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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 *v.* THOMAS LUBANGA DYILO**

Public

Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy
Prosecutor
Mr Ekkehard Withopf, Senior Trial
Lawyer

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

a/0001/06 to a/0003/06 and a/0105/06
Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, following the status conference on 20 November 2007, delivers the following decision on the status of the evidence heard by the Pre-Trial Chamber, the status of decisions of the Pre-Trial Chamber, the manner in which evidence shall be submitted, the evidence of Ms Peduto and the charges confirmed by the Pre-Trial Chamber.

A. Background

1. The Chamber is concerned to ensure that there is a clear understanding as to the relationship between the Pre-Trial Chamber and the Trial Chamber in two areas: first, the status during the trial of any evidence considered by the Pre-Trial Chamber (and including that of the witness Ms Peduto), and, second, the extent to which decisions of the Pre-Trial Chamber (and including the Decision on the confirmation of charges) are binding on the Trial Chamber, and the Chamber invited submissions from the parties and participants on these issues.¹ These, together with submissions on the manner in which evidence shall be submitted, were considered at the status conference on 20 November 2007.²
2. There was broad agreement on three areas: the status of evidence considered by the Pre-Trial Chamber; whether or not their decisions are binding on the Trial Chamber; and the manner in which evidence shall be submitted. The only contentious issues concerned the evidence of the witness Ms Peduto and

¹Prosecution'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, 12 September 2007, ICC-01/04-01/06-953; Conclusions de la Défense sur des questions devant être tranchées à un stade précoce de la procédure, 16 November 2007, ICC-01/04-01/06-1033; Conclusions du Représentat légal de la victims a/0105/06 sur les points a.b.c. de l'Ordonnance du 5 septembre 2007, 16 November 2007, ICC-01/04-01/06-1030; Conclusions des victimes a/0001/06 à a/0003/06 en vue de l'audience du 20.11.2007, 19 November 2007, ICC-01/04-01/06-1034.

² ICC-01/04-01/06-T-61-ENG.

whether or not the Chamber has (and if it has, whether it should exercise) the power to amend or alter the charges confirmed by the Pre-Trial Chamber.

B. The non-contentious issues

3. Given the extent of the agreement between the parties and the participants on the three areas set out above, in the main it is sufficient to set out the overall position as presented to the Chamber, and its conclusions, without summarising the individual submissions presented to the Bench, save that attention has been given to any particular factors that require discrete analysis.
4. Addressing the relationship between the Pre-Trial and Trial Chambers Decisions on procedural matters and the admissibility and relevance of evidence, the relevant Rome Statute framework can be shortly summarised. Article 64(9) of the Statute gives the Trial Chamber a seemingly unqualified power to rule on the admissibility or relevance of evidence. Rule 63(2) of the Rules of Procedure and Evidence states that the Chamber has the authority "to assess freely" all evidence when determining admissibility and relevance, and these matters must be raised, save exceptionally, at the time the evidence is submitted (Rule 64(1)). By Article 74(2) the Trial Chamber's decision is to be based on its evaluation of the evidence and the entire proceedings, and the court "may base its decision only on evidence submitted and discussed before it during the trial". Additionally, the Trial Chamber in performing its functions prior to or during trial may rule on any relevant matters (Article 64(6)(f)).
5. In the view of the Bench, this statutory and regulatory framework undoubtedly establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject

always to any contrary decision of the Appeals Chamber. It is noteworthy that this conclusion was in part confirmed by the Pre-Trial Chamber in the sense that it ruled on 7 November 2006 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" (emphasis added).³ This was repeated in the Decision on the Confirmation of Charges on 29 January 2007,⁴ and in the course of that decision the Pre-Trial Chamber observed that the purpose of the confirmation hearing was "limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought".⁵

6. That said, during the Status Conference on 20 November 2007 the parties and the participants did not dissent from the proposition advanced by the Bench that the Trial Chamber should only disturb the Pre-Trial Chamber's Decisions if it is necessary to do so. Not least for reasons of judicial comity, this Chamber should follow the Pre-Trial Chamber unless that would be an inappropriate approach,⁶ and the prosecution, by way of example, suggested for the purposes of the trial the Bench should not follow the decisions of the court below on witness proofing or victim participation;⁷ indeed, both of those issues are the subject of separate consideration by this Bench.⁸
7. A discrete issue that arose for our consideration is the manner in which evidence is to be introduced during the trial if documents or other exhibits are not formally produced by witnesses during the course of their evidence.

³Decision on the schedule and conduct of the confirmation hearing, ICC-01/04-01/06-678, page 9.

⁴ICC-01/04-01/06-803-tEN, paragraph 40.

⁵*Ibid*, paragraph 37.

⁶ICC-01/04-01/06-T-62-ENG, page 4, lines 7-19.

⁷ICC-01/04-01/06-953, paragraph 9.

