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PRE-TRIAL CHAMBER I

Before:

**Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner**

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Document

Written submissions of the legal representative of victim a/0105/06

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
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Mr Ekkehard Withopf, Senior Trial
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Legal Representatives of the Victims

Ms Carine Bapita Buyangandu (Victim
a/0105/06)
Mr Luc Walley and Mr Franck Mulenda
(Victims a/0001/06, a/0002/06 and
a/0003/06)

Counsel for the Defence

Mr Jean Flamme
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1. On 28 November 2006, in her final submissions,¹ the Legal Representative presented the personal situation of Victim a/0105/06 and the historical context in order to discuss essentially the issue of the characterisation of the armed conflict and its impact on the charges, together with the responsibility of Thomas Lubanga Dyilo in the alleged facts, maintaining that the responsibility in question had to be principally entailed for direct perpetration and only subsidiarily for indirect perpetration. The Legal Representative of Victim a/0105/06 (“the Legal Representative”) also discussed the issue of language in order to demonstrate that Kingwana was merely a form of Swahili, and that persons speaking different forms of Swahili understand one another. The Legal Representative made joint oral submissions with the Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06. Thus she fully supports the arguments submitted orally by the Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06.

2. The Legal Representative is of the opinion that two points made in her oral submissions ought to be developed more fully in these written submissions, namely the threshold for probative value at this stage of the proceedings and the form of the participation in the alleged crimes.

I. Regarding the threshold for probative value

3. The Prosecutor maintains that Thomas Lubanga Dyilo committed war crimes constituted by recruitment (enlistment and conscription) and the use of children under fifteen years of age in an armed conflict². With regard to respect for the rights

¹ See the transcript of the hearing of 28 November 2006, English edited version, pages 45 onwards.

² See the “Warrant of Arrest”, no. ICC-01/04-01/06-02, 10 February 2006. See also the “Document Containing the Charges pursuant to Article 61 (3) (a)”, no. ICC-01/04-01/06-356-Anx4, 28 August 2006.

of the Defence and the presumption of innocence, these allegations could lead to a trial only under the supervision of the judges, a two-stage monitoring process at the preliminary stage of the proceedings.

4. Firstly, the Pre-Trial Chamber orders the arrest and detention of the person against whom the claim is directed by issuing a warrant of arrest. To do so, the Chamber verifies the existence of reasonable presumptions in respect of crimes which fall within the jurisdiction of the Court. The Prosecutor must then submit the document containing the charges for confirmation by the same Pre-Trial Chamber. Under article 58 (1) (a) of the Rome Statute, the Pre-Trial Chamber issues a warrant of arrest provided that it is "*satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court*".³ At this stage of the proceedings, the Prosecutor merely has to submit a summary of the evidence.⁴

5. Once the person against whom the claim is directed has been notified of the document containing the charges, the Pre-Trial Chamber calls for a confirmation of charges hearing to be held. At this stage, and in accordance with article 61 (7) (a) of the Rome Statute, the Pre-Trial Chamber must determine "*whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged*."⁵

6. The Legal Representative is of the opinion that the different terms used in the two provisions lead to a difference in the threshold of the probative value. Whereas the judges may base their decision solely on the perception the Prosecutor has of the case when issuing the warrant of arrest, as far as the confirmation of the charges is

³ Emphasis added.

⁴ This includes identifying information about the person, a specific reference to the crimes, a concise statement of the facts, a summary of the evidence and the reason why the Prosecutor believes that the arrest of the person is necessary. See article 58 (2) of the Rome Statute.

⁵ Emphasis added.

concerned the Prosecutor is obliged to present his evidence to the Pre-Trial Chamber which then proceeds to assess it. However, the burden of proof at the confirmation of charges stage remains lower than that of the burden of proof during the trial.

7. At the trial, and in accordance with article 66 of the Rome Statute, the Trial Chamber will have to be convinced *beyond all reasonable doubt* of the guilt of the accused. But the Pre-Trial Chamber must limit itself to the existence of serious presumptions to confirm the charges. Consequently this requires a *prima facie* assessment of the evidence.

8. The Defence argument that the Prosecutor has not provided sufficient evidence to confirm the charges is based on an erroneous idea insofar as the Defence is not taking into account the difference in the threshold of proof for each stage of the proceedings. The numerous documents tendered into evidence in the case file by the Prosecutor as supported by his oral explanations, and as far as some of the most important ones are concerned, by the testimony of Ms Kristine Peduto, broadly support the presumption that Thomas Lubanga Dyilo's responsibility should be entailed for these war crimes, which fall within the jurisdiction of the Court. These documents clearly show that all the elements of the alleged crimes are present, and that imputability is also established *prima facie*.

