

ANNEX 1



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Date: **16 November 2007**

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
*v. THOMAS LUBANGA DYILO***

Public Document

Defence Submission regarding the matters requiring early determination: status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber; status of the decisions of the Pre-Trial Chamber in trial proceedings; manner in which evidence shall be submitted.

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1. On 12 September 2007, the Prosecutor filed the “Prosecution’s submission regarding the subjects that require early determination: status of the evidence heard by the Pre-Trial Chamber; status of the decisions of the Pre-Trial Chamber and manner in which evidence shall be submitted” (hereinafter referred to as “the Submission”).¹

2. In the present document, the Defence submits its own observations and responds to those set out by the Prosecutor on the following matters: 5(a): The status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber; 5(b): The status of the decisions of the Pre-Trial Chamber in trial proceedings, and 5(c): The manner in which evidence shall be submitted.

5 (A): THE STATUS BEFORE THE TRIAL CHAMBER OF THE EVIDENCE HEARD BY THE PRE-TRIAL CHAMBER

General comments

3. As the Prosecutor rightly notes, the evidence considered by the Pre-Trial Chamber was admitted for the purpose of the confirmation hearing only,² and on the basis of assessment criteria specific to that stage of the proceedings.³

4. In its Decision of 24 May 2007, the Pre-Trial Chamber clearly recalled that: “[...] *Pre-Trial Chamber rulings on the admissibility and probative value of evidence are not binding on a Trial Chamber [...] for the purpose of determining the criminal responsibility of Thomas Lubanga Dyilo, and thus, the outcome of the trial.*”⁴

5. This rule applies to both documentary evidence and oral testimony.

¹ ICC-01/04-01/06-953.

² *Ibid.*, para. 2.

³ “Substantial grounds to believe”, article 61(7); ICC-01/04-01/06-803-tEN, paras. 39, 141, 220, 226, 236, 237, 249, 253 etc.

⁴ ICC-01/04-01/06-915, para. 75; see also para. 68.

Physical and documentary evidence

6. Contrary to what the Prosecutor maintains, the Pre-Trial Chamber did not consider the admissibility of the documents submitted by the Parties for the confirmation hearing. It merely held that any item included in the lists of evidence filed by the Parties pursuant to rule 121 “*shall be admitted into evidence for the purposes of the confirmation hearing*”.⁵

7. Provisional admission at the pre-trial stage is based on the purely formal condition of prior disclosure stipulated in rule 121, and is only of value at the pre-trial stage of the proceedings “*for the purposes of the confirmation hearing*.”⁶

8. Moreover, the fairness of the trial requires that only documents presented and debated in public before the Trial Chamber during the trial may be admitted into evidence. This rule, which is applied by legal systems of both common law and civil law,⁷ is clearly established in the case law of the *ad hoc* tribunals.⁸ It is embodied in article 74(2), which provides that the Trial Chamber may base its decision only on “*evidence submitted and discussed before it at trial*”.

9. Consequently, none of the evidence entered in the record of the proceedings before the Pre-Trial Chamber can be accepted as such by the Trial Chamber until it has been presented and discussed during the trial.

10. The fact that the Pre-Trial Chamber has ruled on the admissibility of certain items of evidence entered in the record for purposes of the confirmation hearing cannot change the status of that evidence at the trial stage.

⁵ ICC-01/04-01/06-678, pp. 9 *et seq.*

⁶ *Idem.* See also, for example, ICC-01/04-01/06-803, para. 39.

⁷ In French law, a principle inferred from Article 347 of the Code of Criminal Procedure and consistently upheld by the Court of Cassation: Cass; crim. 7 January 1841, Bull. Crim. No 1, Cass; crim. 23 Dec 1915, Bull. Crim. No 247, Cass; crim. 9 April 1986, Bull. Crim. No 305.

⁸ *Prosecutor v. Blagojevic*, Case No IT-02-60, *Decision on Joint Defence Motions for Reconsiderations of Trial Chamber’s Decision to Review all Discovery Materials Provided to the Accused by the Prosecution*, IT-02-60-PT, Trial Chamber II, 21 January 2003; p. 5; *Prosecutor v. Blagojevic*, Case No IT-02-60-AR73, *Decision*, Appeals Chamber, 8 April 2003, para. 28.

