Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **13 June 2006**

PRE-TRIAL CHAMBER I

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

Registrar: **Mr Bruno Cathala**

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

Public Formatted and Redacted Version

Prosecution's Response to Application for Release

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

Counsel for the Defence
Mr Jean Flamme

Background

1. On 23 May 2006, Defence filed a "REQUETE DE MISE EN LIBERTE"[1] (Application), requesting the Single Judge of the Pre-Trial Chamber (Single Judge) to order the release of Thomas LUBANGA DYILO.[2]

2. On 29 May 2006, the (full) Pre-Trial Chamber issued its "Ordonnance relative à la requête aux fins de mise en liberté"[3] (29 May 2006 Order), requesting the Defence to inform the Pre-Trial Chamber to which State Thomas LUBANGA DYILO requests to be released.[4] On 31 May 2006, the Defence filed its "Conclusions relatives à l'ordonnance du 29.5.2006"[5] (31 May 2006 Defence Submission), informing the Pre-Trial Chamber that Thomas LUBANGA DYILO wishes to be released to either Belgium or the United Kingdom,[6] and clarified that the Application, based on Rule 185 of the Rules of Procedure and Evidence (Rules) is aiming at release, as distinguished from provisional release.[7]

3. On 2 June 2006, the Single Judge, by way of the "Ordonnance priant le Greffier de fournir des observations sur les conditions de détention de Thomas Lubanga Dyilo"[8] (2 June 2006 Order), requested the Registrar to provide observations on the conditions of Thomas LUBANGA DYILO's detention by 5 June 2006.[9] REDACTED.

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[1] REQUETE DE MISE EN LIBERTE, publicly filed on 23 May 2006.
[2] See Application, at page 24.
[3] Ordonnance relative à la requête aux fins de mise en liberté, 29 May 2006.
[4] See 29 May 2006 Order, at page 3.
[5] Conclusions relatives à l'ordonnance du 29.5.2006, 31 May 2006.
[6] 31 May 2006 Defence Submission, at para.2.
[7] 31 May 2006 Defence Submission, at para.1.
[8] Ordonnance priant le Greffier de fournir des observations sur les conditions de détention de Thomas Lubanga Dyilo, 2 June 2006.
[9] 2 June 2006 order, at page 3.

Preliminary remark

4. The Prosecution notes[10] that the Application has neglected applicable Regulations of the Court (Regulations) that govern the page limits and the format of filings with the Court. These violations of the Regulations include, *inter alia*:[11]

   (i) The Application is comprised of 25 pages, thus violating Regulation 37(1), which states that a document filed with the Registry shall not exceed 20 pages. None of the exceptions as determined by Regulation 38 applies.[12] To the knowledge of the Prosecution, the Defence has not applied for an extension of the page limit pursuant to Regulation 37(2),[13] and neither the Pre-Trial Chamber nor the Single Judge has granted such an extension.

   (ii) The Application is written in single spacing, thus violating Regulation 36(4), which states that documents filed with the Registry shall use 1.5 line spacing.

5. The Prosecution, however, has an even greater concern that the Defence in the public Application makes repeated reference to portions of a confidential

[10] The Prosecution makes these observations for the sole purpose of ensuring that future Defence filings are, as with Prosecution's filings, complying with the applicable Regulations. The Prosecution does not request the Pre-Trial Chamber or the Single Judge to act upon the Prosecution's observations.

[11] The Prosecution notes that the Defence has also not provided a book of authorities.

[12] Whilst it appears that the Application is a challenge to the jurisdiction of the Court, Defence has failed to provide a clear characterisation of the Application. The Prosecution draws the attention of the Pre-Trial Chamber to the fact that the Defence on 12 June 2006 has withdrawn its appeal that was based on similar considerations.

