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PRE-TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public Document

**Decision on the Prosecution and Defence applications for leave to appeal the
Decision on the confirmation of charges**

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No. ICC-01/04-01/06

1/21

24 May 2007

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively) has been seized of applications for leave to appeal the decision on the confirmation of the charges against Thomas Lubanga Dyilo. Having examined the written submissions of the parties, the Chamber

RENDERS THIS DECISION:

I. Procedural background

1. On 29 January 2007, the Chamber issued the Decision on the confirmation of charges in the case of *The Prosecutor v. Thomas Lubanga Dyilo*¹ (“the Decision”).
2. On 5 February 2007, the Prosecution filed its “Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 ‘*Décision sur la confirmation des charges*’”² (“the Prosecution Application”) requesting the Chamber to grant leave to appeal against what it considers to be the substitution of the crimes charged by the Prosecution, under article 8(2)(e)(vii) of the Rome Statute (“the Statute”) with different ones under article 8(2)(b)(xxvi) of the Statute.
3. On 5 February 2007, the Defence filed its “Request for leave to Appeal the Pre-Trial Chamber’s ‘*Décision sur la confirmation des charges*’ of 29 January 2007”³ (“the Defence Application”), raising the following nine grounds which it considers as being appealable issues, namely:
 - i) Ground 1: the admission at the confirmation hearing of Prosecution evidence after the time limit prescribed by the Statute and the *Rules of Procedure and Evidence* (“the Rules”);
 - ii) Ground 2: the determinations by the Chamber on issues not raised by either party during the hearing without granting them the right to be heard on these issues;
 - iii) Ground 3: the holding of the confirmation hearing whilst two appeals on redactions and on jurisdiction were still pending before the Appeals Chamber;

¹ ICC-01/04-01/06-796-Conf-tEN.

² ICC-01/04-01/06-806.

³ ICC-01/04-01/06-807-Conf.

- iv) Ground 4: the refusal of the Chamber to authorise the withdrawal of two witness statements from the Defence Amended List of Evidence;
- v) Ground 5: the Chamber's definition of the "sufficient evidence to establish substantial grounds to believe" evidentiary threshold under article 61(7) of the Statute;
- vi) Ground 6: the abuse by the Chamber of its discretion in admitting all evidence contained in the Prosecution Amended List of Evidence;
- vii) Ground 7: the admission of evidence in violation of article 69(7) of the Statute;
- viii) Ground 8: the reversal of the burden of proof by (i) presuming as authentic some documents tendered by the Prosecution; (ii) taking for granted the Prosecution's assertion that none of its evidence came from the material seized by the Uruguayan MONUC forces; (iii) and not declaring inadmissible any evidence for which the chain of custody had not been established;
- ix) Ground 9: the reliance on a vague charging document, which includes irrelevant allegations and fails to specify critical information.

4. On 9 February 2007, the Prosecution filed its Response to the Defence Application⁴ ("the Prosecution Response") asking the Chamber to grant leave to appeal only with regards to Grounds 2 and 9 of the Defence Application.

5. The same day, the Legal Representatives of Victims a/0001/06 to a/0003/06 filed their response⁵ to the Prosecution Application requesting the Chamber to reject the Prosecution Application.

⁴ ICC-01/04-01/06-818-Conf.

⁵ ICC-01/04-01/06-820.

6. On 21 February 2007, the Chamber granted the Defence Counsel's request to withdraw from the case and suspended the time limit for the Defence to respond to the Prosecution Application until a new counsel for the Defence was assigned.⁶
7. On 26 February 2007, the Legal Representatives of Victims a/0001/06 to a/0003/06 filed their response to the Defence Application asking the Chamber to reject the Defence Application.⁷
8. On 22 March 2007, the Chamber issued a decision⁸ giving the newly appointed Counsel for the Defence until 5 April 2007 to respond to the Prosecution Application.
9. On 3 April 2007, Thomas Lubanga Dyilo filed a "Clarification"⁹ requesting the Chamber to again stay all actions or proceedings which could prejudice or affect the rights of the Defence until the effective appointment of his counsel.
10. On 5 April 2007, the Chamber issued a decision staying all proceedings in relation to the applications for leave to appeal the *Decision on the confirmation of charges* until otherwise decided by the Chamber.¹⁰
11. On 19 April 2007, the Chamber ordered that a duty counsel be appointed in the case of *The Prosecutor v. Thomas Lubanga Dyilo* for the sole purpose of responding to the Prosecution Application.¹¹
12. On 4 May 2007, Mr Emmanuel Altit was appointed duty counsel for Thomas Lubanga Dyilo.¹²

⁶ ICC-01/04-01/06-833-Conf.