11. In ruling on the admissibility of certain items of evidence challenged by the Parties, the Pre-Trial Chamber was systematically at pains to point out that its decision was rendered *“bearing in mind 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 items”*.⁹

12. Thus, as the Prosecutor acknowledges, the Trial Chamber is in no way bound by the decisions of the Pre-Trial Chamber on this subject, and the Parties can again challenge the admissibility of such evidence during the trial phase.¹⁰

1. Oral evidence

2.1 Witness statements and summaries of testimony

13. The combined provisions of articles 67(1)(e) and 69(2) require the witness to appear in person before the Court and offer the opportunity for the Defence to cross-examine him or her.¹¹ This principle is widely applied in a number of national legal systems and is enshrined in the case law of the *ad hoc* tribunals.¹²

14. As the ICTY Appeals Chamber has made clear, “[a] Trial Chamber’s commendable desire to discharge its obligation to ensure that a trial is expeditious does not justify departure from the general rule of direct evidence without express support in the Rules or the consent of the accused”.¹³

15. It follows therefore that witness statements, transcripts of interviews and summaries of statements entered in the record of proceedings before the Pre-Trial

⁹ ICC-01/04-01/06-803-tEN, para. 90

¹⁰ ICC-01/04-01/06-953, para. 6, *in fine*.

¹¹ Unlike the preliminary confirmation proceedings, which expressly allow the Prosecutor to base his case on summary evidence, and where he need not call witnesses (article 61(5)); see also ICC-01/04-01/06-517, p. 6.

¹² See for example *Prosecutor v. Kordic and Cerkez*, Case No IT-95-14/2-AR73.5, *Decision on Appeal regarding statement of a deceased witness*, 21 July 2000, para. 19; *Prosecutor v. Kupreskic et al.*, Case No IT-95-16-AR73.3, *Decision on Appeal by Dragan Papić against ruling to proceed by deposition*, 15 July 1999, para. 18; O. Kwon, *The Use of Written Evidence in Lieu of Oral Testimony in Trial before the ICTY*, Visiting Lecture Speech, ICC, p. 6

¹³ *Prosecutor v. Kupreskic et al.*, *ibid.*, para. 21

Chamber for the purposes of the confirmation hearing cannot be accepted as evidence by the Trial Chamber.

16. The Defence thus concurs with the submissions of the Prosecutor in this regard.¹⁴

2.2 Testimony of Ms Kristine Peduto

17. The Prosecutor is proposing to admit the testimony of Ms Kristine Peduto as evidence before the Trial Chamber under the exceptional arrangements stipulated in rule 68(a), together with all the documents submitted by the Prosecution and the Defence on that occasion.¹⁵

18. Although rule 68(a) is irrelevant in this instance, the Defence, with a view to ensuring that the proceedings are expeditious and efficient, and subject to certain reservations set out below, is prepared to accept this proposal.

Rule 68 is not applicable here.

19. Any exception to the principle that the witness shall appear in person at the trial¹⁶ must be interpreted restrictively. The application of rule 68 can only be justified in exceptional cases, where there are particular difficulties in the way of the witness appearing in person. The drafting history of article 69(2) shows that the drafters only intended this option to be open to witnesses requiring protective measures or to witnesses physically unable to testify.¹⁷ This view is confirmed by the

¹⁴ ICC-01/04-01/06-915, para. 7

¹⁵ Ibid., para. 5

¹⁶ Article 69(2)

¹⁷ Donald K. Piragoff, "Article 69: Evidence, in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), p. 891 – citing Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II U.N. GAOR, 50th Sess., Supp. No 22 UN Doc A/51/22 (1996) p. 217. Two proposals (Japan and France) were submitted to the Preparatory Committee, to which Mr Piragoff refers and which highlight the importance of testimony in person:

France [p. 220 of Prep. Com. report]

Article 122

Testimony

reference in article 56 to cases where “*a unique opportunity to take testimony or a statement [...] may not be available subsequently*”. This is not the case as far as Ms Peduto is concerned.

The Defence agrees to the oral testimony of Ms Peduto being admitted as evidence, with the exception of the written statements submitted when she appeared before the Court, and provided that disclosure by the Prosecutor of information not known to the Defence at the time of the testimony does not require Ms Peduto to testify again.

20. Under no circumstances can written statements transmitted to the Pre-Trial Chamber be admitted as evidence. Only oral testimony taken by the Pre-Trial Chamber, and having been subject to cross-examination by the Defence, may, exceptionally, and subject to the Defence’s approval, be admitted as evidence, the probative value of which will fall to be determined by the Chamber.

