

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/06

Date: 13 February 2007

**THE APPEALS CHAMBER**

**Before:** Judge Georghios M. Pikis, Presiding  
Judge Philippe Kirsch  
Judge Navanethem Pillay  
Judge Sang-Hyun Song  
Judge Erkki Kourula

**Registrar:** Mr Bruno Cathala

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

**Public**

**Prosecution's Response to the Directions and Decision  
of the Appeals Chamber of 1 February 2007**

**The Office of the Prosecutor**

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## Introduction

1. The Appellant has lodged his Appeal pursuant to Article 82 (1) (b) of the Statute which provides that a party may appeal as of right a decision denying release of the person investigated or prosecuted.<sup>1</sup> The issue to be determined by the Appeals Chamber is as indicated in the Directions of the Chamber – “whether the subject-matter of the appeal is an appealable decision within the meaning of article 82 (1) (b) of the Statute pursuant to the provisions of which it was filed.”<sup>2</sup> The Prosecution submits that a decision on confirmation of charges is not a decision denying or granting release.

2. The underlying theme of the submissions of the Appellant in response to the Directions of the Appeals Chamber is its equation of a decision on confirmation with a decision denying or granting release, with the consequential right to appeal such a decision under Article 82 (1) (b).

3. The Appellant has wrongly characterised the decision to confirm charges as a decision on release.<sup>3</sup> The attempt of the Appellant to expand the scope and nature of the decision on confirmation to include any decision resulting in granting or denying release is without any legal basis.<sup>4</sup> The decision on the confirmation of charges can only be appealed if leave is granted under Article 82 (1) (d), which the Appellant has applied for in parallel filing before the Pre-Trial Chamber.

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<sup>1</sup> “Defence Appeal Against the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007”, ICC-01/04-01/06-797, 30 January 2007, para. 3.

<sup>2</sup> “Directions and Decision of the Appeals Chamber”, ICC-01/04-01/06-800, 1 February 2007, para. 2.

<sup>3</sup> “Urgent Defence Request for Extension of Time and Page Limits for Brief in Support of Appeal Against the Décision sur la confirmation des charges”, ICC-01/04-01/06-798, 30 January 2007, paras. 10 and 11.

<sup>4</sup> *Ibid* at para. 10.

4. The Appellant has previously filed applications for release based on lack of jurisdiction and for interim release before the Pre-Trial Chamber. The denial of each of these applications by the Pre-Trial Chamber were, in contrast to the present proceedings, legitimately appealed under Articles 82 (1) (a) and (b) respectively. The Appeals Chamber has rejected both of those appeals.<sup>5</sup> The present application is not only inappropriate, but it is an abuse of the appellate process.

### **Procedural background**

5. 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.<sup>6</sup>

6. On 23 May 2006, the Appellant filed an "Application for Release".<sup>7</sup>

7. On 20 September 2006, the Appellant filed a "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo", which included a consequential request for interim release.<sup>8</sup>

8. On 3 October 2006, the Pre-Trial Chamber rendered its "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute", which denied the Application for Release.<sup>9</sup> The Appellant filed an appeal against this

<sup>5</sup> ICC-01/04-01/06-772; ICC-01/04-01/06-824.

<sup>6</sup> Decision on the Prosecutor's Application for a warrant of arrest, article 58, ICC-01/04-01/06-8-US-Corr Anx I.

<sup>7</sup> ICC-01/04-01/06-121-tEN. In response to an order of the Pre-Trial Chamber, on 31 May 2006 the Appellant stated that "interim release is not at issue" in that application ("Submissions relative to the Order of 29.05.2006", ICC-01/04-01/06-131-tEN, p. 2). On 17 July 2006, in response to a further order from the Pre-Trial Chamber, the Appellant "recharacterise[d] the scope of its application as a challenge to jurisdiction" ("Submissions Further to the Order of 13 July 2006", ICC-01/04-01/06-197-tEN, p. 3, para. 8).

<sup>8</sup> ICC-01/04-01/06-452, 20 September 2006, paras. 33-49 and relief sought, para. (vii).