⁷ ICC-01/04-01/0-839.

⁸ ICC-01/04-01/06-848.

⁹ ICC-01/04-01/06-859.

¹⁰ ICC-01/04-01/06-862.

¹¹ ICC-01/04-01/06-870.

¹² ICC-01/04-01/06-881.

13. On 15 May 2007, the Defence filed its request for extension of time¹³ asking the Chamber to authorise the Defence to file its response on 25 May 2007 or, in the alternative, at the earliest on 22 May 2007.

14. On 16 May 2007, the Chamber issued a decision authorising the Defence to file its response by 22 May 2007 at the latest.¹⁴

15. On 21 May 2007, Thomas Lubanga Dyilo, filed a response to the Prosecution Application asking the Chamber to reject the Prosecution Application.¹⁵

16. On 22 May 2007, Mr Emmanuel Altit, duty counsel of Thomas Lubanga Dyilo, filed, at the request of the Chamber, a response to the Prosecution Application also asking the Chamber to reject the Prosecution Application.¹⁶

17. On the same day, the Registrar filed the correspondence between Thomas Lubanga Dyilo and the Registry amongst which was a letter from Thomas Lubanga Dyilo, dated 21 May 2007, informing the Registrar of his wish to defend himself in the proceedings before the Court.¹⁷

18. Although the Chamber acknowledges the accused's motion to defend himself, it considers that the allegations brought before it in the responses filed by Thomas Lubanga Dyilo and Mr Emmanuel Altit are similar in content, and in some regards, identical. Moreover, the Chamber considers that it has sufficient elements to decide the Prosecution and Defence Applications on their merits.

¹³ ICC-01/04-01/06-905.

¹⁴ ICC-01/04-01/06-906.

¹⁵ ICC-01/04-01/06-909.

¹⁶ ICC-01/04-01/06-913.

¹⁷ ICC-01/04-01/06-910-Conf and Anx1-Anx6.

II. Applicable law

19. The drafters of the Statute intentionally excluded decisions confirming charges against a suspect from the categories of decisions which may be appealed directly to the Appeals Chamber.¹⁸

20. The case-law of the Court indicates that appeals of interlocutory decisions were intended to be “admissible only under the limited and very specific circumstances stipulated in article 82, paragraph 1 (d)” of the Statute.¹⁹

21. Under article 82(1)(d) of the Statute, leave to appeal may be granted only if, in addition to having been addressed in the impugned decision, the issue identified by the appellant meets the following two cumulative criteria:

¹⁸ Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997 at U.N. Doc. A/AC.249/1997/L.9/Rev.1, proposed article 48(4). For an account of the draft history see: *Brady, H., & Jennings, M., “Appeal and Revision”, in Lee, R. S., “International Criminal Court: the Making of the Rome Statute 294 (Kluwer Law International, 1999); Roth, P., & Henzelin, M., “The Appeal Procedure of the ICC”, in Cassese, A., & Jones, J.R. W.D., (Editors) “The Rome Statute of the International Criminal Court: A Commentary, Volume II” (Oxford University Press, 2002).* The drafting history of article 82 of the Statute indicates that proposals were made to allow interlocutory appeals against rulings on evidence and appeals concerning the confirmation or denial of an indictment. As far as the proposal on appeals on admissibility of certain evidence is concerned, some delegations criticized it by arguing that challenges on inadmissibility of evidence could be made before either the Trial Chamber or the Appeals Chamber. While, in relation the proposal on appeals to the confirmation of indictments, some delegations felt that this could be used to delay proceedings. Eventually a compromise was reached whereby these two provisions were deleted in favor of the current article 82(1)(d) of the Statute.

