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THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Navi 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 *v.* THOMAS LUBANGA DYILO**

Public Document

Corrigendum to the supplementation to the document entitled "Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute" of 7 February 2007

The Office of the Prosecutor

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This document is the same as the document filed on 21 May 2007, it corrects the form of the first document.

I. FACTS AND BACKGROUND

1. This document is a supplementation to the document filed by the Defence on 7 February 2007 entitled “Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute”.

2. Pursuant to the Appeals Chamber decision of 3 April 2007,¹ on 4 May 2007, the Registry appointed Ms Annick Patricia MONGO as duty counsel to file, if necessary, her supplementation to the above-mentioned document previously filed by the Defence.

3. The Appeals Chamber decision of last 3 April also directed the duty counsel to file her submissions on 11 May 2007.

4. The deadline was extended to 21 May 2007 by an Appeals Chamber decision of 11 May 2007² further to an application for extension of time filed by Ms MONGO Annick Patricia on 9 May 2007.

5. In the meantime, before she knew of the decision extending the time-limit, the duty counsel filed a submission on 11 May at 15:55 entitled ‘Observations of the Defence confirming the document titled “Defence submissions on the scope of the right to appeal within the meaning of article 82-1-b of the Statute”.

6. Subsequently, the Presiding Judge of the Appeals Chamber issued a clarification with a view to effectively enabling the Defence to file its supplementation on 21 May 2007, at the latest.

¹ ICC-01/04-01/06-882-tEN.

² ICC-01/04-01/06-903.

7. On the one hand, this submission confirms the Defence arguments in the document entitled: “Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute”³ and, on the other hand, it raises an additional argument relating to the Defence appeal against the decision on the confirmation of charges rendered on 29 January 2007 by Pre-Trial Chamber 1.⁴

II. AS TO THE LAW

8. It should be recalled that the Defence had submitted that the decision on the confirmation of charges is a decision denying release, which should be interpreted in light of articles 31 and 32 of the *Vienna Convention on the interpretation of treaties*.⁵ The provisions of the treaty are as follows:

Art. 31 General rule of interpretation

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Art. 32 Supplementary means of interpretation

³ ICC-01/04-01/06-810.

⁴ ICC-01/04-01/06-796-CONF.

⁵ 1155 United Nations Treaty Series, No. 18232. The convention was signed on 23 May 1969 and entered into force on 27 January 1980.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

1) Interpretation of article 82(1)(b)

9. Article 82(1)(b) provides that:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: - A decision granting or denying release of the person being investigated or prosecuted.

10. The Defence would like to point out that it did not add a single word to article 82(1)(b) in the document that it previously filed,⁶ but that it was an interpretation of this article.

11. In its judgment of 13 July 2007⁷ on the “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, the Appeals Chamber pointed out different ways of interpreting a text.

12. In this regard, it stated:

⁶ ICC-01/04-01/06-810.

⁷ ICC-01/04-168.

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 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.

A. The interpretation of article 82(1)(b) in light of its object and purpose and with regard to the Decision on the confirmation of charges

a) The Decision on the confirmation of charges is a decision confirming the warrant of arrest and the detention.

13. The Defence is of the opinion that the Decision on the confirmation of charges is always a decision granting or denying release pursuant to article 82(1)(b). In order to better grasp this, a simple statement of fact is firstly necessary: the confirmation of charges (article 61)⁸ falls under Part 5 of the Statute, entitled *Investigation and Prosecution*. The decision on the confirmation of charges is a decision which confirms the prosecution and consequently the detention. It is therefore a decision denying release.

14. This interpretation is supported by paragraphs 1 and 4 of article 58, which also fall under Part 5 of the Statute.

15. These provisions are as follows:

Paragraph 1 "At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

1. There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
2. The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the

⁸ Article 61 of the Statute.

commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

Paragraph 4 of the same article continues: *"The warrant of arrest shall remain in effect until otherwise ordered by the Court."*

16. It is on the basis of the warrant of arrest that the person concerned was arrested and detained.

17. The detention, which constitutes a denial of freedom, is based on the warrant of arrest.

18. The detention (and implicitly the warrant of arrest) will then be confirmed or quashed by the decision on the confirmation of charges.