<sup>9</sup> ICC-01/04-01/06-512.

decision on 9 October 2006.<sup>10</sup> On 14 December 2006, the Appeals Chamber rendered its judgement on this appeal, which denied the appeal against the decision on jurisdiction.<sup>11</sup>

9. On 18 October 2006, the Single Judge rendered the "Decision on the Application for the interim release of Thomas Lubanga Dyilo".<sup>12</sup> The Appellant lodged an appeal against the Decision on 20 October 2006.<sup>13</sup> On 13 February 2007, the Appeals Chamber rendered its judgement, which denied the appeal.<sup>14</sup>

10. On 29 January 2007, the Pre-Trial Chamber rendered its "Décision sur la confirmation des charges".<sup>15</sup>

11. On 30 January 2007, the Appellant filed the "Defence Appeal Against the Pre-Trial Chamber's 'Décision sur la confirmation des charges' of 29 January 2007".<sup>16</sup>

12. On 1 February 2007, the Appeals Chamber issued the "Directions and Decision of the Appeals Chamber" requesting the Prosecution and the Appellant to address the

<sup>10</sup> "Requête d'appel du Conseil de la Défense de la "Decision on the Defence Challenge to the jurisdiction of the court pursuant to art.19.2 (a) of the Statute" du 3 octobre 2006", ICC-01/04-01/06-532, 9 October 2006. The Appellant filed its substantive "Defence Appeal Against the Decision on the Defence Challenge to the Jurisdiction of 3 October 2006" (ICC-01/04-01/06-620) on 26 October 2006.

<sup>11</sup> "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", ICC-01/04-01/06-772, 14 December 2006.

<sup>12</sup> ICC-01/04-01/06-586-tEN.

<sup>13</sup> "Defence Appeal Against 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-594, 20 October 2006. The Appellant filed its substantive "Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo' " ( ICC-01/04-01/06-618) on 26 October 2006.

<sup>14</sup> "Judgement on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo' ", ICC-01/04-01/06-824.

<sup>15</sup> ICC-01/04-01/06-803.

<sup>16</sup> ICC-01/04-01/06-797. On the same day, the Appellant also filed an "Urgent Defence Request for Extension of Time and Page Limits for Brief in Support of Appeal Against the 'Décision sur la confirmation des charges'", ICC-01/04-01/06-798 ("Defence Request").

issue of whether the subject matter of the appeal is an appealable decision within the meaning of article 82 (1) (b) of the Statute.<sup>17</sup>

13. On 5 February 2007, the Appellant filed a “Request for Leave to Appeal the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007”, pursuant to Article 82 (1) (d), before the Pre-Trial Chamber.<sup>18</sup>

14. On 7 February 2007, the Appellant filed submissions on the scope of the right to appeal within the meaning of article 82 (1) (b) of the Statute.<sup>19</sup>

15. The Prosecution hereby files its response to the Defence Submissions.

## Discussion

### *Interpretation of Article 82*

16. Article 31 of the Vienna Convention on the Law of treaties of 23 May 1969 provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

17. The Appeals Chamber has previously given guidance on the interpretation of Treaties and the Rome Statute. The Chamber has stated that “The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the

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<sup>17</sup> ICC-01/04-01/06-800.

<sup>18</sup> ICC-01/04-01/06-807-Conf (“Defence Request for Leave to Appeal”), referred to in the “Decision on Defence Request for Extension of Time Limit”, ICC-01/04-01/06-815, 8 February 2007.

<sup>19</sup> “Defence Submissions on the scope of the right to appeal within the meaning of Article 82(1)(b) of the Statute”, ICC-01/04-01/06-812, 7 February 2007 (the “Defence Submissions”).

particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.”<sup>20</sup>

18. The Prosecution submits that the plain language of Article 82 (1) (b) is clear, and does not support the Appellant’s submissions. Article 82 (1) (b) covers decisions “granting or denying release” following an express and unequivocal application for release.<sup>21</sup> A decision confirming the charges against a person is not such a “decision denying release”, or on an application for release, even if release was a possible consequence in the event that charges had not been confirmed.