¹⁹ ICC-02/04-01/05-20-US-Exp. Unsealed according to the Decision ICC-02/04-01/05-52, issued on October 2005. See in particular para. 16. The Chamber also finds relevant the similarities of article 82(1)(d) of the Statute with rule 73(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”). Rule 73(B) of the Rules of both ad hoc tribunals, provide namely that an appeal may be granted by the relevant Chamber “if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Furthermore, rule 73(B) of Rules of the Special Court for Sierra Leone (“SCSL”) which provides that appeals under this provision may be granted by the Trial Chamber “in exceptional circumstances and to avoid irreparable prejudice to the party”. The jurisprudence of the SCSL confirmed this trend of adopting a restrictive approach to such appeals. Indeed, in the *Prosecutor v Alex Tamba Brima et al*, SCSL-2004-16-PT, 13 February 2004 the Trial Chamber stated that under rule 73(B) of the Rules, “it must apply entirely new and considerably more restrictive test than the one applied by the ICTR and ICTY”. Moreover, in *Prosecutor v Issa Hassan Sesay*, SCSL-2004-15-PT, 13 February 2004 *et al*, SCSL, it was noted that the objective was to to “grant leave in respect of interlocutory appeals in the interest of expeditiousness”. Accordingly in comparing rule 73(B) of Rules of ICTY ICTR, and SCSL with article 82(1)(d) of the Statute, the Chamber observes that the similarity in the wording, the limiting conditions as well as the discretion placed on the chamber suggests that interlocutory appeals are confined to exceptional circumstances under strictly defined requirements to be applied at the discretion of the Chamber, in order to allow proceedings to follow its ordinary course.

- a. it would significantly affect (i) both the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and
- b. in the opinion of the Pre-Trial or Trial Chamber, its immediate resolution by the Appeals Chamber may materially advance the proceedings.

22. As defined by the Appeals Chamber, “[o]nly an ‘issue’ may form the subject-matter of an appealable decision” and “[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.²⁰ It is “an identifiable subject or topic requiring a decision for its relation, not merely a question over which there is disagreement or conflicting opinion”.²¹

23. Nevertheless, “[n]ot every issue may constitute the subject of an appeal but it must be one apt to significantly affect, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”²² and the “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the appeals Chamber may, materially advance the proceedings’”.²³

24. With respect to the fair and expeditious conduct of the proceedings, “[t]he term “fair” in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right incorporated in the Statute”²⁴ and “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”.²⁵ The “fairness of the proceedings” implies the evaluation of the proceedings of a

²⁰ ICC-01/04-168, para. 9.

²¹ Ibid.

²² ICC-01/04-168, para.10.

²³ Ibid, para. 14.

²⁴ ICC-01/04-168, para. 11.

²⁵ ICC-01/04-168, para. 11.

particular case as a whole²⁶ and “[t]he term “proceedings” as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto”.²⁷ In other words, the Chamber, in its evaluation of the application for leave to appeal, shall consider whether or not the issue raised by either of the parties would significantly affect the fair and expeditious conduct of the proceedings in its entirety.

25. Regarding the significant effect on the “outcome of the trial” requirement, an issue may constitute the subject of an appeal where the “possibility of error in an interlocutory or intermediate decision may have a bearing thereupon” and such an assessment by the Chamber necessarily “involves a forecast of its consequences”.²⁸

26. As already mentioned, the fulfilment of the aforesaid attributes does not automatically qualify the issue as a subject of an appeal. The issue has to be such that “an immediate resolution by the Appeals Chamber may materially advance the proceedings” meaning that prompt reference of the issue to the Appeals Chamber will ensure that the proceedings follow the right course, pre-empting any repercussions of erroneous decisions on the fair and expeditious conduct of the proceedings or the outcome of the trial.

27. Since the above-mentioned criteria are cumulative, failure by the parties to show that the issue at stake may affect the fairness and expeditiousness of the proceedings or the outcome of the trial will make it unnecessary for the Chamber to consider whether the latter requirement of article 82(1)(d) of the Statute has been satisfied.

²⁶ ECHR, Judgement, 2 March 1987, *Monnell and Morris v. United Kingdom*, Series A, No.115; ECHR, Judgement, 6 December 1988, *Barbera, Mességué and Jabardo v. Spain*, Series A, No. 146; ECHR, Judgement, 28 March 1990, *Granger v. United Kingdom*, Series A, No. 174.

²⁷ ICC-01/04-168, para. 12.

²⁸ ICC-01/04-168, para.13.

28. In the view of the Chamber, according to the provisions of the Statute and to general principles of criminal law, an interlocutory decision can only be appealed in exceptional circumstances and to avoid irreparable prejudice to the appellant.²⁹

29. Greater emphasis should be placed on this principle with regard to a decision confirming charges, as any appeal against such a decision would significantly delay the start of the trial and thus the expeditious course of proceedings before the Court.

