Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **7 November 2006**

PRE-TRIAL CHAMBER I

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

Registrar: **Mr Bruno Cathala**

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

Public Document

Public Redacted Version of Request to exclude evidence obtained in violation of article 69(7) of the Statute

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

Counsel for the Defence
Mr. Jean Flamme
Ms. Véronique Pandanzyla

1. Introduction:

1. On 13 October 2006, the Defence requested the Prosecution to provide it a list of all items seized from the headquarters of the UPC, and a copy of the decision issued by a local Tribunal, which declared that the seizure was illegal.
2. On 17 October 2006, the OTP responded that the "request lacks any justification for your indication that this information is relevant in light of article 67(2). Thus, the Prosecution considers this inquiry as being unsubstantiated and will not provide the information requested". The Prosecution further protested the lack of specificity in the request in terms of the location of the seat of the UPC and the date of seizure.
3. During the Lead Counsel's mission to the DRC, he was able to obtain further particulars in relation to the search and seizure, and corresponding decision: namely, that the materials were seized from the office of John/Jean Tenanzabo in August or September 2005; the search was conducted by DRC authorities in the presence of an OTP investigator [redacted]; the decision was issued by the Kisangani Court of Appeal, and was part of a decision acquitting John/Jean Tenanzabo. The Defence incorporated this information into a motion requesting the Chamber to order the Prosecutor to disclose the materials in question.
4. On 2 November 2006, the Chamber issued its decision, in which it concluded that the list of items seized from UPC fell within the Prosecutor's obligations under Rule 77, and thereby ordered the Prosecutor to provide the defence by Monday 6 November 2006, 9.30am, with:
    (i) a list of all items seized during the search and seizure operation which (a) took place at the headquarters of the UPC in Bunia in or around August/September 2005; and (b) has been declared unlawful by the Court of Appeals of Kisangani; and
    (ii) a list of those items seized in the above-mentioned search and seizure operation who have been included in the Prosecution Amended List of Evidence, as filed on 20 October 2006.
5. On Sunday 5 November 2006 at 5.20pm, the Prosecution emailed the following response to the Defence:[1] "You indicate "in or around August/September 2005" whereas our files detail that the search and seizure operation in the presence of

[1] The email is attached to this motion.

[redacted] took place on 16 April 2005. Furthermore, and in particular, the Prosecution makes the following observation: The mere statement that the search and seizure operation you are referring to has allegedly been declared unlawful by the Appeals Court in Kisangani is not verified; the Prosecution notes that you have not provided any materials that support this statement. The Prosecution has no related information; we will, however, make the necessary inquiries. In addition, in light of the divergence in respect of the dates of the alleged search and seizure operation, it is possible that the Appeals Court Decision you are referring to is linked to a different search and seizure operation. Accordingly, the Prosecution does not agree with the conclusion that the materials as detailed in the attached lists result from an illegal search and seizure operation."

6. On Monday 6 November 2006, a member of the Defence team arrived in The Hague with several documents which the lead counsel had insufficient time to procure during his mission to the DRC, in particular, a copy of the Kisangani Court of Appeals decision dated 16 March 2006,[2] which *inter alia*, declared that:

> *La Cour estime que ce moyen de défense et pertinent et fondé. En effet, l'article 33 du Code de procédure Pénale dispose que « les visites et perquisitions se font en présence de l'auteur présumé de l'infraction et de la personne au domicile ou à la résidence de laquelle elles ont lieu, à moins qu'ils ne soient pas présents ou qu'ils refusent d'y assister » ; et la jurisprudence a clarifié cette disposition en décidant dans une situation analogue que « devant les protestations légitimes du prévenu, le juge ne peut prendre en considération une pièce à conviction prétendument trouvée au bureau (ici résidence) lorsque la saisie de la pièce litigieuse a été opérés en l'absence de l'intéressé alors que, mis en état d'arrestation, celui-ci se trouvait entièrement à la disposition du Parquet et pouvait donc être conduit à tout moment sur les lieux de la saisie (C.S.J 25/3/1983, RJZ 1983 ,P.15) . Il en découle que la Cour ne peut prendre en considération les pièces à conviction prétendument trouvées au domicile ou à la résidence du prévenue TINANZABO et dira non établie en fait comme en droit l'infraction de contrefaçon des signe monétaires, l'en acquittera et le renverra quitte des fins des poursuites pour cette infraction. Elle ordonnera en conséquence la*

[2] A copy of this decision is attached to this motion.

restitution au prévenu de ses biens saisis par les Officiers de Police judicaire FETAFETA et PALUKU MATINA en dates du 16 et 17 Avril 2005.

