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**International
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Court**

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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

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

Public

**Prosecution's submission regarding the subjects that require early determination:
status of the evidence heard by the Pre-Trial Chamber; status of decisions of the
Pre-Trial Chamber; and manner in which evidence shall be submitted**

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Procedural History

1. The Prosecution makes reference to the “Background” section in its 11 September 2007 “Prosecution’s submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol”,¹ and hereby files its submissions on items listed in paragraph 5 of the Trial Chamber’s Order.

Issue 5(a): The status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber

The Pre-Trial Chamber’s approach toward the admission of evidence

2. Under the relevant rulings of the Pre-Trial Chamber, the confirmation hearing was conducted on the basis that evidence was admitted for the purpose of that hearing only,² without prejudice to the Trial Chamber’s final determinations as to the admission of evidence.³
3. The Prosecution submits that the Trial Chamber has independent authority to determine the admissibility of the evidence presented before the Pre-Trial Chamber building up to and during confirmation proceedings.⁴ The rules, however, provide for the creation of a record of the pre-trial proceedings, which includes all the evidence that has been admitted for the purposes of those proceedings,⁵ and which will be transmitted to the Trial Chamber pursuant to Rule 130. Further, the evidence included in that record has already undergone initial judicial scrutiny by the Pre-Trial Chamber. The Prosecution submits that

¹ ICC-01/04-01/06-951, 11 September 2007, paras. 1-10.

² In the lead-up to the confirmation hearing, the Pre-Trial Chamber ruled that all evidence included in the Prosecution and Defence Lists of Evidence “shall be admitted into evidence 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”. ICC-01/04-01/06-678, 7 November 2006, p. 9 (emphasis added). See also, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 29 January 2007, para. 40 (“Confirmation Decision”).

³ The Confirmation Decision reiterated that “the admission of evidence at this stage is without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as to the admissibility and probative value of [the evidence]” (para. 90). See also, ICC-01/04-01/06-915, 24 May 2007, paras. 39, 54, 75 and 68.

⁴ See Article 64(9)(a), according to which the Trial Chamber has the power to make an independent evaluation and decision on the admissibility and the relevance of evidence. See also, Rule 63(2)), and 69(4) and Rules 63(2), 64(1) and (2) (according to which, as a general rule, an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber) and 130. Furthermore, Article 74(2) provides that the Trial Chamber’s judgement must be based on “its evaluation of the evidence and the entire proceedings” and reiterates that “[t]he Court may base its decision only on evidence submitted and discussed before it at the trial.” In the view of the Prosecution, the term “entire proceedings” may not extend to evidence admitted during the confirmation hearing.

⁵ See, Friman, H., “Investigation and Prosecution”, in Lee, R. S. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers: New York, 2001), p. 524 and, Lewis, P., “Trial Procedure”, in Lee, R. S. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers: New York, 2001), p. 540.

the record is available to the Trial Chamber and the participants in the proceedings as a tool to facilitate the management and the efficient and expeditious preparation and conduct of the trial proceedings.⁶ For these reasons, it is submitted that, within the context of the applicable procedural framework, the record can be used to the extent possible with a view to maximising the efficiency of the proceedings.

The actual status of the evidence heard by the Pre-Trial Chamber

4. The status of the evidence heard by the Pre-Trial Chamber⁷ can best be analysed by considering three different categories of evidence, namely: (i) the transcript of the in-court testimony of Ms Peduto and any documents tendered through it; (ii) documentary and other real evidence; and (iii) other previously recorded testimony and summary evidence.
5. Testimony of Ms Peduto: The Prosecution submits that the transcripts of the in-court testimony of Ms Peduto,⁸ as well as any documents tendered by the Prosecution⁹ and the Defence¹⁰ during her testimony are governed by Rule 68(a). This evidence is therefore admissible without having to re-call Ms Peduto as a witness at trial.¹¹ The Prosecution, the Defence and the Legal Representatives of Victims had an opportunity to examine Ms Peduto and to test the documents tendered during her testimony. With a view to expediting the proceedings,¹² these transcripts and documents may be admitted under Rule 68(a) by the Trial Chamber *proprio motu*, acting pursuant to its powers under Article

⁶ It should be noted that Rule 131 explicitly left it open whether the Trial Chamber may actually consult the record of the proceedings. It is for the Trial Chamber to actually rule on this matter - Brady, H., "Disclosure of Evidence", in Lee, R. (eds.), *The International Criminal Court, Elements of Crimes and Rules of P Procedure and Evidence*, (Transnational Publishers: New York, 2001), p. 426.

⁷ Although the Trial Chamber's Order refers to "evidence heard by the Pre-Trial Chamber" (emphasis added), the Prosecution assumes that this includes all evidence admitted before the Pre-Trial Chamber, and is not confined to testimony given *viva voce* or evidence expressly discussed. The Prosecution notes that, in principle, the considerations relating to the status of evidence apply to the evidence that has been presented by the Prosecution such as they do to the evidence that has been presented by the Defence.

⁸ ICC-01/04-01/06-T-37-Conf-EN[15NOV2006 Edited]; ICC-01/04-01/06-T-38-Conf-EN[20NOV2006 Edited]; ICC-01/04-01/06-T-39-Conf-EN[21NOV2006 Edited]; ICC-01/04-01/06-T-40-Conf-EN[21NOV2006 Edited].

⁹ EVD-OTP-00074; EVD-OTP-00077; EVD-OTP-00022.

¹⁰ EVD-D01-00001; EVD-OTP-00088; EVD-D01-00002; EVD-D01-00003; EVD-D01-00004; EVD-D01-00005; EVD-D01-00006; EVD-D01-00007; EVD-OTP-00051; EVD-OTP-00052; EVD-D01-00008; EVD-D01-00009; EVD-D01-00010; EVD-D01-00011; EVD-D01-00012; EVD-D01-00013; EVD-D01-00014; EVD-D01-00015; EVD-D01-00016; EVD-D01-00017; EVD-D01-00018.

¹¹ See Article 69(2), Rule 68 and Regulation 54(i). See also, Piragoff, D., "Article 69", in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Nomos publishers, 1999), p. 900.

¹² Commentators have considered one objective of Rule 68 to be expediting trial proceedings where further interrogation of the witness is unnecessary (see May, R., and Wierda, M., *International Criminal Evidence*, (Transnational Publishers: New York, 2002), paras. 7.03 and 7.52.).

64(6)(b). In the alternative, it may be admitted under Rule 68(a) subject to motions by the Prosecution and/or the Defence.

