

**Cour
Pénale
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding
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 Document

**Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007
« Décision sur la confirmation des charges »**

The Office of the Prosecutor

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Introduction

1. The Prosecution hereby requests the Pre-Trial Chamber to grant leave to appeal its 29 January 2007 Decision on the Confirmation of the Charges (hereinafter, the "Decision"). The application for leave is limited to the Pre-Trial Chamber's substitution of the crime charged by the Prosecution, as enshrined in Article 8 (2) (e) (vii) of the Statute, with a different one under Article 8 (2) (b) (xxvii).

2. The Pre-Trial Chamber by proceeding in this manner has altered the characterization of the charge. This has been done despite the clear language of the Statute, which only allows the Chamber to adjourn the proceedings and request the Prosecution to consider amending a charge, if the Chamber is of the view that the evidence submitted appears to establish a different crime.¹ As a result, the Prosecution is forced to proceed with a crime that it had already determined, after careful examination of the evidence in its possession, should not be charged, and to devote time and resources to supplement that evidence, if possible, in order to adequately substantiate that crime at trial.

3. This aspect of the Chamber's Decision constitutes an appealable error causing prejudice to the Prosecution. This error fulfills all the requirements of Article 82 (1) (d) of the Statute, and warrants prompt corrective action by the Appeals Chamber. The Prosecution will advance its arguments in support of leave being granted below. In accordance with the jurisprudence of the Court, the Prosecution will not include at this stage any arguments pertaining to the

¹ See Article 61 (7) (c) (ii).

merits of an eventual appeal, which will be left for discussion before the Appeals Chamber, if leave is granted.²

Procedural Background

4. Thomas Lubanga Dyilo ("the Appellant") was surrendered and transferred to the Court on 17 March 2006, pursuant to a warrant of arrest issued by Pre-Trial Chamber I on 10 February 2006.³
5. On 28 August 2006, the Prosecution filed its Document Containing the Charges and the List of Evidence.⁴
6. On 29 January 2007, the Pre-Trial Chamber rendered its Decision on the Confirmation of Charges⁵.

² See Pre-Trial Chamber I, ICC-01/04-135-tE, "Decision on the Prosecution's Application for Leave to Appeal the Chamber's 'Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6'", 31 March 2006, para. 29, citing with approval a prior decision by Pre-Trial Chamber II.

³ ICC-01/04-01/06-8-US-Corr Anx I, "Decision on the Prosecutor's Application for a warrant of arrest", article 58, 16 March 2006.

⁴ ICC-01/04-01/06-356, "Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3) and annexes", 28 August 2006.

⁵ ICC-01/04-01/06-796.

Admissibility of this Application

The proper way for the Prosecution to impugn the Decision is through the avenue provided for in Article 82 (1) (d)

7. The Prosecution submits that, not being a decision under Article 61 expressly included in the *numerus clausus* of decisions against which an appeal lies as a matter of right⁶, any attempt to impugn the Chamber's Decision is necessarily governed by the general regime of leave to appeal enshrined in Article 82 (1) (d).

8. The Prosecution notes that the Defence has filed an appeal directly before the Appeals Chamber, analogizing the Pre-Trial Chamber's Decision with a "decision [...] denying release of the person being investigated or prosecuted", within the terms of Article 82 (1) (b).⁷ The Prosecution submits that the Defence's reliance on this particular provision of the Statute is misplaced, and will explain in detail its position before the Appeals Chamber in due course.⁸ However, even assuming, *arguendo*, that the analogy was correct, that particular avenue would still remain closed to the Prosecution, to the extent that the Decision would effectively be equivalent to one *denying*, and not granting, release. As a consequence, the Prosecution could claim no identifiable prejudice by the Decision in this instance, and would accordingly have no valid basis for an appeal under Article 82 (1) (b).

⁶ See Article 82 (1) (a)-(c).

⁷ ICC-01/04-01/06-797, "Defence Appeal against the Pre-Trial Chamber's 'Décision sur la confirmation des charges' of 29 February 2007", 30 January 2007, para. 3.

