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**International
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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 Redacted Version
**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**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer
Mr Fabricio Guariglia, Senior Appeals Counsel

Mr Thomas Lubanga Dyilo

Legal Assistant

Ms Véronique Pandanzyla

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keita

Introduction

1. The Prosecution hereby files its response to the document entitled Request for Leave to Appeal the Pre-Trial Chamber's 'Décision sur la confirmation des charges', filed by the Defence on 5 February 2007. The Prosecution in general opposes leave to appeal being granted, except in relation to certain issues specified in this document.

Procedural Background

2. 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 2006.¹
3. On 28 August 2006, the Prosecution filed its Document Containing the Charges and the List of Evidence.²
4. On 20 October 2006, the Prosecution filed its Submission of the Amended List of Evidence Pursuant to Rule 121(3)³
5. On 29 January 2007, the Pre-Trial Chamber rendered its Decision on the Confirmation of Charges⁴ (the "Decision").
6. On 5 February 2007, the Prosecution filed its Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 « Décision sur la confirmation des charges »
7. On 5 February 2007, the Defence filed its Request for Leave to Appeal the Pre-Trial Chamber's 'Décision sur la confirmation des charges' of 29 January 2007⁵ (the "Application").⁶

¹ICC-01/04-118-US-Exp-Corr, "Decision on the Prosecutor's Application for a warrant of arrest, article 58", 10 February 2006.

² 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

³ ICC-01/04-01/06-595-Conf

⁴ ICC-01/04-01/06 -796 - Conf

⁵ ICC-01/04-01/06-807 - Conf

⁶ The Prosecution notes that the Defence is currently also attempting to seek appellate review of the Decision by means of a direct appeal under an expansive interpretation of Article 82 (1) (b). The Prosecution opposes this attempt, and will be filing before the Appeals Chamber a document explaining its position on February 13th, as requested by the Appeals Chamber. The Prosecution further notes with

8. On 7 February 2007, the Pre-Trial Chamber rendered its Decision ordering the Defence to File a Public Redacted Version of its "Application for Leave to Appeal the Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges'⁷
9. On 7 February 2007, The Defence filed its document «Demande de modification des délais en vertu de la norme 35 du règlement de la Cour»⁸
10. The Prosecution hereby files its response to the Application.⁹

Preliminary considerations

The existence of an "issue"

11. The Prosecution submits that, in accordance with the jurisprudence of this Chamber, no leave to appeal can be granted in relation to issues that do not arise from the decision impugned.¹⁰ The Prosecution further submits that in those cases where an applicant fails to substantiate the existence of an issue, mischaracterizes the true nature of an issue or offers in support arguments that are plainly misconceived, the "issue" must be deemed non-existent, in the sense of lacking any factual basis, and leave must be denied.¹¹
12. Moreover, mere disagreement or conflict of opinion "does not define an appealable subject".¹² Accordingly, leave cannot be granted in those instances where an applicant merely expresses disagreement with a decision in relation to a specific

concern the practice adopted by the Defence, whereby appellate review *of the same decision* is being sought simultaneously through separate procedural avenues.

⁷ ICC-01/04-01/06-813

⁸ ICC-01/04-01/06-814

⁹ The Prosecution is filing this document as "confidential", since such was the security classification of the Application. It will file a public redacted version of this document once it receives and analyzes a public version of the Application.

¹⁰ Pre-Trial Chamber I (Judge Steiner as Single Judge), *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, ICC-01/04-01/06-165-Conf-Exp", 23 June 2006, para. 18.

¹¹ *Ibid.*, para. 25.

¹² ICC-01/04-168, Appeals Chamber "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. 9.

matter, but fails to demonstrate the existence of an issue warranting appellate review, be it legal, factual or mixed in nature, including the relevant reasons.¹³

13. The above explained considerations do not detract from the well established principle that the merits or substance of the appeal should not be considered by the Pre-Trial Chamber when deciding whether one or more issues should be certified for appeal. While determining whether the existence of an issue allegedly arising from a decision being impugned has a solid factual basis, a Pre-Trial Chamber must endeavour not to delve into matters that ought to be properly left for a subsequent determination by the Appeals Chamber.