6. Documentary and other real evidence: During the pre-trial proceedings, the materials included in the Prosecution Additional List of Evidence,¹³ the Defence List of Evidence,¹⁴ and the Defence List of Additional Evidence,¹⁵ were admitted into evidence for the confirmation hearing, unless they were expressly ruled inadmissible.¹⁶ The Pre-Trial Chamber found that, on the face of it, these materials complied with the requirements of admissibility for the purposes of the confirmation proceedings, thereby filtering out evidence that was, in the view of the Chamber, inadmissible. During this process, the materials admitted were given exhibit numbers and they were included in the record of the proceedings which has been transferred to the Trial Chamber. It is submitted that, notwithstanding the power of the Trial Chamber to make a new and independent assessment of the admissibility of evidence, the Prosecution should be permitted to tender all these materials into evidence from the bar table by referring to their exhibit number in the record of the proceedings.¹⁷ With respect to the exhibits in relation to which the defence has raised an objection and that were nevertheless admitted into evidence by the Pre-Trial Chamber,¹⁸ the Defence may be invited to clarify whether it maintains its

¹³ ICC-01/04-01/06-595-Conf-Anx, 20 October 2006.

¹⁴ ICC-01/04-01/06-644-Conf-Anx, 2 November 2006.

¹⁵ ICC-01/04-01/06-674-Conf-AnxA, 7 November 2006.

¹⁶ ICC-01/04-01/06-678, 7 November 2006, p. 9. See also, Confirmation Decision, para. 40.

¹⁷ During this process, new evidence numbers may be provided.

¹⁸ The disputed items of evidence that have been admitted by the Pre-Trial Chamber are the following: "Items Seized", objection made at ICC-01/04-01/06-674-Conf, 7 November 2006, admitted at the Confirmation Decision, para. 62; Items seized by Uruguayan MONUC forces on 6 September 2003, objection made at ICC-01-04-01-06-T-41-EN[22NovEdited], p. 9, line 19 to p. 10, line 25, admitted at the Confirmation Decision, para. 94; Evidence on the chain of custody and transmission for which the Prosecution has not provided any information, objection made at ICC-01/04-01/06-764, 7 December 2006, para. 52 and ICC-01-04-01-06-T41-EN[22Nov2006Edited], p. 11, lines 8-12, admitted at the Confirmation decision, para. 98; anonymous hearsay evidence and accessibility to the sources of information contained in certain items of evidence, including redacted versions of witness statements, transcripts of interviews, notes and reports of witness interviews prepared by OTP investigators, summaries of evidence, parts of Ms Peduto's testimony, reports, emails, and press articles, objection made at ICC-01/04-01/06-758-Conf, 6 December 2006, para. 49 and ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 11, lines 8-11, admitted at the Confirmation Decision, para. 106; attestations relating to the 6 former child soldiers whose cases are detailed in the Document Containing the Charges, objection made at ICC-01/04-01/06-759-Conf-tEN, 6 December 2006, admitted at the Confirmation Decision, para. 107; various witness testimonies, objection made at ICC-01/04-01/06-759-Conf-tEN, 6 December 2006 and ICC-01/04-01/06-T-42-CONF-EN[22Nov2006Edited], p.2, line 12 to p. 64, line 19, admitted at the Confirmation Decision, para. 122; testimony of Ms Peduto, objection made at ICC-01/04-01/06-759-Conf-tEN, 6 December 2006, and ICC-01/04-01/06-T-42-CONF-EN[22Nov2006Edited], p.2, line 12 to p. 64, line 19, admitted at the Confirmation Decision, para. 122, and various evidence disclosed to the Defence, objection made at ICC-01-04-01-06-T-41EN[22Nov2006Edited], p. 4, lines 21-23, admitted at the Confirmation Decision, para. 130.

objection before the Trial Chamber decides on the admission of that evidence into the trial proceedings.

7. Previously recorded witness testimony and summary evidence: The Prosecution submits that the previously recorded witness testimony and the summary evidence that has been admitted for the purposes of the confirmation proceedings are not admissible as evidence.¹⁹ They should nevertheless remain available to the Trial Chamber and to the participants in the proceedings. Such information may be used by the Trial Chamber and the participants in the proceedings in preparation for the in-court testimony of those witnesses, as well as during their questioning in court.²⁰

Issue 5(b): The status of the decisions of the Pre-Trial Chamber in trial proceedings

8. Under item 5 (b) of the schedule, the Prosecution is requested to address the status of the decisions issued by the Pre-Trial Chamber for the purposes of trial proceedings. The Prosecution considers that the issue included in the schedule can be best discussed by analysing three constituent aspects: (a) the general status of decisions of the Pre-Trial Chamber before the Trial Chamber; (b) the status of the Pre-Trial Chamber's confirmation decision; and (c) the particular problems raised by the Pre-Trial Chamber's amendment of the charges brought by the Prosecution. The Prosecution will deal with each of these aspects below.

The general status of decisions of the Pre-Trial before the Trial Chamber

9. The Trial Chamber will ordinarily not be bound by decisions entered by the Pre-Trial Chamber,²¹ as each are different judicial organs with separate mandates.²² This will be particularly clear in relation to procedural matters, as the Trial Chamber is the master of

¹⁹ Rule 68(a) *a contrario*.

²⁰ Moreover, in the event that the witnesses in question are present before the Trial Chamber, their previously recorded witness testimony itself may, under certain circumstances, become admissible pursuant to Rule 68(b) and it may therefore be introduced into the trial proceedings at a later stage.

²¹ For instance, it has been stated that in relation to issues of admissibility and jurisdiction, "decisions of a PTC are of no consequence, in principle, on further determination by the Trial Chamber" - Fourmy, O., "Powers of the Pre-Trial Chambers", in Cassese, A. *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press: New York, 2002), p. 1227.

²² The Pre-Trial Chamber serves primarily the role of exercising limited supervisory powers at the investigative stage, safeguarding the rights of the defence, and once charges have been brought, determining whether those charges justify committing the case for trial. The Trial Chamber is the trier of fact and the arbiter of the law, and the custodian of the fairness and the expeditiousness of trial proceedings.

its own procedure.²³ Pursuant to the general principle that ICC proceedings must move forward,²⁴ however, validly entered decisions from a Pre-Trial Chamber in the same case should remain undisturbed, subject to the Trial Chamber's authority to correct or amend, whenever possible, defective rulings by the former Chamber which adversely impact on trial proceedings. In relation to the Pre-Trial Chamber's procedural rulings entered prior to the confirmation hearing, which covered, *inter alia*, the issue of "witness proofing" as well as the manner of victim participation at that hearing,²⁵ the Prosecution respectfully submits that those rulings were confined to that particular procedural step and cannot produce any legal effect whatsoever in trial proceedings. The Trial Chamber has full authority to make fresh determinations on all these issues.

The status of the 29 January 2007 Confirmation Decision

10. On 29 January 2007, the Pre-Trial Chamber confirmed charges against Thomas Lubanga Dyilo ("Confirmation Decision").²⁶ The charges brought by the Prosecution were confirmed, for the period early September 2002-13 August 2003, albeit under a different legal characterization for parts of it (early September-2 June 2003).²⁷ In this regard the Confirmation Decision, subject to the caveats to be discussed below, sets the parameters of the Trial Chamber's factual inquiry;²⁸ however other issues discussed in the Confirmation Decision,²⁹ as with the other decisions of the Pre-Trial Chamber discussed above, do not bind either the parties or the Trial Chamber.³⁰

²³ For a parallel example, see Appeal's Chamber decision on victim participation on appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 43: "An interlocutory appeal of this nature, in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings. [...] It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance".