⁸ The Prosecution has been invited to file a document responding to the Defence's submissions by 13 February 2007. See ICC-01/04-01/06-800, "Directions and Decision by the Appeals Chamber", 1 February 2007.

The Decision involves an issue capable of affecting the fair and expeditious conduct of the proceedings or the outcome of trial

9. The Prosecution has recognized from the outset of these proceedings the substantial involvement of third States in the DRC situation, namely Uganda and Rwanda.⁹ The Prosecution even led evidence prior to and during the confirmation hearing in this regard.¹⁰ However, after an in- depth factual and legal analysis of all the available evidence, the Prosecution concluded that it could not establish before a Trial Chamber of this Court, in the context of proceedings aimed at establishing the individual criminal responsibility of a person, and not State responsibility, a sufficient nexus capable of supporting a finding beyond a reasonable doubt of the existence of an armed conflict of an international character.¹¹ This assessment, it is respectfully submitted, has not been altered by the Pre-Trial Chamber's findings in its Decision, or the information on which the Chamber placed reliance; the Prosecution will discuss its assessment in its appeal brief, if leave to appeal is granted. The critical issue is that the Chamber is effectively forcing the Prosecution to, contrary to its professional assessment, include a specific crime in its charging instrument and prove it at trial.

10. It is respectfully submitted that the Decision satisfies all limbs of the test enshrined in Article 82 (1) (d) for leave to be granted. Under the existing jurisprudence of the Court, any application for leave is governed by the following principles:

⁹ See Opening Statement, T. PP. 45-46, 9 November 2006. See also discussion on armed conflict, T.PP. 95-101, 13 November 2006.

¹⁰ For an example, see video evidence DRC-OTP-0148-0302 and its transcript DRC-OTP-0164-0672.

¹¹ This is a statement of fact confined only to the amount and quality of the evidence in the possession of the Prosecution.

- The object of Article 82 (1) (d) “is to pre-empt the repercussions of erroneous decisions in the fairness of the proceedings or the outcome of trial”.¹²
- Only an “issue” may form the subject-matter of an appealable decision; an “issue” is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination;
- Not every issue may constitute the subject of an appeal, but it must be one apt to “significantly affect”, i.e. in a material way, either “the fair and expeditious conduct of the proceedings”, or (b) “the outcome of trial”;¹³
- Identification of an issue, as defined above, does not automatically qualify it as the subject of an appeal in so far as it must be an issue “for which in the opinion of the Pre-trial or Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings”.¹⁴
- “Fairness of the proceedings” includes “respect for the procedural rights of the Prosecutor”;¹⁵
- “Proceedings”, within the terms of the first part of Article 82 (1) (d) “is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto”;¹⁶ and

¹² ICC-01/04-168, Appeals Chamber’s “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 ‘Decision Denying Leave to Appeal’”, 13 July 2006, para. 19.

¹³ Ibid, para. 10.

¹⁴ Ibid, paras. 14-15; see also ICC-01/04-01/06-672-tEN, Pre-Trial Chamber I’s, “Decision on the Defence Request for Leave to Appeal Regarding the Transmission of Applications for Victim Participation”, 6 November 2006, p. 5.

¹⁵ ICC-01/04-135-tEN, Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s ‘Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006’”, 31 March 2006, para. 38.

- The “outcome of trial” is a separate consideration and requires an examination of “the possible implications of a given issue being wrongly decided on the outcome of the case”.¹⁷

The existence of an “issue”