7. It is apparent from the above decision that the seizure in questions corresponds to the date and place of seizure, from which the prosecution documents originated. It can therefore be extrapolated that the seizure of 16 April 2005, which was conducted in the presence of [redacted], was illegal under the relevant provisions of DRC law.
8. In light of the fact that the Prosecution had previously informed the Pre-Trial Chamber that they intended to [redacted], it would be extremely strange (in fact incredulous) if they had not followed the domestic proceedings [redacted] with some interest [redacted].[3] Thus, the fact that the Prosecution claims to be unaware of such a decision either displays bad faith or gross prosecutorial negligence. At the very least, it evidences the fact that the Prosecution conducted its investigations in a manner which was completely oblivious to the applicable legalities. The fact that the Prosecution has continued to stall – constitutes a blatant contravention of 2 November 2006 decision.
9. In any case, the Defence submits that the decision of the Kisangani Court must be immediately complied with: that is, all materials seized should be returned to John Tinanzabo, and the Prosecution should be precluded from relying on them as evidence in support of its case.

2. Submissions:

2.1 Legal regime for investigations under the Statute

10. The Defence firstly observes that the ability of the Prosecutor to conduct on-site investigations was considered to be "highly controversial" during the drafting of the Statute;[4] the final text of the Statute reflects this reluctance as its ability to conduct on-site investigations was limited accordingly. Thus, article 54(2) of the Rome Statute authorises the Prosecution to conduct investigations on the territory of a State either in accordance with the terms of Part 9, or as authorized by the Pre-Trial Chamber under article 57, paragraph 3(d). This limitation should be clearly contrasted to the relationship between the Prosecution and national authorities which was provided for at the ad hoc Tribunals. The defence would thus distinguish any case law of the ad hoc Tribunals which related to the right of the ICTY/ICTR prosecutors or SFOR to

[3] The Defence further observes that the decision in question was widely and publicly reported – see for example, MOUNC new report dated 8 May 2006 http://www.monuc.org/News.aspx?newsID=10946
[4] W. Schabas, An Introduction to the International Criminal Court (Cambridge University PRESS, 2004) at page 127.

conduct searches pursuant to a warrant issued by an ICTY judge since these decision were expressly predicated on the primacy of the ad hoc Tribunals and the fact that obligations under Chapter VII prevail over international rules of consent-based judicial assistance.[5]

11. As far as the Defence can ascertain from the court record,[6] the Prosecution did not request authorisation from the Chamber to directly collect evidence on the territory of the DRC either under article 57(3)(d), or as a unique investigative opportunity under article 56.[7] The Defence further submits that these articles would not be applicable in any case. Article 57(3)(d) requires the prosecutor to demonstrate that "the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9". In the present case, the DRC authorities were clearly willing and available to execute the request; the issue lies more in the fact that they implemented it in a manner which contravened the DRC law. Under Part 9 of the Rome Statute, the obligation to investigate and collect evidence on the territory of a State party lies primarily with that State party.
12. Article 93, which governs such investigative actions, provides that the State shall fulfil its obligations in a manner which is consistent with Part 9, and in accordance with the procedures set out under national law.
13. Article 99(4) enables the prosecutor to collective evidence directly on the territory of a State party only if the measure in question can be implemented on a voluntary basis (i.e. witness interviews).
14. Under article 88 of the Statute, State parties are obliged to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.
15. In this regard, the defence observes that there were procedures available under DRC law which would have enabled the authorities to request a search warrant. However, a core component of these procedures was the existence of judicial safeguards, which were not incompatible with the Rome Statute: in fact, such safeguards appear to be

[5] For example, Prosecutor v Kordic and Cerkez: Decision stating reasons for Trial Chamber's ruling of 1 June 1999 rejecting Defence motion to suppress evidence , http://www.un.org/icty/kordic/trialc/decision-e/90625EV58869.htm

[6] The Defence concedes that there may be ex parte or confidential decisions issued in the situation file to which it has not been granted access.

[7] The Prosecution filed a motion in relation to a unique investigative opportunity on 19 April 2006 (i.e. 2-3 days after the materials had been seized). See ICC Press Release dated 22 April 2005, Pre Trial Chamber I Hearing on the Prosecutor's request under article 56.

designed to protect the rights of suspects from arbitrary arrests and seizures in a manner which is consistent with article 55 of the Statute.