²⁴ See for example, Harmon, M. B., "The Pre-Trial process at the ICTY as a means of ensuring expeditious trials", *Journal of International Criminal Justice* (2007) Vol. 5, p. 377.

²⁵ ICC-01/04-01/06-679, 8 November 2006 and ICC-01/04-01/06-672, 6 November 2006.

²⁶ In that decision, the Chamber correctly defined the purpose of the confirmation hearing as being "limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought" - Confirmation Decision, para. 37.

²⁷ The Chamber declined to confirm the charges for the periods July 2002-early September 2002 and 13 August 2003-end of 2003, considering that the Prosecution had failed to produce sufficient evidence establishing substantial grounds - Confirmation Decision, paras. 370, 397, 410.

²⁸ Article 64(8)(a) clarifies that at the trial stage, "the charges" are the charges as confirmed by the Pre-Trial Chamber.

²⁹ For example, the Pre-Trial Chamber devoted substantial parts of its decision to deal with the issue of the applicable modes of liability (paras. 317-367).

³⁰ Thus, taking the example above, the Pre-Trial Chamber's theories of liability should not be seen as forcing the Prosecution to lead evidence pertaining to that Chamber's understanding of the legal requirements of co-perpetration, or to bind the Trial Chamber to adopt the elements espoused by the Pre-Trial Chamber for its final analysis of the evidence tendered at trial.

The Pre-Trial Chamber's amendment of the charges

11. In the Document Containing the Charges filed pursuant to Article 61(3)(a) ("Document Containing the Charges"),³¹ the Prosecution pleads that the alleged crimes were committed in the context of a conflict not of an international character.³² Consequently, the Prosecution charged Thomas Lubanga Dyilo with three counts of conscripting and enlisting children under the age of fifteen years into armed forces or groups and using them to participate actively in hostilities, pursuant to Article 8(2)(e)(vii) of the Statute.³³ The Pre-Trial Chamber, however, found that "there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003".³⁴
12. As a result, for the period between July 2002 and 2 June 2003, the Pre-Trial Chamber changed the legal characterisation of the charges under Article 8(2)(e)(vii) to allegations of conscripting and enlisting children under the age of fifteen years into the national armed forces and using them to participate actively in hostilities, pursuant to Article 8(2)(b)(xxvi) of the Statute.³⁵ The Pre-Trial Chamber was of the view that "articles 8(2)(e)(vii) and 8(2)(b)(xxvi) of the Statute criminalise the same conduct whether it is committed in the context of a conflict of an international character or in the context of a conflict not of an international character" and therefore considered that "it is not necessary to adjourn the hearing and request the Prosecutor to amend the charges".³⁶ The Prosecution stresses that the Chamber did not reject the charges brought by the Prosecution; rather, it imposed a new legal characterisation, displacing the one that the Prosecution had chosen.
13. Both the Prosecution and the Defence requested leave to appeal the Confirmation Decision in relation to the issue of the scope of the Pre-Trial Chamber's authority under Article 61(7).³⁷ The Pre-Trial Chamber rejected both the application for leave to appeal of

³¹ ICC-01/04-01/06-356-Conf-Anx 1, 28 August 2006.

³² *Ibid*, para. 7.

³³ *Ibid*, p. 25.

³⁴ Confirmation Decision, para. 220. The relevant evidence is discussed in paras. 181-196.

³⁵ *Ibid*, pp. 157-158.

³⁶ *Ibid*, para. 204.

³⁷ See ICC-01/04-01/06-806, 5 February 2007, para. 12; ICC-01/04-01/06-807-Conf, 5 February 2007. See in particular section 2.2 (paras. 13-16).

the Prosecution and the Defence, and directed both parties to the Trial Chamber for relief on this issue.³⁸

14. The concerns raised by the Confirmation Decision call for judicial intervention. An apparent jurisdictional error has occurred yet the parties at this critical juncture appear to be left with no avenue to address this issue other than before the Trial Chamber. The decision leaves legal and factual uncertainty which undermines the goals of fair, expeditious and focused trial proceedings and will cause prejudice to the Defence and the Prosecution in the preparation and conduct of the trial. Among other problems, the Chamber has confirmed a charge that the Defence had no opportunity to oppose at the confirmation hearing, neither legally nor factually.³⁹
15. It is also unclear how the Prosecution must conduct its case. Whereas the Prosecution at all times has affirmed the pivotal role that Uganda played in the conflict at the relevant time, and in particular its support for the UPC/FPLC, the Prosecution did not consider that the Ugandan occupation of Ituri for certain periods of time in and of itself internationalised what remained in essence an armed conflict between local armed groups.⁴⁰ Further, whilst the Prosecution will continue to lead evidence on Uganda's significant support to the UPC/FPLC, including training as well as the provision of uniforms, weapons and ammunition,⁴¹ the Prosecution has no evidence that could support

³⁸ ICC-01/04-01/06-915, 24 May 2007, see in particular para. 44 ("Decision Denying Applications for Leave to Appeal").

³⁹ The current situation is also problematic as, at present, the Confirmation Decision functions as an extension of the Document Containing the Charges, forcing parties and Trial Chamber to "reconstruct" the charges from separate documents.

⁴⁰ While there is no doubt that the law of international armed conflict applies to the occupation itself, the Prosecution was of the view that such an occupation does not automatically, and without further findings, establish the international character of armed conflicts other than the occupation which were taking place, in whole or in part, on that territory. The Pre-Trial Chamber appears to have considered that there may only be one armed conflict, or one characterisation, at any given point in time. The Prosecution notes that this would appear to be inconsistent with the jurisprudence which recognises the possibility of an internal conflict becoming international or, "depending upon the circumstances, be[ing] international in character alongside an internal armed conflict" (ICTY, *Prosecutor v. Tadić*, "Appeal Judgement", IT-94-I-A, 15 July 1999, para. 84, cited in the Confirmation Decision, para. 209). The Prosecution also recalls that in discussing the *nexus* between the armed conflict and the relevant crimes, the Pre-Trial Chamber made no finding that the relevant conduct was committed in the context of, or was associated with, the Ugandan occupation of Ituri. Rather, the Pre-Trial Chamber referred to a series of battles fought by the UPC/FPLC and to "fight[ing] the Lendu enemies", which in the absence of a finding of Ugandan occupation it considered to be non-international (Confirmation Decision, paras. 227-237).

⁴¹ The Prosecution makes reference to its presentations during the Confirmation Hearing (see ICC-01-04/01-06-T-30-EN[09Nov2006Edited] pp. 45(25)-46(1-6), 62(22)-63(6), 66(16-19); ICC-01-04/01-06-T-33-EN[13Nov2006Corrected] pp. 62(12-13), 94(16-20), 96(15-23), 97(12-13), 98(8-10), 99(2-12), 100(10-11); ICC-01-04/01-06-T-34-EN[14Nov2006Edited] pp. 34(10-14), 36(18)-37(6), 54(9-11), 124(24)-125(12); and ICC-01-04/01-06-T-37-EN[15Nov2006Edited] pp. 16(24)-18(9)). The Prosecution in addition draws the attention of the Trial Chamber to the submission of the Legal Representatives for victim a/0105/06 at the occasion of the hearing

a finding beyond a reasonable doubt of “overall control” by Uganda⁴² over any of the relevant armed groups. Thus, the Decision forces the Prosecution to lead evidence to satisfy a different test, at the risk of facing a negative decision if the Trial Chamber also considers that only through a different standard, such as the “overall control” one, could the conflict properly become internationalised. The Prosecution is, however, in a position to lead evidence in support of the occupation of Ituri by Uganda if the Trial Chamber considers that this could demonstrate the international character of the armed conflict in which the offences were allegedly committed.