⁸Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049.

Although the prosecution advanced submissions as to whether it should be “permitted to tender [...] materials into evidence from the bar table by referring to their exhibit number in the record of the proceedings”,⁹ the solution proposed by the Bench proved uncontroversial, namely that the sole issue in this regard of consequence is whether or not the particular piece of evidence surmounts the applicable admissibility and relevance threshold.¹⁰ Once this issue is resolved, as a general proposition, the exact manner of introduction is unlikely to involve a dispute of substance, and it should be dealt with by reference to the circumstances of the situation.

8. Generally, there is agreement that subject to the operation of specific provisions such as Rule 68(a) (which provides for the introduction of prior recorded testimony if particular criteria are met), evidence before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*. Therefore, the record of the pre-trial proceedings (and all the evidence admitted for that purpose) transmitted to the Trial Chamber by virtue of Rule 130 is available mainly to be used as a “tool” to help with preparation and the progress of the case.¹¹ Nonetheless, the parties (and where relevant, the participants) can agree convenient mechanisms for the introduction of undisputed evidence.¹²

⁹ ICC-01/04-01/06-953, paragraph 6.

¹⁰ ICC-01/04-01/06-T-61-ENG, page 7.

¹¹ ICC-01/04-01/06-953, paragraph 3.

¹² See, for instance, Regulation of the Court 54 (j) (the presentation of evidence in summary form) and Regulation 54 (i) (the presentation of previously recorded evidence).

C. The contentious issues

1) Ms Peduto's testimony

Submissions and relevant provisions

9. As indicated above, there was no agreement between the parties and the participants as regards the approach to be taken to the evidence given during the Confirmation Proceedings by the witness Ms Peduto (the only *viva voce* witness then called by the prosecution). The prosecution submitted that the transcripts of her evidence as well as any documents produced or considered by that witness during her testimony are governed by Rule 68(a),¹³ and they are admissible in written form and, in the result, there is no requirement on the prosecution to call her again as a witness during the trial.¹⁴ The prosecution submitted that it is sufficient for reliance on this rule that it does not wish to call her again (and that as a result she will not be "present" before the Trial Chamber), and that adding as a precondition for the operation of the provision such matters as the illness, disappearance or unavailability of the witness would introduce unwarranted factors not contained in the provision.¹⁵ The prosecution agreed that she is available to be called as a witness (save that a request would have to be made to the United Nations to facilitate her attendance).¹⁶

10. The prosecution contended that it is enough for these purposes that the defence and one of the legal representatives of victims had an opportunity to examine Ms Peduto and to test any relevant documents during her testimony

¹³ Rule 68(a) provides: "When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave evidence previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording;"

¹⁴ ICC-01/04-01/06-953, paragraph 5.

¹⁵ ICC-01/04-01/06-T-61-ENG, page 30, line 10 and page 32, lines 12-16.

¹⁶ ICC-01/04-01/06-T61-ENG, page 17.

before the Pre-Trial Chamber. Therefore, with a view to expediting the trial process, it submitted that the transcripts of her evidence (and any documents referred to by her) ought to be admitted without more under Rule 68(a). The prosecution suggested finally that the Chamber, acting *proprio motu* under Article 64(6)(b),¹⁷ can in any event require the admission of this evidence in this manner, irrespective of any prosecution application.¹⁸ The prosecution submitted that it was irrelevant, or at the very least no bar to this proposed course of action, that the defence had not been warned of a risk that Ms Peduto may only be called to give evidence once because she had been extensively questioned as an “overview” witness who went “to the heart” of the allegations against the defendant.¹⁹

11. The defence, subject to one reservation, did not oppose the introduction of this evidence in transcript and documentary form, although they suggested that this result could only be achieved with the agreement of the defendant and that the proposed use of Rule 68 is impermissible. The reservation is that the defence wishes, before giving final agreement, to protect itself against the possibility that the process of lifting redactions to any relevant materials might reveal factors that necessitate Ms Peduto giving oral evidence.²⁰

12. As regards the suggested inappropriate resort by the prosecution to Rule 68, the defence place substantial reliance on Article 69(2) of the Statute, which provides as follows:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or the Rules of Procedure and Evidence. The Court may also permit the giving of *vive voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in

¹⁷ Article 64(6)(b) provides that “the Trial Chamber may [...] require the attendance and testimony of witnesses and production of documents and other evidence”.

¹⁸ ICC-01/04-01/06-953, paragraph 3.

¹⁹ ICC-01/04-01/06-T61-ENG, page 17.

²⁰ ICC-01/04-01/06-T61-ENG, page 20.

accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

Article 68 sets out statutory obligations imposed on the Court to provide for the protection of victims and witnesses and their participation in the proceedings.

