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

Date: 21 May 2007

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Claude Jorda
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 Prosecution Application for Leave to Appeal filed with Pre-Trial
Chamber I on 5 February 2007**

The Office of the Prosecutor

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1. Introduction

1. On 29 January 2007, the Pre-Trial Chamber rendered its *Decision on the confirmation of charges* (“the Confirmation Decision”),¹ in which it confirmed, “on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from September 2002 to 2 June 2003.”²

2. On 5 February 2007, the Prosecution filed an application for leave to appeal the Confirmation Decision.³ The application was limited to the issue of whether the Pre-Trial Chamber was empowered to substitute the crime charged by the Prosecution, “as enshrined in article 8(2)(e)(vii) of the Statute, with a different one under article 8(2)(b)(xxvii).”⁴

3. In response, the Defence opposes the Prosecution application for leave to appeal, firstly, because the Prosecution waived its right to appeal on the issue by the simple fact that it invited the Chamber to resort to the mechanism under regulation 55 of the *Regulations of the Court* for the sake of judicial economy.

4. Moreover, the Defence submits that the cumulative criteria for obtaining leave to appeal under article 82(1)(d) have not been met and that, in addition, the Prosecution’s submissions regarding the second and third criteria do not seem to follow from the issue as framed by the Prosecutor, but rather from the outcome of the Confirmation Decision.

¹ ICC-01-04-01-06-796-Conf-tEN.

² Page 158.

³ ICC-01/04-01/06-806, *Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 “Décision sur la confirmation des charges”* of 5 February 2007.

⁴ *Ibid.*, page 2.

2. Waiver of the right to appeal

5. In a document appended to the Document Containing the Charges, the Prosecution stated that it believed that the facts as detailed in the Document Containing the Charges could underpin three other modes of liability. Although the Prosecution did not define these modes of liability in the Document Containing the Charges, it did nevertheless request that “the Pre-Trial Chamber make findings that the legal requirements of these three modes of liability are either satisfied or not satisfied, based on its review of the materials submitted at the Confirmation Hearing. Such findings would promote efficiency by ensuring that in the event any of the three legal theories of criminal liability were later deemed infirm, through events not foreseen at this time, the Parties would not be obligated to return to the Pre-Trial Chamber to seek the confirmation of new charges based on the same evidentiary showing.”⁵

6. The Defence objected to this Prosecution strategy of discharging its burden regarding the allegation, stating that this prejudiced its right to be informed in a timely manner of the nature of the charges, both prior to and at the confirmation hearing.⁶ In particular, the Defence argued that for “the purposes of the confirmation hearing, in determining whether the elements of liability are satisfied, [...] the Chamber should also consider whether the Prosecution has pled this conduct with sufficient detail and clarity to enable the Defence to challenge the Prosecution case at the confirmation hearing and to properly comment on the scope of liability before the Chamber issues its decision. If that is not the case, then in accordance with Article 61(6)(b), the Defence respectfully requests the Chamber to dismiss the charges or, alternatively, under Article 61(6)(c), adjourn the hearing and request the Prosecution to prepare a new charging document. In this sense, the use of the word “adjourn” in Article 61(6)(c) clearly implies that the Chamber should not do so after the hearing

⁵ ICC-01/04-01/06-356, *Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)*, 21 August 2006.

⁶ Transcript of the hearing of 24 November 2006, pages 29 to 34.

itself, since to do so would deprive the Defence of the right to be heard and to challenge the reformulated charging document.”⁷

7. In its legal submission,⁸ the Prosecution defended its tactic of referring to other modes of liability in a document other than the Document Containing the Charges, stating that “[t]o the extent that the Prosecution, whilst not pleading these other forms of criminal liability, has made reference to “*indirect co-perpetration*” and “*common purpose*” as possible other forms of criminal responsibility, the Prosecution has acknowledged that depending on the evidence eventually admitted at trial, Thomas LUBANGA DYILO could be criminally responsible under these forms of criminal liability, for the same conduct. The Prosecution submits that this is entirely consistent with the powers of the future Trial Chamber under Regulation 55 of the *Regulations of the Court* to change the legal characterisation, including, *inter alia*, in respect of the form of criminal responsibility pursuant to Article 25, “*without exceeding the facts and circumstances described in the charges and any amendments to the charges*”.⁹

8. Although the Prosecution made reference to the powers of the Trial Chamber, its arguments were addressed to the Pre-Trial Chamber. In effect, the Prosecution was arguing that, by analogy, the Trial Chamber would have the same power to recharacterise the charges based on what it considered to be the most appropriate mode of liability. The Prosecution reiterated this view in footnote 54 of the document filed on 28 August 2006, addressed specifically to the Pre-Trial Chamber. This clearly confirms that its analysis of article 25 did not relate to possible future actions on the part of the Trial Chamber, but to the possible decision that might be taken by the Pre-Trial Chamber.¹⁰

⁷ Transcript of the hearing of 24 November 2006, p. 31, line 9 to p. 32, line 2.