21. The Defence would further point out that, when the witness appeared before the Court, and to date, the information disclosed by the Prosecutor was and still is redacted, which limits its comprehensibility, and hence its usefulness to the Defence.

22. That is why, in order to safeguard the rights of the accused, it is appropriate to allow for the possibility that the removal of these redactions might reveal information which, had it been known to the Defence when the witness was testifying, would have provided the Defence with other opportunities for cross-

1. In principle, the Trial Chamber shall hear witnesses in person. However, in exceptional circumstances and in the interest of justice, the Trial Chamber may, of its own motion or at the request of the prosecutor or the accused, order that a deposition be taken for the purposes of the trial in the manner provided in Article 118.

Japan [p. 217 of Prep. Com. Report]

Evidence

1. The Accused shall be permitted full opportunity to examine all witnesses, and he/she shall have the right of compulsory process for obtaining witnesses on his/her behalf at public expense.

2. A document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause.

examination. In that case, the Defence must be permitted to recall the witness for a fresh cross-examination.

5(B) THE STATUS OF THE DECISIONS OF THE PRE-TRIAL CHAMBER IN TRIAL PROCEEDINGS

1. The status of decisions rendered by the Pre-Trial Chamber other than the *Decision on the confirmation of charges*

23. The Defence agrees with the principles expressed by the Prosecutor in paragraph 9 of his Submission.¹⁸

2. The status of the *Decision on the confirmation of charges* of 29 January 2007

24. The Defence concurs with the points set out by the Prosecutor in paragraph 10 of his Submission.¹⁹ However, it objects to the Prosecutor's request for amendment of the charges accepted by the Pre-Trial Chamber in the *Decision on the confirmation of charges*. The Defence makes the following submissions in this regard:

2.1 Re-characterisation amounts to a modification of the charges, which may only take place in accordance with the relevant provisions of the Statute and of the Rules of Procedure and Evidence.

25. As is emphasised by the Prosecutor, the fairness of the trial requires the accused to be informed precisely of the charges against him, so that he can prepare his defence effectively and efficiently before the commencement of the trial. The accused must therefore know for certain whether, in respect of the period between July 2002 and 2 June 2003, he is being charged with offences under article 8(2)(b)(xxvi) or under article 8(2)(e)(vii).

26. The concept of "charges" refers both to the material acts imputed to the accused, which must be described sufficiently accurately, and to the legal characterisations on the basis of which he is being prosecuted for those acts, and finally to the form of criminal responsibility under which the accused is being

¹⁸ ICC-01/04-01/06-953

¹⁹ *Idem*.

charged. The case law of the *ad hoc* tribunals thus emphasises the need to inform the accused, prior to the start of the trial, of the precise legal characterisation of the crimes for which he is being prosecuted, and of the specific legal basis for the form of responsibility alleged.²⁰ Failing this, the document containing the charges must be amended in accordance with a specific procedure, or if this has not been done in a timely manner, it must be dismissed.²¹

27. It follows that any re-characterisation, whether of the crime itself or of the form of individual criminal responsibility ascribed to the accused, constitutes an “amendment of the charges” under the Statute and the Rules of Procedure and Evidence. The Prosecutor recognises this when he criticises the Pre-Trial Chamber for “*amending the charges by changing the legal characterisation*”.²²

28. The Statute and the Rules specify the procedural conditions under which the charges may be amended. This form of procedure is based on two fundamental requirements: first, ensuring that the accused has been definitively informed of the charges against him well enough in advance of the commencement of the trial to allow him to prepare his defence, and secondly, ensuring a strict separation between the chamber responsible for determining the charges confirmed against the accused and the chamber tasked with examining whether or not those charges are well-founded and with ruling on the accused’s guilt.

29. In light of these principles, neither of the two proposals submitted by the Prosecutor can be accepted.

²⁰ *Prosecutor v. Zoran Kupreskic et al.*, Case No IT-95-16-T, Judgement, 14 January 2000, para. 738; *Prosecutor v. Krnojelac*, Case No IT-97-25-A, Judgement, 17 September 2003, para. 138: “With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3))”; *Prosecutor v. Brdanin and Talic*, Case No IT-99-36-T, *Decision on objections by Momir Talic to the Form of the amended indictment*, 20 February 2001, Trial Chamber II, paras. 48-52; *Prosecutor v. Simic et al.*, Case No IT-95-9-T, Judgement, 17 October 2003, paras. 114-120 and, for example, para. 116.