30. Moreover, particular attention should be paid to the status of detention of the accused. To authorize the parties to appeal the decision confirming charges when the suspect is under detention would cause avoidable delay in the procedure, which has to be carefully counterbalanced with the interests of the suspect to a fair and expeditious trial.³⁰

31. Furthermore, the Chamber notes that rule 122 (3) and (4) of the Rules stipulates that “objections and [...] observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing” shall be raised by the parties at the beginning of the confirmation hearing and such objections and observations shall, at no subsequent point, be raised or made again.

32. However, in the view of the Chamber, issues relating to the admissibility and relevance of evidence can always be raised by either party pursuant to article 64 of the Statute and rule 63 of the Rules according to which the Trial Chamber “shall have, *inter alia*, the power [to] rule on the admissibility or relevance of evidence”, and may therefore reassess Pre-Trial Chamber rulings on admissibility and relevance of evidence tendered at the pre-trial stage by the parties.

²⁹ ICC-02/04-01/05-20-US-Exp. Unsealed pursuant to Decision ICC-02/04-01/05-52, issued on October 2005.

³⁰ The Defence itself in its Response maintains that “autoriser le Procureur a interjeter appel causerait des retards, ralentirait une procédure déjà longue, serait dangereuse pour l'économie judiciaire et préjudiciable a la Défense” and that this “influerait négativement sur la durée que M. Lubanga Dylo passerait en détention et serait contraire a ses droits fondamentaux tels que garantis par l'Article 67 du Statut”, ICC-01/04-01/06-913, par. 36 and 48.

III. Analysis of the parties' allegations

a. First Ground: Whether the alleged admission of Prosecution evidence after the time limit prescribed by the Statute and the Rules is an issue that would significantly affect the fair and expeditious conduct of the proceedings

33. The Defence challenges the allegedly untimely introduction into evidence, after the time limit prescribed by rule 121(3) of the Rules, of the following documents³¹: i) the statement of Kristine Peduto; ii) four new reports presented during the hearing of 27 November 2006 ("the four reports"); iii) an expert report from the Court of Appeals of Paris concerning the creation of an e-mail account ("the expert report"); iv) the statement and the transcript of the interview of two witnesses; and v) an affidavit sworn by a Prosecution investigator.

i) The statement of Kristine Peduto

34. The Chamber recalls that it has already dealt with this matter in the Decision on the Prosecution's Request of 12 October 2006,³² which has not been challenged by the Defence. Furthermore, the statement of Kristine Peduto was filed by the Prosecution within the time limit under rule 121(5) of the Rules and not under rule 121(3) of the Rules. The Chamber considers that this matter does not constitute an issue within the meaning of article 82(1)(d) of the Statute.

ii) The four reports and the expert report

35. The Chamber recalls that the four reports and the expert report were filed on a motion by the Defence and at the order of the Chamber for clarification purposes during the confirmation hearing.

36. Moreover, the Chamber emphasises that the Trial Chamber has the authority to freely assess all evidence in accordance with rule 63 of the Rules. Fairness of the

³¹ Defence Application, paras. 10-12 and paras. 61 and 66-68.

³² ICC-01/04-01/06-593-Conf.

proceedings has to be assessed on the basis of the proceedings in their entirety in a particular case. Therefore, with regards to the nature or to the admission into evidence of the four reports and the expert report, the Chamber is of the view that matters raised concerning the above-mentioned documents cannot be considered “issues” within the meaning of article 82(1)(d) of the Statute.

- iii) The statement and the transcript of the interview of two witnesses

37. The Chamber recalls the *Decision concerning the Prosecution Proposed Summary Evidence*,³³ by which it specifically declared “inadmissible for the purpose of the confirmation hearing the statements [of the two witnesses]”. The Chamber further recalls that these two statements were submitted as evidence by the Defence on 7 November 2006.³⁴ Furthermore, the statements were tendered within the time limit prescribed by rule 121(6) of the Rules. Therefore, no violation of rule 121(3) of the Rules has occurred. In the view of the Chamber, there is no basis for seeking leave to appeal on this matter as it cannot be considered as an “issue” within the meaning of article 82(1)(d) of the Statute.