9. As far as the specific element involving the age of the children recruited who participated in the hostilities is concerned, the Defence also claims that the Prosecutor has provided no evidence. The Legal Representative recalls that this element was widely reported in various documents, in particular the United Nations reports, insofar as some are based on the interviews conducted by Ms Kristine Peduto on the ground with children who she testifies were under the age of fifteen. However, the Defence has deliberately ignored the victims. The Legal Representative

therefore recalls, in support of the evidence submitted by the Prosecutor, that some of the victims authorised to participate in this stage of the proceedings are child soldiers who have been demobilised and who were under the age of fifteen at the material time.

10. The issue of the threshold is thus resolved insofar as it appears that the evidence tendered in the case file is sufficient to establish substantial presumptions regarding the responsibility of Thomas Lubanga Dyilo for the alleged crimes of enrolment and use of children under the age of fifteen in an armed conflict, whether international or non-international.⁶ The form of Thomas Lubanga Dyilo's participation in the perpetration of these crimes has yet to be determined.

II. Regarding individual criminal responsibility

11. Article 25 (3) of the Rome Statute describes the various forms of participation in the crimes which fall within the jurisdiction of the Court.

12. It should be noted on the one hand that article 25 (3) (a) describes three forms of perpetration (direct perpetration, co-perpetration and indirect perpetration) and on the other hand that the other provisions of that same article also establish other forms of direct and indirect perpetration which are just as relevant in the present case. Article 25 (3) (b) and (c) describes forms of direct and indirect participation (ordering, soliciting, inducing) which fall into the category of co-perpetration, as does article 25 (3) (d) albeit from a different point of view.⁷ However, by basing his

⁶ The Legal Representative reiterates here her oral arguments regarding the characterisation of the conflict and its impact on the alleged crimes.

⁷ Co-perpetration refers to what is known in the case law of the three above-mentioned international criminal tribunals as joint criminal enterprise. This form of participation in a crime was defined by the Appeals Chamber in the *Tadic* case (15 July 1999, paras. 185-234), as stemming from *committing*. The case law then set out the elements of this form of participation

argument on article 25 (3) (a) of the Rome Statute, the Prosecutor claims that two forms of responsibility may be applied to this case: either co-perpetration or indirect perpetration. The Prosecutor alleges that co-perpetration is the principal responsibility. Indirect perpetration is alleged only subsidiarily.⁸

13. For the Prosecutor, co-perpetration pre-supposes a material element consisting of either *de facto* or *de jure* control of the military structure which was the cause of the crimes, and a mental element resulting from the intent to pursue the common goal. According to the Prosecutor, *“in the case of crimes committed through organised structures of power, the person who controls the organisation should be considered as a co-perpetrator as a result of his functional control of the crime”*.⁹ The Prosecution therefore bases its argument on Thomas Lubanga Dyilo’s authority, *de facto* and *de jure*, within the UPC and FPLC and refers back to the evidence presented in support of this. As far as intent is concerned, the Prosecution deduces this from a cluster of facts, including the recruitment of child soldiers by Thomas Lubanga Dyilo himself, visits to instruction/training camps, and the use of child soldiers as bodyguards.

14. The Prosecutor’s analysis reveals a certain number of inadequacies in our opinion.

15. Firstly, the facts described clearly demonstrate that Thomas Lubanga Dyilo committed the crimes alleged, on the one hand as an individual, and on the other

and more importantly, how a case must be pleaded in an indictment. The case law established three forms, of which only the first two in our opinion apply to direct co-perpetration. See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, paras. 196-204; *Prosecutor v. Radoslav Brdjanin & Momir Talic*, Case No. IT-99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (Trial Chamber 2), 26 June 2001, para. 25.

⁸ See the “Document Containing the Charges pursuant to Article 61 (3) (a)”, Document No. ICC-01/04-01/06-356-Anx4, 28 August 2006, paras. 20-24. See also the transcript of the hearing of 14 November 2006, realtime version, pp. 60-91.

⁹ See the transcripts of the hearing of 14 November 2006, realtime version, p. 90 English edited version.

hand through the political-military structure which had been established. He personally solicited enlistment (through public appeals to the Hema) and encouraged them (in particular by visiting the camps where the recruits were trained and in his address to the people congratulating them on their mobilisation); he supervised the training of the recruits (always through his visits to the camps where such training was provided), etc. It is therefore not legally sound to limit allegations to co-perpetration alone whereas the facts described show obvious direct perpetration.