16. The Prosecutor submits that the Trial Chamber has the statutory authority to remedy the legal and procedural defects resulting from the Confirmation Decision and to place the ongoing proceedings on a certain and solid foundation. Further, the Trial Chamber has the inherent authority to control its own procedures and to ensure that the interests of justice are upheld in proceedings before it. While the Statute may not define a procedural route that squarely fits the present scenario, there are at least two remedial avenues that appear available to the Trial Chamber: (i) to acknowledge that in respect of certain confined findings, the Pre-Trial Chamber acted *ultra vires* and that its change of the legal characterisation is null and void; and (ii) to, at an early stage of the proceedings, employ its powers under Regulation 55 to modify the legal characterisation of the facts confirmed by the Pre-Trial Chamber;⁴³ eventually the Trial Chamber could agree that the Prosecution presents all of its evidence in relation to the armed conflict concerning both its international and non-international aspects.

(see ICC-01-04/01-06-T-30-EN[09Nov2006Edited] p. 93(7-12); and ICC-01-04/01-06-T-47-EN [28Nov2006 Edited] p. 51(14-17).

⁴² See e.g., ICTY, *Prosecutor v. Tadić*, “Appeal Judgement”, IT-94-1-A, 15 July 1999, para. 137, cited in the Confirmation Decision, paras. 209-210. The Chamber, however, did not base its finding on this test or any other type of agency test applicable to the relationship between Uganda and the UPC/FPLC, but only on Uganda’s occupation of the Ituri region.

⁴³ It is respectfully submitted that the Chamber may properly decide to adopt other remedies, beyond those suggested by the Prosecution in this document. The primary goal should be to prevent trial proceedings to commence in an irregular or unfair manner, and the Chamber should be free to determine the best avenue to reach that objective. The Prosecution may explore further possibilities if necessary, including the possibility of applying to withdraw an element of the charges pursuant to Article 61(9), and is willing to assist the Chamber with supplementary submissions if the Chamber so determines.

A. The critical defects of the Chamber's Decision

The Pre-Trial Chamber exceeded its jurisdiction

17. The Prosecution submits that the Pre-Trial Chamber exceeded the scope of its powers under Article 61(7) by modifying the legal characterisation of the charges and adding to the factual basis of those charges.⁴⁴ The role of the Pre-Trial Chamber under Article 61(7) is to ensure that only those charges brought by the Prosecutor which are supported by sufficient evidence proceed to trial. Article 61(7) does not provide for the Pre-Trial Chamber to itself amend charges, nor to insert material facts into the pleadings. The Statute only allows the Chamber to request the Prosecutor to consider such an amendment.⁴⁵ There was thus no legal basis in the Statute or the Rules for the Pre-Trial Chamber to amend the legal characterisation or to expand the factual basis of the charges pleaded by the Prosecution.

The Pre-Trial Chamber modified the legal characterization and factual basis of the charges

18. The Pre-Trial Chamber firstly amended the charges by changing their legal characterisation⁴⁶ from offences under Article 8(2)(e)(vii) to offences under Article 8(2)(b)(xxvi) for the period from September 2002 to 2 June 2003.⁴⁷ The Pre-Trial Chamber appeared to base that amendment on a finding that an occupation of certain territory automatically, and without further findings, establishes the international character of other armed conflicts taking place, in whole or in part, on that territory. This finding of occupation, which led to the amendment of the legal characterisation, was itself based on public documents and constituted an amendment of the factual basis of the charges,

⁴⁴ Article 61(7) is unequivocal in this regard: the Statute only empowers the Pre-Trial Chamber to choose among the three options prescribed in Article 61(7)(a) – (c), which exhaustively delineate the Pre-Trial Chamber's powers in rendering a decision on the confirmation of charges. A further option is not available.

⁴⁵ According to a suggestion by France to what is now Article 61(7), the Chamber should be given the power to "confirm only parts of the indictment and amend it, [...] by withdrawing certain charges deemed not sufficiently serious, or by giving some facts another characterisation" (UN.Doc.A/AC.249/L.3, 6 August 1996, Art. 48(5)(b)). Argentina made a proposal that limited the Chamber's power to "determine in relation to each count whether a *prima facie* case exists" (Unofficial document, 12 August 1996, Rule 61(c)). The different approaches between these proposals were reflected in the reports presented in August 1997 and January 1998, in which the possibility for the Pre-Trial Chamber to confirm only part of the indictment by giving a different qualification to the facts and to directly amend the indictment was placed between brackets (UN Doc. A/AC.249/1997/L.8/Rev.1 and UN Doc A/AC.249/1998/L.13). The gap between both approaches was bridged in March 1998, in a proposal submitted by 14 delegations, including France and Argentina (UN Doc.A/AC.249/1998/WG.4/DP.36), which gave rise to a formulation of a wording almost identical to the current Article 61(7)(c)(ii) (UN Doc.A/AC.249/1998/WG.4/DP.40). In Rome, this further option was adopted instead of the bracketed options presented in August 1997 and January 1998.

⁴⁶ Regulation 52(c) requires the Prosecution to include in the Document Containing the Charges "a legal characterization of the facts to accord both with the crimes [...] and the precise form of participation [...]".

⁴⁷ Confirmation Decision, paras. 220, 249 and 264-293.

exceeding and purporting to supplement the material facts pleaded by the Prosecution.⁴⁸ The statement of facts in the Document Containing the Charges constitutes the factual basis for the Confirmation Hearing, as well as for the confirmation decision.⁴⁹ The Document Containing the Charges did not include any material facts which, if proven, could establish that the conflict, in the context of which the alleged conduct took place, was of an international character,⁵⁰ and no evidence was adduced in this regard.⁵¹ The Pre-Trial Chamber thus changed the factual basis of the charges brought by the Prosecution, adding material facts that had not been pleaded in order to sustain its change of the legal charges.⁵²

B. The power of the Trial Chamber to rule on the issue

19. The Prosecution submits that the Trial Chamber has the power to remedy the present irregularity. The Trial Chamber is the master of the trial proceedings and it has the statutory authority to take the necessary measures to manage the proceedings before it. The Prosecution submits that for this purposes, the Chamber may properly resort to different provisions: Article 64(2) and Rule 134 provide the Trial Chamber with the power to take any decision that is required to ensure the fair and expeditious conduct of the proceedings. Furthermore, Article 64(6)(f) states that “[i]n performing its functions prior or during the course of a trial, the Trial Chamber may, as necessary: [...] (f) [r]ule on *any other relevant matters*” (emphasis added).⁵³ This provision provides the Trial

⁴⁸ Regulation 52(b) requires the Prosecution to include in the Document Containing the Charges “a statement of facts [...] which provides a sufficient legal and factual basis to bring the person [...] to trial”.

