Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **23 May 2006**

PRE-TRIAL CHAMBER I

Before: **Judge Sylvia Steiner, Single Judge**

Registrar: **Mr Bruno Cathala**

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

Public

APPLICATION FOR RELEASE

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

Defence Counsel
Mr Jean Flamme

Legal Assistant
Ms. Veronique Pandanzyla

1. BACKGROUND

1.

On 13 January 2006, the Office of the Prosecutor filed an application for the issuance of a warrant of arrest against Mr Thomas Lubanga Dyilo.

On 20 January 2006, Pre-Trial Chamber I invited the Prosecution to submit supporting material and convened a hearing on the application, which was held on 2 February 2006.

On 25 January 2006, the Prosecution submitted information and materials in a document entitled "Prosecution's Submission of Further Information and Materials".

In filing a document entitled "Prosecution's Submission of Further Information and Materials" on 27 January 2006, the Prosecution presented further information and materials.

On 2 February 2006, an *ex parte* hearing with the Prosecution was held in closed session to address a number of questions arising from the Prosecution's application.

In its decision of 10 February 2006, Pre-Trial Chamber I issued a warrant of arrest against Mr Thomas Lubanga.

2.

In its order of 24 February 2006, Pre-Trial Chamber I requested the Democratic Republic of the Congo to arrest Mr Thomas Lubanga Dyilo and surrender him to the Court.

3.

Mr Thomas Lubanga Dyilo travelled to Kinshasa in July/August 2003 in connection with the policy of reconciliation and integration of the political forces in Ituri into national politics at the invitation of the national government and the international community.

Nonetheless, he was deprived of his liberty when he arrived in Kinshasa and was placed under house arrest from 13 August 2006 and prohibited from leaving the town.

No arrest warrant was issued against him. No order was issued in this respect.

He was imprisoned at the *Centre pénitencier et de rééducation de Kinshasa* on 2 March 2005.

No arrest warrant was served on him at that time or subsequently. Two supposed “arrest warrants” appear in the case-file:

- the document dated 19 March 2006 for “endangering national security”, bearing no confirmation of receipt signature,
- the document dated 29 March 2006 for “murder and unlawful detention followed by torture,” bearing no confirmation of receipt signature,

During his detention in the DRC, he did not appear before an *auditeur militaire* each month, as required by military law, or where appropriate, *quod non*.

4.

On 16 March 2006, the *Auditeur General* of the Congolese Armed Forces signed a warrant for removal addressed to the Director of the *Centre pénitencier et de rééducation de Kinshasa* requesting that the applicant be taken to the *Auditorat Général* of the DRC Armed Forces.

5.

On 16 March 2006, a record of service of the ICC Prosecutor’s request was drawn up by the *Premier Avocat Général* of the DRC Armed Forces.

The disposition of the record reads as follows:

> “*FOR THESE REASONS,*
>
> *notify as of this day Mr Thomas Lubanga Dyilo of our decision to accede to the ICC request for:*
>
> - *his arrest*
> - *his surrender to the ICC*
> - *and the identification, tracing, freezing and seizure of his property and assets*
>
> *and, so that the party concerned may not plead ignorance, present to him the said request and all supporting materials for him to be apprised thereof*”.

6.

On 16 March 2006, the applicant appeared before the P*remier Avocat Général* of the DRC Armed Forces.

On that occasion, the applicant’s lawyer submitted a brief raising a number of challenges, including:

- arbitrary detention with no judicial examination phase against him
- fact that he was never heard by any Congolese court

Decision no. 001/2006 of 16 March 2006 issued by the *Auditeur Général* of the DRC Armed Forces reproduces word for word the reply of his *Auditorat*, represented by his P*remier Avocat Général*:

> *"- as regards the arbitrary detention, that such was warranted by the existence of serious, grave and corroborating indicia against the accused and the risk that he might abscond;*
>
> *- that if he was not heard by any Congolese court, it was because his case was still investigated by the state prosecution officer;*
>
> *All of which means that the service was completed by the signature of the service record by the accused and his counsel"*

The decision rules as follows:

> *FOR THESE REASONS*
>
> *Find the challenges raised by the defence admissible but without merit; thereby dismiss them; decide to accede to the ICC request for:*
>
> *- the arrest of Mr Thomas Lubanga Dyilo;*
> *- his surrender to the ICC;*
> *- the identification, tracing, freezing and seizure of his property and assets;*
>
> *Further decide to close the legal proceedings against the accused by the* Auditorat Général *in order to facilitate the joinder of the proceedings at the ICC and due compliance with the* ne bis in idem *principle.*
>
> *Whereupon we hereby transmit to the ICC all the certified true photocopies of the documents in case file RMP No. 0123/NBT/-05 opened in this regard.*

7.