11. The Chamber’s Decision, plainly *substituting* a crime charged by the Prosecution with a *different* crime, without any amendment ever being considered, let alone initiated by the Prosecution, poses the vital question of the scope of the Chamber’s authority under Article 61 (7) for the purposes of conducting its scrutiny of the charges brought before it. Conversely, it directly relates to the scope of the Prosecution’s autonomy to determine, according to its own professional assessment, which crimes should be included in its charging instruments and prosecuted at trial.
12. Questions flowing from this issue relate, first, to the proper interpretation of the terms of Article 61 (7) (c) (ii), and in particular to the formula “a different crime within the jurisdiction of the Court” contained therein¹⁸, and second, to the very existence of this Chamber’s authority to effectively modify the legal characterization of the charges, a power which, in the Prosecution’s submission, Pre-Trial Chambers of the Court are not vested with.¹⁹ *The Trial*

¹⁶ ICC-01/04-168, Appeals Chamber’s “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 ‘Decision Denying Leave to Appeal’”, 13 July 2006, para. 12.

¹⁷ *Ibid*, para. 13.

¹⁸ See Decision, para. 11, considering that the purportedly identical criminal conduct in both Article 8 (2) (b) (xxvi) and Article 8 (20) (e) (vii) relieved the Chamber of the requirement to “adjourn the hearing and request the Prosecution to modify the charges” (own translation). The Prosecution obviously takes issue with this particular finding, which will be discussed in detail before the Appeals Chamber if and when leave is granted.

¹⁹ See K. K. Shibahara, “Article 61: Confirmation of the charges before trial”, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court: observer’s notes article by article*

Chamber is the organ which has the power to decide the proper legal characterization of the facts, based on a full presentation of all necessary evidence at trial, and following a specific procedure to that end.²⁰

The issue involved affects the fair and expeditious conduct of the proceedings

13. The Pre-Trial Chamber has arguably deprived the Prosecution of its statutory right to *consider* and *decide* whether an amendment to the charges is warranted. The Chamber expressly ruled that adjourning the hearing and requesting the Prosecution to consider the modification of the charges, as prescribed by Article 61 (7) (c) (ii) of the Statute, was, in the specific circumstances of the case, “not necessary”.²¹ It declined to follow that process and instead proceeded to confirm part of the charges brought by the Prosecution (the enlistment, conscription and use in hostilities of children under the age of 15 years for the period September 2002-2 June 2003) using a different legal characterization than the one pleaded (Article 8 (2) (b) (xxvi) in lieu of Article 8 (2) (e) (vii)).

14. This arguable violation of a procedural right of significant importance to the Prosecution should be enough to demonstrate that the fairness of the confirmation proceedings has been affected by the Decision.²² As the Prosecution will demonstrate before the Appeals Chamber if leave is granted,

(1999) at 791, margins nos. 33-34: As for the results of the hearing, the Pre-Trial Chamber is to make one of the following orders (paragraph 7): (...) (c) to adjourn the hearing and *request the Prosecutor to consider*: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) *Amending a charge* because the evidence submitted appears to establish a different crime (emphasis added).

²⁰See Regulation 55 of the Regulations of the Court.

²¹ See Decision, paras. 202-204.

²²As stated by this Chamber in its 31 March 2006 Decision, already cited: “fairness of the proceedings” includes “*respect for the procedural rights of the Prosecutor*” (para. 38, emphasis added).

the selection of the crimes to be prosecuted before Chambers of this Court is a decision that rests solely within the province of the Prosecutor, with Pre-Trial Chambers exercising an important, but nonetheless statutorily confined supervisory role.²³ The Chamber's Decision - completely altering this balance - has effectively expelled the Prosecution from the final decision-making process pertaining to the selection of the crimes to be prosecuted at trial. This is against both the letter and the spirit of Article 61 (7).

15. The Prosecution further notes that the Decision's negative consequences arguably go beyond the rights of the Prosecution and affect other participants: although the Chamber itself recognizes that the process enshrined in Article 61 (7) (c) (ii) entitles the Defence to exercise the procedural rights afforded by Article 61 (6) in relation to the amended charge²⁴, it nonetheless concludes that since the underlying criminal conduct is allegedly the same in both of the criminal provisions in question, there is no need for an adjournment in the instant case.²⁵ In this manner, the Decision has, at a minimum, deprived the Defence of any opportunity to consider whether to exercise any of the procedural rights enshrined in Article 61 (6) in relation to a *whole element* of the crime, namely: that the conduct in question "took place in the context of and was associated with an international armed conflict".²⁶

16. The Decision also affects both the fairness and the expeditiousness of *subsequent* proceedings, to the extent that it forces the Prosecution to proceed

²³ The Prosecution will develop these arguments in its document in support of the appeal.

