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

Date: 9 February 2007

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, President
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

Response to the "Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 *Décision sur la confirmation des charges*" filed by the Prosecutor

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
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Lawyer

Counsel for victims a/0001/06 to a/0003/06

Mr Luc Walleyen
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Counsel for the Defence

Mr Jean Flamme
Mr Geoff Roberts
Ms Véronique Pandanzyla

Counsel for victim a/0105/06

Ms Carine Bapita Buyangandu

NOTING the Decision on the Confirmation of Charges dated 29 January 2007;

NOTING the Prosecutor's application notified on 5 February 2007;

PURSUANT TO regulation 65(3) of the Regulations of the Court;

1. The representatives of victims a/0001/06 to a/0003/06, who are authorised to participate in the confirmation hearing, hereby submit a response to the application filed by the Prosecutor on 5 February last under rule 155(1) of the Rules of Procedure and Evidence, seeking the leave of Pre-Trial Chamber I to appeal the Decision on the Confirmation of Charges, on the basis of article 82(1)(d) of the Rome Statute.

2. The representatives of the victims are of the opinion that the application is likely to slow down the proceedings before the Trial Chamber, which goes against the interests of the victims, who wish for justice to be rendered.

3. The Prosecution rightly recalls that there is no legal basis allowing it to appeal the Decision on the Confirmation of Charges because it states that the decision is "not (...) a decision under Article 61 expressly included in the *numerus clausus* of decisions against which an appeal lies as matter of right, 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)".¹

¹ Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "*Décision sur la confirmation des charges*", para. 7.

4. It must be noted that the legal basis put forward by the Prosecution to obtain leave to appeal also raises problems.

5. As the Prosecution recalls, the Appeals Chamber interpreted article 82(1)(d) of the Rome Statute in the context of the judgment on the Prosecutor's application for extraordinary review of the decision rendered on 31 March 2006 in which the Pre-Trial Chamber denied an application for leave to appeal.² According to the Appeals Chamber, therefore, "the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial."³

6. Considering the Appeals Chamber's reasoning in its judgment of 13 July 2006, it appears, however, that, despite the Prosecution's efforts, the problem raised now does not constitute "an identifiable subject or topic requiring a decision for its resolution",⁴ but is indeed "merely a question over which there is disagreement or conflicting opinion".⁵ Furthermore, it should be recalled that the Appeals Chamber itself stated that "[t]here may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject."⁶

7. The Prosecutor himself put forward the two distinct legal bases in support of his application for the issuance of a warrant of arrest because Pre-Trial Chamber I issued the warrant of arrest against Thomas Lubanga Dyilo, on which, for each

² See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", no. ICC-01/04-168, 13 July 2006.

³ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *op. cit. supra* footnote 2, para. 19, p. 8.

⁴ *Ibid.*, para. 9, p. 5.

⁵ *Ibid.*

⁶ *Ibid.*

crime, he relied on the legal basis relating to an internal armed conflict and, at the same time, the legal basis relating to an international armed conflict.⁷

8. The Prosecutor changed his mind in the meantime because the Document Containing the Charges, Article 61(3)(a) states that “[t]he crimes occurred in the context of an armed conflict not of an international character.”⁸

9. However, at the confirmation hearing, the Prosecution again repeatedly referred to the links that existed between the UPC/FPLC and Uganda and Rwanda.⁹

10. Moreover, as the Pre-Trial Chamber recalled, “articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute consider the same conduct as a crime, be it committed within the context of a conflict of an international character or within the context of a conflict not of an international character”.¹⁰ Thus it seems that it was not necessary for Pre-Trial Chamber I to resort to article 61(7)(c)(ii) by requesting the Prosecutor to “[a]mend[] a charge because the evidence submitted appears to establish a different crime”, as in the instant case the same crime is indeed at issue.

11. Finally, it must also be noted that the purpose of the confirmation of charges is to determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”¹¹ The fact that Pre-Trial Chamber I confirmed the charges brought against Thomas Lubanga Dyilo in no way prevents the Trial Chamber from modifying the legal characterisation of facts, in accordance with regulation 55 of the Regulations of the Court, and re-examining the

⁷ See the “Warrant of Arrest”, ICC-01/04-01/06-2-tEN, 10 February 2006 (reclassified as public on 17 March 2006), p. 5.

⁸ See the “Document Containing the Charges, Article 61(3)(a)”, ICC-01/04-01/06-356, Annexe 1, 28 August 2006, para. 7, p. 3.

⁹ See transcripts ICC-01-04-01-06-T30-EN of 9 November 2006 and ICC-01-04-01-06-T34-EN of 14 November 2006.

¹⁰ See the “Decision on the Confirmation of Charges” of 29 January 2007, para. 204, p. 67.

¹¹ See article 61(7) of the Rome Statute.

characterisation of the conflict in which the crimes ascribed to Thomas Lubanga Dyilo were committed.

12. To conclude, the Prosecution's application for leave to appeal against the Decision on the Confirmation of Charges must be denied.

[signed]

Luc Walley and Franck Mulenda (absent at signature)

Legal Representatives of Victims a/0001/06 to a/0003/06

Done on 9 February 2007

At

Brussels