⁸ Prosecution’s Document Addressing Matters that were Discussed at the Confirmation Hearing, 4 December 2006, ICC-01/04-01/06-748-Conf.

⁹ *Ibid.*, para. 28.

¹⁰ The Prosecution states the following: “See document of 28 August 2006, para. 12(ii). The Prosecution recalls the following statement: “In the document Containing the Charges, the Prosecution submits that Thomas

9. Accordingly, the Defence submits that it would contravene fair trial requirements to authorise the Prosecution, which is a permanent officer of the Court, to defend a legal position directly in its own favour, only to abandon it once the consequences reveal themselves to be less favourable.

10. In this respect, the Defence points out that the Appeals Chamber of the ICTY recently ruled that it would be unfair to allow the Prosecution to reverse its legal position on appeal to the detriment of the accused.¹¹

3. Minimum requirements for obtaining leave to appeal: the Prosecution submissions

11. Citing article 82(1)(d) of the Statute, the Prosecutor submitted that the issue affected the fairness of the proceedings, firstly by violating “a procedural right of significant importance to the Prosecution”,¹² that is, “the right to consider and decide

LUBANGA DYILO is criminally responsible as a joint perpetrator pursuant to Article 25(3)(a). The Pre-Trial Chamber found, upon review of the Arrest Warrant Application [...] that indirect co-perpetration was also potentially a viable theory of criminal responsibility. Based on the facts as detailed in the Document Containing the Charges, the Office of the Prosecutor believes that “common purpose” in terms of Article 25(3)(d) could properly be considered as a third applicable mode of criminal liability.”” The submissions made by the Prosecution at the confirmation hearing reflect this position; see Transcript of the hearing of 24 November 2006, pages 89 and 122. Another version of the submission (see page 122 of the transcript) was made in the context of the document of 28 August 2006: “However, the Prosecution considers that, as it stated in its application of 25 August, indirect perpetration could also be applicable” (see page 89 of transcript; the Prosecution notes that the “application of 25 August” is the document of 28 August 2006).

¹¹ *Prosecutor v. Brđanin*, Appeal Judgement, 3 April 2007.

<http://www.un.org/icty/brdjanin/appeal/judgement/brd-aj070403-e.pdf>.

In its judgement, the Trial Chamber based its legal findings on a statement of principle that the Prosecution had previously accepted as correct. The Prosecution then gave notice of appeal on the ground that the Chamber had committed a mistake of law on that point. Though the Appeals Chamber concluded that it held the residual power of examining a question of general interest to the Tribunal, it did nevertheless conclude that it would be unfair to enter new convictions based on a reformulation of the law (see paragraph 361). It should also be kept in mind that the Pre-Trial Chambers of the ICC have in the past stated that, unlike at the ICTY, the appeals mechanism at the ICC does not allow appeals on the ground that the issue is of general interest to the Court. See ICC-01/04-135, *Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 30 March 2006, para. 21; and ICC-02/04-01/05-20-US-Exp, *Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58*, 19 August 2005, para. 16, unsealed pursuant to Decision ICC-02/04-01/05-52 of 13 October 2005. See also the decision of the ICTR Appeals Chamber, *Rwamakuba v. The Prosecutor*, “*Decision on Prosecution’s Notice of Appeal and Scheduling Order*” of 18 April 2007, in which the Appeals Chamber dismissed the Prosecutor’s notice of appeal. In this case, after acquittal, only the Registrar made submissions to the Chamber regarding a motion for compensation; the Prosecutor had not made any submissions to the Trial Chamber. In the view of the Appeals Chamber, as the Prosecutor had not made any submissions to the Trial Chamber, he is estopped from making submissions on appeal. Para. 6.