The applicant has been imprisoned at Scheveningen prison since 17 March 2006. He is being detained in isolation and is unable to interact with his fellow detainees.

Despite the Defence's repeated request for the disclosure of the Prosecutor's case file, in particular in its request of 20 March 2006 and its letter of 23 March 2006, in keeping with rules 76 and 77, the Prosecutor has to date failed to disclose his case file and more specifically the materials referred to in the 20 March 2006 request or the subsequent materials provided to Pre-Trial Chamber I for the purposes of obtaining the issuance of the arrest warrant.

2. MERITS

2.1. Unlawful detention in the DRC prior to 16 March 2006

8.

Article 17 of the Congolese Constitution states:

> *A person's individual freedom shall be guaranteed. This shall be the rule and detention shall be the exception.*
>
> *A person may be prosecuted, arrested, detained or convicted only under the law and in the forms which its provides*

Article 18 of that Constitution states:

> *Any person arrested must be informed forthwith of the reasons for his arrest and of any charges against him in a language which he understands.*
>
> *He must be informed of his rights forthwith. Any person kept in police custody shall have the right to contact his family or lawyer immediately.*
>
> *The period spent in police custody may not exceed 48 hours. Upon expiry of this period, any person in custody must be released or made available to the competent judicial authority.*

Article 19 (2) states:

> *All persons shall be entitled to have their case heard by a competent judge within a reasonable time*

These rules may also be found in article 9 of the International Covenant on Civil and Political Rights:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right **to compensation**.

The European Convention on Human Rights (article 5) and the American Convention on Human Rights (articles 7 and 25) contain similar provisions.

In an advisory opinion, the Inter-American Court stated on the issue of whether the right of *habeas corpus* could be suspended in exceptional situations that: "in order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane or degrading punishment or treatment."[1]

The Defence maintains that there existed no situation within the DRC (insofar as it existed in Kinshasa at the time, *quod non*) that justified suspending the legal safeguards against arbitrary arrests and unlawful detention.

9.

These provisions were not respected.

The applicant was not informed of the grounds for his arrest either when he was deprived of his liberty on 13 August 2003 or when he was imprisoned on 2 March 2005.

No warrant of arrest was served on him. No case file was made available to him. No judicial examination was conducted. He was not therefore informed of the grounds

[1] Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).

for his arrest or of the charges against him. He was kept in detention arbitrarily for over 18 months.

Furthermore, the applicant was not brought before the competent judicial authority within the 48 hour time-limit.

Alternatively, even if the documents entitled "arrest warrant" are considered valid and as having been served upon the applicant, note must be taken of the fact that the charges are not clearly set out therein:

- the two arrest warrants specify completely different charges which, furthermore, also differ from those specified in the documents entitled "decision on extension of provisional detention" in which "genocide" and "crimes and against humanity" are stated;
- the two supposed arrest warrants do not set out any facts.

It follows that the applicant was never informed of the charges against him or of the reasons for those charges.

His arrest and subsequent detention were therefore unlawful.

10.

Additionally, the applicant was referred to the **military judicial authorities**.

There was no basis in law for doing so. Mr Thomas Lubanga Dyilo was president of the UPC (*Union des Patriotes Congolais*) political party, was never a soldier either in the official Congolese army or, insofar as it is relevant, in the FPLC. He has no rank and, for that matter, was never integrated into the FARDC (official Congolese army) as was for instance, the FPLC's former chief of staff, who now holds the rank of general in the FARDC.

Moreover, the judicial identity record signed by the *Premier Avocat Général* states his occupation:

- *politician*
- *co-founder and national president of the UPC, a party recognised by the Ministry of the Interior. Ministerial order no. 25/2004 dated 2/7/2004*

Insofar as the military authorities unlawfully deprived him of his liberty, even though they had no jurisdiction over him, the deprivation his of liberty was unlawful.