⁴⁹ See Articles 61(1), 61(3), 61(5) and 61(7). In this context, see also, Article 74(2). The Prosecutor does not agree with the Pre-Trial Chamber that it is of any relevance that “(i) the legal characterisation of the conflict as of an international nature had already been mentioned in the Decision on the arrest warrant against Thomas Lubanga Dyilo; and (ii) the Defence itself raised the issue of the international character of the conflict at the confirmation hearing and all participants had the opportunity to present their observations on the matter” (see Decision Denying Applications for Leave to Appeal, para. 43), since the facts raised in those instances were not stated in the Document Containing the Charges.

⁵⁰ In particular, the Prosecution did not plead either that Uganda was an occupying power in Ituri or any other material facts from which such an inference could be drawn.

⁵¹ See Confirmation Decision, paras. 214-217 and notes 282-286. The Prosecution notes that before both the Pre-Trial Chamber (Article 61(7)) and before the Trial Chamber (Article 74(2)), a confirmation decision or judgement may only be based on the evidence presented.

⁵² In so doing, the Pre-Trial Chamber committed Thomas Lubanga Dyilo to trial for crimes which are materially different from those set out in the Document Containing the Charges, exceeding the scope of its powers under Article 61(7). In this context, see Confirmation Decision, para. 203, defining the scope of Article 61(1)(7).

⁵³ The Rules of Procedure and Evidence of the UN *ad hoc* Tribunals include a provision with a similar scope to Article 64(6)(f), namely Rule 54. The appropriate test for the application of Rule 54 is whether it is “necessary (not simply useful or helpful) for the purposes of the investigation or for the preparation or conduct of the trial” that a certain measure be taken (ICTY, *Prosecutor v. Delalić et al.*, “Decision of the President”, IT-96-21-T, 11 November 1996, para. 38). Rule 54 has been used as a legal basis for a very wide range of decisions, including

Chamber with a general power of regulation, enabling it to adapt, within the limits of the Statute and the Rules, to the configuration of the proceedings before it.⁵⁴ In turn, the underlying rationale of Regulation 55 may also constitute an appropriate legal basis for the Trial Chamber to rule on this issue.

The necessity of an immediate ruling by the Trial Chamber on the issue

20. The precise scope and legal foundation of the charges has a manifest impact on the trial to come. The Prosecution submits that for the following reasons the Trial Chamber should employ its powers and rule on the issue at this stage of the proceedings:

- a. *to put the ongoing proceedings on a solid foundation and thus ensure the fairness of the trial proceedings:* The Trial Chamber should clarify from the outset on what basis the trial proceedings will be conducted, so that the parties will know what case they are expected to prove or answer, and what facts and circumstances will eventually be considered by the Trial Chamber in its final decision.⁵⁵ Under Article 64(2), the Trial Chamber has a duty to ensure that the trial proceedings are conducted fairly; and
- b. *to ensure the expeditiousness of trial proceedings:* Article 64(2) also provides that the Trial Chamber has a duty to ensure that the trial proceedings are conducted expeditiously. The Prosecution submits that it would be inefficient to conduct an entire trial knowing that in the view of the accusatory organ tasked with the mission of presenting the case, the Trial Chamber will, in the best case scenario, have to resort to Regulation 55 at a later stage of the proceedings. In a worst case scenario, it cannot be ruled out that the Appeals Chamber could, after lengthy trial and appeals proceedings, remand the case back to another Trial Chamber for a re-trial, having found that the trial proceedings were conducted on the basis of charges that were partially void.

21. The Prosecution stresses that it is not requesting the Trial Chamber to review or overturn a decision from the Pre-Trial Chamber, a power that only the Appeals Chamber can

for the withdrawal of charges against a person and for his release, (ICTY, *Prosecutor v. Sikirica et al.*, “Order for the Withdrawal of the Charges”, IT-95-8-T, 17 June 1996) or for a ruling that the status of the original indictment against an accused remain unchanged and valid (ICTY, *Prosecutor v. Kordić et al.*, “Order on Status of Indictment”, IT-95-14-PT, 22 November 1996).

⁵⁴ Terrier, F., “Powers of the Trial Chamber”, in Cassese, A. *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press: New York, 2002), p. 1275.

⁵⁵ Article 74(2) provides that the decision of the Trial Chamber “shall not exceed the fact and circumstances described in the charges and any amendments to the charges”.

exercise; rather, the Prosecution is resorting to the Chamber's authority to regulate its procedure in order to remedy an anomaly capable of adversely affecting trial proceedings.

C. Remedies at the Disposal of the Trial Chamber

The Trial Chamber may sever the ultra vires portions of the Confirmation Decision

22. The Prosecution submits that those parts of the Confirmation Decision in which the Pre-Trial Chamber acted *ultra vires* are null and void. As a result, these limited portions of the Confirmation Decision can have no legal effect on the trial proceedings, and must be severed from the other parts of the Confirmation Decision that have full legal effect. In the present circumstances the trial may proceed on those parts of the Confirmation Decision which have full legal effect as these portions make findings on all the material facts underpinning the charges pleaded by the Prosecutor in the Document Containing the Charges.⁵⁶
23. Given the Pre-Trial Chamber's excess of jurisdiction, the Prosecution submits that the modifications of the charges identified above are of no legal effect.⁵⁷ In a number of domestic⁵⁸ and international⁵⁹ legal systems, a decision or parts of a decision are null and void for excess of jurisdiction if a court made an order that had no proper foundation in

⁵⁶ The only exceptions concern facts pertaining to the responsibility of Thomas Lubanga Dyilo for the periods prior to September 2002 and after 13 August 2003. The present filing by the Prosecution does not refer to those periods.

⁵⁷ Court orders, or parts of such orders, made in excess of the powers of a court, defined by its jurisdiction, are null and void from the outset. See for example, ECHR, *Benham v. the United Kingdom*, "Judgment", 10 June 1996, para. 24, referring to English law.