13. The defence also submitted that they find assistance in Article 56 of the Statute which outlines the role of the Pre-Trial Chamber in relation to unique investigative opportunities, and the need to preserve evidence which may otherwise not be available at trial.²¹

14. In the light of those provisions, the defence suggested that the presumption is strongly in favour of calling live evidence unless it is necessary to provide protective measures of the kind contained in Article 69(2) or if the witness is genuinely unavailable to give oral evidence.²²

15. The legal representative for victims a/0001/06 to a/0003/06 submitted they were not given the opportunity to question Ms Peduto properly during the confirmation of charges hearing (in fact, they were allowed to ask one question by the Pre-Trial Chamber), and, moreover, they did not have access to all of the documents and materials relevant to her evidence, and including some of those that do not have a confidential classification.²³ The legal representative pointed out that Ms Peduto has been in personal contact with at least one of the victims. In those circumstances these victims seek the attendance at trial of this witness so that further questions can be put to her.²⁴

²¹ ICC-01/04-01/06-1033, paragraph 19.

²² *Ibid.*

²³ ICC-01/04-01/06-1034, paragraph 9.

²⁴ *Ibid.*, paragraph 11.

16. It is suggested that Ms Peduto was known as someone who was concerned with children recruited by the UPC, and one of the victims called for Ms Peduto's help when her son was taken by the militia. Furthermore, it is said she has a dossier on one of these victims which the representative wishes to investigate by way of questioning. The victims seek to question the witness with a view to clarifying the context of the crimes the accused faces and as someone who can speak to their consequences.²⁵

17. Subject to any matters that may be disclosed, the representative agreed that prior to putting such questions as may be permitted by the Bench, the evidence of Ms Peduto given at the Pre-Trial stage could be introduced in a way that would obviate the need for her to repeat areas of evidence orally that she has already provided to the Pre-Trial Chamber.²⁶ The Bench directed that consideration should be given by the parties to providing the victims with disclosure of the closed-session testimony²⁷ (which has been agreed) and the victims' representative undertook to set out a detailed outline of the questions he wishes to advance,²⁸ which was received on 30 November 2007.²⁹

Analysis

18. Notwithstanding the encouragement that has been given to the Bench, particularly by the prosecution, to rule in principle on the use that can properly be made of Rule 68(a) (by explaining the ambit of the words "is not present before the Trial Chamber", and particularly whether some additional gloss or meaning should be added to them), in the view of the Bench it would be undesirable to make an abstract decision on this issue without a firm

²⁵ ICC-01-04-01-06-T61-ENG, page 26.

²⁶ ICC-01-04-01-06-T61-ENG, page 25.

²⁷ ICC-01/04-01/06-T-61-ENG, page 34, line 25 to page 36, line 8.

²⁸ ICC-01-04-01-06-T61-ENG, pages 34, 35 and 61.

²⁹ ICC-01/04-01/06-1051.

understanding of the relevant facts. In its filing of 23 November 2007,³⁰ the prosecution informed the Chamber that the parties agree that the previous testimony of Ms Peduto and the documents tendered during her oral testimony before the Pre-Trial Chamber can be introduced by way of transcripts and documents. However, as set out above, the legal representative for the victims wishes to put questions to Ms Peduto in court. Should that course of action be followed, Rule 68(a) is automatically rendered unavailable because Ms Peduto would be “present before the Trial Chamber”, and in consequence the rule could not support an application to substitute transcripts for her oral evidence: the provision depends on the absence of the witness in order for it to apply. Since this “mixed” approach to her evidence is a likely, if not the most likely, result it would be artificial for the Bench to make a ruling on an issue of law that is, certainly at present, founded on a factual matrix that would ensure the rule has no relevance.

19. It is likely that should the mixed approach (set out above) to Ms Peduto’s evidence be approved by the Chamber, the judges will wish in due course to hear submissions (in the absence of agreement) on whether the audio visual recording of her evidence from the confirmation hearing should be played during the trial so that it becomes part of the public record.

2) The charges confirmed by the Pre-Trial Chamber

Background

20. On 29 January 2007 the Pre-Trial Chamber confirmed six charges against the accused on which he was committed for trial, in the following way:³¹

³⁰ Prosecution’s response to the Trial Chamber’s request related to prior recorded testimony, ICC-01/04-01/06-1042.

³¹ ICC-01/04-01/06-803-tEN, pages 156-157.

- **CONFIRMS**, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of **enlisting** and **conscripting** children under the age of fifteen years into the FPLC and **using** them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003 (emphasis added);
- **CONFIRMS**, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of **enlisting** and **conscripting** children under the age of fifteen years into the FPLC and **using** them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003 (emphasis added);

21. The Chamber describes these as six charges, because the Pre-Trial Chamber in each instance referred to the **charges** of:

- enlisting
- conscripting, and
- using

22. The Document containing the Charges, dated 28 August 2006, had formulated the crimes alleged against the accused differently:³²

Count 1: CONSCRIPTING CHILDREN INTO ARMED GROUPS, a **War Crime**, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

Count 2: ENLISTING CHILDREN INTO ARMED GROUPS, a **War Crime**, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

Count 3: USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a **War Crime**, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

23. The distinction between these two formulations of the relevant charges can be summarised as follows:

³² Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), ICC-01/04-01/06-356-Conf-Anx 1, page 25.