16. The law cited by the decision of 16 April 2006 is founded on the inviolability of domiciles [8] - effectively, to guard the rights to privacy, security and freedom from unlawful interference. The legality of search and seizure operations and procedural requirements are regulated by the décret du 6 août 1959 portant Code de Procédure Pénale de la République Démocratique du Congo, in section IV, articles 22 and 23.
17. Article 22 of this Code provides that:

« *L'officier du ministère public peut procéder à des visites et à des perquisitions au domicile ou à la résidence de l'auteur présumé de l'infraction ou des tiers.*

En cas d'infraction non flagrante, les magistrats auxiliaires du parquet ne peuvent procéder à ces visites et à ces perquisitions contre le gré des personnes à domicile ou à la résidence desquelles elles doivent se faire, que de l'avis conforme du ministère public, magistrat de carrière, sous la direction duquel ils exercent leurs fonctions, et, en son absence, qu'en vertu d'une ordonnance motivée du juge- président… »

18. It follows from article 22(1) that officers of the office of public prosecutions can carry out searches and seizures from the domicile or residence of the suspect of a crime or third parties. However, magistrates external to the office of public prosecutions may only carry out such search and seizures against the will of the persons at the residence or domicile in question with the prior authorisation of the office of public prosecutions (article 22(2)) or the authorisation of the presiding judge of the district tribunal (article 22(3)).
19. Article 23 of the Congolese Criminal Code further provides:

[8] In this regard, article 69 of the DRC penal code provides : « sera puni d'une servitude pénale de huit jours à deux ans et d'une amende de trois cents francs congolais au maximum ou d'une de ces peines seulement celui qui, sans ordre de l'autorité et hors les cas où la loi permet d'entrer dans le domicile des particuliers contre leur volonté, se sera introduit dans une maison, une chambre ou un logement habité par autrui ou leurs dépendances, soit à l'aide de menaces ou de violences contre les personnes, soit au moyen d'effraction, d'escalades ou de fausses clefs. » Similarly article 70 of the ordinance of 4 July 1910 stipulates that: « Tout individu qui, hors les cas prévus à l'article 69, pénètre contre la volonté de l'occupant dans une maison, un appartement, une chambre, une case, une cabane, un logement ou leurs dépendances clôturées, est puni d'une servitude pénale de sept jours au maximum et d'une amende de deux cents francs au plus, ou d'une de ces peines seulement ».

« *Ces visites et perquisitions se font en présence de l'auteur présumé de l'infraction et de la personne au domicile ou à la résidence de laquelle elles ont lieu, à moins qu'ils ne soient pas présent ou qu'ils refusent d'y assister* »

20. The Supreme Court of Justice of the Democratic Republic of Congo[9] has held that all « *devant les protestations légitimes du prévenu, le juge ne peut prendre en considération une pièce à conviction prétendument trouvée au bureau lorsque la saisie de la pièce litigieuse a été opérés en l'absence de l'intéressé alors que, mis en état d'arrestation, celui-ci se trouvait entièrement à la disposition du parquet et pouvait donc être conduit à tout moment sur les lieux de la saisie* ».

21. The Kinsangani Court of Appeal was thus entitled to conclude that all evidence which was seized in the absence of the suspect should be disqualified from the consideration of the court.
22. In this connection, the defence submits that the right to be protected from illegal and/or arbitrary searches constitutes a fundamental human right.[10] In light of the fact that the authorities seized all materials at his residence, the process also violated his right to privacy, and given the absence of a legal or factual basis for the search, could give rise to the conclusion that the search was motivated by discrimination on political or ethnic grounds.[11]
23. In the absence of an order from the ICC, or a legitimate domestic search warrant, it is also not apparent whether the Prosecutor would have had legitimate forensic grounds to conduct a search in the residence of Mr. Tinanzabo, or whether, to utilise the phrase of this Prosecutor, it was merely a 'fishing expedition'.[12]

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[9] Arret de la Cour Supreme de justice du 25 Mars 1983 , cited in the Revu Juridique du Zaire, page 15

[10] As protected under article 17 of the ICCPR, which provides as follows: Article 17.1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
Article 17.2. Everyone has the right to the protection of the law against such interference or attacks.
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

[11] The Defence notes that the prohibition against discriminatory measures can never be derogated from. (General Comment 29 on States of Emergency, CCPR/C/21/Rev.1/Add.11
31 August 2001).