⁵⁸ In English law, the appropriate test for whether an order of a magistrates' court is void for lack of jurisdiction is that set out by the House of Lords in *McC. v. Mullan* [1985] AC 528: in its judgment, a magistrates' court acted in excess of jurisdiction if, among other things, it exercised its powers in a procedural manner that involved a gross and obvious irregularity, or if it made an order that had no proper foundation in law because of a failure to observe a statutory condition precedent (finding endorsed by the ECHR, *Benham v. the United Kingdom*, "Judgment", 10 June 1996, paras. 25 and 34. In the legal system of Costa Rica, a defect pertaining to the Prosecutor's initiative regarding the presentation of charges causes an absolute nullity (*Proceso Penal*, art. 178; see also, Javier Llobert Rodríguez, *Proceso Penal Comentado*, UCI, 1998, p. 436(9)). In the Bolivian legal system, judicial enactments that were issued in violation of the applicable formal and legal requirements are void, unless their effect can be remedied (*Código de Procedimiento Penal*, art. 167). Article 169 (*Defectos absolutos*) refers to those acts that cannot be remedied. Excess of jurisdiction is expressly mentioned as a cause of nullity (art. 46 – *Incompetencia*), which is governed by art. 169(4). See also, Articles 225 and 227 of *Código Procesal Penal Model para Iberoamerica*. In the Spanish legal system, judicial acts are subject to absolute nullity when done, among other things, with manifest lack of jurisdiction or objective or functional competence or with total disregard of the essential norms of procedure established by law or when effectively resulting in a lack of proper defence (*Ley Orgánica del Poder Judicial* 6/1985, 1 Julio, art. 238). According the Italian law of criminal procedure, violations of the provisions pertaining to the exercise of the prosecutor's power to present the charges, amongst others, cause an absolute nullity, which cannot be remedied (*Codice di procedura penale*, art. 178(a)-(b) and art. 179).

⁵⁹ See statement by Judge Pikis at ICC-01/04/01/06-568 OA3, 13 October 2006, Dissenting Opinion by Judge Pikis, para. 24. See also, ICTY, *Prosecutor v. Kupreškić et al.*, "Decision on Appeal by Papić Against Ruling to Proceed by Deposition", IT-95-16, 15 July 1999, para. 14.

law. In the present case, the void parts of the Confirmation Decision are limited portions which can be discretely identified. The Prosecution submits that, when faced with a decision containing a partial nullity, the Trial Chamber should sever those parts of the decision which were made without legal authority, as they cannot form the basis for future legal proceedings, and must then consider whether the valid parts of the decision may stand. The Trial Chamber should, as a question of principle, give effect to validly made decisions, or portions of decisions, whenever possible.⁶⁰ An examination of some domestic legal systems shows that if the valid portions of a decision are coherent, and contain all of the essential elements to proceed, then proceedings should continue in the interest of the efficient administration of justice.⁶¹ In the context of a decision on the confirmation of charges, the Prosecution submits that the decision may stand if the valid parts of the decision show that there is sufficient evidence to establish substantial grounds to believe that the essential elements of the offences as charged are made out. In such a situation, the decision (once the void parts are severed) still provides a proper basis for a trial. The Prosecution contends that, despite the nullity of confined parts of the Confirmation Decision, in this case the Pre-Trial Chamber has validly made all of the findings required to confirm the charges under Article 8(2)(e)(vii), as brought by the Prosecution, for the period from early September 2002 to 13 August 2003:⁶²

- In relation to the element that children under the age of fifteen years were conscripted and enlisted into *armed forces or groups*, the Pre-Trial Chamber expressly classified

⁶⁰ According to the Roman maxim of “*utile per inutile non vitiatur*”, what is useful is not vitiated by the useless (Maxims of Law from Bouvier’s 1856 Law Dictionary). The U.S. Supreme Court ruled that “[i]f the jury give a verdict of the whole issue and of more, ... that which is more is surplusage, and shall not stay judgment, for ‘utile per inutile non vitiatur’” (United States of America, Supreme Court of the United States, *Stallor v. US*, 157 U.S. 277, 1895; see also, United States of America, Supreme Court of Florida, *Johnson v. State*, 9 So. 2d 208, 210 (Fla. 1891)).

⁶¹ Italian private and administrative law provides for the principle of the conservation of legal acts, according to which the legal effect of partially void acts should be preserved where possible (see, for example, Articles 1367, 1419 and 1424 of the Civil Code (*codice civile*). In English administrative law, a Court is entitled to set aside or disregard an invalid part of a decision except if the invalid part is inextricably interconnected with the valid part so that severing this part would be to alter the substance of the valid part. The courts’ approach to severance is that it is generally appropriate to sever what is invalid if what remains after severance is essentially unchanged in purpose, operation and effect (see England, *Dunkley v. Evans* [1981] 3 All ER 285 at 287, [1981] 1 WLR 1522 at 1524, DC, per Ormrod J and by McNeill J in *R v. Secretary of State for Transport, ex p GLC* [1986] QB 556 at 573, 578, [1985] 3 All ER 300 at 310, 314; England, *Thames Water Authority v. Elmbridge Borough Council* [1983] QB 570 at 578; [1983] 1 All ER 836 at 842; CA, per Dunn LJ, and at 585 and 847 per Stephenson LJ (there should not be severance unless ‘the good and bad parts are clearly identifiable and the bad parts can be separated from the good and rejected without affecting the validity of the remaining part’).

⁶² In addition to the two elements discussed below, the Pre-Trial Chamber also explicitly found that there is sufficient evidence to establish substantial ground to believe that the conduct took place in the context and was associated with an armed conflict (Confirmation Decision, paras. 286-293); that Thomas Lubanga Dyilo had the *mens rea* required for the establishment of the crimes (Confirmation Decision, paras. 404-409); and that Thomas Lubanga Dyilo is responsible for the crimes as a co-perpetrator (Confirmation Decision, paras. 368-403).

the FPLC as an “armed group”, without limiting that classification to the period subsequent to the withdrawal of Ugandan forces from Ituri.⁶³

- In relation to the contextual element of an armed conflict, to establish the international character of an armed conflict it is necessary to plead all the material facts inherent to an armed conflict, and in addition those material facts that are specific to the international character of the armed conflict. The Pre-Trial Chamber found that for the entire period from July 2002 to December 2003 an armed conflict existed in Ituri.⁶⁴ The Pre-Trial Chamber specified that from July 2002 to 2 June 2003, the armed conflict was international due to the presence of Uganda as an occupying power,⁶⁵ while after the withdrawal of Uganda, the armed conflict continued to exist as an armed conflict not of an international character.⁶⁶ Hence, the occupation by Uganda was *not* considered by the Pre-Trial Chamber to be a determining factor for the *existence* of the armed conflict. Rather, the Pre-Trial Chamber considered it to be a factor relevant only to the *characterisation* of the conflict as an international armed conflict. If, for the period between July 2002 and 2 June 2003, the *ultra vires* findings of the Pre-Trial Chamber with respect to the occupation by Uganda are disregarded, then the remaining findings in the Confirmation Decision establish the elements of an armed conflict not of an international character.⁶⁷ Indeed, for the period after the withdrawal of Uganda, the Pre-Trial Chamber explicitly found that the armed conflict continued to exist as a conflict not of an international character.⁶⁸

24. The Confirmation Decision thus makes findings covering all the material facts necessary to proceed against Thomas Lubanga Dyilo for the crimes under Article 8(2)(e)(vii). Therefore, the Confirmation Decision still constitutes a proper basis for the trial proceedings against Thomas Lubanga Dyilo. In fact, the Prosecution submits that the trial proceedings can only proceed on the basis of those charges.⁶⁹

⁶³ Confirmation Decision, paras. 282 and 258. Indeed, at no point did the Pre-Trial Chamber refer to the FPLC as a national armed force (see in particular, paras. 249-253, which deal with the conscription and the enlistment of children under the age of fifteen years by the UPC/FPLC between July 2002 and 2 June 2003).

