistrates Court Act 1930;

Criminal Procedure Code (Strafprozeßordnung, StPO);

Magistrates' Courts Act 1980