16. Furthermore, the theory of co-perpetration does not necessarily involve control, as the Prosecutor maintains. In this case also, reference must be made to the theory of joint criminal enterprise¹⁰ as developed in the case law of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").¹¹ The *Stakic* judgment had already shown that some forms of joint criminal enterprise are equivalent to co-perpetration, and the essential element is the sharing of a common goal:¹² even if the accused is not in a position of authority relative to the perpetrator of the crime, from the time when this common design is shared and one of them has carried out the agreed crime, all those who had subscribed to the common goal may be held liable. This constitutes joint criminal enterprise, co-perpetration or co-action. Consequently, proof of the *de facto* or *de jure* authority wielded by Thomas Lubanga Dyilo is not necessary to prove his responsibility for the crimes committed by the other participants in his plan to enlist and conscript child soldiers, and other war crimes.

¹⁰ The Defence argued this issue in depth.

¹¹ Accordingly, in the *Rasevic* Case, the Chamber listed 4 aspects: the plurality of persons, the existence of a common plan which amounts to or involves the commission of a crime, participation of the accused in the plan. See *The Prosecutor v. Mitar Rasevic*, Case No. IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment (Trial Chamber 2), 28 April 2004, paras. 14-15.

¹² See *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgement (Trial Chamber 2), 31 July 2003, para. 440.

17. This notwithstanding, this position of authority is not entirely irrelevant to the case, as it could constitute an aggravating circumstance for the person against whom the claim is directed. It is worth noting that the Rome Statute is aware of this concept of joint criminal enterprise, since article 25 (3) (d) provides for the joint commission of a crime, which seems to constitute another expression of the joint criminal enterprise. The advantage of the Rome Statute lies in the fact that this form of participation in the crime is expressly mentioned in the Statute, whereas for the two *ad hoc* tribunals, it is case law, interpreting their respective Statutes, which infers it from the commission of the crime.

18. Lastly, regarding intention, all that is necessary is to provide evidence that Thomas Lubanga Dyilo shared the common goal, and to set out that goal precisely. In this case, from the beginning of the RCD-K/ML, Thomas Lubanga Dyilo subscribed to the plan to enlist and conscript child soldiers. As leader of the UPC and the FPLC, he played a central role in his movement in continuing to implement this previous plan. Furthermore, the fact that in the midst of conflict, he continued to make statements inciting the enlistment and conscription of child soldiers proves that he did not dissociate himself from the common design.

19. As concerns indirect perpetration, the Prosecutor submits that the material element is the same as in the case of co-perpetration, indirect perpetration being only "*a variant of the notion of the control of the crime*".¹³ And yet the facts alleged certainly do not show indirect participation in the crime. Relying on the concept of indirect participation would adulterate the truth as evidenced by the facts presented to the Chamber. As concerns the mental element of indirect perpetration, the Prosecutor maintains that he must provide the proof of intentional and informed influence over the perpetrators of the crimes to incite them to commit them, adding that "*[h]is intent must be directed at both the agent so that he commits the crime and at the underlying*

¹³ See the transcript of the hearing of 14 November 2006, realtime version, p. 122, lines 19-20.

crime".¹⁴ There are, in the main, two forms of indirect perpetration: firstly, where the person against whom the claim is directed provided substantial assistance in the commission of the crime without committing it himself. This is complicity, which is a complex concept in itself. The second form is where that person committed the offence of negligence by failing to prevent the crime and/or punish its commission. Depending on the circumstances and the legal system, this is either vicarious liability or command responsibility. In both cases, the elements of the crime are different from what the Prosecutor argued. This notwithstanding, it must be emphasised that the Prosecutor correctly alleges this form of indirect participation subsidiarily.

20. As concerns the confirmation of charges, regulation 52 (c) of the Regulations of the Court indicates what must be pleaded in the document containing the charges, as follows: "*a legal characterisation of the facts to accord both with the crimes under articles 6, 7 and 8 and the precise form of participation under articles 25 and 28*". Pursuant to this regulation, in the document containing the charges, the Prosecutor refers to article 25 (3) (a) of the Rome Statute for all three counts charged.¹⁵

21. An in-depth study of article 25 (3) (a), 25 (3) (b), 25 (3) (c) and 25 (3) (d) of the Rome Statute demonstrates that some acts may be covered by several forms of participation. For example, in the case of Thomas Lubanga Dyilo, as commander-in-chief of the FPLC, in wielding his authority and giving orders to his subordinates, he was able to order the recruitment of child soldiers. In this instance, these acts may fall under indirect perpetration (article 25 (3) (a) of the Rome Statute), and also under article 25 (3) (b) which does not assume an official superior-subordinate relationship between the person giving the order and the person carrying it out.¹⁶

¹⁴ *Ibid.*, p. 124, lines 15-16.