[13] Neither prior to filing the Application nor as part of the Application.

filing of REDACTED and even quotes extensively from its confidential Annexes.[14]

Procedural aspects

6. The Application is not, as the Defence itself states,[15] a request for interim release in terms of Article 60 (2). Rather, the Application appears to be a challenge to the jurisdiction of the Court, based on the alleged illegality of Thomas LUBANGA DYILO's prior detention in the DRC and of the process of his arrest for and surrender to the Court.[16]

7. The Defence has failed to provide a clear characterization of its request or to properly identify a legal basis for it, other than a brief reference to Rule 185. This provision, however, only deals with the *procedure* to be followed once a person is released from the custody of the Court other than upon completion of sentence. Rule 185 does not provide a legal *foundation* for release, a measure that necessarily requires a previous determination by the Court terminating the exercise of jurisdiction over the relevant person (e.g., a negative decision on jurisdiction or admissibility, or an acquittal). The Prosecution should not be required to "reconstruct" the nature and normative basis of an application made by another participant. For the purposes of the instant litigation, the Prosecution will assume, and in an effort to assist the Pre-Trial-Chamber in the expeditious determination of the relevant issues, that the Defence has filed a challenge to the jurisdiction of the Court under Article 19, and will deal with it accordingly. The Prosecution reserves its

[14] See at paras. 5 and 6 of the Application.

[15] See paragraph 2 above.

[16] The Prosecution notes that under the terms of Article 19(4) of the Statute, by filing the Application, the Defence has made use of its opportunity to challenge the jurisdiction of the Court.

right to request leave to file supplementary submissions if the Pre-Trial Chamber deems this characterization of the Defence pleadings by the Prosecution as not being correct.

Alleged illegality of Thomas LUBANGA DYILO's arrest and detention in the DRC

Duration of Thomas LUBANGA DYILO's detention in the DRC

8. The Prosecution draws the attention of the Pre-Trial Chamber to the fact that the information on the duration of Thomas LUBANGA DYILO's alleged house arrest and subsequent detention in the DRC is, at the very least, misrepresenting the facts. Repeatedly, the Defence - making no difference between the time prior to 19 March 2005, the date of Thomas LUBANGA DYILO's arrest, and after 19 March 2005 - either suggests or explicitly states[17] that Thomas LUBANGA DYILO was deprived of his liberty in the DRC since 13 August 2003.[18]

9. This statement is both unsubstantiated and factually incorrect:

   (i) The Prosecution notes that, other than making the respective allegation, the Defence does not provide any details on the alleged house arrest of Thomas LUBANGA DYILO prior to March 2005. This in itself is indicative in respect of the reliability of the respective statement. It is even more indicative when combined with the fact that the Defence in the Application uses a number of different terms for Thomas LUBANGA DYILO's alleged house

[17] Reference is made to, *inter alia*, paras. 3, 11, 12, 15, 16 and 18 of the Application.
[18] What includes a significant portion of the time-period - July 2002 to December 2003 - that is detailed in the arrest warrant against Thomas LUBANGA DYILO.

arrest prior to 19 March 2005. These terms range from "restricted freedom measures",[19] "deprived of his liberty",[20] "house arrest"[21] and "held arbitrarily"[22] to "detention".[23]

(ii) Whilst it appears to be true that Thomas LUBANGA DYILO from mid-August 2003 onwards spent significant portions of his time in Kinshasa, the evidence and information available to the Prosecution shows that he throughout 2003 and 2004 was able to move freely and to communicate, without restrictions, with whomever he wanted, including individuals within the UPC and the FPLC.[24] This is, *inter alia*,[25] evidenced by the fact that THOMAS LUBANGA DYILO was able to give interviews throughout the time he was allegedly deprived of his liberty.[26] Furthermore, the Prosecution considers it significant that on 8 December 2003, Thomas LUBANGA DYILO, as the President of the UPC, signed a decree REDACTED.[27]

10. To the knowledge of the Prosecution,[28] Thomas LUBANGA DYILO was arrested on 19 March 2005, after the DRC authorities had placed him under various forms of house arrest for about two weeks immediately prior to 19

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[19] See Application, at para. 15.
[20] See Application, at para. 11.
[21] See Application, at para.3.
[22] See Application, at para. 12.
[23] See Application, at para. 18.
[24] Thus, Thomas LUBANGA DYILO throughout 2003 and afterwards continued to be in charge of both the UPC and the FPLC.
[25] The Prosecution draws the attention of the Pre-Trial Chamber to the fact that at this stage it can only provide information and evidence that is not - or not anymore - protected by agreements pursuant to Article 54(3)(e) of the Statute.
[26] The respective documents and press releases are attached as Annexes 1 to 4.
[27] The 8 December 2003 decree is attached as confidential Annex 5.
[28] As detailed in the Prosecutor's Application for Warrant of Arrest, Article 58 (12 January 2006 Application), Formatted and Redacted Version, at paras. 21, 171 and 173.