- iv) Affidavit sworn by a Prosecution investigator

38. The Chamber observes that the affidavit sworn by a Prosecution investigator in relation to the search and seizure in the Democratic Republic of the Congo was not submitted as an alternative to items included in the Prosecution List of Evidence; rather, it was submitted at the same time as the alternative list of evidence. As stated by the Prosecution in its response, the affidavit had been presented “in the confined context of a judicial dispute on the admissibility of specific evidence under article 69” of the Statute.³⁵ The Chamber further observes that each participant had ample opportunity to comment on the affidavit.

³³ ICC-01/04-01/06-515-Conf-Exp.

³⁴ ICC-01/04-01/06-673.

³⁵ Prosecution Response, para. 27.

39. Furthermore, the right of the Defence to object to or comment on the affidavit during the proceedings before the Trial Chamber is not affected as it is within the powers of the Trial Chamber to rule on the admissibility or relevance of evidence under article 64(9) of the Statute.

40. Accordingly, the Chamber finds that this matter is not an issue that would significantly affect the fair and expeditious conduct of the proceedings.

b. Second Ground and Prosecution's ground: Whether the alleged determination by the Chamber on issues not raised at the confirmation hearing without giving the participants the right to be heard is an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial

41. In its application, the Prosecution challenges the alleged amendment by the Chamber of the legal characterisation of the charges submitting that the Chamber exceeded the scope of its authority under article 61(7) of the Statute and deprived the Prosecution of its rights under the Statute to amend the charges.

42. In its application, the Defence alleges that the Chamber erred in law by changing the charges and, in contravention of article 61(7) of the Statute,³⁶ confirming the new charges without adjourning the proceedings and giving the Defence the right to be heard thereby significantly affecting the fair and expeditious conduct of the proceedings.³⁷

43. The Chamber observes 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*,³⁸ and ii) the Defence itself raised the issue of the

³⁶ Article 61(7) of the Statute states that the Chamber shall, on the basis of the hearing, decide whether to confirm the charges or invite the Prosecutor to consider amending a charge if the Chamber is of the view that the evidence establishes a different crime.

³⁷ Defence Application, paras. 13-16, 61 and 70-71.

³⁸ ICC-01/04-01/06-1-US-Exp-Corr, para. 99.

international character of the conflict at the confirmation hearing and all participants had the opportunity to present their observations on the matter.³⁹

44. Furthermore, pursuant to regulation 55 of the Regulations of the Court, the Trial Chamber may “change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused”. Indeed, there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the Chamber.

45. Therefore, the Chamber considers that the matter raised is not an issue that would affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

c. Grounds 3, 6, 8 and 9 of the Defence Application which, according to the Defence, would significantly affect the fair and the expeditious conduct of the proceedings

- i) Third ground: Whether the holding of the confirmation hearing whilst two appeals on redactions and on jurisdiction were still pending before the Appeals Chamber is an issue that would significantly affect the fair and expeditious conduct of the proceedings

46. In its third ground, the Defence argues that the Chamber erred in not adjourning the confirmation hearing because deliberations on two appeals on redactions and on jurisdiction were pending before the Appeals Chamber.⁴⁰

³⁹ ICC-01-04-01-06-T-33-EN, p. 96, lines 12-23; ICC-01-04-01-06-T-44-EN, p. 73, lines 1-4; " ICC-01-04-01-06-T-47-EN, p. 16, lines 12-20; and ICC-01-04-01-06-T-47-EN, p.49-51.

⁴⁰ Defence Application, paras. 17-18.

47. The Defence further submits that the Chamber failed to review the Prosecution applications for redactions in relation to some statements and documents as directed by the Appeals Chamber in its judgement of 14 December 2006. As a result, the Chamber failed to take into account the effect of the judgement on the Defence as directed by the Appeals Chamber.⁴¹

48. According to article 82(3) of the Statute, an appeal shall not have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules.

49. The Chamber recalls that the Defence has not requested that the appeals brought before the Appeals Chamber have suspensive effect.⁴² Consequently, the Chamber considers that the Defence has waived its right to complain about the holding of the confirmation hearing while appeals were still pending before the Appeals Chamber.⁴³

50. Furthermore, this matter was addressed in the Chamber's oral decision of 10 November 2006 for which no application for leave to appeal was made at the time.⁴⁴

51. Therefore, the Chamber considers that this matter does not constitute an issue within the meaning of article 82(1)(d) of the Statute.