¹² ICC-01/04-01/06-806, para. 14.

whether an amendment to the charges is warranted”,¹³ and, secondly, by infringing “the Prosecution’s fundamental right *and duty* to bring before Trial Chambers of this Court only cases that the Prosecution believes to be firmly supported by the evidence collected during the investigation.”¹⁴

12. With regard to the requirement for expeditiousness of the proceedings, the Prosecutor maintained that “the Decision forces the Prosecution to devote time and resources to the collection and analysis of additional evidence in order to be in a position to adequately substantiate the existence of an international armed conflict at trial. It also creates a new burden in terms of pre-trial disclosure, since the Prosecution must now arguably identify and transmit to the Defence any new exculpatory information in its possession pertaining to the amended charge, i.e. information undercutting the existence of an international armed conflict.”¹⁵

13. With regard to the final requirement, according to which the issue involved could affect the outcome of the trial, the Prosecution submits that the current formulation of the charges is ‘problematic’, because it could lead to an acquittal¹⁶ or require the Trial Chamber to resort to the procedure provided for in regulation 55 of the *Regulations of the Court*.¹⁷

14. In the alternative, the Prosecution submits that the immediate resolution of the issue would materially advance the proceedings in that it would ensure that “the proceedings continue on the correct footing, avoiding any unnecessary prejudice to the Prosecution and any damaging effect to the fairness and efficiency of the proceedings stemming from the Decision.”¹⁸

15. Although, on its face, the issue raised by the Prosecution superficially resembles the Defence’s ground of appeal, the following differences should be borne

¹³ Ibid., para. 13.

¹⁴ Ibid., para. 16.

¹⁵ Ibid., para. 17.

¹⁶ Ibid., para. 10.

¹⁷ Ibid., para. 10.

¹⁸ Ibid., para. 21.

in mind. Firstly, the Defence has consistently insisted on the obligation of the Chamber and the Prosecution to inform it in advance of the nature of the charges and to afford the Defence the opportunity to make submissions on the matter. Secondly, the Defence was at no point informed that the UPC could be considered as a national armed force¹⁹ or that the issue of the expansion of the legal definition of the concept of national armed force would be raised at the confirmation hearing. Finally, whilst the Prosecution may rely on the mechanism provided for in articles 61(8) and (9), in addition to the procedures provided for in article 82(1)(d), the Defence has no recourse against what it considers to be prejudicial procedural errors which need to be remedied without delay in order to materially advance the proceedings.

4. The expeditiousness of proceedings

16. As a preliminary matter, the Defence observes that the issue for which the Prosecution is seeking leave to appeal is fundamentally linked to the respective powers of the Prosecution and the Pre-Trial Chamber. The Defence notes in this regard that Pre-Trial Chamber II denied an application for leave to appeal filed in the *Kony et al.* case in which the Prosecution submitted that the impugned decision “substantially alter[ed] the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber.” The Chamber found in that instance that “it appears debatable whether a question exclusively relating to the apportioning of powers between organs of the Court [could] qualify as an issue that pertains to or would ‘significantly affect the fair...conduct of proceedings’”.²⁰ In the same vein, it has also been found that at the ICTY such matters did not automatically meet the criteria required for obtaining leave to appeal. Thus, in *Prosecutor v. Milutinović*, the Prosecution applied for leave to appeal a decision in which the Chamber ordered it to reduce the scope of its case, submitting that the “decision raised[d] important legal issues relating to the

¹⁹ To the contrary, at the hearing on the Prosecution Application for the issuance of a warrant of arrest, the Prosecution referred to the UPC as a regional rather than a national entity. Transcript of the hearing of 2 February 2006, edited version, p. 29.

²⁰ ICC-02/04-01/05-20, *Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58*, 19 August 2005, made public pursuant to Decision no. ICC-02/04-01/05-52 of 13 October 2005.

division of powers of the different organs of the Tribunal” and that it was “therefore in the interest of the development of the jurisprudence of the International Tribunal [...] that a final determination on these legal issues be made by the Appeals Chamber at the earliest opportunity.” The Milutinović Trial Chamber summarily dismissed this argument, finding that it “d[id] nothing to advance a request for certification and, consequently, [would] not be addressed”.²¹

17. The Defence further submits that the Prosecution’s argument does not meet the criteria for the expeditiousness of proceedings for the reasons set out below.