The “outcome of trial” component and its correct interpretation in the instant case

14. The Defence contends that three issues involved in the Confirmation Decision are issues that would significantly affect the outcome of the trial as required by article 82(1)(d).¹⁴ In particular, the Defence refers to the impossibility for the Defence to withdraw the statements of REDACTED and REDACTED from its List of Additional Evidence; the admission for the purposes of the confirmation hearing of the evidence seized in REDACTED; and the evidentiary standard established by the Chamber to determine whether there was sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo committed each of the crimes charged.¹⁵ The Defence argues the three issues mentioned above would significantly affect the outcome of the trial, in that the Pre-Trial Chamber would have been unable to confirm the charges if a different decision on these issues had been taken.¹⁶
15. The Prosecution respectfully submits that the argument advanced by the Defence cannot be accommodated under article 82(1)(d), for at least three reasons:
 - First, the Prosecution submits that the Defence argument nullifies in practice the distinction envisaged in article 82 of the Statute between appeals available to the parties as of right and appeals for which prior

¹³ Ibid.

¹⁴ Defence request, para. 53.

¹⁵ Ibid., paras. 57, 59 and 60, respectively.

¹⁶ Ibid., paras. 57-59.

leave of the Chamber is required. If, as the Defence claims, “any decision of the Pre-Trial Chamber on whether or not to confirm the charges brought against Thomas Lubanga Dyilo automatically affects the outcome of the trial”¹⁷, then an appeal against any decision on confirmation of charges is in practice available to the parties as of right. However, article 82 does not list decisions on confirmation of charges among those for which an appeal lies as of right. In fact, it was the intention of the drafters not to include such decisions among those for which no leave from the Chamber is required.¹⁸

- Second, the Prosecution submits that the Defence’s reading of the requirement of potential impact of the issue on the outcome of the trial is excessively broad in light of the wording of article 82(1)(d). The Defence approach disregards the distinct terms used in article 82(1)(d) when addressing the consequences of the impugned decision, referring to “proceedings” when considering issues of fairness and expeditiousness but limited to the outcome of the “trial”.¹⁹ Accordingly, not every issue that may influence the course of the “proceedings” in general terms is or can be regarded as an issue that would significantly affect “the outcome of the case”²⁰ within the meaning of article 82(1)(d). In particular, a decision on confirmation of charges cannot be seen as involving *per se* issues that would significantly affect the outcome of the subsequent trial against the person charged. A decision by the Pre-Trial Chamber to confirm or not to confirm the charges is not equivalent to a conviction or

¹⁷ *Ibid.*, para. 56.

¹⁸ See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN Doc. A/CONF.183/2/ADD.1, 14 April 1998, art. 81(1)(c); Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN Doc. A/CONF.183/C.1/WGPM/L.2/ADD.2, 4 July 1998, art. 81(1)(c); and Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN Doc. A/CONF.183/C.1/WGPM/L.2/ADD.6, 11 July 1998, art. 81(1)(c). See also H. Brady and M. Jennings, “Appeal and Revision”, in R.S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, London, Boston 1999), p. 300.

¹⁹ *Situation of in the Democratic Republic of the Congo*, Judgement 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, paras. 12-13.

²⁰ *Ibid.*, para. 13.

an acquittal under the Statute.²¹ The Trial Chamber is not bound by any such decision when determining the eventual outcome of the case.

- Finally, the Prosecution submits that the Defence interpretation of article 82(1)(d) is inconsistent with the object and purpose of this provision, namely to restrict interlocutory appeals to only important issues that would have a significant effect on the ongoing proceedings before the Court, thereby promoting the efficient and expeditious conduct of such proceedings.²² Pursuant to the Defence's line of argument, almost every issue arising prior to the trial of the person charged and somehow connected to such trial should be deemed to have a significant impact on "the outcome of the trial".

16. An analysis of the case-law of the ICTY and the ICTR in application of their corresponding rules shows that only issues which would significantly affect the position of the person in respect of the substantive charges against him or her may be considered to affect "the outcome of the trial", and may thus merit leave for interlocutory appeal.²³ Other issues, however, including preliminary issues which would prevent holding the trial, such as the dismissal of the indictment against the accused²⁴ or the unfitness of the person to stand trial²⁵, have not been considered to affect as such "the outcome of the trial".

²¹ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006, para. 56.

²² See *Situation in the Democratic Republic of the Congo*, "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-141, AC, 24 April 2006, paras. 35 and 41, with authorities.