With regard to applicable case-law, the European Court of Human Rights examined in the case of Öcalan v. Turkey[2] whether the inclusion of a military judge as a member of a court that is to try a non-military accused breached the rights of the accused to a fair and impartial trial. The Court observed that it had been consistently held that certain aspects of the status of military judges sitting as members of the state security courts made their independence from the executive questionable (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 68; and *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII, § 39).[3]

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[2] Case of Öcalan v. Turkey (Application No. 46221/99), 12 May 2005 (Grand Chamber): The relevant paragraphs are as follows:
112. The Court has consistently held that certain aspects of the status of military judges sitting as members of the State Security Courts made their independence from the executive questionable (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 68; and *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII, § 39).
113. It is understandable that the applicant – prosecuted in a State Security Court for serious offences relating to national security – should have been apprehensive about being tried by a bench which included a regular army officer belonging to the military legal service. On that account he could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case (see, among other authorities, *Iprahim Ülger v. Turkey*, no. 57250/00, 29 July 2004).
114. As to whether the military judge's replacement by a civilian judge in the course of the proceedings before the verdict was delivered remedied the situation, the Court considers, firstly, that the question whether a court is seen to be independent does not depend solely on its composition when it delivers its verdict. In order to comply with the requirements of Article 6 regarding independence, the court concerned must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings, namely the investigation, the trial and the verdict (those being the three stages in **Turkish** criminal proceedings according to the Government).
115. Secondly, when a military judge has participated in one or more interlocutory decisions that continue to remain in effect in the criminal proceedings concerned, the accused has reasonable cause for concern about the validity of the entire proceedings, unless it is established that the procedure subsequently followed in the state security court sufficiently disposed of that concern. More specifically, where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.
116. In its previous judgments, the Court attached importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see, among other authorities, *Incal,* cited above, § 72). Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30).
117. In the instant case, the Court notes that before his replacement on 23 June 1999 the military judge was present at two preliminary hearings and six hearings on the merits when interlocutory decisions were taken. It further notes that none of the decisions were renewed after the replacement of the military judge and that all were validated by the replacement judge.
118. In these circumstances, the Court cannot accept that the replacement of the military judge before the end of the proceedings disposed of the applicant's reasonably held concern about the trial court's independence and impartiality. Insofar as the decision or reasoning in the case of *Imrek v. Turkey* may be regarded as inconsistent with this conclusion, the Grand Chamber would not follow the decision and the reasoning in that case.
Consequently, there has been a violation of Article 6 § 1 on this point.
[3] At para. 112.

The Court found that it was important to note, firstly, that the accused had been prosecuted on the basis of charges relating to national security and secondly, that he was nonetheless being tried by a bench made up of members of the armed forces. With respect to the first point, the Court found that the accused had a legitimate reason to fear that the state security court might be inclined to allow itself to be influenced by considerations which had nothing to do with the nature of the case (see also *Iprahim Ülger v. Turkey*, no. 57250/00, 29 July 2004).[4]

The applicant points out that the case-file contains an arrest warrant that includes the charge of endangering national security, which proves that the DRC military authorities put everything together.

On the second point, the Court held that the fact that a civilian (see identity record) is tried by a court composed **in part** of members of the armed forces seriously jeopardises the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, Piersack v. Belgium, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30).[5]

The court found that the rights of the accused had been violated within the meaning of article 6 (1) of the Convention. As such, that the applicant, a civilian, was brought before the military courts suffices to sow doubt as to the impartiality of the "judicial examination" (insofar as it existed) and, in any case, the charges against him (insofar as they existed).

The subsequent referral of his case-file to the ICC cannot "cleanse" the proceedings and "wash away" the initial violations of the rights to a fair and impartial trial.

11.