²¹ *Prosecutor v. Krnojelac*, *Idem*, para. 145; *The Prosecutor v. Zoran Kupreskic et al.*, *Idem*, para. 748; *Prosecutor v. Simic et al.*, *Idem*, para. 120; *Prosecutor v. Brdanin and Talic*, *Idem*, para. 51.

²² ICC-01/04-01/06-953, para. 18.

2.2 The Trial Chamber does not have the power to set aside, declare void or amend the *Decision on the confirmation of charges*.

30. The Prosecutor contends that the Pre-Trial Chamber ruled *ultra vires* in amending the charges presented without adjourning the hearing pursuant to article 61(7)(c), and in confirming the charge under article 8(2)(b)(xxvi) for the period between July 2002 and 2 June 2003.

31. Irrespective of whether or not this contention is well-founded, the Prosecutor's request to the Trial Chamber to declare this part of the *Decision on the confirmation of charges* null and void and to address itself to the original offence under article 8(2)(e)(vii), as proposed by the Prosecution in its detailed list of the charges, cannot be accepted.

32. This request runs counter to the provisions of the Statute and of the Rules, whereby only the Pre-Trial Chamber has the power to determine the charges and to amend them if necessary.²³ The Trial Chamber has no authority to amend the charges. Its powers are confined to permitting a charge to be withdrawn at the Prosecutor's request.²⁴

33. This request is also incompatible with the fact that there is no provision in either the Statute or the Rules for an appeal against the decision on the confirmation of charges, irrespective of objections raised against it.²⁵ The Trial Chamber's "*general power of regulation*", as contended by the Prosecutor, for purposes of ensuring a fair and expeditious trial, cannot under any circumstances go so far as to include a power of review and a right of censure in respect of the decision on the confirmation of charges.

34. Finally, to confer on the Trial Chamber the authority to determine the charges to be examined at the trial, thus obliging it to assess *in limine litis* whether there are

²³ Article 61(7) of the Statute, rule 128.

²⁴ Article 61(9) of the Statute.

²⁵ See in this regard ICC-01/04-01/06-915, paras. 19 *et seq.*

substantial grounds to believe that the accused is guilty, would seriously infringe the principle of separation between those tasked with drawing up the document containing the charges and those tasked with assessing the merits thereof beyond all reasonable doubt.

2.3 Regulation 55 conflicts with the Statute and the Rules of Procedure and Evidence and has no basis in the applicable law as set out in article 21 of the Statute.

35. The Prosecutor further proposes that the Chamber should apply regulation 55 of the Regulations of the Court, which provides that, *“without exceeding the facts and circumstances described in the charges”*, the Trial Chamber may, in its final decision, *“change the legal characterisation of facts”* to accord with the crimes prosecuted or with the form of participation alleged against the accused.

36. The Defence submits that this regulation is inherently incompatible with the provisions of the Statute and of the Rules, to which it is hierarchically subordinated, and is of the view that the Chamber has the authority to find it unlawful and to refuse to apply it.

37. Such unlawfulness is apparent from the following considerations:

- By its very nature, in that the regulation lays down a rule which directly affects the very substance of the trial and one of the core rights of the accused, it was not open to the judges to include such a provision in the Regulations of the Court, whose sole purpose, under the terms of article 52 of the Statute, is to regulate the *“routine functioning”* of the Court. Only the Statute and the Rules of Procedure and Evidence could introduce this remarkable exception to the principle that the charges must be definitively determined prior to the commencement of the trial.²⁶

²⁶ *Supra*, footnotes 25 and 26.

- As an “amendment of the charges”, any re-characterisation must be carried out in accordance with the combined provisions of articles 61(4) and 61(9) and of rules 121(4) and 128, which give the Pre-Trial Chamber exclusive power in this matter, and require that the accused be informed of the charges against him prior to the commencement of the trial. In providing the Chamber responsible for ruling on the guilt of the accused with the possibility of considering an amendment to the charges once the trial has begun, and by allowing it to modify the characterisation of the facts in its final decision without the accused having previously been put on notice of the new characterisation which it has chosen to apply, regulation 55 violates the principles laid down in the Statute and in the Rules.
- Regulation 55 cannot rely on any general principle of international law and conflicts with the principles laid down by the case law of the *ad hoc* tribunals. Addressing the issue of “*how Trial Chambers should act in the case of an erroneous legal classification of facts by the Prosecutor*”,²⁷ the ICTY laid down principles which can be transposed, *mutatis mutandis*, to the procedures in force before the International Criminal Court. Having noted that “*no general principle of criminal law common to all major legal systems of the world may be found*”,²⁸ governing the issue of the power of the judges to re-characterise the charges, the ICTY stresses that “*in this state of flux the rights of the accused would not be satisfactorily safeguarded were one to adopt an approach akin to that of some civil law countries. Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge.*”²⁹