²³ Such issues typically involve the admission of evidence at trial for the substantiation of the charges faced by the accused or the determination of the scope of such charges. For the former, see e.g. *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case no. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004, para. 25; and *Prosecutor v. Halilović*, Case no. IT-01-48-T, Decision on Motion for Certification, 30 June 2005. For the latter, see e.g. *Prosecutor v. Hadžihasanović and Kubura*, Case no. IT-01-47-T, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 bis of the Rules, 26 October 2004; *Prosecutor v. Halilović*, Case no. IT-01-48-PT, Separate Opinion Of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment', 14 January 2005.

²⁴ *Prosecutor v. Jović*, Case no. IT-95-14 & 14/2-R77, Decision on Defence Application for Certification on Interlocutory Appeal, 3 February 2006 ("[t]he Chamber cannot accept the claim, put in very general terms, that the immediate dismissal of the Indictment, in whole or in part, and the termination of the proceedings before the Tribunal constitute in themselves "issues" in the meaning of Rule 72(B)(ii) of the

17. Addressing the first two issues identified by the Defence,²⁶ the Prosecution submits that issues concerning the consideration or admissibility of evidence before the Pre-Trial Chamber for the purposes of the confirmation hearing cannot have an impact on the result of any eventual trial. Any such trial is to be conducted before a different Chamber of this Court and on the basis of new or additional evidence that the parties may submit.²⁷ Moreover, as clearly stated by the Pre-Trial Chamber, any decision on the admissibility of evidence for the purposes of the confirmation hearing is without prejudice to the admissibility assessment by the Trial Chamber of the same evidence at trial.²⁸
18. With regards to the third issue identified by the Defence, the Prosecution submits that the evidentiary standard required for the confirmation of charges is not an issue which would significantly affect the determination of the criminal responsibility of Thomas Lubanga Dyilo, and thereby the outcome of his trial. Such evidentiary standard does not have any bearing on the future verdict on the case, for which a clear standard is indicated in the Statute²⁹ and which can and will still be reached independently by the Trial Chamber.³⁰

Rules ... granting certification on such a basis would defeat the wording and purpose of Rule 72(B)(ii) of the Rules").

²⁵ *Prosecutor v. Strugar*, Case no. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 5 ("The issue of the Accused's fitness to stand trial is an important one, bearing crucially upon the fairness of the proceedings ... It may also significantly affect "the outcome of the trial", but whether this would be the case would depend on the merit of issues which the Defence seeks to ventilate").

²⁶ Defence request, paras. 57-59.

²⁷ Art. 64(8)(b).

²⁸ Confirmation Decision, paras. 55 and 90.

²⁹ Art. 66(3).

³⁰ All three issues are discussed in further detail below.

The issues raised by the Defence

19. The Prosecution will address in the following pages each of the issues raised by the Defence in its Application. It will advance its position as to whether leave should be granted or not in relation to each individual issue, and the reasons supporting that position.

The first issue: whether the Pre-Trial Chamber was permitted to admit Prosecution evidence into the confirmation hearing after the time-limit imposed by the Rules

20. The Defence grievance pertains to five items: (a) the witness Kristine Peduto, (b) four reports presented on 27 November 2006, (c) an expert report from the Court of Appeals of Paris, (d) the statements of REDACTED and REDACTED and (e) the affidavit by REDACTED. The Prosecution respectfully submits that the Defence misstates the relevant sequence of events and the nature of the material in question. The issue presented by the Defence does not stem from the Decision. The Prosecution will briefly address each item of material referred by the Defence:

a) The testimony of Kristine Peduto:

21. The Defence claims that the testimony of this witness should have been tendered 30 days before the confirmation hearing, since this would be the applicable time-limit under Rule 121 (3).³¹ The Defence, however, overlooks two critical facts: (a) that such testimony was admitted by the Chamber not under Rule 121 (3), but as new evidence pursuant to Rule 121 (5), which expressly allows the Prosecution to present such evidence “no later than **15 days** before the date of the hearing”;³² and (b) that despite this, the statement of the witness, in redacted form, as well as the witness’ name were disclosed **29 days** prior to the hearing, a fact that excludes any prejudice that could be validly claimed by the Defence.³³ Hence, the issue raised by the

³¹ See Application, para. 11.

³² See 19 October 2006, Decision on the Prosecution’s Request of 12 October 2006, ICC-01/04-01/06-593-Conf, pp. 5-7.

³³ Ibid., p. 6.