⁶⁴ Confirmation Decision, paras. 205-237.

⁶⁵ *Ibid*, para. 220.

⁶⁶ *Ibid*, paras. 227-237.

⁶⁷ *Ibid*, paras. 236-237.

⁶⁸ Moreover, the Prosecution notes that the Confirmation Decision does not indicate that the Prosecution has failed to establish the material facts it pleaded, which go to the existence of an armed conflict not of an international character for the entire period relevant to the charges.

⁶⁹ The Prosecution notes that the Trial Chamber could be seen as exceeding its own jurisdiction if it proceeded on the basis of the charges that have been confirmed by the Pre-Trial Chamber exceeding the scope of its powers under Article 61(7). Article 61(11) provides that the Trial Chamber is constituted and will be in charge of the

The Trial Chamber may utilize Regulation 55

25. The Prosecution notes that the Pre-Trial Chamber itself stated that Regulation 55 was an available avenue for the Trial Chamber to address this issue.⁷⁰ The object of Regulation 55 is to ensure that the Trial Chamber, as arbiter of the applicable law, has the opportunity to correct such qualification where it deems it necessary to match the legal character of the charges to the facts before it (ensuring that any discrepancy does not result in impunity), and also to ensure that this is done in a manner which fully respects of the rights of the participants.⁷¹ While the formal process may not take place until a later stage in the proceedings, the Prosecutions submits that nothing prevents the Trial Chamber from foreshadowing that it is possible or likely that it may exercise its authority under Regulation 55 at an early stage in the trial proceedings. Such notification could take place, for example, during the status conferences foreseen in rule 132(2).⁷²
26. The Prosecution submits that such an early notification would be entirely consistent with the object and purpose of Regulation 55, as it would assist in ensuring that the accused is aware of the charges to which he must answer during the trial, and has adequate time to effectively prepare his defence.⁷³ Similarly, the Prosecution considers that it is incumbent upon it to bring the possibility of the need to re-characterise the charges to the attention of the Trial Chamber at the earliest opportunity.⁷⁴
27. Should the Chamber consider that Regulation 55 cannot be properly applied at this stage of the proceedings, the Chamber may nonetheless agree to permit the Prosecution to

proceedings “once the charges have been confirmed *in accordance with this article*” (emphasis added). Consequently, the Trial Chamber arguably may not be properly seized with charges that have been confirmed in violation of the provisions of Article 61.

⁷⁰ Decision Denying Applications for Leave to Appeal, para. 44.

⁷¹ See Stahn, C., “Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55”, 16 *Criminal Law Forum*, Vol. 1, (2005), at 3: “If a Trial Chamber is not in a position to change the legal qualification of the crimes after the commencement of trial, i.e. genocide instead of crimes against humanity, an accused might have to be acquitted on this point, even though the evidence presented at trial clearly demonstrated that he or she was guilty of a crime within the jurisdiction of the Court”.

⁷² *Ibid*, at 26. Such a notification could be based on, inter alia, the Pre-Trial Chamber’s decision on confirmation of charges, *ibid*, at 28, and the record of the pre-trial proceedings, both transmitted by the Presidency pursuant to rule 129, or the submissions of the participants under regulation 55(2).

⁷³ Regulation 55(2) and (3); see also, Article 67(1)(a) and (b). This would also appear to be consistent with the practice under analogous national procedures: see e.g., Meyer-Gossner, *Strafprozessordnung*, 47th ed.(2004), Commentary to Section 265 of the German Code of Criminal Procedure, making reference to jurisprudence of the German Federal High Court.

⁷⁴ The Prosecution submits that the Parties to the proceedings can raise the issue of Regulation 55 with the Trial Chamber to trigger such a review. While the language of the regulation is silent in this regard, nothing precludes this interpretation. The Appeals Chamber has stated that it is “axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it” (ICC-01/04-168, 13 July 2006, para. 20), and the Pre-Trial Chamber denied the Prosecution’s Application for Leave to Appeal on the understanding that the Parties could seek such a recharacterisation (Decision Denying Applications for Leave to Appeal, para. 44).

present all its evidence in relation to the armed conflict, both pertaining to its internationalised as well as its internal features, thereby assisting the Chamber to arrive at the most appropriate characterisation of the conflict based on all the evidence before it, including by resorting, if necessary, to Regulation 55 at a later stage in the proceedings.⁷⁵

Issue 5(c): The manner in which evidence shall be submitted subject to Article 64(8)(b) and Rule 140

28. The Prosecution hereby files its submission on item 5 c. of the Order.⁷⁶ The Prosecution understands this item to require submissions on a) the order of the presentation of evidence; b) the order of the questioning of witnesses; c) the manner in which witnesses may be questioned; and d) the manner in which other evidence may be submitted.⁷⁷ The Prosecution notes that the Statute and the Rules are silent on many of these issues and leave broad discretion to the Trial Chamber to give directions within the framework defined by the Statute, the Rules and the Regulations.⁷⁸
29. The present submissions are intended to be applicable to the manner of presentation of evidence in general. However, the Prosecution is aware that a different manner of submission of evidence may be required to facilitate the testimony of a traumatised witness, a child, in particular a former child soldier, an elderly person or a victim of sexual violence. In such cases, the Trial Chamber may adopt appropriate special measures under Rule 88 on a case-by-case basis.

Order of presentation of evidence

30. In order for the accused to decide whether or not to exercise his procedural rights under Articles 67(1)(g) and (i), the accused must have a complete picture of the incriminating evidence. For these reasons, the Prosecution submits that it be permitted to present all its incriminating evidence at the beginning of the trial. Further, it is respectfully submitted that the proposed manner of presentation of evidence will best serve the efficient

⁷⁵ This would appear to be the manner in which the Pre-Trial Chamber envisioned the handling of the issue at trial (Decision Denying Applications for Leave to Appeal, para. 44).

⁷⁶ In its "Request for submissions on the subjects that require early determination" (ICC-01/04-01/06-936, 18 July 2007, para. 2), the Trial Chamber strongly encouraged the parties to consult and to achieve consensus between themselves on the items contained therein. On 21 August, the Prosecution met with the Defence. During this meeting the question pertaining to the manner of submission of evidence was raised among other things.

⁷⁷ In the view of the Prosecution, these issues are arising directly out of Article 140(1).

⁷⁸ See in particular, Articles 64(2), 64(6)(b) and (d), 67(1)(e), 69(2) and (3); Rules 63(5) and 140; and Regulation 43.

administration of justice and foster expeditiousness of trial proceedings.⁷⁹ The presentation of evidence by the Prosecution should be followed by the presentation of the evidence of the Defence, provided that the accused decides to rebut the incriminating evidence and to present his own evidence.

31. With a view to ensuring that the Trial Chamber has all relevant evidence before it,⁸⁰ the Trial Chamber may permit the Prosecution to present evidence in rebuttal and the Defence to potentially present evidence in rejoinder. In the view of the Prosecution, the Trial Chamber may decide on a case-by-case basis whether, and under what conditions, evidence in rebuttal and in rejoinder may be presented.