19. In light of article 58, it is undeniable that the decision on the confirmation of charges is a decision denying release and confirming the warrant of arrest.

20. That is why the Appeals Chamber will hear the appeal of Mr Lubanga Dyilo Thomas against the decision on the confirmation of charges of 29 January 2007.⁹

b) The decision on the confirmation of charges is a decision confirming the evidence which enabled the issuance of the warrant of arrest.

21. The Defence submits that the decision on the confirmation of charges against the person being prosecuted is the basis for maintaining him or her in detention. The initial ground for the detention as evidenced by the issuance of the warrant of arrest remains the submission of evidence or other information making it possible to induce and satisfy the Pre-Trial Chamber *that there are reasonable grounds to believe*

⁹ ICC-01/04-01/06-796-tEN-CONF.

*that the person being investigated has committed a crime within the jurisdiction of the Court.*¹⁰

22. Article 58(1) refers to evidence or other information submitted by the Prosecutor, constituting *reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court*. The evidentiary threshold required at this stage of the proceedings is lower than that required at the confirmation hearing. When the warrant of arrest is issued, the Prosecution can submit simple information constituting reasonable grounds to believe that the person has committed a crime.

23. However, at the confirmation hearing, the Prosecution must prove that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.¹¹

24. Accordingly, the Defence submits that the legal basis on which the detention initially rested when the warrant of arrest was issued is necessarily displaced by the decision on the confirmation of charges.

25. If the Statute provides that the detention of a person must be based on meeting certain threshold evidentiary requirements,¹² the Defence should be entitled to challenge these requirements in a significant and effective way and, for the Defence, the confirmation hearing is the most appropriate occasion to do so.

26. At the confirmation hearing,¹³ the Defence therefore expressly requested the release of Thomas Lubanga Dyilo and, in its legal observations on the issues raised

¹⁰ Article 58(1)(a) of the Statute.

¹¹ Article 61(7) of the Statute.

¹² See the Separate Opinion of Judge Pikis "The availability of evidentiary material establishing grounds leading to a reasonable belief that the arrestee committed a crime or crimes in accordance with article 58(1) of the Statute is the *sine qua non* for the issuance of a warrant of arrest", *Judgment 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"* of 13 February 2007, para. 4.

¹³ Transcript of 28 November 2006, page 148, para. 10.

at the hearing,¹⁴ it made the same request on the ground that the compelling requirements for maintaining the detention after the confirmation hearing were not met.

27. The Pre-Trial Chamber did not reject the request *in limine litis*, but preferred to consider it on the merits and to determine whether there was sufficient evidence to establish substantial grounds to believe that Mr Lubanga had committed each of the crimes charged.

28. The fact that the Pre-Trial Chamber considered the request together with the merits, that is to say the determination and the assessment of the charges, shows that the decision on the confirmation of charges to automatically decide the issue of detention and denied the request for release

29. Furthermore, as drafted, article 82(1)(b) does not require a formal application solely and directly requesting release. This article refers to a decision *granting or denying release of the person being investigated or prosecuted*.

30. The wording and the scope of this article are therefore broad.

31. To conclude, the Defence challenge to the Prosecution evidence is a challenge to detention. In the same vein, the decision on the confirmation of charges is a decision confirming the Prosecution evidence and the detention. In this case, the decision on the confirmation of charges is a decision rejecting the request for release, and, as such, can of course be appealed on the basis of article 82(1)(b).

B. Interpretation of article 82(1)(b) having regard to the wider aims of the law

32. As required by article 21(3),¹⁵ article 82(1)(b) must be interpreted and applied in accordance with internationally recognised human rights.

¹⁴ Defence Brief on the Confirmation Hearing, ICC-01/04-01/06-764, 7 December 2006, para. 53.

33. Article 82(1)(b) provides that decisions granting or denying release may be appealed because it guarantees an internationally recognised human right: the right to liberty, a right generally enshrined in international instruments and in the *Universal Declaration of Human Rights*.

34. Under article 3 of the 1948 *Universal Declaration of Human Rights*:¹⁶ “Everyone has the right to life, liberty and security of person.”