Defence, i.e. the invalid filing of this witness' evidence outside the applicable statutory time-limit, does not exist as such.

b) The four reports:

22. This specific material was not evidence tendered by the Prosecution as part of its list of evidence, but rather material flowing from a specific request by the Pre-Trial Chamber. On 23 November 2006, the PTC specifically requested that the Prosecution address the Defence challenge that Thomas Lubanga Dyilo was not Hema-Gegere, that such an ethnic group did not exist and that it was in fact a derogatory term.³⁴
23. Following further directions by the Presiding Judge³⁵, the Prosecution made oral submissions on the issue, 27 November 2006.³⁶ The material was not introduced as evidence or assigned an evidence number. Rather, on 17 January 2007, the Registry filed the "Registration in the Record of Material Presented During the Confirmation Hearing Held in Open Session on 27 November 2006 + Annexes 1-4"³⁷ whereby four reports mentioned during this presentation were registered as "ICC-01/04-01/06-HNE-14, 15, 16 and 17"; accordingly the reports were not filed as evidence which is assigned an Evidence Number starting with 'EVD'. More importantly, the material has *not* been relied upon by the Chamber in its Decision, which further confirms its non-evidentiary character.

c) The expert forensic report:

24. This document was presented by the Prosecution on 27 November 2006 during its submissions challenging the credibility of certain Defence evidence.³⁸ Accordingly, the report did not constitute evidence subject to the deadlines established in Rule 121. The Presiding Judge further stated that the admissibility of the evidence would "be

³⁴ Request by Presiding Judge Jorda - transcript 23 November 2006, p. 102, lines 1-23.

³⁵ "PRESIDING JUDGE JORDA: [...] what I don't want is for there to be an oral presentation and a written document as well. You choose, okay? MR WITHOPF: Thank you, Mr President, and we choose to make an oral representation, please." (Transcript - 27 November 2006, page 15, lines 11-22)."

³⁶ Transcript, 27 November 2006, p. 16-26.

³⁷ ICC-01/04-01/06-788.

³⁸ Transcript - 27 November 2006, p. 38-45.

examined during our deliberations and after having received the possible comments or observations of the Defence."³⁹

25. Moreover, the Prosecution stresses that the Report has not been relied upon at all by the Chamber in its Decision, and accordingly cannot constitute an issue that arises from it.

d) The statements of REDACTED and REDACTED:

26. This particular allegation by the Defence is particularly surprising. The statements in question were never tendered by the Prosecution. Rather, they were submitted *by the Defence* and were originally included in its List of Evidence. The filing by the Defence on 7 November 2006 included those two statements on its list of additional items of evidence: "Submission of Additional Items to be Added to the Defence List of Evidence" + Conf Annex A.⁴⁰ Hence, the statement that the Chamber allowed the Prosecution to tender these statements outside the time-limit imposed by Rule 121 (3) is wholly misconceived. The issue simply does not exist.⁴¹

e) The affidavit by REDACTED:

27. The Prosecution filed this Declaration in the context of the Defence Challenge to the Prosecution's reliance on certain documents obtained during the search and seizure in the DRC. The filing to which it is annexed is "Prosecution's Further Response to the Defence 'Request to exclude evidence obtained in violation of article 69(7) of the Statute', 22 November 2006"⁴², which contained two annexes: the affidavit and a list of alternative evidence to those presented during the hearing that were subject of the search. The affidavit was neither tendered nor registered as evidence. Rather, it was filed only for the purposes of providing accurate information to the Chamber on the search and seizure operation conducted by the DRC authorities and the presence of an OTP investigator in that procedure, i.e. the filing took place in the confined context of

³⁹ Transcript - 27 November 2006, p.44, lines 21-25 and p. 45, lines 1-2

⁴⁰ ICC-01/04-01/06-673-Conf

⁴¹ The Prosecution notes that the issue of whether the Chamber erred by refusing the Defence request to withdraw these two statements from its list of amended evidence is pleaded as a discreet issue in the Application (see paras. 23-29).

⁴² ICC-01/04-01/06-726-Conf

a judicial dispute on the admissibility of specific evidence under Article 69⁴³, and not in the broader context of the confirmation of the charges.

28. Accordingly, the Prosecution submits that, not being evidence tendered by the Prosecution for the purposes of supporting the charges, the affidavit clearly fell outside the scope of Rule 121. The Defence's contention is entirely without merit.