March 2005. Since then, and only since then, he was detained in the Centre Pénitentiaire et de Rééducation de Kinshasa.

No impact of the alleged irregularities of the detention in the DRC on the legality of the ICC proceedings

11. The Prosecution submits that, even if there were aspects in the proceedings in the DRC that may entail violations of the law governing the domestic proceedings,[29] they do not impact on the legality of the proceedings of the Court against Thomas LUBANGA DYILO. Even if such violations existed, they could not be attributed to the Office of the Prosecutor (OTP) - or to the Pre-Trial Chamber -, either legally or factually. Consequently, they would not impact on the legality of Thomas LUBANGA DYILO's arrest for and surrender to the Court and his detention in the Court's Detention Centre since then.

12. The knowledge of the Prosecution in respect of the reasons for and details of Thomas LUBANGA DYILO's detention in the DRC prior to his arrest for and surrender to the Court was determined by and limited to the information contained in the NOTE SYNOPTIQUE SUR ETAT DE LA PROCEDURE-DOSSIER DE L'ITURI of 10 August 2005 (NOTE SYNOPTIQUE),[30] the copy of the DRC file on Thomas LUBANGA DYILO's detention,[31] and discussions with representatives of the DRC authorities.[32] The Prosecution has

[29] The Prosecution is not in a position to assess whether there had or had not been such violations.
[30] The NOTE SYNOPTIQUE was attached as Annex 3 to the *Ex Parte* "Prosecution's Submissions of Further Information and Materials", filed on 25 January 2006 (25 January 2006 Prosecution Filing). The 25 January 2006 Prosecution Filing was reclassified as confidential on 20 March 2006. In addition, the Prosecution has disclosed the NOTE SYNOPTIQUE to the Defence on 23 May 2006.
[31] Attached as Annex 1 to the 25 January 2006 Prosecution Filing.
[32] See REDACTED.

comprehensively shared this information with the Pre-Trial Chamber, in both filings[33] and at the occasion of the Court hearing of 2 February 2006.[34] Based on this official information,[35] there was - neither for the Prosecution nor for the Pre-Trial Chamber - and still is no reason to believe that the arrest and detention of Thomas LUBANGA DYILO in the DRC was illegal. To the contrary, the information provided on its face confirmed the legal basis for the DRC proceedings against Thomas LUBANGA DYILO. In particular, and contrary to the Defence's assertion that Thomas LUBANGA DYILO was never informed about the charges against him or of the cause of those charges,[36] the NOTE SYNOPTIQUE clearly states that Thomas LUBANGA DYILO was informed about the allegations that led to his arrest in the DRC.[37]

13. The information the OTP had at its disposal[38] prior to the issuance of the arrest warrant against Thomas LUBANGA DYILO on 10 February 2006 did not give cause to inquire into the legality of the DRC proceedings against Thomas LUBANGA DYILO. Against this background, the allegation made by the Defence that the Prosecution - and the Pre-Trial Chamber[39] - has (deliberately) failed to intercede in the DRC,[40] has accordingly endorsed and

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[33] See in particular the 25 January 2006 Prosecution Filing, at paras. 3, 4, 8 to 15, 17 to 19, and 22(i).
[34] See (English) transcript (Redacted Version) of the 2 February 2006 Court hearing, at pages 9 to 13, 38 and 39.
[35] The Prosecution is aware of the criticism expressed by international NGOs in relation to the DRC proceedings, including, *inter alia,* in respect of Thomas LUBANGA DYILO. Human Rights Watch stated that there had been a *"clear violation of Congolese legal procedures"* (see Human Rights Watch's 15 December 2005 Report "Democratic Republic of Congo - Elections in sight: 'Don't Rock the Boat'", at page 15). The Prosecution has provided the Pre-Trial Chamber with the respective information (see 25 January 2006 Prosecution Filing, at para.11).
[36] See Application, at para. 9.
[37] See NOTE SYNOPTIQUE, at page 8: "REDACTED."
[38] And shared with the Pre-Trial Chamber.
[39] The Prosecution notes that the Defence in the context of the respective allegations is repeatedly making reference to "the ICC".
[40] See Application, at para. 30.