35. According to article 9(1) of the *International Covenant on Civil and Political Rights* of 16 December 1966: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

36. According to article 6 of the *African Charter on Human and Peoples’ Rights* of 27 June 1981 which entered into force on 21 October 1986: “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

37. To much the same effect is article 5(1) of the *European Convention on Human Rights and Fundamental Freedoms* of 04 November 1950¹⁷ which reads as follows: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty.”

38. The same is true for article 7 of the *American Convention on Human Rights* of 22 November 1969¹⁸ which enacts the following provisions:

¹⁵ Article 21(3) of the Statute.

¹⁶ A.G. res. 217A (III), U.N. Doc A/810, page 71 (1948) *Universal Declaration of Human Rights*.

¹⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force 3 September 1953, revised by Protocol No. 3, entered into force 21 September 1970, Protocol No. 5 entered into force 20 December 1971 and Protocol No. 8, entered into force 1 January 1990.

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court for trial.
6. Anyone who is deprived of his liberty shall be a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies...etc.

39. Therefore, according to these international instruments, a genuine right to liberty exists and this right is guaranteed by a permanent right to appeal a decision to deny release at any stage in proceedings.

40. According to a principle of criminal procedure in civil law systems "*Liberty is the rule, detention the exception*". This principle reflects the right to liberty.

41. In common law legal systems, the concept of *habeas corpus* best represents the right to liberty in cases of wrongful detention.

42. This right to liberty and, if necessary, the right to apply for release is provided for by article 60¹⁹ and rule 185.

43. A decision to deny release can be appealed at any time on the basis of the internationally recognised right to liberty.

¹⁸ *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

¹⁹ Article 60 of the Statute.

44. Accordingly, any decision whose **purpose is** to grant or deny release – in this case, the decision on the confirmation of charges as a decision to deny release – falls within the scope of article 82(1)(b) and should be appealable.

2) SCOPE OF ARTICLE 82(1)(b)

45. Its scope can be determined in accordance with rule 185²⁰ which sets out the various scenarios under which the Court may grant release. Under rule 185:

1. Subject to sub-rule 2, where a person surrendered to the Court is released from the custody of the Court because the Court does not have jurisdiction, the case is inadmissible under article 17, paragraph 1(b), (c) or (d), the charges have not been confirmed under article 61, the person has been acquitted at trial or on appeal, or for any other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State. In this case, the host State shall facilitate the transfer in accordance with the agreement referred to in article 3, paragraph 2, and the related arrangements.

2. Where the Court has determined that the case is inadmissible under article 17, paragraph 1(a), the Court shall make arrangements, as appropriate, for the transfer of the person to a State whose investigation or prosecution has formed the basis of the successful challenge to admissibility, unless the State that originally surrendered the person requests his or her return.

46. Rule 185 sets out scenarios under which release may be granted: the Court lacks jurisdiction, the case is inadmissible, charges are not confirmed, the person has been acquitted at trial or on appeal **or for any other reason**.

47. This rule gives guidance to the Appeals Chamber as to the various options for release and permits a broad interpretation of article 82(1)(b) based on article 31 of the *Vienna Convention on the Law of Treaties*. Interpretation (of the wider aims of the law) having regard to all the basic texts governing the Court.

48. The Defence is of the opinion that article 82(1)(b) must be interpreted in light of rule 185.

49. Article 60 also sets out scenarios under which interim release may be granted. It states:

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

50. Interim release is a category of release. The Defence is of the opinion that the concept of release under rule 185 is much broader than that of interim release under article 60.

51. The Defence considers that it is wrong to assert that article 82(1)(b) applies only to applications for interim release. If that were the case, article 82(1)(b) would have been worded as follows: "*A decision granting or denying **interim** release of the person being investigated or prosecuted*".

52. This is not the case here: the adjective "interim" does not appear in article 82(1)(b). This suffices to demonstrate that this article applies to all applications for release.

53. In conclusion, the scope of article 82(1)(b) encompasses all forms of release.

²⁰ Rule 185 of the *Rules of Procedure and Evidence*.

54. The broader scope of article 82(1)(b) is supported by a previous Appeals Chamber decision in the instant case which relates to the formal application for release by Mr Lubanga Thomas Dyilo²¹ based on 82(1)(b).