The second issue: whether the Chamber acted ultra vires by making determinations on issues not raised at the confirmation hearing without giving the parties the right to be heard

29. This issue coincides with the one raised by the Prosecution in its own application for leave to appeal.⁴⁴ There is no disagreement between the parties as to the fact that the Chamber erred by not following the appropriate procedure for amendment of the charges, as enshrined by Article 61 (7), and also as to the appealability of the issue.⁴⁵ The Prosecution accordingly does not oppose leave being granted in relation to this issue.

The third issue: whether the Chamber erred by holding the confirmation hearing while two appeals on redactions and one on jurisdiction were still pending

30. The Prosecution respectfully submits that the issue does not arise from the Decision. The Pre-Trial Chamber was faced with a belated request for a postponement of the hearing, which the Chamber rightly dismissed, the defence having foregone its statutory right to seek suspensive effect of the appeals lodged.⁴⁶ Nothing precluded the Defence to utilise the appropriate procedural vehicle to halt the proceedings before the Pre-Trial Chamber, which was at all times available to it. The Defence

⁴³ Processes of this type are frequent in international criminal jurisdictions, and may amount to "trials within a trial" or *voir dire* proceedings. See ICTY Appeals Chamber, *Prosecutor v. Delalic et al*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 543.

⁴⁴ ICC-01/04-01/06-806, Prosecution's "Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "Décision sur la confirmation des charges", 5 February 2007, para. 1

⁴⁵ *Ibid.*, paras. 11-12

⁴⁶ Transcript, 10 November 2006, page 28, line 25; page 29, lines 1-7.

chose not to do so, and instead requested in the 11th hour a postponement of the hearing, with no statutory support whatsoever.⁴⁷ The Defence is now advancing, compressed in a footnote, a set of completely unsubstantiated assertions as to why suspensive effect was never requested, which range from rather inexplicable statements (“it was not possible to request suspension of the jurisdiction decision because suspension would result in the immediate release of the suspect”) to statements that show that it was the Defence’s choice not to seek that provisional relief (suspensive effect would have effectively postponed the confirmation hearing “in clear violation of the requirement that proceedings be expeditious”).

31. Moreover, the Defence can claim no prejudice in relation to this particular issue: first, its appeal on jurisdiction was rejected *in toto* by the Appeals Chamber⁴⁸; second, the Pre-Trial Chamber did not consider any of the material affected by the two appeals on redactions for the purposes of the Decision: The Chamber determined that it would only re-evaluate the Rule 81 applications related to the First and Second Decisions if it was convinced that ‘substantial grounds to believe’ could not otherwise be established using other evidence. (para. 54); accordingly, the Chamber decided that it would *not* consider the redacted statements and associated documents affected by the Appeals Decisions in reaching its conclusions on the merits. (para. 55). Further, the Chamber decided to err on the side of caution and whereas in principle the last four statements of REDACTED, Peduto, REDACTED and REDACTED, were not technically affected by the Appeals Decisions, the Chamber viewed it was necessary to re-evaluate the redactions to these statements and related documents on the basis of the principles enunciated by the Appeals Chamber because: (i) redactions were

⁴⁷ ICC-01/04-01/06-684, Defence’s “Requête de report de l’audience de la confirmation des charges”, 8 November 2006.

⁴⁸ “Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber 1 entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” – ICC-01-04-01-06-773-OA5. “Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber 1 entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” – ICC-01-04-01-06-774-OA6, 14 December 2006.

authorized after the impugned decisions were issued, and (ii) the reasoning in the later decisions was related to the reasoning in the impugned decisions. (Paras. 51-52).⁴⁹

32. The Defence claims that by acting in this manner it was deprived of an opportunity to assess whether the evidence was exculpatory, or could have otherwise assisted it in attacking the credibility of Prosecution evidence.⁵⁰ However, this rather speculative statement overlooks the fact that the Chamber expressly stated that there was *no prejudice* to the Defence in proceeding in this way because: (i) these were documents the Prosecution was relying upon for the purposes of supporting the charges, i.e. material of primarily an incriminatory nature; and (ii) in any case, the Chamber had retained the potentially exculpatory portions of the documents, and only those portions, as indicated by the Defence.⁵¹

The fourth issue: whether the Chamber erred in refusing the Defence request to withdraw the statements of witnesses on its list of amended evidence

33. The Prosecution recognizes that the issue as such is one involved in the Decision, and that it could impact on the fairness of the confirmation proceedings.⁵² The Prosecution, however, notes that the Defence has only argued that the “outcome of trial” would be affected by this issue, to the extent that the Chamber allegedly would have not been able to confirm the charges without the statements in question. As already advanced, the Prosecution strongly disputes the interpretation whereby anything that supported the confirmation of the charges automatically affects the “outcome of trial”.⁵³

⁴⁹ Annex 1 (Conf) and Annex 2 (Conf-EX) to PTC decision contains additional reasons on the redactions to these four statements and Annex 3 provides the detailed excerpts of redactions.