19. The Appellant has cited Article 82 (1) (b) as referring to “a decision of the Court having the effect of granting or denying release”.<sup>22</sup> There is nothing in that provision that mentions *the effect of* granting or denying release. Indeed there is no specific provision in the Statute or Rules that any decision that has, among others, the *effect of* a release falls within the ambit of Article 82 (1) (b).

20. The Prosecution submits that the preparatory work on Article 82 confirms that a decision on the confirmation of charges is not appealable under the provisions of Article 82 (1) (b).<sup>23</sup> The drafting history confirms that Article 82 (1) (b) relates to granting or denying a request for release. There was no direct or indirect reference to

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<sup>20</sup> “Judgment on the Prosecutor’s application for extraordinary review of Pre-Trial Chamber I’s 31 March 2006 Decision denying leave to appeal”, ICC-01/04-168, 13 July 2006 (“Judgement on Extraordinary Review”), paras. 33-34 and footnotes.

<sup>21</sup> i.e. applications under Article 60.

<sup>22</sup> Defence Submissions, para. 21. See also Defence Submissions, para. 16; Defence Request, para. 10.

<sup>23</sup> The Appellant acknowledges in para. 12 of the Defence Submissions that “.. preparatory work can only serve to confirm an interpretation accorded to a provision in accordance with the principles set out in article 31 of the Vienna Convention.”

extend the provision to decisions on confirmation. The initial wording of the current Article 82 (1) (b) was “*an order granting or denying release of the defendant on bail*”.<sup>24</sup>

21. The drafting history of Article 82 further demonstrates that it was not the intention of the drafters of the statute to make decisions against confirmation decisions appealable as of right under Article 82 (1) (b) or under any other provision of the Statute or Rules. The drafters rejected a proposal to include a provision allowing interlocutory appeals as of right in relation to the confirmation or denial of an indictment.<sup>25</sup> As a compromise, delegates agreed to allow interlocutory appeal rights in specific circumstances set out in Article 82 (1) (d).<sup>26</sup> Consequently, any challenge to such decisions must be with the leave of the relevant Chamber.

22. The Prosecution submits that to allow the Appellant’s attempt to expand the scope of Article 82 (1) (b) in order to permit appeals as of right against any decision on the confirmation of charges, along with any other decision which substantiates the continued detention of a person, directly contravenes the intention of the drafters and would undermine the logic of the appellate regime.

<sup>24</sup> “Article 81, Appeal Against Other Decision: Working Paper”. A/CONF-183/C-1/WGPM/L-72, 10 July 1998.

<sup>25</sup> See Brady and Jennings “Appeal and Revision” in Lee (ed) *The International Criminal Court: The making of the Rome Statute* (1999), p. 300: “Some delegations expressed similar reservations about the right to appeal the confirmation of an indictment. They argued this could lead to long and deliberate delays, and is a matter quintessentially within the Prosecutor’s discretion and should not be the subject of an appeal. The right to appeal against a decision to confirm an indictment was deleted from the article”. See “Article 73 bis. Appeal against interlocutory decisions”, A/AC-249/1998/WG-4/CRP-8, 25 March 1998:

Either party may appeal any of the following interlocutory decisions in accordance with the rules:

(a) a decision with respect to jurisdiction or admissibility;  
(b) an order granting or denying release of the defendant on bail;  
[(c) *an order that confirms or denies, wholly or in part, the indictment;*]  
[(d) an order of exclusion of evidence.]

See also Documents A/CONF.183/2/Add.1, p. 126 and A/CONF-183/C-1/WGPM/L-2/ADD-6, 11 July 1998, art. 81(1)(c) confirming the deletion of the right to appeal a decision on confirmation. See further “Prosecution’s Response to Defence Request for Leave to Appeal the Pre-Trial Chamber’s ‘*Décision sur la confirmation des charges*’ of 29 January 2007”, ICC-01/04-01/06-818-Conf, 9 February 2007, para. 15 and authorities cited at footnote 18.