Order of the questioning of witnesses

32. Rule 140(2) identifies who shall be given an opportunity to question a witness. However, it does not specify the order in which witnesses may be questioned.⁸¹ In the view of the Prosecution, trial fairness and trial expediency may best be served if the party who is submitting evidence by way of a witness, and is thus most familiar with that witness and his or her testimony, is therefore permitted to question that witness first and to elicit from him or her the core evidence for which that witness was called to testify in a systematic, complete and expeditious manner. Subsequently, that witness may be questioned by the other party in accordance with Rule 140(2)(b).
33. With a view to having a complete picture on all relevant matters related to the witness's testimony and its reliability, as well as the credibility of the witness, the Trial Chamber may permit the party submitting evidence by way of a witness to re-examine that witness following the questioning by the other party in accordance with Rule 140(2)(b). The Prosecution submits, that the Trial Chamber should, as a rule, allow re-examination on matters that arise during questioning pursuant to Rule 140(2)(b).
34. According to Rule 140(2)(c), "[t]he Trial Chamber has the right to question a witness before or after a witness is being questioned by a participant referred to in sub-rules 2 (a)

⁷⁹ The Prosecution is in a unique position to present its own evidence, being familiar with the witnesses and any other evidence that it intends to adduce, and can more efficiently organize its case as well as the logistics of bringing witnesses to the Court or otherwise presenting evidence to the Chamber.

⁸⁰ See Articles 54(1)(a) and 69(3).

⁸¹ Rule 140 only states that the Trial Chamber has the right to question a witness before or after a witness is questioned by a party referred to in Rule 140(2)(a) or (b), and that the Defence shall have the right to be the last to examine a witness.

or (b)”.⁸² Therefore the Prosecution submits that, as witnesses should be questioned first by the party submitting evidence by way of a witness, the Trial Chamber’s possible questioning of a witness should take place subsequent to a witness being re-examined by the party submitting evidence by way of a witness. This system will also allow the Trial Chamber to focus on those areas that it may consider have not been sufficiently explored during the questioning of a witness by the parties.

35. Rule 140(2)(d) provides that the Defence must always be the last to examine a witness, whether that is questioning pursuant to Rule 140(2)(b), re-examination, or examination after a witness is being questioned by the Trial Chamber pursuant to Rule 140(2)(c).

Manner in which witnesses may be questioned

36. The Prosecution submits that the scope of the initial questioning of a witness should be limited to matters relevant to the case. It should allow for the evidence to be given freely and without influence from the participant questioning the witness. Therefore, the Prosecution submits that the participant conducting the initial questioning should, in principle, not be permitted to lead a witness. However, the Prosecution further submits that the party conducting the initial questioning should be permitted to lead the witness to provide background evidence and evidence on other issues that are not contentious or in dispute.⁸³
37. Subsequent questioning pursuant to Rule 140(2)(b) includes the purpose of contesting the evidence given by a witness during the initial questioning, to challenging its reliability and to impeaching the credibility of the witnesses. In the view of the Prosecution, in order to achieve these purposes, it is necessary to allow the party conducting the subsequent questioning to lead a witness. Re-examination by the party proposing evidence by the way of a witness should, in the view of the Prosecution, be limited to issues arising out of the subsequent examination and should, in principle, not be leading. Eventually, the Prosecution submits that the Defence’s final examination under Rule 140(2)(d) should be limited to matters arising during the questioning conducted by others, including the Trial

⁸² In the view of the Prosecution, this provision suggests that the Trial Chamber’s possible questioning of a witness may not interrupt the questioning of a witness by a party referred to in article 140(2)(a) or (b) or be conducted in between the questioning of a witness by the parties.

⁸³ This practice has been followed before the ICTY. See ICTY, *Prosecutor v. Kordic et al.*, “Trial Transcript”, IT-95-14/2-T, 5 August 1999, p. 6405. See also Boas, G., “Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility”, 12 *Criminal Law Forum*, (2001), p. 62.

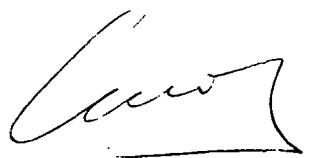
Chamber, subsequent to the Defence's prior examination of that witness. If a witness has been proposed by the Defence, the final examination should not be leading.

Manner in which other evidence may be submitted

38. The Prosecution submits that trial expediency as well as the efficient management of the proceedings may best be served if a party submitting evidence by way of documentary or other material evidence, such as audio or video recordings, may do so from the bar table. In the view of the Prosecution, there should be no requirement that documents and other material evidence be introduced through a witness for the purposes of their authentication,⁸⁴ without prejudice to the need to provide for a proper foundation in the form of specific representations to the Chamber, where required. Any direction from the Trial Chamber should not, however, preclude the parties from tendering documentary and other material evidence through a witness.

Relief

39. The Prosecution requests that the Trial Chamber consider the submissions on issues which require early determination, pursuant to the Trial Chamber Order, as set out above.



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of September, 2007
At The Hague, The Netherlands

⁸⁴ No such requirement exists at the ICTY, which is also governed by a mixed *sui generis* procedural system. See in particular, ICTY, *Prosecutor v. Kordić et al*, "Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts", IT-95-14-T, 1 December 2000. See also, May, R. and Wierda, M., "Evidence Before the ICTY", in May, T., *et al.* (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Brill Academic Publishers: 2001), pp. 257 and 258, *citing in support of this position also a decision rendered in the Blaškić case.*

ANNEX
LIST OF AUTHORITIES

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<http://www.un.org/icty/transe14-2/990805ed.html>

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<http://www.un.org/icty/kupreskic/appeal/decision-e/90715EV39111.htm>

Prosecutor v. Sikirica et al., IT-95-8-T, Order for the Withdrawal of the Charges against the Person Named Goran Lajić and for his Release, 17 June 1996
<http://www.un.org/icty/indictment/english/sik-worderi960617e.pdf>

Prosecutor v. Šimić, IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Armed Conflict in Bosnia-Herzegovina, 25 March 1999
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(b) ICTR

Prosecutor v. Rusatira, ICTR-2002-80-I, Decision on the Prosecutor's Ex-Parte Application for Leave to Withdraw the Indictment, 14 August 2005
<http://69.94.11.53/ENGLISH/cases/Rusatira/decisions/140802.htm>

(c) ICJ

Democratic Republic of the Congo v. Uganda, Judgement, 19 December 2005

<http://www.icj-cij.org/docket/files/116/10455.pdf>

(d) ECtHR

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(e) Domestic Courts**United Kingdom**

Dunkley v Evans [1981] 3 All ER 285 at 287, [1981] 1 WLR 1522 at 1524, DC, per Ormrod J and by McNeill J in R v Secretary of State for Transport, ex p GLC [1986] QB 556 at 573, 578, [1985] 3 All ER 300 at 310, 314

House of Lords in McC. v. Mullan [1985] Appeal Cases 528

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R. v. Johnson & Franklin Wholesale Distributors Ltd., [1971] 4 W.W.R. 534, per Tysoe J.A.

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United States of America

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