- the prosecution elected to charge three offences only without including the additional element or characterisation introduced by the Pre-Trial Chamber in the first group of three charges that “(t)he conduct took place in the context of and was associated with an international armed conflict”;³³
- once the ingredient of international armed conflict was included for the first group of three charges, a particular additional element was then raised, namely that “(t)hat the perpetrator **conscripted** or **enlisted** one or more persons into the **national armed forces** or used one or more persons to participate actively in hostilities” (Article 8(2)(b)(xxvi), element 1). In distinction, Article 8(2)(e)(vii), element 1, stipulates “(t)hat the perpetrator conscripted or enlisted one or more persons into an **armed force or group** or used one or more persons to participate actively in hostilities” (emphasis added in both instances). Therefore, in order to prove the first two charges of the first group as re-characterised, the prosecution must demonstrate that the accused **conscripted** or **enlisted** child soldiers into the **national armed forces** (as opposed to **using** them to participate actively in hostilities, where that element does not apply).
- the prosecution did not limit the operation of particular charges by reference to specific dates, whilst the Pre-Trial Chamber identified two precise periods of time, split between the two groups of three charges (although throughout the Document Containing the Charges the prosecution make clear the overall timeframe and the circumstances in which it alleges these offences were committed).

³³ Article 8(2)(b)(xxvi), element 4.

24. The Pre-Trial Chamber determined 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 However, 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 was not necessary to adjourn the hearing and request the Prosecutor to amend the charges”.³⁵

25. A question which falls for consideration by the Bench is whether the additional element introduced by the Pre-Trial Chamber in the first group of three confirmed charges that “(t)he conduct took place in the context of and was associated with an international armed conflict” is a necessary ingredient of the charges which must be established (along with the other elements) before there can be a conviction for that offence, or whether it simply provides a legal context without changing the elements of the alleged crime which the prosecution is obliged to prove. This is discussed at the end of this Decision.

26. The prosecution and the defence concurrently sought leave to appeal the Confirmation Decision in relation to the extent of the Pre-Trial Chamber’s authority under Article 61(7) of the Statute. The essential issue raised was whether the Pre-Trial Chamber had power to reformulate/amend the charges as described above (or insert material facts into the pleadings) rather than requesting the prosecution to consider amending the charges and whether this was appropriate without, according to the Defence, having heard evidence on

³⁴ ICC-01/04-01/06-803-tFN, paragraph 220 (the evidence is summarised at paragraphs 181-196).

³⁵ ICC-01/04-01/06-803-tFN, paragraph 204.

this point.³⁶ It was suggested that the language of Article 61(7) indicates the Pre-Trial Chamber only has power to consider the “crimes charged”, rather than having a power to reformulate them *proprio motu*, and that there is 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 advanced by the prosecution, save by following the particular procedure set out in Article 61(c).³⁷ The Pre-Trial Chamber rejected the applications for leave to appeal and directed the parties to the Trial Chamber for relief on this issue, when it is suggested “there is nothing to prevent the Prosecution and 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”.³⁸

Prosecution's submissions

27. The prosecution argued that the Pre-Trial Chamber “did not reject the charges brought by the Prosecution; rather, it imposed a new legal characterisation, displacing the one the Prosecution had chosen”.³⁹ The prosecution submitted that the history described above has resulted in serious factual uncertainty being introduced into the proceedings, which will have a tendency to undermine “the goals of fair, expeditious and focussed trial proceedings and will cause prejudice to the Defence and the Prosecution in the preparation and conduct of the trial”.⁴⁰ The prosecution suggested that unfairness may result from the defendant facing a charge that he had no opportunity to oppose at the confirmation hearing. The prosecution’s argument on the introduction by

³⁶ Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 “Décision sur la confirmation des charges”, 5 February 2007, ICC-01/04-01/06-806, paragraphs 11-12; Request for Leave to Appeal the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007, 5 February 2007, ICC-01/04-01/06-807-Conf, paragraphs 13-16.

³⁷ ICC-01/04-01/06-953, paragraph 17.

³⁸ Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, paragraph 44.

³⁹ ICC-01/04-01/06-953, paragraph 12.