<sup>26</sup> *Ibid.* If the decision involves an issue that would affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and for which, in the opinion of the pre-trial chamber or trial chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

*Whether a Decision on confirmation of charges is a decision on release within the meaning of Article 82 (1) (b).*

23. A decision on the confirmation of charges is not a decision denying or granting release. The Prosecution submits that an application for release and any ensuing decision is dealt with under separate and distinct provisions under the Statute and the Rules and are not part of the confirmation proceedings under Article 61 of the Statute. The passing reference to the release of the Appellant in the last paragraph of the Defence Brief on matters raised during the confirmation hearing,<sup>27</sup> is not a formal request for release under the provisions of Article 60 and Rule 118.<sup>28</sup>

24. The Prosecution submits that the provisions of Article 82 (1) (b) must be given their natural and ordinary meaning. The provision applies to a decision granting or denying release and this must refer to a decision following a formal request for release under the Statute and the Rules.<sup>29</sup> It does not extend to the effect or remedy ensuing from a decision in the manner urged by the Appellant.<sup>30</sup>

25. The provisions governing applications for release are enshrined in Articles 60 (3) and (4) and Rule 118.<sup>31</sup> As the Appellant has not made an express and specific request pursuant to these provisions in the context of the confirmation proceedings,<sup>32</sup>

<sup>27</sup> "Defence Brief on Matters the Defence Raised During the Confirmation Hearing - Legal Observations", ICC-01/04-01/06-764, 7 December 2006, para. 53 (Relief sought).

<sup>28</sup> The Appellant cannot be allowed to transform every decision into a decision on release, which would grant a right to appeal without seeking leave according to their submissions, merely by requesting the release of the person as part of the relief sought.

<sup>29</sup> There can be no decision when there was no express request for release by the Appellant along the lines of the provisions of Rule 118 including the provision that notice must be given to the Prosecution and the decision is to be made after the written observations of the Prosecutor and the detained person.

<sup>30</sup> See Defence Submissions, para. 16; Defence Request, para. 10. See para. 19, above.

<sup>31</sup> Rule 118 (3) provides that "After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once a year".

<sup>32</sup> The Appellant had already made one such formal application for interim release under Article 60. However the appeal against the decision on this application was still proceeding at the time that the confirmation hearing concluded. Thus any application for release under Article 60 during the confirmation hearing would have been irregular, or at best duplicative.

there has been no proper request before the Pre-Trial Chamber that would result in a decision denying release as the Appellant argues.

26. The Prosecution submits that by disguising the decision on confirmation as a denial of the Appellant's release, the Appellant is attempting to circumvent the mandatory procedure for applying for leave to appeal set out in Article 82 (1) (d). The Prosecution submits that in the absence of any express provision in the Statute or Rules regulating appeals against a decision on confirmation, the applicable provision is Article 82 (1) (d). The Appellant must therefore first seek the leave of the Pre-Trial Chamber and fulfil the enumerated criteria in Article 82 (1) (d).<sup>33</sup>

27. Further, the Appellant himself recognises the applicability of Article 82 (1) (d) to the decision on confirmation of charges. Since lodging the current appeal, the Appellant has requested the leave of the Pre-Trial Chamber to appeal the decision on confirmation.<sup>34</sup> This shows that the Appellant acknowledges that the proper avenue to challenge a decision on confirmation is by seeking the leave of the Pre-Trial Chamber. The maintenance of parallel litigation on this issue in two different forums, seeking leave to appeal under Article 82 (1) (d) after filing an appeal under Article 82 (1) (b), improperly complicates and abuses the appellate process.

*The erroneous interpretation of Article 82 (1) (b) proposed by the Appellant*

28. The Appellant has elected to use the provisions on release to seek relief against a decision on the confirmation of charges. The Prosecution reiterates that a decision on confirmation is not a decision denying release and any appeal will have to be filed under Article 82 (1) (d), not under Article 82 (1) (b) which deals only with formal decisions on release.

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<sup>33</sup> As outlined above, the drafters of the Statute considered and expressly rejected a proposal to allow appeals against decisions on the confirmation of charges as of right. See para. 21, above.

<sup>34</sup> Defence Request for Leave to Appeal, ICC-01/04-01/06-807-Conf.