⁵⁰ Application, para. 23.

⁵¹ Decision, para. 55. The Defence offers no argument against these conclusions by the Pre-Trial Chamber.

⁵² The Prosecution clearly supports the Chamber’s Decision in this particular point, and will advance its arguments before the Appeals Chamber as to why the Decision should be confirmed if leave is granted by the Pre-Trial Chamber.

⁵³ See section on outcome of trial in “Preliminary considerations”, above.

The fifth issue: Whether the Chamber erred in law in its definition of the applicable evidentiary threshold

34. The Prosecution respectfully submits that the issue should be deemed as not being involved by the Decision, in the absence of any arguments supporting its existence in the Application. The Defence fails to provide a single argument in support of its position that the Chamber's approach to the "substantial grounds to believe" test, which included an extensive discussion on the proper interpretation of Article 61 (7), is flawed. The Defence's position is effectively reduced to the unsubstantiated assertion that the evidentiary threshold adopted by the Chamber was "far too low".⁵⁴
35. Whereas the Prosecution recognizes that arguments pertaining to the merits of the appeal need not be advanced in an application for leave to appeal, it also submits that under the jurisprudence of this Court, mere disagreement with an aspect of a judicial decision cannot serve as a basis for leave to be granted.⁵⁵ At a minimum, an applicant seeking leave should provide arguments establishing that his or her objections to a particular aspect of a Chamber's decision have some basis. Failure by an applicant to meet this rather basic burden should lead to a dismissal of the application.

The sixth issue: whether the Chamber abused its discretion in admitting all evidence from the Prosecution Amended List of Evidence

36. The Defence has mischaracterized the facts and the decision. First, in the decision on the schedule and conduct of the confirmation hearing⁵⁶, the then Single Judge held that all items on both the Prosecution and the Defence lists of evidence would be admitted "for the purpose of the confirmation hearing unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing".⁵⁷ The Chamber expressly considered Article 69(4) and Rules 63(1) and (2)

⁵⁴ Application, para. 30.

⁵⁵ ICC-01/04-168, Appeals Chamber "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. 9

⁵⁶ ICC-01/04-01/06-678.

⁵⁷ *Ibid.* page 8.

in its determination.⁵⁸ These provisions do not restrict the discretion of the Chamber to assess documents as a whole. Furthermore, the Defence did not oppose this decision.

37. Second, contrary to the Defence assertions, the Chamber did consider the arguments raised by the Defence to challenge the admissibility of groups of documents.⁵⁹ The Defence challenged the following groups of documents on a general basis: (i) summaries⁶⁰ (ii) redacted statements⁶¹ (iii) any documents obtained from the search and seizure at the REDACTED⁶² (iv) any documents obtained from the search and seizure operation performed by the REDACTED⁶³ (v) any documents for which no chain of custody was not provided⁶⁴ (vi) all NGO reports⁶⁵ (vii) all press articles⁶⁶ (viii) all documents not commented upon by witnesses⁶⁷ (ix) emails⁶⁸ and (x) videos⁶⁹.

38. On the Defence's challenge to any documents obtained further to a search and seizure operation, the Chamber fully considered the issue of the REDACTED search and seizure in 28 paragraphs. On the issue of the REDACTED search and seizure, the Chamber noted that the Prosecution had confirmed that no such seized documents were contained on its list of evidence. In the absence of any specific information from the Defence to contradict this assertion or to point the Chamber to documents that were so affected, the Chamber held that it was not in a position to consider whether any documents of this type could be held inadmissible under Article 69(7).⁷⁰

39. On the Defence's general challenge to all summaries, redacted statements, NGO reports, emails and press articles, the Chamber considered the Defence challenge to

⁵⁸ *Ibid.* page 5.