- ii) Sixth ground: Whether the alleged abuse by the Chamber of its discretion in admitting all evidence contained in the Prosecution Amended List of Evidence is an issue that would significantly affect the fair and expeditious conduct of the proceedings

⁴¹ Defence Application, para. 21.

⁴² ICC-01/04-01/06-T-32-EN, page 28, line 25 and page 29, lines 1-7.

⁴³ *Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-A. Appeal Judgement, 29 July 2004, para. 222: "If a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived his right to bring the issue as a valid ground of appeal".

⁴⁴ ICC-01/04-01/06-T-32-EN[10Nov2006Edited].

52. With respect to the sixth ground, the Defence challenges the Chamber's admission into evidence of the items included in the Prosecution Amended List of Evidence filed on 20 October 2006.

53. The Chamber recalls that none of the participants objected timeously to the *Decision on the schedule and conduct of the confirmation hearing* in which the Chamber decided that all the material tendered by the participants "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 the Prosecution or the Defence" and that "the Defence may challenge or deal with any item included in the Prosecution List of Additional Evidence".⁴⁵

54. The Chamber considers that the Defence has failed to raise this matter timeously and has consequently waived its right to raise it at this pre-trial stage. The Chamber further considers that this evidence can be assessed by the Trial Chamber pursuant to article 64(9) of the Statute and rule 63(2) of the Rules. Therefore, the Chamber considers that this matter does not constitute an issue within the meaning of article 82(1)(d) of the Statute.

- iii) Eighth ground: Whether the alleged reversal of the burden of proof is an issue that would significantly affect the fair and expeditious conduct of the proceedings

55. In its eighth ground, the Defence argues that the Chamber erred in reversing the burden of proof in relation to: i) the authenticity of the Prosecution List of Evidence, ii) the evidence allegedly obtained unlawfully by the Uruguayan MONUC forces, and iii) all evidence for which the Prosecution allegedly failed to establish the chain of custody.⁴⁶

⁴⁵ ICC-01/04-01/06-678.

⁴⁶ Defence Application, paras. 40-41.

56. In that respect, the Chamber observes firstly that no challenges were made to the authenticity of the evidence, but rather to its probative value. As such, this issue was not dealt with in the Decision.

57. Secondly, the Decision never addressed the issue of the presumption of the authenticity of all evidence tendered by both participants.

58. Finally, the Chamber considers that the Defence has not substantiated its claim and therefore that the Defence's challenge on admissibility is moot.

59. Accordingly, the Chamber considers that the Defence's arguments relating to the burden of proof are not appealable issues as they were not dealt with in the impugned Decision.

- iv) Ninth ground: Whether the decision by the Chamber to proceed to trial on an alleged vague charging document is an issue that would significantly affect the fair and expeditious conduct of the proceedings

60. With respect to its ninth ground, the Defence argues that the fact that the Chamber allowed the hearing to proceed on a vague charging document which includes irrelevant and prejudicial allegations would significantly affect the fair and expeditious conduct of the proceedings.⁴⁷

61. The Defence alleges that the charging document lacks specificity as to the dates, time and place of the alleged crimes. It also alleges that the legal theories of criminal responsibility put forward by the Prosecution lack clarity.

62. The Chamber emphasises that it is the duty of "any participant in criminal proceedings to offer comprehensive arguments and substantiated positions

⁴⁷ Defence Application, paras. 45-51 and 79-82.

pertaining to the claims they make".⁴⁸ In this case, the Defence does not provide any specific indication enabling the Chamber to identify which irrelevant and prejudicial information the Defence is referring to.

63. Accordingly, the Chamber considers that this matter does not constitute an issue within the meaning of article 82(1)(d) of the Statute.

d. Grounds 4, 5 and 7 of the Defence Application which, according to the Defence, would significantly affect the outcome of the trial

- i) Fourth ground: Whether the alleged refusal of the Chamber to authorise the withdrawal of two witness statements from the Defence Amended List of Evidence is an issue that would significantly affect the outcome of the trial

64. With respect to its fourth ground, the Defence alleges that the Chamber erred in refusing the Defence's request to withdraw the statements of two witnesses on its Amended List of Evidence.