29. The Prosecution submits that although decisions denying or granting release can be appealed under the provisions of Article 82 (1) (b), a decision on confirmation of charges is not such a decision. The expansive interpretation by the Appellant that any decision which may, as a consequence, lead to the ongoing detention or the release of a person falls within the ambit of Article 82 (1) (b) is wrong.<sup>35</sup> If the Appellant's argument is correct, then this could open the door to appeals as of right against a wide range of decisions of the Court, as many different decisions may have a direct or indirect effect on his continued detention.

30. The submission of the Appellant<sup>36</sup> that other decisions which may result in release – such as decisions on jurisdiction and admissibility, or acquittals at trial or on appeal – are appealable under Article 82 (1) (b) is flawed. Such decisions are appealable under distinct and express provisions under the Statute.<sup>37</sup> Those distinct provisions would be rendered redundant under the interpretation proposed by the Appellant. This submission of the Appellant simply highlights the convoluted and overlapping appellate regime which results from the interpretation he proposes.<sup>38</sup>

31. The Appellant's argument that the reference to non confirmation of charges in Rule 185 means that this and other listed decisions are appealable under Article 82 (1) (b) is also incorrect. There is no direct reference to Article 82 (1) (b) in Rule 185. Rule 185 sets out the considerations for the Court in determining where to send a released person. This is a procedure for effecting the release of a person where the legal basis for their continued detention no longer exists. It does not mean that such decisions, including decisions not to confirm charges, would be a decision granting release for the purposes of appellate proceedings. The decision in this case was to confirm the

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<sup>35</sup> Defence Submissions, paras 16 to 22.

<sup>36</sup> Defence Submissions, para. 17.

<sup>37</sup> See Articles 81 and 82 (1) (a).

<sup>38</sup> The Appellant recognizes as much in para. 18 of the Defence Submissions.

charges – the fact that this upholds the legal basis for ongoing detention does not transform it into a decision denying release.<sup>39</sup>

32. The submissions of the Appellant<sup>40</sup> on interlocutory appeals against decisions that impact on his personal liberty are irrelevant to the issue of whether a confirmation decision can be appealed under Article 82 (1) (b). Firstly, there are procedures in the Statute and Rules giving the Appellant a right to appeal decisions on requests for provisional release, a right he has already exercised. Secondly, there are other safeguards and avenues that may be pursued if the Appellant feels that there has been an inordinate period of detention, namely Article 60 (3)<sup>41</sup> and (4).<sup>42</sup> The reference to a detention period of two to three years during the trial and potential appellate phase<sup>43</sup> is irrelevant and speculative.

33. The Prosecution submits that the ICTY jurisprudence relied on by the Appellant is distinguishable from the instant scenario where Article 82 (1) (b) makes no express provision for appealing decisions on confirmation. The procedures in the French code and the ICTY Rules relied on by the Appellant<sup>44</sup> are expressly provided for in their relevant Rules. Furthermore, Rule 65 *ter* and Rule 73 *bis* of the ICTY relied on by the Appellant do not deal with the release of an Accused and they do not pertain to the actual confirmation of charges based on the sufficiency of evidence as provided for in Article 61 of the Statute.<sup>45</sup> The provisions deal primarily with a situation where

<sup>39</sup> Furthermore, other decisions listed in Rule 185, such as those on jurisdiction and admissibility, are not appealable under Article 82 (1) (b) but under other distinct provisions such as Article 82 (1) (a).

<sup>40</sup> Defence Submissions, paras. 27 to 29.

<sup>41</sup> This provision serves to ensure that a person will not remain in pre-trial detention if the circumstances underlying that detention have materially changed - Khan, "Article 60: Initial proceedings before the Court" in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, 778 [2]. There has been no such change in this case, and the circumstances which warrant the ongoing pre-trial detention of the Appellant continue to apply.

<sup>42</sup> If the conditions in Article 60(4) are met, then the Chamber has a discretion, not an obligation, to order the interim release of the person – "the Court shall consider releasing the person" (emphasis added)

<sup>43</sup> Defence Submissions, para. 33.

<sup>44</sup> Defence Submissions, paras. 31-32.