assisted in the violation of fundamental rules of international law[41] and has taken advantage of Thomas LUBANGA DYILO's alleged illegal detention,[42] is lacking a factual basis.[43]

14. The Defence's assertion[44] that both the OTP and the Pre-Trial Chamber had, at the time of the determination on the 12 January 2006 Application on 10 February 2006, and based on the view that Thomas LUBANGA DYILO may be released soon and flee, considered the illegality of his arrest and detention in the DRC, is misconstrued. The OTP at the time was only concerned that Thomas LUBANGA DYILO may be released by the DRC authorities prior to the Court's request for arrest and surrender. Both the Prosecution and the Pre-Trial Chamber had indeed reason to believe that Thomas LUBANGA DYILO could be released in the near future. This belief was based on the fact that the local investigations against him turned out to be very difficult, in particular in light of the capacity of the DRC authorities to investigate the underlying facts within the time-frame as determined by the DRC law. This

[41] See Application at para. 30. The allegation is made implicitly.

[42] See Application at para. 32.

[43] The Prosecution has nevertheless extensively reviewed the jurisprudence as quoted by the Defence in support of the view that "the ICC" was under a duty to investigate the legality of the arrest and detention of Thomas LUBANGA DYILO in the DRC. The Prosecution notes that in respect of all quoted jurisprudence the Defence has neglected substantial differences in respect of the underlying facts and thus has drawn inappropriate analogies: (1) In *Loizidou vs. Turkey* (see Application, at para. 31), the European Court of Human Rights (ECHR) found that Turkey exercised *"effective overall control"* in the region concerned (Northern Cyprus). This situation of "effective overall control" is fundamentally different to the situation in respect of the ICC's mandate and legal and factual capability to influence or control national proceedings; (2) In *Naletilić vs. Croatia* (see Application, at para. 31), the conclusion of the Defence is not supported by any finding in the Decision of the ECHR. To the contrary, the ECHR rejected the complaints of the Applicant; (3) In *Mansur vs. Turkey* (see Application, at para. 33) and *Kalashnikov vs. Russia* (see Application, at para. 33), the Applicants were held in detention by Turkey and Russia respectively throughout the proceedings. In both cases, the ECHR had to determine on the impact of the States concerned having joined the European Convention on Human Rights only after the alleged violations of human rights, and not on a situation similar to the one of Thomas LUBANGA DYILO.

[44] See Application, at para. 20: "The Defence is deeply concerned by such reasoning".

consideration, however, had no bearing on the legality of Thomas LUBANGA DYILO's arrest and detention in the DRC.

15. In any event, the arrest and detention of Thomas LUBANGA DYILO in March 2005 was not triggered by a request or any other involvement of the OTP, nor had the OTP or any other organ of the Court prior to the notification of the Auditeur Général des FARDC (Auditeur Général) of the DRC pursuant to Article 87 of the Statute on 15 March 2006 made a request to keep Thomas LUBANGA DYILO in custody. Thus, given that (1) Thomas LUBANGA DYILO was not arrested and detained in the DRC "at the behest of"[45] the OTP and, consequently, (2) that he was not in the Court's "constructive custody"[46] prior to his arrest and surrender on 16 March 2006, the alleged violation of the rights of Thomas LUBANGA DYILO cannot be attributed to the OTP or the Court.