[12] Such a vague explorative search would violate the restriction imposed by the UN Human Rights committee that searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment: Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994). http://www1.umn.edu/humanrts/gencomm/hrcom16.htm at para 8.

2.2 Legal regime for admission of evidence under the Statute

24. Article 69(7) of the Statute provides that "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible:
    (a) The violation casts substantial doubt on the reliability of the evidence; or
    (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
25. The Defence is of the view that the material in question was collected in a manner which violates the provisions of the Statute (namely article 93), and its admission, in support of the Prosecution case, would be antithetical to and would seriously damage the integrity of the proceedings. The Defence further submits that the burden of proving that the evidence is admissible, and was not taken in circumstances which would violate article 69(7) falls on the Prosecutor.[13]
26. Although the Court is not entirely bound by national laws of evidence, in determining whether the second limb of article 69(7) has been met, "[i]t might be difficult, however, to keep away entirely from domestic criminal procedure, especially when the means of obtaining evidence require, for example, that the judicial authority should in the event interfere with the rights of interested third parties or the accused. The observance of formal requirements under domestic law for such infringements may be decisive for the determination as to whether or not human rights have been violated while obtaining the evidence".[14] In this regard, as stated by the Kisangani Court of Appeal (relying on Supreme Court jurisprudence), the appropriate remedy for materials which were illegally seized is to exclude them from the proceedings and order their restitution to the rightful owner. This position is reflective of the antecedents of DRC legislation in Belgian law, which also mandates that such materials must be excluded.[15]
27. The Defence further submits that its exclusion is warranted in light of the following. Article 54(1)(c) requires the Prosecutor to conduct its duties in a manner which is

[13] Decision on Zdravko Mucic's Motion for the Exclusion of Evidence 2 September 1997 at para. 42. http://www.un.org/icty/celebici/trialc2/decision-e/70902732.htm
[14] A. Orie "Accusatorial v. Inquisitorial Approach in International Criminal Proceedings" The Rome Statute of the International Criminal Court (Cassese, Gaeta and Jones eds) at page 1486.
[15] "The judge may only base his findings of guilt on information put before him lawfully. Unlawful evidence must be removed from the dossier, and the judge may not take any account of it in reaching his finding […] This rule has no statutory basis, but has grown out of the case law […] The *ratio legis* of the exclusionary rule is the discouragement of unlawful behaviour by the police when collecting evidence" C. Van den Wyngaert, *Strafrecht en Strafprocesrecht in Hoofdlijnen* (4th edn, Antwerp, 1999) 902-3.

consistent with the rights of persons arising under the Statute. It is clear that the Prosecutor cannot simply turn a blind eye to any infringements which occur directly in their presence, and from which they derive a direct benefit. To hold otherwise would be to permit the Prosecutor to farm out less than salubrious methods of evidence taking and witness interviewing to local authorities.

28. John Tinanzabo was arrested at approximately the same time as the search and seizure. As noted by the Kisangani Court of Appeal, none of the materials seized from his resident were introduced into evidence against him in relation to the local proceedings. It is therefore not difficult to suspect that the local proceedings were merely a diversionary tactic, which were used to justify the provision of the materials in question to the Prosecution.
29. [redacted]
30. The Defence has expressed its concern in relation to the willingness of the OTP to actively benefit from patently illegal actions in its appeal brief challenging jurisdiction. The current operation appears to be merely demonstrative of a pattern of illegal cooperation between the OTP and certain authorities within the DRC. In this regard, the defence notes that the Prosecution was not merely the 'fortunate recipient' of the 'fruits of the poisoned tree': the Prosecution investigator was physically present at the scene. It is therefore apparent that the investigator would have been informed in advance of the proposed action, and would also have had sufficient opportunity to verify in advance whether the procedures being utilised for the search would comply with domestic law.[16]
31. The only conclusions which are available on the facts is that the Prosecution either knowingly participated and benefited from an illegal search, or participated with wilful disregard to the legalities of the procedure and the rights of Mr. Tinanzabo.
32. In light of the fact that the preamble to the Statute sets out the aim of promoting "respect for the enforcement of international justice", the defence submits that the admission of evidence which had been illegally procured by the ICC OTP would be antithetical to and seriously damage the integrity of the proceedings: the organs of the

[16] In this connection, the Defence notes that the Prosecution has hired regional experts at various times for the purpose of advising on the applicable DRC legislation. See for example, footnote 49 of the Prosecution's Response to Application for Release dated 13 June 2006 (ICC-01/04-01/06-150), which refers the « RAPPORT INTERIMAIRE DE CONSULTANCE, 26 December 2005, prepared by Professor LUZOLO Bambi Lessa, who was recruited by the OTP in November 2005 for two months as a consultant for the specific purpose to provide the OTP with a comprehensive and accurate overview of the DRC procedures in respect of the Article 59 proceedings. Similarly, during the hearing of 2 February 2006, the Prosecutor referred to the fact that it had relied on a regional expert from the DRC.