4.1 The approach adopted by the Chamber was more favourable to the Prosecution than the other available options

18. Article 61(7)(b) allows the Chamber not to confirm the charges without prior notification of or submissions from the Prosecution if the Prosecution evidence is not sufficient to confirm the charges. Accordingly, the Defence respectfully submits that the Prosecution cannot claim that the actions of the Chamber were prejudicial to its rights since the approach the Chamber finally adopted was in fact more in its favour than the possibility envisaged in article 61(7)(b). In fact, the Defence is of the opinion that if the options available to the Chamber were limited to the possibility of declining to confirm the charges pursuant to article 61(7)(b) or of adjourning the hearing pursuant to article 61(7)(c), the first option would have been more appropriate, since the Chamber would have had to take into account, firstly, the effect of an adjournment on the already considerably extended period of detention prior to the confirmation hearing,²² secondly, the fact that the Prosecution had already obtained a postponement of the confirmation hearing and, lastly, the fact that the Defence application for postponement of the hearing had been denied.²³

²¹ *The Prosecutor v. Milutinović, Decision Denying Prosecution’s Request for Certification of Rule 73 bis issue for Appeal*, 30 August 2006, para. 9.

²² See, for example, [insert ICTY case law requiring the Prosecutor to withdraw counts in the indictment or refusing requests for leave to amend indictments.]

²³ In this regard, the Human Rights Committee held that the refusal to grant the Defence an adjournment in circumstances in which the Prosecution had already obtained a postponement of hearings was a violation of

3.2 *The Prosecution has suffered no prejudice because it was forewarned of the opinion of the Chamber in regard to the nature of the armed conflict and because it had the time and necessary resources to prepare its case accordingly*

19. The Prosecution was informed at a very early stage in the proceedings that the Chamber considered that the conflict could be characterised as an international armed conflict. At an *ex parte* hearing on the Prosecutor's application for the issuance of a warrant of arrest,²⁴ the Pre-Trial Chamber expressly requested that the Prosecution address the issue of the characterisation of the armed conflict in light of the activities of Rwanda and Uganda and of the decision of the International Court of Justice.²⁵

20. In its subsequent decision on the application for the issuance of a warrant of arrest, the Chamber deliberately emphasised that the issuance of the warrant of arrest did not indicate that it considered itself to be bound "by the legal characterisation of the conduct referred to in the Prosecution's Application".²⁶ In point of fact, the decision of the Chamber clearly informed the Prosecution that the judges considered that there were reasonable grounds to believe that the conflict could be characterised as international.²⁷ In particular, the Chamber added: "...on the basis of the evidence and information brought by the Prosecution, there are reasonable grounds to believe that the Uganda People's Defence Force (the "UPDF") may have directly or indirectly intervened in the conflict in Ituri, in the context of

article 14 of the *International Covenant on Civil and Political Rights* due to lack of equality of arms. *Frank Robinson v. Jamaica*, Communication No. 223/1987, U.N. Doc. Supp. No. (A/44/40) at 241 (1989), para. 10.4, <http://www1.umn.edu/humanrts/undocs/session44/223-1987.htm>.

²⁴ Confidential transcript of 2 February 2006, edited version.

²⁵ Page 30 of the edited version of the transcript, lines 1-23.

²⁶ ICC-01/04-01/06-8-US-Corr, *Decision concerning Pre-Trial chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case of the Prosecutor v. Thomas Lubanga Dyilo*, 24 February 2006, para. 16, made public on 17 March 2006 pursuant to Decision ICC-01/04-01/06-37.

²⁷ "With regard to the first condition, the Chamber finds that there are reasonable grounds to believe that between July 2002 and December 2003 there was an armed conflict in the region of Ituri and that the alleged crimes underlying the case against Mr Thomas Lubanga Dyilo (the alleged policy/practice of the *Union des Patriotes Congolais* (the "UPC")/*Forces Patriotiques pour la Libération du Congo* (the "FPLC") of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen) were committed in connection with that armed conflict. In addition, the Chamber observes that enlisting into the FPLC, conscripting into the FPLC or using to participate actively in hostilities children under the age of fifteen constitutes a war crime under either article 8(2)(e)(vii) of the Statute if the conflict is of a non-international character or article 8(2)(b)(xxvi) of the Statute if the conflict is of an international character." ICC-01/04-01/06-8-US-Corr., para. 25.

which the above-mentioned UPC/FPLC's policy/practice allegedly took place. As a result, the Chamber considers that there are reasonable grounds to believe that the conflict in Ituri may have had either a non-international character or an international character."²⁸