16. Even if the detention of Thomas LUBANGA DYILO in the DRC were attributable to the OTP – which it is not –, the extraordinary remedy of release would be disproportionate to the alleged violation of the rights of Thomas LUBANGA DYILO.[47]

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[45] The Prosecution makes reference to the Decision of the ICTR Appeals Chamber in *Barayagwiza vs. The Prosecutor*, Decision, 3 November 1999 (First *Barayagwiza* Appeals Decision), in particular at paras. 43 to 45, 52 and 54. The Prosecution notes that whilst the Defence has put much weight on this Decision, having quoted it extensively in support of the Application, it has neglected the fundamental differences in respect of the underlying facts between the case of *The Prosecutor vs. Barayagwiza* and the instant case: Barayagwiza's detention in Cameroon from 4 March 1997 until his transfer to the ICTR's Detention Unit on 19 November 1997 was *triggered* by an *official request* of *the ICTR Prosecutor*. The Prosecution in addition makes reference to *The Prosecutor vs. Rwamakuba*, ICTR-98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, 12 December 2000, at paras. 30 and 33.

[46] First *Barayagwiza* Appeals Decision, *supra* footnote 45, at paras. 54-57, and 61.

[47] See *The Prosecutor vs. Dragan Nikolić*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, at paras. 28-33. See also *The Prosecutor vs. Barayagwiza*, ICTR-97-19-AR72, Decision, 31 March 2000, at para. 71. The Prosecution notes that the jurisprudence of the *ad hoc* Tribunals requires that the violation of the rights be of *"egregious*

Article 59 proceedings

17. Thomas LUBANGA DYILO was arrested for and surrendered to the Court in compliance with the requirements as outlined in Article 59 of the Statute and Rule 117. In particular, the allegations that the proceedings pursuant to Article 59 of the Statute were not conducted before the competent judicial authorities and that Thomas LUBANGA DYILO was not served the arrest warrant at the time of his arrest in the DRC lack a factual basis.

Competent judicial authorities

18. The arrest proceedings in the DRC pursuant to Article 59 of the Statute were conducted before the Auditeur Général, the competent judicial organ of the DRC.[48] In preparation of, at the time, *possible* future arrest and surrender proceedings, the competence of the Auditeur Général was subject to discussions in January and February 2006 between the OTP and the DRC authorities. A report submitted at the request of the OTP by the DRC authorities,[49] identifying, with reasons, the Auditeur Général as the competent organ within the DRC judicial system to conduct the Article 59 arrest and surrender proceedings, formed the basis for discussions between

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nature" for the extraordinary remedy of release to be granted. – The Prosecution furthermore refers to the Decision of the ICTR Appeals Chamber in the case of *Semanza vs. The Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, at paras. 125 and 129.

[48] As stated in the REDACTED.

[49] RAPPORT INTERIMAIRE DE CONSULTANCE, 26 December 2005, attached as confidential Annex 6. Professor LUZOLO Bambi Lessa, who provided and signed the Report, was recruited by the OTP in November 2005 for two months as a consultant for the specific purpose to provide the OTP with a comprehensive and accurate overview of the DRC procedures in respect of the Article 59 proceedings. Professor LUZOLO Bambi Lessa is a professor of law at the University of Kinshasa, a barrister in the DRC, the former President of the *Commission Permanente de Réforme du Droit Congolais* and a current member of the same commission, and a member of the *Collège Juridique* of the Cabinet of the President of the Republic.

the DRC authorities and the OTP on 12 and 21 January 2006, and between the DRC authorities and the OTP and the Registry on 7 and 9 February 2006. At the occasion of these discussions, the DRC authorities confirmed the competence of the Auditeur Général.

The arrest warrant has been served

19. The Defence's allegation that Thomas LUBANGA DYILO was not served with the ICC arrest warrant "on Congolese territory"[50] in the course of the proceedings pursuant to Article 59 of the Statute, is lacking a factual basis:

    (i) By its 24 February 2006 "DEMANDE D'ARRESTATION ET DE REMISE DE M. THOMAS LUBANGA DYILO ADDRESSÉE À LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO"[51] (24 February 2006 Order), the Pre-Trial Chamber ordered[52] the Registrar to attach the following documents[53] to the request handed over to the DRC authorities: (a) A copy of the arrest warrant against Thomas LUBANGA DYILO of 10 February 2006, (b) a copy of the Decision of the Pre-Trial Chamber of 10 February 2006,[54] (c) a copy of the relevant provisions of the Rules of Procedure and Evidence in a language Thomas LUBANGA DYILO understands and speaks, and (d) any further document that may be needed by the national authorities to