⁴⁰ ICC-01/04-01/06-953, paragraph 14.

the Pre-Trial Chamber of the international element was succinctly set out as follows:⁴¹

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. 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, the Prosecution has no evidence that could support a finding beyond reasonable doubt of 'overall control' by Uganda 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 this could demonstrate the international character of the armed conflict in which the offences were allegedly committed

28. Generally, the prosecution argued it is unable to call evidence that it considers would establish beyond reasonable doubt that the conflict, in the context of which the alleged conduct took place, was in a true legal sense of an international character.⁴²

29. As to remedies, two main alternative routes are suggested by the prosecution against the background of the submission 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".⁴³ Article 64(2) of the Statute requires the Trial Chamber to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard to the protection of victims and witnesses. Rule 134 permits the Chamber to rule on any issue concerning the conduct of the proceedings. In performing its functions the Chamber may "rule on any other relevant matters" (Article 64(6)(f)). It is suggested we have "inherent authority" to control its own procedures, most

⁴¹ ICC-01/04-01/06-953, paragraph 15.

⁴² ICC-01/04-01/06-953, paragraph 18.

⁴³ ICC-01/04-01/06-953, paragraph 16.

particularly to ensure that the interests of justice are protected, and notwithstanding the absence of any precisely defined or identified procedure in this regard, the Bench should either rule that the Pre-Trial Chamber acted *ultra vires* and that its decision to change the legal characterisation is null and void ("the first route"). Alternatively, the Bench is invited to utilise Regulation of the Court 55 at this stage to modify the characterisation of the facts for the charges confirmed by the Pre-Trial Chamber or to indicate that it will do so in due course ("the second route").⁴⁴

30. Addressing the first route, the prosecution stressed it is not inviting the Trial Chamber to review or overturn a decision of the Pre-Trial Chamber but instead to "remedy an anomaly capable of adversely affecting the trial proceedings".⁴⁵ However, as just described, simultaneously the prosecution invites the Bench to conclude that certain parts of the Confirmation Decision are without legal effect. It is suggested that the Bench can decide which parts of the Confirmation Decision are valid and operative.⁴⁶ Therefore, by way of the first route the Chamber is asked to proceed only on those portions of the Confirmation Decision that in the Chamber's estimation are valid, and that in the result the prosecution suggest the Chamber should try the case on the basis of the charges as set out in the Document Containing the Charges,⁴⁷ in relation to which there is a proper evidential basis for trial, particularly given the Pre-Trial Chamber found that an armed conflict existed independently of whether it is to be characterised as international or otherwise.⁴⁸ It is suggested that disregarding the Pre-Trial Chamber's *characterisation* of the conflict as international would not in any way undermine the integrity of the charges as

⁴⁴ ICC-01/04-01/06-953, paragraph 16.

⁴⁵ ICC-01/04-01/06-953, paragraph 21.

⁴⁶ ICC-01/04-01/06-T-61-ENG, page 46.

⁴⁷ ICC-01/04-01/06-953, paragraph 22.

⁴⁸ ICC-01/04-01/06-953, paragraph 23.

framed by the prosecution, because the valid findings in the Confirmation Decision amply support them.⁴⁹

31. Turning to the second route, the prosecution underlined that Regulation 55 provides the opportunity for a modification of the **legal characterisation of the facts**, the possibility of which is to be notified to the parties “at any time during the trial” if the Bench considers it may take this course (Regulation 55 (2)). Whilst the prosecution accepts that the formal part of this process may usually be effected during a later stage in the proceedings, nonetheless the Bench can “foreshadow” that which is “possible or likely [...] at an early stage”.⁵⁰ This provision enables the Trial Chamber to modify the characterisation of the facts in law to accord with the crimes alleged under Articles 6, 7 or 8 of the Statute or to accord with the form of participation of the accused, so long as this does not exceed the facts and circumstances described in the charges and any amendments thereto. These limitations on the ambit of Regulation 55 reflect the provisions of Article 74(2) which provides that:

The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at trial.

32. The prosecution drew attention to the ‘warning element’ provided in Regulation 55(2), which ensures the parties receive early notice whenever it occurs to the Bench that a change to the legal characterisation of the charges is a possibility.⁵¹ The prosecution submitted that dealing with this issue in a substantive way now would be consistent with the spirit of that provision.⁵²

⁴⁹ ICC-01/04-01/06-953, paragraph 23.

⁵⁰ ICC-01/04-01/06-953, paragraph 25.

⁵¹ ICC-01/04-01/06-T-61-ENG, page 44, line 16 to page 45, line 1.

⁵² ICC-01/04-01/06-953, paragraph 26.