The Congolese Code of Criminal Procedure provides that the state prosecution officers handling a complaint may, on the basis of a provisional arrest warrant, place the accused in detention for a period not exceeding 5 days provided that he be brought before the competent judge so that the latter may rule on the detention on remand so long as the following conditions are met (article 28(2)):

> "*if there exist serious indicia of the accused's guilt and the facts appear to constitute an offence punishable under the law by a sentence of no less than six months' penal servitude*. (art. 27.1)"

Upon expiry of the five-day period, detention on remand may be extended only by decision of the president of the *tribunal de grande instance* or the *juges de paix* by an order rendered in chambers.

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[4] At para. 113.
[5] At para. 116.

These provisions are consistent with articles 5(3) and 6(1) of the European Convention on Human Rights.

The European Court has ruled that the purpose of article 5(3) is to preclude the provisional detention of an accused being extended beyond a reasonable time limit in the pre-trial phase or during the trial itself.[6]

The rights of an accused become active at the very moment he is deprived of his liberty.[7]

In this case, it must be noted that the applicant has been deprived of his liberty and cut off from his family for 33 months.

12.

At no point has the applicant appeared before the competent judge. He was therefore held arbitrarily in detention in the DRC for 30 months.

13.

During this time, no charge was brought against him and no case file was prepared or made available to him.

The file "*Auditeur Général* v. Kisembo et al" appended to the arrest documentation is not known to the applicant.

Furthermore, these documents cannot be taken into consideration. They were provided to the Defence on CD-ROM.

The file is handwritten and the electronic copies are often illegible.

Until such time as legible photocopies are provided to the Defence, this file cannot be taken into consideration, insofar as it is relevant to the applicant (*quod non*) and, further, was never made available to the accused whilst he was in detention.

The applicant's detention must therefore be ruled unlawful in accordance with article 18 of the Congolese Constitution and the relevant international norms, in particular, articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[6] *Wemhoff v. Germany* (2122/64) [1968] ECHR 2 (27 June 1968).
[7] *Wemhoff v. Germany* (2122/64) [1968] ECHR 2 (27 June 1968).

14.

Subsidiarily, and insofar as the Code of Military Justice is applicable to the applicant (*quod non*) the following observations need to be made.

The relevant articles of the code stipulate:

> ***Article 205***
>
> *Detention of persons is the exception. Liberty is the rule.*
>
> *Nonetheless, when the military examining judge authorised to initiate proceedings considers that the act constitutes an offence punishable under law by a sentence of no less than one year's penal servitude and there are serious and sufficient indicia of guilt, he may order legal measures to restrict the freedom of any person subject to the jurisdiction of the military courts or provisionally detain that person for a period not exceeding fifteen days.*
>
> ***Article 206***
>
> *An accused person with respect to whom there are serious and sufficient indicia of guilt may nevertheless be placed in provisional detention when the act constitutes an offence punishable by a sentence less than one year but more than six months if there is reason to believe that he will abscond, if his identity is unknown or uncertain or, where due to grave and exceptional circumstances, it is in the overriding interests of public safety that he be detained.*
>
> *Should, upon expiry of the fifteen-day period, this authority considers that there is no cause to uphold the arrest warrant, it shall order that it be withdrawn.*
>
> ***Article 207***
>
> *Restriction of freedom shall be the decision off the* auditeur militaire, *who shall issue an order determining the conditions and procedures thereof. The commander of the unit of which the accused is a member shall be kept informed.*
>
> ***Article 208***
>
> *When proceedings have been ordered, imprisonment and detention may be ordered only on the basis of a provisional arrest warrant issued by the* auditeur militaire.
>
> *The provisional arrest warrant shall be valid for fifteen days.*

Article 209

If the judicial examination of the case must last longer than fifteen days and the military examining judge considers it necessary to keep the accused in detention, he shall refer the matter to the auditeur général. *The* auditeur général *shall rule on the provisional detention and decide whether to grant one month's extension; this decision shall be renewed on a monthly basis, if the duly justified requirements of the examination so require.*

Nevertheless, detention on remand may be extended only once where the act appears to constitute only an offence for which the sentence provided for by law is no greater than two months' penal servitude.

Where the prescribed sentence is equal to or greater than six months, detention on remand may not be extended beyond twelve consecutive months.

Once this period has elapsed further extension may be authorised by the competent court.

15.

These provisions have not been respected.