²⁴ See Decision, paras. 203.

²⁵ See Decision, para. 204.

²⁶ See Elements of Crimes, Article 8 (2) (b) (xxvi), element (4).

to trial with a charge that the Prosecution does not consider to be substantiated by the evidence in its possession. This outcome infringes the Prosecution's fundamental right *and duty* to bring before Trial Chambers of this Court only cases that the Prosecution believes to be firmly supported by the evidence collected during the investigation.

17. Moreover, the Decision forces the Prosecution to devote time and resources to the collection and analysis of additional evidence in order to be in a position to adequately substantiate the existence of an international armed conflict at trial. It also creates a new burden in terms of pre-trial disclosure, since the Prosecution must now arguably identify and transmit to the Defence any new exculpatory information in its possession pertaining to the amended charge, i.e. information undercutting the existence of an international armed conflict.
18. The additional burdens imposed by the Decision can thus considerably affect the Prosecution's ability to reach a state of complete trial-readiness and consequently lead to postponements and delays of any trial proceedings, including an amendment of the charges, if required.

The issue involved can affect the outcome of trial

19. The conclusion that the Chamber's Decision is clearly capable of affecting the outcome of trial flows from its plain reading. As already advanced, under the terms of the Decision the Prosecution is forced to prosecute at trial a crime containing specific elements which the Prosecution considers not to be supported by the evidence currently in its possession. The forced inclusion of this crime in the charges can lead to different problematic scenarios at trial

ranging from an acquittal for the crime envisaged in Article 8 (2) (b) (xxvi) if the Prosecution fails to adequately substantiate the existence of an international armed conflict, to a conviction for a different crime through a re-characterization of the facts by the Trial Chamber, if the Chamber considers that a distinct crime has been established by the evidence led. The latter scenario could require following the steps established in Regulation 55, consequently causing further delay to trial proceedings.²⁷

Immediate resolution by the Appeals Chamber will materially advance the proceedings

20. The second component of Article 82 (1) (d) is also satisfied in this case. As stated by the Appeals Chamber, “advance” in the context of this provision means to “move forward” by “ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings”.²⁸

21. It is respectfully submitted that in the instant case timely intervention by the Appeals Chamber will ensure that the proceedings continue on the correct footing, avoiding any unnecessary prejudice to the Prosecution and any damaging effect to the fairness and efficiency of the proceedings stemming from the Decision. A prompt reversal or amendment of the Decision will

²⁷ Moreover, if the Prosecution is forced to reallocate a number of its limited resources to establish the existence of an international armed conflict, then other areas of the case can suffer, and as a result the overall strength of the case may be affected. A weakening of the presentation of the Prosecution’s case has a direct impact on the outcome of trial.

²⁸ See ICC-01/04-168, Appeals Chamber’s “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 ‘Decision Denying Leave to Appeal’”, 13 July 2006, para. 15.

prevent the Prosecution from being unduly forced to move forward with a crime it had not pleaded, and consequently avoid the detrimental consequences that have already been described in this document.

22. Even if the Decision is confirmed by the Appeals Chamber, there will be important positive effects, to the extent that subsequent proceedings will take place on a firmer and clearer basis, enabling the Prosecution to plan ahead and manage its resources in an informed and efficient manner, and ensuring legal certainty for all participants in the trial proceedings.

Conclusion

23. For the foregoing reasons, the Prosecution respectfully requests the Pre-Trial Chamber to grant the requested leave to appeal.



for **Luis Moreno-Ocampo**
Prosecutor

Dated this 5th day of February 2007
At The Hague, The Netherlands