33. Finally, if the Bench is not prepared to make a final decision on this issue or to give an indication at this stage, it is submitted by the prosecution the Chamber should permit it to present all the available evidence on the issue of the armed conflict (international or otherwise), so that the Bench can address the question of the international element at a later stage in the trial, modifying the legal characterisation to the extent appropriate.⁵³ However, it is not suggested that this would significantly alter the nature of the prosecution's case (about thirty extra documents and three or four additional witnesses, and some further questioning of other witnesses).⁵⁴ In a footnote the prosecution tentatively raised the possibility of making an application to withdraw a portion of the charges.⁵⁵ This was not materially developed during the hearing, save that the possibility of a partial withdrawal of the charges was relied on.⁵⁶ This possibility was expanded on in far greater detail, at the invitation of the Bench,⁵⁷ in the prosecution's additional written filing of 23 November 2007.⁵⁸

Defence submissions

34. The defence submitted that it is impermissible to amend or vary the charges, at any stage.⁵⁹ It contended that fairness requires the accused to be informed of the precise nature of the charges against him at the conclusion of the Confirmation Hearing so he can effectively prepare his defence.⁶⁰ Furthermore, it is argued that any re-characterisation, whether of the crime or the form of individual responsibility, would constitute a "modification of the

⁵³ ICC-01/04-01/06-T-61-ENG, page 41.

⁵⁴ ICC-01/04-01/06-T-61-ENG, pages 42 and 43.

⁵⁵ ICC-01/04-01/06-953, paragraph 16, footnote 43.

⁵⁶ ICC-01/04-01/06-T-61-ENG, pages 37-40; 64 and 66.

⁵⁷ ICC-01/04-01/06-T-61-ENG, page 66-69.

⁵⁸ Prosecution's Submission of Authorities supporting the withdrawal of a fact or element underpinning a charge, ICC-01/04-01/06-1041.

⁵⁹ ICC-01/04-01/06-1033, paragraph 24.

⁶⁰ ICC-01/04-01/06-T-61-ENG, page 53.

charges”⁶¹ under the Statute and the Rules⁶² and that the Chamber is bound by the decision of the Pre-Trial Chamber.⁶³ Irrespective of the merit of the argument that the Pre-Trial Chamber acted *ultra vires* in modifying the charges presented by the prosecution, it is submitted the Trial Chamber has no power at any stage to make any further modification to the charges as confirmed on 29 January 2007.⁶⁴ The core submissions were, first, that an amendment of any kind would breach the requirement of certainty for the accused and, second, Regulation 55 should not be relied on.

35. The defence additionally submitted the provisions of Regulation 55 are contrary to the Statute and the Rules of Procedure and Evidence, and the Chamber is invited to declare the regulation unlawful.⁶⁵ This is based on the suggestion that because it affects certain fundamental defence rights, it goes beyond the proper subject matter of a regulation, which pursuant to Article 52 should only deal with matters that are “necessary for the routine functioning of the court”.⁶⁶ It is submitted that amendments to the charges are provided for by the Rome Statute framework during the pre-trial stage.⁶⁷ It is argued that international law does not provide any authority for Regulation 55, and reference was made to the approach of the ICTY under their different framework. The Chamber is reminded that Article 21 requires the Court, in the first instance, to apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence and, thereafter, (where appropriate) applicable treaties and the principles and rules of international law.⁶⁸ By Article 64(1) the “functions and powers of the Trial Chamber [...] shall be exercised in accordance (the) Statute and the Rules of Procedure and Evidence”.

⁶¹ ICC-01/04-01/06-T-61-ENG, page 54.

⁶² ICC-01/04-01/06-1033, paragraphs 25-27.

⁶³ ICC-01/04-01/06-T-61-ENG, page 52.

⁶⁴ ICC-01/04-01/06-1033, paragraph 30.

⁶⁵ ICC-01/04-01/06-1033, paragraph 37.

⁶⁶ ICC-01/04-01/06-T-61-ENG, page 55 and following.

⁶⁷ Article 61(4) and (9); Rule 121(4).

⁶⁸ Article 21(1)(a) and (b).

36. The defence submitted that in any event Regulation 55 does not apply to this situation because the nature of the conflict is said to be a factual question of such importance as to necessitate an amendment to the arrest warrant, and, moreover, the suggested change involves a modification of the factual basis of the charges by adding essential facts.⁶⁹

37. The defence submitted that there are only three options available in this situation: to withdraw the charges on an application by the prosecution (Article 61(9)); to refer the charges back to the Pre-Trial Chamber (Article 64(4)); or to leave the charges as confirmed.⁷⁰

Submissions of the participants

38. The representatives of the victims did not make any submissions on this issue in writing. Orally, the representative for victim a/0105/06 submitted that whether or not it is described as an internal or international armed conflict does not matter because the crimes charged under Article 8(2)(b)(i) are the same. It was submitted that Regulation 55 cannot be characterised as an illegal provision because it has been adopted by the Assembly of States Parties. Finally, the representative submitted that it was important that the international element remained, "to show the world what really happened" and that "history and truth should not be set aside".⁷¹

Analysis and conclusions

39. Addressing the prosecution's first route, in the judgment of the Bench, the Trial Chamber has no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber. The power to frame

⁶⁹ICC-01/04-01/06-1033, paragraphs 39-42.

⁷⁰ICC-01/04-01/06-T-61-ENG, page 56.