55. On that occasion, the Appeals Chamber did not restrict the scope of article 82(1). It did not indicate that this article applies only in the case of a formal application for release and only in that case. Had this been the Appeals Chamber's intention, it would have made it explicit.

56. This implies on the contrary that the scope of article 82(1)(b) is broad and that the decision on the confirmation of charges can be interpreted as a decision denying release.

3) – RIGHT TO APPEAL A DECISION ON THE CONFIRMATION OF CHARGES

A. Having regard to an objection, challenge or question considered together with the merits at the confirmation hearing

57. The Defence submits that, although the Statute does not expressly provide for a right to appeal a *decision on the confirmation of charges* as such, it is neither correct nor logical from a legal perspective to claim that there is no automatic right to appeal a decision on the confirmation of charges. For example, rule 122²² provides that if a question or challenge concerning the Court's jurisdiction or the admissibility of a case arises, rule 58 applies.²³

²¹ ICC 01/04-01/06-824 of 13 February 2007.

²² Rule 122 of the *Rules of Procedure and Evidence*.

²³ Rule 58 of the *Rules of Procedure and Evidence*.

58. In other words, the Pre-Trial Chamber may join the question, challenge or objection to the confirmation proceeding, i.e. it would rule on the question, challenge or objection at the same time as deciding whether to confirm of charges.

59. This means that, under article 82(1)(a) of the Statute, the Defence would automatically be entitled to appeal that part of the decision on the confirmation of charges which deals with the Court's jurisdiction or the admissibility of the case.²⁴

60. Just as a decision on the confirmation of charges may at the same time constitute a decision on jurisdiction or admissibility, the Defence maintains that in the instant case the decision on the confirmation of charges also constitutes a decision on release.

61. In any case, a detained person would welcome equally enthusiastically a straightforward decision to release him or her and a decision not to confirm the charges with release. The title of the decision is of little importance, it is the end result that counts, that is, the release of the detained person.

62. Although there is no provision which expressly provides for the right to appeal a decision on the confirmation of charges (or decisions to accept or reject applications for release), the fact remains that there are many arguments in favour of the right to appeal.

B. Having regard to the preparatory work

63. The interpretation of article 82(1)(b) given above is confirmed by the preparatory work establishing, as contemplated under article 32 of the *Vienna Convention on the Law of Treaties*, supplementary means of interpretation in order to a) confirm the meaning of a provision resulting from the application of article 31 of

²⁴ Transcript of the hearing of 09 November 2007.

the *Vienna Convention on the Law of Treaties*, b) clarify ambiguous or obscure provisions and c) avoid results which are manifestly absurd or unreasonable.

64. The Defence intends to apply article 32 on the basis of paragraph a), that is, as a supplementary means of interpretation confirming the meaning of a provision of the Statute.

65. Although there is no provision which expressly provides for the right to appeal a decision to confirm or not to confirm charges, nothing precludes it insofar as the preparatory work has not excluded the possibility, as the Prosecution asserts.

66. According to the preparatory work, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998,²⁵ the following wording of article 81 on appeals against interlocutory decisions was proposed:

1. Either party may appeal any of the following interlocutory decisions in accordance with the *Rules of Procedure and Evidence*:

(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;

(e) When the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal.

2. An interlocutory appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the *Rules of Procedure and Evidence*.

67. The intention was to discuss the right to appeal an order that confirms or denies, wholly or in part, the indictment.

²⁵ A/CONF. 183/2/Add.1, 14 April 1998. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome (Italy), 15 June – 17 July 1998.

68. In fact, the intention was to adopt the procedure provided for by the *ad hoc* tribunals for confirming or not confirming the indictment and ruling on the right to appeal an order that confirms or denies, wholly or in part, the indictment.

69. The procedure for confirming or not confirming an indictment before the *ad hoc* tribunals is entirely different from the procedure established by the Court's basic texts.

70. For example, at the International Criminal Tribunal for Rwanda, rule 47 of the *Rules of Procedure and Evidence* provides that the *reviewing judge shall examine the indictment, each of the counts in the indictment, and the supporting materials provided by the Prosecutor. The judge then makes an order either to confirm each count, request the Prosecutor to present additional material in support of any or all counts, dismiss each count, or may adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.*

71. This is by no means an *inter partes* hearing as provided for in the procedure for confirming charges before the Court.