[50] See Application, at para. 26.
[51] DEMANDE D'ARRESTATION ET DE REMISE DE M. THOMAS LUBANGA DYILO ADDRESSÉE À LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO, 24 February 2006.
[52] See 24 February 2006 Order, at pages 4 and 5.
[53] In French language, the language chosen by the DRC.
[54] Which is the "Decision on the Prosecutor's Application for Warrant of Arrest" (10 February 2006 Decision).

perform the surrender. In addition, the Pre-Trial Chamber ordered[55] the Registrar to ensure that Thomas LUBANGA DYILO receive a copy of the arrest warrant and of the relevant provisions of the Rules of Procedure and Evidence. Furthermore, the Pre-Trial Chamber ordered[56] the Registrar to ensure that Thomas LUBANGA DYILO be informed at the time of his arrest of his statutory rights.

(ii) On 14 March 2006, the Registrar handed over, *inter alia*, the arrest warrant against Thomas LUBANGA DYILO to the competent DRC authorities.[57]

(iii) REDACTED states that Thomas LUBANGA DYILO "was notified of the warrant of arrest by the judicial Congolese authorities on 16 March 2006".[58] REDACTED explicitly states that all materials attached to the Court's Request were provided to Thomas LUBANGA DYILO. Attached to the Court's Request was the arrest warrant. The Prosecution draws the attention of the Pre-Trial Chamber to the fact that Thomas LUBANGA DYILO signed the REDACTED,[59] and neither he nor his legal representative made any corrections or comment to the document.

(iv) The REDACTED of 16 March 2006[60] explicitly states: REDACTED.

20. This series of events show that Thomas LUBANGA DYILO was provided with the Court's arrest warrant against him, together with all other materials as requested by the Pre-Trial Chamber's 24 February 2006 Order, on 16 March

[55] See 24 February 2006 Order, at page 5.
[56] See 24 February 2006 Order, at page 5.
[57] REDACTED.
[58] REDACTED.
[59] REDACTED.
[60] REDACTED.

2006, and thus in the context of the proceedings pursuant to Article 59 of the Statute.

Information about the charges

21. The Prosecution has noted with surprise the statement of the Defence that "the Applicant has ... been detained for more than two months without being informed promptly of the cause of the charges against him".[61]

22. This statement is, as known by both Counsel for the Defence and Thomas LUBANGA DYILO, grossly incorrect. Thomas LUBANGA DYILO is comprehensively informed about the charges against him. Article 67(1)(a) of the Statute is fully complied with:

    (i) The arrest warrant served on Thomas LUBANGA DYILO on 16 March 2006 details the charges, including the main underlying facts, and provides for the legal qualification of the crimes.

    (ii) Defence and thus Thomas LUBANGA DYILO have access to the Pre-Trial Chamber's 10 February 2006 Decision.[62] The 10 February 2006 Decision provides, though redacted and formatted, substantial additional details on the underlying facts of the charges.

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[61] See Application, at para. 29.

[62] The Decision was formatted and redacted by the Pre-Trial Chamber by its 24 February 2006 "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo" (24 February 2006 Decision), noting, *inter alia*, "articles 57(3)(c), 67(1) and 68(1) of the Rome Statute, Rules 87(2)(c) and 88(4) of the Rules of Procedure and Evidence" - thus aspects of the protection of victims and witnesses -, and *considering, inter alia*, that Thomas LUBANGA DYILO "has right of access to a readable version of the part of the Decision that refers to the case against him ...". On 17 March 2006, the Pre-Trial Chamber reclassified the 24 February 2006 Decision and the formatted and redacted version of the 10 February 2006 Decision as public.