⁷¹ICC-01/04-01/06-T-61-ENG, page 70.

the charges lies at the heart of the Pre-Trial Chamber's functions, as set out in Article 61 of the Statute. By Article 61(9), after the charges have been confirmed, control over them remains with the Pre-Trial Chamber until the commencement of the trial, since post-confirmation and "before the trial has begun", the Prosecutor may, with the permission of the Pre-Trial Chamber and on notice to the accused, amend the charges. Although no definition is provided as to when the trial is considered to have begun, the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any,⁷² are made prior to the calling of witnesses. This conclusion is based on the plain, unambiguous language of Article 61 (11) which states that:

Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to Article 64 (4)⁷³, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the pre-Trial Chamber that is relevant and capable of application in those proceedings. (emphasis added)

40. Article 61(11), therefore, qualifies the authority of the Trial Chamber when giving it responsibility for the conduct of the "subsequent proceedings", by making it, *inter alia*, subject to "paragraph 9" which, as just set out, extends the authority of the Pre-Trial Chamber over the charges until the trial has begun. A joint reading of Article 61(9) and Article 61(11) demonstrates in the clearest terms that during the preparation phase of the trial (in this case before 31 March 2008)⁷⁴ any application to amend the charges must be made to the Pre-Trial Chamber.

⁷² Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial, ICC-01/04-01/06-1083, page 3.

⁷³ Article 64(4) provides: "The Trial Chamber may, if necessary, for its effective and air functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge of the Pre-Trial Division."

⁷⁴ Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, paragraph 29.

41. In consequence, the Chamber does not have jurisdiction over this issue, which has been addressed to the wrong Chamber. The Pre-Trial Chamber confirmed the charges in their current form by “amending (the) charges” without specifically giving the prosecution an opportunity to make representations under Article 61(7)(c), although the Chamber notes the Pre-Trial Chamber observed in its Decision on the applications for leave to appeal 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.”⁷⁵ In the view of this Bench, although the prosecution unsuccessfully sought leave to appeal the confirmation decision in this regard, that step does not nullify or remove the binding provision affording the Pre-Trial Chamber sole authority (subject to revision by the Appeals Chamber) over any issue concerning amendments to the charges, certainly before the trial has begun. The only power which the Trial Chamber has during this stage, which does not involve altering the wording or the substance of the charges in any way, is to rule on any application for joinder or severance of the charges against more than one accused.⁷⁶

42. After the trial has begun, the two additional powers given to the Trial Chamber under the Rome Statute framework in relation to the charges are to grant or reject an application by the prosecution to withdraw the charges⁷⁷ and to modify the legal characterisation of the facts under Regulation 55.

43. It follows that the Trial Chamber would be acting *ultra vires* if it followed the prosecution’s “first route” and attempted to interfere with, or strike down, the

⁷⁵ ICC-01/04-01/06-915, paragraph 43.

⁷⁶ Article 64(5), Rule 136.

⁷⁷ Article 61(9).

decision of the Pre-Trial Chamber on an issue over which it has exclusive control. The Pre-Trial Chamber and the Trial Chamber have separate functions at different stages of the proceedings, and there is no hierarchy of status between them. The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber (although as set out above the Trial Chamber is not bound by decisions of the Pre-Trial Chamber on evidential or procedural issues), and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges. Contrary to the submissions of the prosecution, the Trial Chamber has severely limited authority as regards the content of the charges.

44. It is noteworthy that if the prosecution are correct as regards their proposed first route, the consequences for the institutional framework of the ICC and expeditious justice would be profound. It would mean that contrary to the express provisions of the Statute, there are two independent routes by which the parties can challenge the Decision on the confirmation of charges: first, by way of an appeal to the Appeals Division and, second, on an application to the Trial Chamber to strike down part or all of the decision on the basis that the Pre-Trial Chamber had acted *ultra vires* (and, in all likelihood, for other reasons not canvassed before this Bench). In our judgment recognising or creating this second avenue of appeal would be an institutional development of such significance that it is dependent on it being included as an express provision approved by the Assembly of States Parties. In its absence the Trial Chamber cannot nullify or ignore Pre-Trial Chamber's Decision on the confirmation of charges. Furthermore, any Trial Chamber review of the decision of the Pre-Trial Chamber would frequently involve revisiting a large part of the evidence, the submissions and the applicable law considered by the Pre-Trial Chamber. In the present case this would necessarily involve, bearing

in mind the detail of the submission of the defence in its Request for Leave to Appeal, a review of all the evidence heard by the Pre-Trial Chamber in order to ascertain whether or not the evidence justified the alteration made to the charges. The potential delays this would cause to the trial process are self-evidently considerable, not least because a decision by the Trial Chamber on this issue would itself be susceptible to an appeal to the Appeals Division. Furthermore, in our view a Trial Chamber will not ordinarily engage in questions involving a detailed examination and resolution of facts or evidence before the commencement of the trial itself.