72. It is therefore erroneous to claim that this issue was considered during the preparatory work and that the proposal was not adopted. It should also be noted that in the case of *ad hoc* tribunals, the order is made by a single judge without an *inter partes* hearing; at the Court, the decision is taken by a bench of judges after the person being prosecuted has had an opportunity to challenge the charges and Prosecution evidence and to present his or her own evidence.

73. The argument that the preparatory work rejected the possibility of appealing a decision on the confirmation of charges must fail.

74. This paves the way for the Appeals Chamber to be able to render, in this first case before the Court and pursuant to article 82(1)(b), an authoritative decision on

this point, granting the right to appeal a decision on the confirmation of charges, which would establish the Court's jurisprudence.

C. Having regard to the nature of the decision on the confirmation of charges and the Pre-Trial Chamber's powers

75. The nature of the decision on the confirmation of charges suggests that there is a right to appeal the decision. The decision on the confirmation of charges is an adversarial decision (except when the person being prosecuted waives the right to be present at the hearing), as are the proceedings insofar as a real debate takes place between the parties. The nature of the decision on the confirmation of charges and the adversarial nature of the proceedings suggest that the party challenging the decision has a right to have it set aside.

76. Under article 61(6):²⁶

At the hearing, the person may:

- a) Object to the charges*
- b) Challenge the evidence presented by the Prosecutor; and*
- c) Present evidence.*

77. In practice, the confirmation hearing was held over several sessions, during which there were fierce debates on the issue of admissibility and the probative value of the Prosecution evidence. As in a judgement on the merits after trial, the decision on the confirmation of charges assessed the parties' evidence.

78. Moreover, it must be noted that the debates on the admissibility of the Prosecution evidence were the subject of several Defence appeals relating to Prosecution disclosure of redacted evidence.

79. It must be conceded that there was a real **miniature** trial before the Pre-Trial Chamber. The decision on the confirmation of charges of 29 January 2007 gives

many reasons and runs to 134 pages, 36 of which are devoted to admissibility and probative value, which demonstrates the extent of the debates.

80. It should be emphasised that never before has an international court allowed the parties to debate the main issues of the case to such an extent at the pre-trial phase. It would be entirely unjust if the party challenging the resultant conclusions had no right to appeal them. Given that the instant case is the first case before the Court, an authoritative decision by the Appeals Chamber on the right to appeal a decision on the confirmation of charges, pursuant to article 82(1)(b) and in accordance with the internationally recognised principle of the right to a fair trial, would be welcomed.

81. Never before has an international court established (as provided for in the Court's basic texts) a real bench of judges at the pre-trial phase which organises hearings on the confirmation or non-confirmation of charges.

82. In international law, it is therefore a *sui generis* court in the sense that it has no known direct forerunner and, as mentioned above, there is no real *inter partes* hearing prior to trial before the *ad hoc* tribunals.

83. It would therefore be fair to grant any party challenging a decision made by such a court leave to appeal the decision.

84. One cannot use the argument that no international instrument provides for this right, inasmuch as the Pre-Trial Chamber is a new concept in international law.

85. A right to appeal the decision on the confirmation of charges rendered by this Appeals Chamber will allow international legal instruments to adapt thereto and modify their provisions on the right to appeal by incorporating the right to appeal a decision on the confirmation of charges.

²⁶ Article 61(6) of the Statute.

86. Indeed, a fair trial, the cornerstone of international criminal law, calls for respect for the rights of the accused, as provided for in article 67 of the *Rome Statute of the International Criminal Court* (ICC). The right to appeal ranks among the fundamental rights to a fair trial. This Appeals Chamber will henceforth, through the decision it will render, incorporate the right to appeal a decision on the confirmation of charges as a fully-fledged right to a fair trial under article 82(1)(b) of the Statute.

RELIEF SOUGHT

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER

87. To allow the Defence submission and consider Mr Lubanga's appeal from the decision on the confirmation of charges under article 82(1)(b).

[signed]

Ms Patricia Annick Mongo

Dated this 22 May 2007.

At Brazzaville.