¹⁵ *Ibid.*, p. 88, line 1.

¹⁶ See *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, 1 December 2003, para. 793. See also *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, 17 June 2004, paras. 281-284.

22. The submissions of the Legal Representative in no way imply a change in the charges against Thomas Lubanga Dyilo. These submissions, insofar as the document containing the charges is concerned, seek solely to establish that that the form of participation of the suspect cannot be limited to the form mentioned in article 25 (3) (a) of the Rome Statute and that therefore, during its deliberations, Pre-Trial Chamber I should consider the fact that the form in which Thomas Lubanga Dyilo participated in the crimes referred to in article 8 (2) (e) (vii) of the Statute may also be applicable under article 25 (3) (b), 25 (3) (c) and 25 (3) (d) of the Rome Statute.

23. Indeed, nothing would prevent the Pre-Trial Chamber, when making a determination as to whether there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo committed each of the crimes ascribed to him, from specifying the forms of responsibility. This option arises from the Chamber's inherent power to weigh the evidence tendered and make findings at its discretion, taking account of the threshold of proof.

24. Furthermore, during the hearing of 24 November 2006, the Defence submitted that “[...] *if the Prosecution intended to elaborate on the requirements to invoke liability under Article 25, it should do so in written form prior to the confirmation hearing, otherwise the Defence would be unable to determine which acts or conduct the Prosecution was relying on to ground individual liability and to organise its preparation in advance of the hearing accordingly*”¹⁷. However, the Defence referred to case law only very partially. In the *Semanza* judgment, the ICTR Appeals Chamber found that the Prosecutor's obligation to plead the exact mode of participation is relative and not imperative and that the absence of precision may be offset by other documents.¹⁸ Furthermore, in the

¹⁷ See transcript of hearing of 24 November 2006, English version, lines 14-20, p. 29.

¹⁸ See *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgment (Appeals Chamber), 20 May 2005, para. 259: “*The Appeals Chamber notes that it has long been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under Article 6(1) of the Statute. The*

Gacumbitsi case, the ICTR Appeals Chamber found that the title of the count was sufficient to allow the Defence to understand that all the forms provided apply to each specific act which follows, even if the specific forms of participation in that act do not include all the elements of the title¹⁹.

25. For these reasons, the Legal Representative requests that the Pre-Trial Chamber confirm the charges against Thomas Lubanga Dyilo.

/signed/

<hr/> Carine Bapita Buyangandu
Legal Representative of Victim a/0105/06

Done on 1 December 2006

At The Hague

The Netherlands

Appeals Chamber reiterates that, to avoid any possible ambiguity, it would be advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged. Nevertheless, even if an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused might have received clear and timely notice of the form of responsibility pleaded, for instance in other paragraphs of the indictment. In the case at hand, the Appeals Chamber is satisfied that the Appellant had clear and timely notice that he was being charged with, inter alia, complicity in genocide and aiding and abetting extermination”.

¹⁹ See *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, para. 123: “In considering whether the Appellant received clear and timely notice, the Indictment must therefore be considered as a whole. In this case, the Appeals Chamber finds, by majority, Judge Güney and Judge Meron dissenting, that the reference to aiding and abetting in the preamble to Count 4, taken in combination with the allegations of material facts sufficient to support a conviction under that mode of liability, was sufficient to put the Appellant on notice that he was charged with aiding and abetting the murders of Marie and Béatrice. Specifically, paragraph 36 of the Indictment states that the Appellant ordered his tenants to leave their home and made an announcement that, in the context of the ongoing genocide, made clear that he was doing so because he did not want the home to serve as a refuge for Tutsi. Other paragraphs of the Indictment detail the context of the genocidal campaign, which ensured that in expelling the tenants under these circumstances, the Appellant was exposing them to a high probability of death. Taken together -- and independently of the allegation at the end of paragraph 36 that the Appellant subsequently ordered the tenants’ murder, which pleads the alternative “ordering” theory – these paragraphs allege the necessary material facts in support of a conclusion that the Appellant aided and abetted their murder”.