⁵⁹ The Chamber equally considered the Prosecution's challenges to admissibility of evidence on the Defence's list of evidence at pages 40-42 of the Decision and denied the Prosecution's requests.

⁶⁰ Transcript of the Confirmation Hearing, 22 November 2006 at pages 25-31.

⁶¹ Transcript of the Confirmation Hearing, 22 November 2006 at pages 19-20 and 25-26.

⁶² Transcript of the Confirmation Hearing, 10 November 2006 at pages 22-24.

⁶³ Transcript of the Confirmation Hearing, 22 November 2006 at p. 11-14.

⁶⁴ Defence Brief on Matters the Defence Raised during the Confirmation Hearing – Legal Observations, 6 December 2006, ICC-01/04-01/06-758. para. 52.

⁶⁵ Transcript of the Confirmation Hearing, 22 November 2006 at p. 33.

⁶⁶ Transcript of the Confirmation Hearing, 22 November 2006 at p.34.

⁶⁷ Transcript of the Confirmation Hearing, 22 November 2006 at p.37-38.

⁶⁸ Transcript of the Confirmation Hearing, 22 November 2006 at p. 37.

⁶⁹ Transcript of the Confirmation Hearing, 22 November 2006 at p. 41-43.

⁷⁰ *Ibid.* paras. 62-90 and 91-94.

the fact that it could not access the sources of information contained in these types of documents and accordingly could not verify the authenticity/accuracy/veracity of the information contained therein.⁷¹ The Chamber held that the Statute does not mandate that documents with anonymous sources are inadmissible. Accordingly, the Chamber determined that only the weight of the documents could be affected, and, where any such items of evidence contain hearsay from anonymous sources, the Chamber will determine the probative value of those documents in light of other elements of proof.⁷² In particular, the Chamber expressed its awareness of the difficulty that these elements of proof raise for the Defence, and accordingly held that it would not rely such pieces of evidence except to corroborate other elements of proof.

40. In any event, the Chamber did not consider summaries⁷³, witness statements for which there were redactions to identity⁷⁴, emails or press articles in its decision and accordingly, these items cannot constitute an issue that arises from it.

41. On the Defence's challenge to all documents where no information pertaining to chain of custody was provided by the Prosecution, all documents not commented upon by witnesses and the related challenge to videos, the Chamber noted that the Defence chose to contest this evidence in very general terms only, without identifying which documents in particular it challenged. Accordingly, the Chamber determined that the Defence did not provide an adequate basis upon which to challenge the admissibility of these documents.⁷⁵

⁷¹ *Ibid.* para.99-106.

⁷² Decision, para. 106.

⁷³ Decision, paras. 43-55.

⁷⁴ *Ibid.*, paras. 43-55.

⁷⁵ Decision on the Confirmation Hearing, paras. 95-98. The issue of the alleged reversal of the burden of proof in relation to these decisions is discussed below

The seventh issue: whether the Chamber erred in admitting evidence that should have been excluded by virtue of Article 69 (7)

42. The Prosecution recognizes that the issue raised by the Defence is involved by the Decision. The Prosecution, however, strongly disputes that the issue in question affects the outcome of trial. First, the Prosecution reiterates its opposition to any interpretation whereby a decision confirming charges in and of itself “affects the outcome of trial”, as articulated by the Defence. Second, it submits that the Defence’s argument that the Chamber relied “extensively”⁷⁶ on this evidence is wholly inaccurate: as noted by the Chamber at footnote 93 of the decision, only 70 of the hundreds of documents seized were included on the Prosecution’s amended list of evidence; of those 70, a fraction (about 13) was actually discussed during the hearing; finally, the Chamber relied on **6 documents** stemming from the search and seizure, as follows:

- Footnote 1: DRC-OTP-0092-0378; CV of Thomas Lubanga Dyilo;
- Footnote 2: DRC-OTP-0091-0039 (at page 0047); Statute of the UPC dated 15 September 2000;
- Footnote 162: DRC-OTP-0089-0165; l’Acte Constitutif de l’UPC dated 15 September 2000 ;
- Footnotes 212, 446, 462, 467: DRC-OTP-0089-0057; REDACTED in which Thomas Lubanga Dyilo as President of the UPC expels REDACTED;
- Footnote 247: DRC-OTP-0093-0137: Presentation entitled 'Discours de REDACTED' ;
- Footnote 462: DRC-OTP-0089-0093; UPC Decree No. 3 bis dated 02-06-2003 where Thomas Lubanga Dyilo reshuffles the UPC posts and nominates national secretaries.