²⁷ *Prosecutor v. Zoran Kupreskic et al.*, Case No IT-95-16-T, *Judgement*, 14 January 2000, paras. 728 *et seq.*

²⁸ *Ibid.*, para. 738.

²⁹ *Ibid.*, para. 740.

- In seeking a “balance” between safeguarding the rights of the accused and “the interests of justice”, the ICTY is of the view that the power to modify the characterisation of facts, as envisaged by regulation 55, is only lawful where “a lesser included offence, not charged in the Indictment, may be or has been proved in court”.³⁰ However, if the proposed new characterisation refers to a “different offence, not charged in the indictment, [...] which has different objective or subjective elements” or a “more serious offence than that charged in the original Indictment”, the Prosecution must seek leave from the Chamber to amend the indictment so that the Defence has the opportunity to challenge this charge. In these latter two hypotheses, the transposition of these principles into the procedural law in force before the International Criminal Court means that any request for re-characterisation must be subject to the procedure for amendment of the charges provided for in articles 61(4) and 61(9) and rules 121(4) and 128. Both hypotheses preclude the application of regulation 55 of the Regulations of the Court.

38. The Chamber has the power to rule that regulation 55 of the Regulations of the Court does not comply with the provisions of the Statute and of the Rules of Procedure and Evidence, and to refuse to apply it in the present case:

- Articles 21 and 64(1) of the Statute require the Chamber to apply, in the first place, the Statute, the Rules of Procedure and Evidence and the “principles and rules of international law”, which, as previously demonstrated, preclude the application of regulation 55 of the Regulations of the Court.
- Once it has found that this is the case, the Chamber can and must use the powers it has under article 64(2) in order to ensure the fairness of the trial “with full respect for the rights of the accused”, and refuse to apply

³⁰ *Ibid.*, para. 742(c).

regulation 55 of the Regulations of the Court in the present case. Should they wish to do so, it will be open to the judges in plenary, acting under article 52, to determine whether this provision should be amended or deleted.

- The principle whereby a court seized of criminal proceedings is competent to determine whether a regulation is compatible with hierarchically superior provisions and, if appropriate, to declare it unlawful and refuse to apply it is widely shared by the world's principal legal systems.³¹ The ICTR, ICTY and the SCSL have declared themselves competent to determine whether certain provisions of their Rules of Procedure and Evidence are compatible with their Statutes and with the general principles of international law.³²

2.4 In the alternative, regulation 55 does not apply to the issue raised by the Prosecutor.

39. Regulation 55 provides that, for purposes of re-characterising the facts, the Chamber cannot exceed *"the facts and circumstances described in the charges and any amendments to the charges"*.

40. However, the crimes provided for in articles 8(2)(b)(xxvi) and 8(2)(e)(vii) each require the establishment of substantially different facts regarding the nature of the conflict, namely, whether it is international or non-international, and also regarding the nature of the armed forces involved. The nature of the conflict is a question of fact,³³ whose importance is such that any amendment of the charges in this regard

³¹ French law: Article 111-5 of the Penal Code; Court of Arbitration, 5 July 1951, Avranches and Desmarets; See also US Supreme Court, *Marbury v. Madison*, 5 U.S. 137, 24 February 1803; For example in Canada, *R. v. DeSousa* [1992] 2 R.C.S. 944.

³² See for example: *Prosecutor v. Simic et al.*, Case No IT-95-9-T, *Decision on Simo Zaric's Application for Provisional Release*, 4 April 2000; *Prosecutor v. Moinima Fofana*, Case No SCSL-2003-11-PD, *Decision on the Urgent Defence Application for Release from Provisional Detention*, 21 November 2003; *Prosecutor v. Nahimana*, Case No ICTR-99-52-T, *Decision on the Defence's Motion for the Release or alternatively Provisional Release of Ferdinand Nahimana*, 5 September 2002.