65. The Chamber recalls that the two statements in question were initially presented as evidence by the Prosecution, declared inadmissible by the Chamber and then tendered as evidence by the Defence in its "Submission of list of additional items to be added to the Defence List of Evidence"⁴⁹ ("the Defence Additional List of Evidence").

66. The Chamber also recalls that in its *Decision on the Practices of Witness Familiarisation and Witness Proofing*, it ruled that evidence, once introduced by any of the parties, does not belong to the parties, but to the Court.⁵⁰

⁴⁸ Prosecution Response, para. 45.

⁴⁹ ICC-01/04-01/06-673 and ICC-01/04-01/06-673-Conf-AnxA.

⁵⁰ ICC-01/04-01/06-679, para. 26.

67. In the view of the Chamber, the mere fact that the Defence alleged that it “was unable to fully review the evidence” by the time of the confirmation hearing and that the Defence should be entitled to withdraw the evidence, lacks factual and legal basis. As emphasised above, it is the duty of any participant to substantiate the claims they make.

68. Finally, a matter relating to the admissibility of evidence can be subject to a new assessment by the Trial Chamber for the purpose of the trial under article 64(9) of the Statute. Hence, this matter is not an issue that would affect the outcome of the trial.

- ii) Fifth ground: Whether the alleged erroneous definition of the evidentiary threshold used by the Chamber is an issue that would significantly affect the outcome of the trial

69. With respect to its fifth ground, the Defence submits that the “sufficient evidence to establish substantial grounds to believe” evidentiary threshold defined by the Chamber was “far too low”.⁵¹

70. The Chamber considers that the matter raised by the Defence is not based on any specific argument or fact, but is merely a broad assertion that the threshold set by the Chamber was “far too low”, which according to the Appeals Chamber is a mere “disagreement or conflicting opinion” does not constitute an issue within the meaning of article 82(1)(d) of the Statute.⁵² The lack of supporting arguments to buttress this assertion does not enable the Chamber to assess the matter.

71. Accordingly, the Chamber considers the matter raised by the Defence to be nothing more than a disagreement on the interpretation of a rule of law which does not constitute an issue within the meaning of article 82(1)(d) of the Statute.

⁵¹ Defence Application, para. 31.

⁵² ICC-01/04-168, para. 9

- iii) Seventh ground: Whether the admission of evidence that allegedly should have been excluded by virtue of Article 69(7) of the Statute is an issue that would significantly affect the outcome of the trial

72. With respect to the seventh ground, the Defence challenges the admission of the evidence seized by the Congolese authorities in the presence of an investigator from the Office of the Prosecutor. The Defence alleges that the Chamber erred in admitting evidence that should have been excluded by virtue of article 69(7) of the Statute claiming that extensive “reliance upon this evidence was necessary for the Pre-Trial Chamber to be able to confirm the charges and as such this issue clearly significantly affected the outcome of the trial”.

73. The Chamber observes that the arguments in support to this ground are the same arguments as those put forward in the Defence’s request to exclude evidence obtained in violation of article 69(7) of the Statute.⁵³ Hence, no new arguments challenging the interpretation given by the Chamber to article 69(7) of the Statute in the Decision, have been brought by the Defence in support of its application for leave to appeal.

74. The Chamber considers that the matter raised by the Defence is a mere disagreement on the interpretation of the article 69(7) of the Statute. As such, it does not constitute an appealable issue.

⁵³ ICC-01/04-01/06-674-Conf.

75. Furthermore, the Chamber notes that Pre-Trial Chamber rulings on the admissibility and probative value of evidence are not binding on a Trial Chamber. In this case, a final determination on the admissibility of the evidence will be made by the Trial Chamber for the purpose of determining the criminal responsibility of Thomas Lubanga Dyilo, and thus, the outcome of the trial.


76. Accordingly, the Chamber considers that this matter does not constitute an issue within the meaning of article 82(1)(d) of the Statute.

FOR THESE REASONS

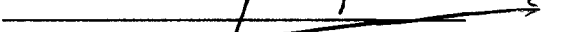
REJECTS the Prosecution Application;

REJECTS the Defence Application.

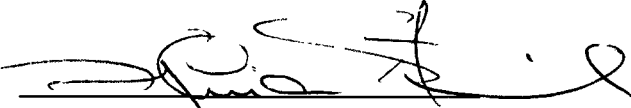
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Claude Jorda



Judge Sylvia Steiner

Dated this Thursday 24 May 2007

At The Hague, The Netherlands