21. At the confirmation hearing, the Defence submitted that "during some time periods the area was controlled by forces linked to foreign governments",²⁹ adding that some elements of the Document Containing the Charges seem to point to the existence of an armed conflict of an international character.³⁰

22. In its brief on matters it raised at the confirmation hearing, the Defence recalled that "during the time period set out in the charges, the area of Ituri was governed by various political and military formations, and during some time periods, the area was controlled and administered by forces linked to foreign governments."³¹ The Defence added that "[i]n the context of the form of the charging document, the Defence opined that the involvement of foreign elements, such as the UPDF, could transform the conflict in Ituri into an international armed conflict. This possibility was recognised by the Pre-Trial Chamber in its decision on the issuance of the arrest warrant and during the hearing of 2 February 2006, in which the Chamber expressly referred to the findings of the International Court of Justice in the case brought by the DRC against Uganda."³²

23. The Prosecution elected not to address these matters at the confirmation hearing and, in its subsequent submission, it merely confined itself to stating, in this regard,

²⁸ Ibid., para. 85.

²⁹ Transcript of the hearing of 24 November 2006, edited version, p. 15, lines 17 to 19.

³⁰ Transcript of the hearing of 24 November 2006, edited version, pp. 65, 66 and 73.

³¹ ICC-01/04-01/06-764, Defence Brief on Matters the Defence Raised During the Confirmation Hearing – Legal Observations, para. 7.

³² Ibid., para. 8. See also para. 13.

that “the reference in paragraph 84 to the UPDF does not *per se* make the conflict an “international” conflict.”³³

24. The appeals process at the ICC is not designed to correct the errors in strategy or oversights on the part of participants.³⁴ In requesting the confirmation of the charges by the Pre-Trial Chamber, the Prosecution was under the obligation to submit to the Chamber all relevant information – both incriminating and exonerating – and to structure its case so as to sustain the burden of proof attached to all elements of the alleged crime, particularly (if this was indeed the Prosecution’s case) the non-international character of the conflict. In light of the unequivocal wording of the decision on the issuance of a warrant of arrest, the Prosecution should have allowed for the fact that the issue of the characterisation of the armed conflict was of a certain import within the context of the confirmation hearing. It had, in fact, nine months to prepare its evidence and submissions in this regard.

25. Regarding the Prosecution’s argument that the decision affects the fairness of proceedings in that it infringes “the Prosecution’s fundamental right and duty to bring before Trial Chambers of this Court only cases that the Prosecution believes to be firmly supported by the evidence collected during the investigation”, the Defence submits that if the Prosecution were allowed to adjust the substance of the charges based on what it considers to be the easiest evidence to establish, the obligation to establish the truth that article 54(1) imposes on the Prosecutor would be violated. If reliable indicia suggest that the conflict should be considered as being of an international character, the Prosecution cannot deliberately ignore such indicia merely because such an approach would magnify its workload, if not exonerate the accused.

5. The expeditiousness of proceedings

³³ Prosecution’s Document Addressing Matters that were Discussed at the Confirmation Hearing, 4 December 2006, ICC-01/04-01/06-749.

³⁴ As the ICTY Appeals Chamber noted, “The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing”, *Prosecutor v. Erdemovic*, Appeal Judgement of 7 October 1997, para. 15.

26. Firstly, the Defence notes that the criteria set out in article 82(1)(d) should be met cumulatively. Thus, as Pre-Trial Chamber II stated, “this means that the party applying for leave to appeal needs to demonstrate the existence of both the above requirements; and that failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met.”³⁵ Accordingly, given that this issue does not affect the fairness of the proceedings, the Chamber does not need to consider its impact on the expeditiousness of the proceedings.

27. In any event, the Defence notes that the issue raised by the Prosecution is essentially connected to the evidence, that is, to the fact that the Pre-trial Chamber considered that while there was sufficient evidence to establish substantial grounds to believe that an armed conflict of an international character occurred during the relevant period, by contrast, there was insufficient evidence to establish that there was *not* an armed conflict of an international character during the same period. It does not appear from the application for leave to appeal that the Prosecution is challenging the legal definition of an armed conflict of an international character.

28. Accordingly, the Defence submits that in point of fact, article 61(8) of the Statute is the most appropriate and expeditious legal basis for dealing with evidentiary matters because it authorises the Prosecution to submit additional evidence to support the charge as it was initially framed. If it so prefers, the Prosecution may, under article 61(9), apply to the Chamber for leave to amend the charges. Thus, the Statute clearly provides for the relief sought by the Prosecution. It is therefore a waste of time and resources to apply to the Appeals Chamber for relief to which the Prosecution is already entitled.