³³ See *Prosecutor v. Brdanin and Talic*, Case No IT-99-36-T, *Decision on objections by Momir Talic to the Form of the amended indictment*, 20 February 2001, Trial Chamber II, paras. 48-55; *Prosecutor v. Simic et*

requires a procedure to amend the document containing the charges.³⁴ The nature of the armed forces involved in acts of enlistment or conscription (national armed forces or armed groups) is an issue requiring the establishment of facts which, at least in part, are not identical.

41. The Prosecutor himself notes that “[t]he 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” [emphasis added].³⁵ It is precisely because the “factual basis” of the two offences is markedly different that any re-characterisation of the facts pursuant to regulation 55 would clearly make the trial unfair.

42. As the Trial Chamber cannot address facts other than those specifically set out in the *Decision on the confirmation of charges*, it would appear that regulation 55 of the Regulations of the Court is in any event impossible to implement.

2.5 The Prosecutor may only request the Trial Chamber to withdraw the charge under article 8(2)(b)(xxvi), or submit an application to amend the charges to the Pre-Trial Chamber.

43. The Prosecutor points out that he “has no evidence that could support a finding beyond reasonable doubt of ‘overall control’ by Uganda over any of the relevant armed groups”,³⁶ and that, as a consequence, if the criteria of “overall control” were to be relied on, he would be unable to provide evidence of an international armed conflict, as required under article 8(2)(b)(xxvi).

al., Case No IT-95-9-T, Judgement, Trial Chamber II, 17 October 2003, paras 114-120, for example para. 116; *Prosecutor v. Hadzihasanovic et al.*, Case No IT-01-47-T, *Decision on Defence Motion Regarding Cross-Examination of Witnesses by the Prosecution*, 9 December 2004, *Prosecutor v. Hadzihasanovic et al.*, Case No IT-01-47-AR72, *Decision Pursuant to Rule 72(E) as to Validity of Appeal (AC)*, 21 February 2003, para. 11.

³⁴ *Prosecutor v. Brdanin and Talic*, *idem.*, para. 52; *Prosecutor v. Simic et al.*, *idem.*, para. 119 and 120.

³⁵ ICC-01/04-01/06-953, para. 18.

³⁶ *Ibid.*, para. 15.

44. From the foregoing observations, it is clear that, in light of this difficulty, the Prosecutor can only ask the Trial Chamber to withdraw the contested charge,³⁷ or refer the matter back to the Pre-Trial Chamber in accordance with rule 128. There is a risk, however, that this second possibility will find itself barred by the *res judicata* principle, as the issue of the type of conflict and its implications for the confirmation of the charges has already been raised and resolved by the Pre-Trial Chamber.³⁸ It would also significantly affect the right of the accused to be tried without undue delay.

5(C) THE MANNER IN WHICH EVIDENCE SHALL BE SUBMITTED

45. The Defence concurs with the arguments set out by the Prosecutor in paragraphs 28 *et seq.* of his Submission, with the exception of his request that he be permitted to submit “*evidence in rebuttal*”³⁹ following the presentation of the Defence evidence.

46. In effect, unlike the Statutes and Rules of the *ad hoc* tribunals,⁴⁰ neither the Statute nor the Rules of Procedure and Evidence of the ICC make provision for the Prosecution to respond to Defence evidence by submitting evidence in rebuttal.

³⁷ Article 61(9), *in fine*.

³⁸ See ICC-01/04/01-06-1-Conf-EN, transcript of 2 February 2006, p. 25, lines 11 *et seq.*; In a Decision concerning the Decision of 10 February 2006 issuing the warrant of arrest for Mr Thomas Lubanga Dyilo, the Pre-Trial Chamber deliberately highlighted the fact that it did not consider itself bound by the Prosecution’s legal characterisation of the conduct referred to in the Prosecution’s Application, ICC-01/04-01/06-8-US-Corr, para. 16. The Chamber informed the Prosecutor that there were reasonable grounds to believe that the armed conflict could be described as having an international character, ICC-01/04-01/06-8-US-Corr, paras. 25 and 85.

³⁹ ICC-01/04-01/06-953, para. 31.

⁴⁰ See Rules of Procedure and Evidence of the International Criminal Tribunals, Rule 85.

FOR THESE REASONS,

MAY IT PLEASE TRIAL CHAMBER I:

TO TAKE ACCOUNT of the submissions of the Defence as set out in detail hereinabove.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 16 November 2007, at The Hague.