<sup>45</sup> Rule 73 *bis* (D) – "After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix

the Prosecution has been directed by the Trial Chamber to select a representative sample of counts to proceed with, to ensure fair and expeditious proceedings.

*An Appeal against a Decision confirming charges requires the leave of the Pre-Trial Chamber.*

34. The Prosecution submits that the Appellant is attempting to evade compliance with the criteria in Article 82 (1) (d) that it must meet prior to obtaining leave to appeal by distorting the provisions of Article 82 (1) (b) and broadening its scope to include decisions on confirmation. The Prosecution submits that any appeal against a decision on confirmation must be filed under Article 82 (1) (d).

35. A natural and ordinary reading of Article 82 (1) (d) confirms that it applies to interlocutory decisions not expressly referred to in the other provisions of Article 82. A review of the provisions of Article 82 (1) (b) and Article 82 (1) (d) demonstrates that the pertinent provision on appeals against decisions on confirmation is Article 82 (1) (d). Article 82 (1) (b) makes no reference at all to its application to decisions on confirmation. Conversely, Article 82 (1) (d) covers “a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

36. The Prosecutor submits that absent any express provision dealing with appeals against a decision confirming charges, the only available avenue is Article 82 (1) (d). An appeal under this provision requires leave of the Chamber that gave the decision under Rule 155. As the Appeals Chamber has previously decided, “A right to appeal

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a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.”

arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber.”<sup>46</sup>

37. This is consistent with the jurisprudence of the *ad hoc* International Tribunals, which demonstrates a reluctance to review decisions on the confirmation of indictments under their respective Rules. Consequently, any review of the confirmation decision is permitted only in limited circumstances and with the leave of the Chamber. In the ICTR case of *Prosecutor v Bagosora*, the Appeals Chamber rejected an application by the Prosecutor for leave to appeal the Decision of the confirmation Judge dismissing the indictment.<sup>47</sup> Also, in the case of *Prosecutor v Nahimana*, the Trial Chamber stated that “The Trial Chamber observes initially that what the defence is really asking for is a measure of re-examination or review of the decision by which the Judge confirmed the indictment pursuant to Rule 47 of the Rules. On this point, however, the Chamber considers that neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision”.<sup>48</sup> The ICTY Trial Chamber in *Prosecutor v Kovacevic* similarly refused to “strike” a confirmed indictment.<sup>49</sup>

<sup>46</sup> Judgement on Extraordinary Review, para 20.

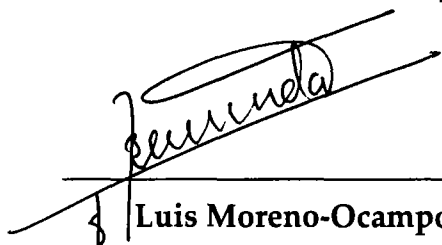
<sup>47</sup> *Prosecutor v Theoneste Bagosora and 28 others*, Decision on the admissibility of the Prosecutor’s appeal from the decision of a confirming Judge dismissing an indictment against Theoneste Bagosora and 28 others, 8 June 1998. In para. 34 of the Decision, the Appeals Chamber rejected the argument of the Prosecution that it has an unlimited and unqualified right of appeal from decisions of the trial chambers. The Prosecution had lodged its appeal directly with the Appeals Chamber.

<sup>48</sup> *Prosecutor v Ferdinand Nahimana*, Decision on the preliminary motion filed by the defence based on defects in the form of the indictment, 24 November 1997, para. 6. See also paras 7 – 9. The Decision was followed in *Prosecutor v Andre Ntagerura*, Decision on the preliminary motion filed by the defence based on defects in the form of the indictment, 28 November 1998. The Chamber emphasised in para 29 that “only under special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision”. See also para. 31.

<sup>49</sup> *Prosecutor v Milan Kovacevic*, Decision on Defence motion to strike confirmed amended indictment, 3 July 1998.

**Conclusion**

38. For the abovementioned reasons, the Prosecution respectfully requests that the Appeals Chamber reject the appeal in its entirety.



**Luis Moreno-Ocampo**  
**Prosecutor**

Dated this 13<sup>th</sup> day of February 2007

At The Hague, The Netherlands