29. In this regard, were the Prosecution to be granted leave to appeal under article 82(1)(d), provided no request for extension of time is granted, the Prosecution would have 21 days to submit its appellate brief and the Defence would have 21 days to

³⁵ ICC-02/04-01/05-20-US-Exp, unsealed following Decision ICC-02/04-01/05-52 of 13 October 2005, para. 12.

respond to it. These time limits, which do not take account of the delays caused by the possible participation of victims, would amount to an extension of time of at least two months.

30. Furthermore, the Defence observes that the Appeals Chamber recently noted that barring rare exceptions,³⁶ it “is not invested with original jurisdiction”.³⁷ Thus, even if leave to appeal were granted, and the Appeals Chamber were to uphold the Prosecution’s submissions, the Prosecution would in the final analysis be forced to return before the Pre-Trial Chamber.

31. As concerns the Prosecution’s submission that the decision has an impact on the time and resources at its disposal because it forces the Prosecution to gather additional evidence regarding the character of the armed conflict, the Defence is concerned at the fact that the Prosecution seems to consider that it is not, in the normal course of events, required to fulfil its obligation to gather and disclose exonerating evidence, just as is the case for incriminating evidence. In this instance, if, as the Prosecution claims, the articulation of the charges in the context of an armed conflict of an international character means that the existence of information attesting to the contrary would be likely to exonerate the accused, the reverse is also true: if Thomas Lubanga Dyilo were to be answerable for an offence committed within the context of an armed conflict not of an international character, the existence of an armed conflict of an international character could exonerate him. It would therefore follow that it would be equally incumbent upon the Prosecution to gather information confirming the international character of the conflict as it would be for information attesting to the contrary, regardless of how the charges are framed. As a result, if the Prosecution organised its investigation and discharged its disclosure obligations pursuant to article 54, the Chamber’s decision would have no overall impact on the time and resources of the Prosecution.

³⁶ Articles 110 and 42(8) of the Statute.

³⁷ ICC-01/04-01/06-873, *Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007*, 27 April 2007, para. 6.

6. Is this issue likely to affect the outcome of the trial?

32. As was seen in paragraphs 24 to 28 above, the decision by the Pre-Trial Chamber to immediately amend the characterisation of the charges does not prevent the Prosecution from resorting to the procedures set out in articles 61(8) and 61(9). Given that the standard applicable for the confirmation of the evidence would remain the same, whether an adjournment is granted to the Prosecutor and whether he submits additional evidence under article 61(7)(c), or decides to submit additional evidence under article 61(8), or even amend the charges under article 61(9), arguably, the outcome of the trial would be the same. The outcome of the trial would therefore not be affected.

33. Furthermore, even if the Pre-Trial Chamber had not decided to recharacterise the charges, the Trial Chamber would have had the opportunity to do so pursuant to regulation 55 of the *Regulations of the Court*. Thus, although the decision of the Pre-Trial Chamber has an impact on the time at which such a process would occur, it does not affect the outcome of the process.

34. Lastly, the Defence is not in agreement with the Prosecution when the Prosecution describes the decision as “problematic” in that it could result in an acquittal. Such a statement shows that the Prosecution is displaying less impartiality than is desirable in performing its duty to establish the truth.

7. Would a resolution of the issue materially advance the proceedings?

35. In regard to the Prosecution’s submission that leave to appeal would materially advance the proceedings in that it would ensure that “the proceedings continue on the correct footing, avoiding any unnecessary prejudice to the Prosecution and any damaging effect to the fairness and efficiency of the proceedings stemming from the Decision”, the Defence notes that the Prosecution confines itself to merely repeating arguments it has already made in regard to the first two criteria

(fairness and expeditiousness) and that it submits no independent grounds warranting an immediate resolution of the matter.

36. Furthermore, as discussed above, the Prosecution has the option of resorting to the mechanisms provided for in articles 61(8) and 61(9). Accordingly, leave to appeal on this specific issue would be prejudicial to the proceedings in that it would force the Defence to devote its time and resources to unnecessary appellate proceedings.

FOR THESE REASONS,

May it please Pre-Trial Chamber I to deny the Prosecution's application for leave to appeal the Confirmation Decision.

/signed/

Thomas Lubanga Dyilo

Dated this 21 May 2007

At The Hague