Court can not simultaneously uphold the rule of law whilst breaking the law or condoning and benefiting from such illegality.

33. Regarding the timing of this issue, the Defence submits that it is imperative to address the issue immediately, since the provenance of the materials in question clearly impacts on the 'sufficiency of the evidence'. In light of the fact that such materials could not in themselves, be used to found a conviction or an element of the charge, they should excluded from the Chamber's consideration as to whether the Prosecution has sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. It would be neither fair nor expeditious to continue the proceedings only to reach the ultimate conclusion that the materials utilised to confirm the charges can not be taken into consideration for the final judgement.
34. Finally, the Defence observes that whereas article 69(4) provides for some degree of discretion in the admission of evidence, if the criteria set out in article 69(7) are met, the Chamber must [17] exclude the evidence in question from the proceedings.

2.3 Impact of the illegal seizure on rights of the Defence

35. The Defence further submits that the extremely broad nature of the seizure has deprived the defence of access to an otherwise accessible source of information.[18] In this connection the Defence notes that according to the index of material seized, the Prosecution obtained over 1000 items. Apart from the 70 items which the Prosecution intends to rely on during the confirmation hearing, the Prosecution has not returned the remaining documents to their rightful owner, nor have they disclosed any of these documents to the defence under rule 77 or article 67(2). Indeed, the list of materials has been drafted in such vague terms that it is impossible for the Defence to ascertain the potential relevance of the materials, and whether such materials may be

[17] The article provides that the evidence "shall not be admissible".

[18] The Defence refers to the cautionary approach adopted by Judge Hunt in relation to an application for a search warrant: "The power of seizure granted to the prosecution is a very powerful weapon in its hands. By seizing material, the prosecution denies such accused persons access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of those accused. In one case, in which the accused became aware of the seizure by the prosecution, the prosecution waited over six months before providing the accused with a copy of the documents. In another case, in which the accused was unaware of the seizure by the prosecution the accused had obtained an
order requiring the relevant Bosnian authorities to produce the documents, which was not complied with. Only after the trial had ended was it discovered that the documents had been in the possession of the prosecution throughout the trial." Decision of Duty Judge on Search and Seizure Warrant, Case IT-02-55-Misc4, cited in G. McIntyre, 'Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY', 25 August 2003, Outreach Seminar: Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps < http://www.isrcl.org/Papers/McIntyre.pdf >

exculpatory.[19] The Defence submits that the extremely vague description of the items frustrates the objection of the Chamber's decision of 3 November 2006, and thus in effect, amounts to non-compliance.

36. In this connection, since the rationale of excluding evidence improperly obtained by law enforcement authorities is to discourage such actions by public officials, it does not follow that the Defence is precluded from relying on such evidence if the Defence was not involved in any impropriety.[20] To hold otherwise would punish the Defence for the delicts of the Prosecution.
37. The Defence also notes that the Prosecutor has suggested in its letter of 5 November 2006 that there were other search and seizures operations conducted during 2005. The Defence is therefore of the view that the local authorities were obliged to comport to the same legal requirements for these searches, and furthermore, that any failure to do so is material to the preparation of the Defence case, and impacts on the credibility of Prosecution evidence.

3. Relief Sought:

38. For the reasons set out above, the Defence respectfully requests the Honourable Pre-Trial Chamber to:

    i. order that the items seized from the residence of Mr. Tinanzabo be excluded from the Prosecution list of evidence;
    ii. order the Prosecution to immediately provide a more elaborate list of the evidence seized from the residence of Mr. Tinanzabo; and
    iii. order the Prosecution to provide further information regarding all other search and seizure operations, and whether these operations were conducted in accordance with the applicable law of the DRC.

[19] The Defence has attached a copy of this list to this motion.
[20] The Defence also notes that the decision of the Kisangani Court of Appeal only disqualified incriminating evidence from its consideration.

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Jean Flamme, Counsel for Thomas Lubanga Dyilo

Dated this 7th day of November, 2006

At The Hague