45. After the trial has begun, the prosecution can make an application to the Trial Chamber to “withdraw the charges”, and if this application is made the Bench would then be able to consider whether or not a partial withdrawal of the charges is permissible. The prosecution, as referred to earlier, supplied an additional filing on 23 November 2007⁷⁸ setting out a significant body of authority from the Trial Chambers of the ICTY indicating that under the framework governing the work of that court (on this issue, the Rules of Procedure and Evidence, Rules 50 and 51), the prosecution have been permitted to withdraw certain elements of a charge, including withdrawing the characterisation of the relevant armed conflict as international. The Defence filed a response to that filing on 27 November 2007⁷⁹ disputing the contention that those authorities establish a recognised practice of permitting the prosecution to partially withdraw charges.

46. However, it would be premature for the Bench to rule on this issue at this stage. Until the time stipulated in the Statute is reached,⁸⁰ the Trial Chamber is without authority on this issue and it would be wrong to render a preliminary

⁷⁸ ICC-01/04-01/06-1041.

⁷⁹ Réponse de la Défense à la “Prosecution’s Submission of Authorities Supporting the Withdrawal of a Fact or Element Underpinning a Charge”, ICC-01/04-01/06-1048.

⁸⁰ Article 61(9).

decision when the Pre-Trial Chamber remains seized of any applications to amend the charges, which in turn may affect whether or not an application is made to withdraw one or more of the charges, wholly or in part.

47. Turning finally to Regulation 55, this regulation was recommended by the judges in plenary and thereafter adopted by the Assembly of States Parties, which underlines its legitimacy. The Bench recognises, however, that if use of Regulation 55 conflicted with any statutory provision or one contained in the Rules of Procedure and Evidence, then the latter take precedence.⁸¹ However, the terms of Regulation 55 do not involve any conflict with the main relevant provision, Article 74(2), because they allow for a modification of the legal characterisation of the facts rather than an alteration or amendment to the facts and circumstances described in the charges. Therefore, so long as the facts and the circumstances as described in the charges are not exceeded, pursuant to Regulation 55 it is possible to give those facts and circumstances a different legal characterisation, so long as no unfairness results.

48. The scheme of Regulation 55 indicates that a decision to modify the legal characterisation of facts will only occur at a late rather than an early stage in the trial, because it is provided that notice shall be given to the parties of this possibility once it emerges, and the Court shall hear submissions “after having heard the evidence”.⁸² This will be a fact-dependent decision, and the Bench has concluded that it would be against the interests of justice to attempt indicate in advance of the trial what the conclusion may be once the Bench has heard the evidence and any submissions on this issue. What is clear is that this is likely to emerge as an issue at the conclusion of the evidence in the case, and the parties and participants are, accordingly, on notice (pursuant to Regulation 55(2)) that there is a possibility that the Chamber may modify the

⁸¹ Article 21(1)(a).

⁸² Regulation 55(2).

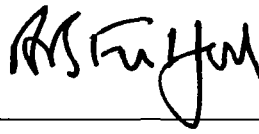
characterisation of the facts so as to delete the international armed conflict ingredient of the first group of three charges, thereby re-characterising it as internal.

49. The Trial Chamber has concluded that this is a necessary ingredient of the first group of three charges in the sense that, as they are framed, in order for there to be a conviction the prosecution would need to establish, *inter alia*, that the relevant conduct took place in the context of and was associated with an international armed conflict. If the prosecution fails to establish that element the first three charges, as they currently stand, would fail. A subsidiary argument that the Bench will only address if it arises is whether the alternative, narrower formulation (namely an armed conflict of an internal character) is included within the current wording, on the basis of the well established principle of *majori continet in se minus*, that the greater includes the lesser.⁸³ The parties and the participants are on notice that this is an issue that may arise and they should prepare their cases on the basis that the Bench may decide that the first group of three charges encompass both international and internal armed conflicts.

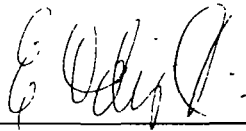
50. It follows the prosecution should be prepared to call, and the defence should be in a position to address, all the available evidence (which is not considerable) on the issue of whether the relevant conduct took place in the context of, and was associated with, an international armed conflict. Thereafter, either on an application after the beginning of the trial to withdraw a part of the first group of three charges or by way of an investigation into whether the legal characterisation of the first group of three charges should be modified, the Bench may rule, at the appropriate stage, on aspects of the issues discussed above.

⁸³ *Posadas*, 478 U.S. 328 (1986).

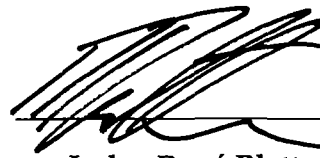
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 13 December 2007

At The Hague, The Netherlands