(iii)Furthermore, and in particular, Defence and thus Thomas LUBANGA DYILO have access[63] to the Prosecution's 12 January 2006 Application. The 12 January 2006 Application contains, though redacted and formatted,[64] in compliance with Article 58(2)(b) of the Statute "[A] concise statement of the facts which are alleged to constitute those crimes". It provides furthermore, as requested by Article 58(2)(d) of the Statute, "[A] summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes." This information is very detailed in respect of the facts of the crimes for which the Prosecution considers Thomas LUBANGA DYILO criminally responsible.[65]

Aspects in the Application that have no direct bearing on the determination on the Application

23. In the Prosecution's view, the statements made by the Defence in respect of disclosure and the conditions in the Detention Centre have no direct bearing on the Application. In light of the fact that the statements made by the Defence are factually incorrect, the Prosecution nevertheless addresses these statements as follows:

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[63] The formatted and redacted version of the 12 January 2006 Application was reclassified as "confidential" on 22 March 2006.

[64] In compliance with the 24 February 2006 Decision, at page 6, the Prosecution has redacted and formatted the 12 January 2006 Application. The Prosecution notes that the same considerations of the Pre-Trial Chamber as detailed in footnote 62 above did apply.

[65] REDACTED.

Disclosure

24. The Prosecution has noted, again with surprise, the statement of the Defence that "the Prosecutor still has not disclosed any evidence of a strictly incriminating nature that is of use to the Defence".[66] This allegation is - unfortunately again - grossly neglecting the facts.

25. The Prosecution makes reference to the extensive information it has provided to the Pre-Trial Chamber and Counsel for the Defence in the course of the 24 May 2006[67] closed session Court hearing on its past disclosure activities, the current status of disclosure and the plans of the Prosecution to ensure continued compliance with its disclosure obligations in future. As part of this information, the Prosecution has informed the Pre-Trial Chamber[68] that it has disclosed, to date, REDACTED.[69]

26. Furthermore, on 2 June 2006 and on 9 June 2006, the Prosecution has, pursuant to Rule 77, provided for inspection of a total of six documents, comprised of 23 pages.

27. In addition, REDACTED. This information formed the basis for the Single Judge to outline the future disclosure process between the Parties in the "Decision on the Postponement of the Confirmation Hearing and the

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[66] See Application, at para. 29.

[67] The Prosecution realizes that the Court hearing took place the day *after* the filing of the Application. Nevertheless, Defence, having received the disclosure materials at various disclosure meetings prior to the Court hearing, was aware of the facts forming the basis for the information the Prosecution had provided to the Pre-Trial Chamber at the occasion of the hearing.

[68] See (English) transcript of the 24 May 2006 Court hearing, at pages 18 to 19.

[69] Whilst the Prosecution would be prepared to in the instant public filing provide further information on its past disclosure activities, having ensured compliance with its statutory obligations, it realizes that the 24 May 2006 Court hearing was a closed session Court hearing. Consequently, the Prosecution is not in a position to in a public filing include this information.

Adjustment of the Timetable set in the Decision on the Final System of Disclosure".[70]

28. As the Prosecution has complied in the past with all Court decisions on disclosure, it will do so in future, fully discharging its respective statutory duties.

Conditions of Thomas LUBANGA DYILO's detention

29. Pursuant to Regulation 90, it is the Registry that has the responsibility for all aspects of the Detention Centre.[71] Accordingly, the Prosecution refrains from making observations on the conditions of Thomas LUBANGA DYILO's detention.

30. The Prosecution has taken note of the contents of the REDACTED. In the Prosecution's view, based on the information provided, the conditions in which Thomas LUBANGA DYILO is detained are in compliance with the law.

31. The Prosecution explicitly confirms the observations in the REDACTED in respect of the OTP agreement - after having carefully balanced possible security concerns with Thomas LUBANGA DYILO's legitimate interest to have a person to talk to - to allow contact between Thomas LUBANGA DYILO and REDACTED.[72]

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[70] Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure, 24 May 2006.
[71] See also 2 June 2006 Order, at page 3.
[72] See Registry's 5 June 2006 Submission, at page 4.

Public formatted and redacted version

32. Due to aspects in the present submission that address matters contained in confidential filings and information that was provided in closed session Court hearings, the Prosecution has filed the present submission as a "Confidential" document. The Prosecution will file a public formatted and redacted version as soon as practicable.

Request

33. In light of the foregoing reasons, the Prosecution requests the Pre-Trial Chamber to reject the Application.

Fatou Bensouda
Deputy Prosecutor (Prosecutions)

Dated this 13th day of June 2006
At The Hague, The Netherlands