43. The “extensive reliance” claimed by the Defence on the material in question, accordingly, does not exist. Finally, the Prosecution stresses that the Decision expressly leaves it to the Trial Chamber to make a final determination as to the

⁷⁶ Application, para. 59.

admissibility and probative value of the evidence in question.⁷⁷ Hence, any forecast on the impact on the “outcome of trial” of this evidence would necessarily be premature, since the Trial Chamber is yet to rule on its admissibility and probative value. The Defence is free to raise this issue before that Chamber as soon as it deems so convenient.

The eighth issue: whether the Chamber erred in reversing the burden of proof

44. The Prosecution opposes leave being granted on the basis that the issue does not arise from the Decision. Contrary to the Defence’s submissions, at no point did the Pre-Trial Chamber reverse the burden of proof, within the terms of Article 66 of the Statute (*presumption of innocence*). On the contrary, the Chamber expressly established that the burden was on the Prosecution to provide concrete and tangible evidence supporting its allegations.⁷⁸
45. What the Defence attempts to disguise as reversals of the burden of proof are actually instances where the Defence either failed to substantiate specific claims or to offer arguments in support of a claim. This has nothing to do with the presumption of innocence, as established in Article 66, and only relates to the duty of any participant in criminal proceedings to offer comprehensive arguments and substantiated positions pertaining to the claims that they make.⁷⁹ Consequently, the Defence’s claims pertaining to the evidence that the Defence wrongly alleged emanated from a search and seizure conducted by REDACTED forces, and to alleged and never substantiated breaches of the chain of custody by the Prosecution⁸⁰ are misconceived and bear no connection with the onus of proof, as established by the Statute. Rather, they only

⁷⁷ Decision, para. 90.

⁷⁸ Decision, para. 39.

⁷⁹ For instance, it has been stated that a distinction must be made “between (a) the obligation of the prosecution to prove all the facts necessary to establish guilt; and (b) the obligation on either the prosecution or defence to establish the facts on a particular issue. These burdens have sometimes been referred to as (a) the legal or persuasive burden of proof; and (b) the evidential burden of proof” (May and Wierda, *International Criminal Evidence, Burden and Standard of Proof*, at 4:62; Waight and Williams, *Evidence Commentary and Materials*, Lawbook Co, 6th Edition, at p. 56)

⁸⁰ Application, paras. 42-43.

relate to defects and insufficiencies in the Defence's arguments, as determined by the Chamber.⁸¹

46. The Prosecution further notes that the Chamber's ruling referred to at para. 41 of the Application was not, as portrayed therein, one whereby the *Prosecution* evidence was deemed to be authentic, unless rebutted by the Defence. The ruling actually established a *general system*, consistent with the confined nature of the confirmation hearing, whereby material *on both parties' lists of evidence* would be automatically admitted into evidence for the purpose of the confirmation hearing, "unless it is expressly ruled inadmissible by the Chamber upon a challenge by the Prosecution or the Defence, as the case may be".⁸² This presumption in favour of admission of material was ruled on before the hearing began and clearly set out the parameters for a challenge. At no point did the Defence oppose this general system, including by timely seeking leave to appeal, which is being now challenged for the first time in the Application.

The ninth issue: Whether the Chamber erred in permitting the trial to proceed on a vague indictment

47. The Prosecution recognizes that the issue arises from the Decision impugned and further accepts that it can affect the outcome of trial. The Prosecution strongly disputes that the document containing the charges is vague, contains irrelevant allegations or otherwise fails to provide full and adequate notice of the charges, as claimed by the Defence.⁸³ It will develop its arguments before the Appeals Chamber if and when leave in relation to this specific issue is granted by the Pre-Trial Chamber.

⁸¹ See Decision, paras. 91-94 and 95-98.

⁸² Ruling by Judge Jorda acting as Single Judge, Decision on the schedule and conduct of the confirmation hearing, 7 November 2006, ICC-01/04-01/06-678.

⁸³ Application, paras. 45-51.

Conclusion

48. For the above mentioned reasons, the Prosecution respectfully requests the Pre-Trial Chamber to reject leave to appeal, except in relation to those specific issues not opposed by the Prosecution in this document.




Luis Moreno-Ocampo
Prosecutor

Dated this 06th day of March 2007
At The Hague, The Netherlands