At the time the applicant's liberty was restricted, on 13 August 2003, no order was issued to this end by the *auditeur militaire*, meaning that placing him under house arrest was wholly arbitrary. The applicant has been deprived of any contact with his family in the DRC ever since.

Furthermore, the commander of the unit of which the applicant is alleged to be a member (*quod non*) was not kept informed.

16.

No arrest warrant was served upon the applicant either on 13 August 2003 or 2 March 2005 or subsequently. The case file does not even contain any document relating to the period prior to 2 March 2005.

Insofar as they are held to be valid and to have been served, the "arrest warrants" in the case file are not dated with the day of the arrest but with a later date. It is noteworthy that the documents entitled decision on extension of provisional detention which concern the crimes of genocide and crimes against humanity are all dated the second of the month, which confirms that the date of arrest was 2 March 2006, since the first of these documents is dated 2 April 2006.

17.

Neither on 2 March 2006 or at any time subsequently has an order been issued by the *auditeur militaire*.

The applicant did not appear before the *auditeur militaire* each month, as should have been the case.

The documents entitled Decision on extension of provisional detention state *in fine*:

> Decide that detention shall be extended for a month subject to the following conditions:
>
> 1. The examining magistrate shall make progress with the proceedings within the following thirty days;
> 2. He shall also keep us abreast of the documentation filed as part of the prosecution or examination;
> 3. **Lastly, he shall bring the accused before us within the next thirty days.**

Moreover, **no investigation** of the applicant was carried out. The Prosecutor at the International Criminal Court acknowledged this at the hearing of 2 February 2006 since he stated there that the case file in the DRC was **empty and that no judicial examination was under way** (p. 39).

Insofar as they are valid, *quod non* given that the applicant made no appearance, the documents entitled Decision on extension of provisional release are lacking for 2 January 2006 onwards, as of which date, it is argued in the alternative, that Mr Thomas Lubanga Dyilo in any case had to be released.

These documents are also lacking from August 2005 onwards with respect to the proceedings for endangering national security.

18.

Following 12 months of detention starting on 13 August 2003 and subsequent to 2 March 2005, the extension of detention on remand was not authorised by the competent court and no hearing was held nor any order issued in this respect.

19.

The *premier avocat général* of the Armed Forces, Colonel Lukanzu Mputu, **acknowledged** that the detention was arbitrary and unlawful when he asserted that it was ***warranted*** by the *existence of serious, grave and corroborating indicia against the accused and that his absconding was to be feared* and *that he* ***had not been heard by any***

Congolese court *because his case was still in the pre-jurisdictional examination phase, being conducted by the state prosecution officer.* [8]

The "*justification*" given for the arbitrary arrest and detention and the lack of any appearance before the competent judge had no basis in law. Further, it does not fall under any exception.

The 16 March 2006 appearance before the *auditeur général* of the FARDC was **out of time**. Furthermore, he was not **competent** to handle the file. On a final point, his decision, which reproduces the arguments of counsel for the applicant in its reasons, failed to set out the reasons why the arguments put forward were dismissed.

The only action that could therefore be taken with respect to the applicant was **to release him**.

His subsequent surrender to the International Criminal Court is therefore unlawful as it is based on his arbitrary arrest and unlawful detention under national law.

20.

The applicant should have been released in the DRC before being lawfully arrested in accordance with current DRC legislation for the purposes of the international arrest warrant.

The last part of article 89 (1) of the Rome Statute is clear in this respect:

> "States Parties shall, **in accordance with** the provisions of this Part and **the procedure under their national law**, comply with requests for arrest and surrender."

The fact that the applicant did not appear before the competent judge meant *inter alia* that he was unable to exercise his rights with respect to the violation of the Congolese norms and to request his release and to exercise his rights under article 89 (2) of the Rome Statute, since he was entitled to argue the principle of *non bis in idem* before his country's **national** courts.

By ruling that the ICC had jurisdiction and that the case was admissible, the Pre-Trial Chamber found that there were serious grounds to believe that the applicant might be released in the forthcoming weeks since under Congolese law detention must be confirmed by a judge after a period of 12 months,[9]

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[8] Decision of 001/2006 of 16/3/2006.

[9] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and Incorporation of Documents into Record of Case of Mr Thomas Lubanga Dyilo dated 24 February 2006.

The Chamber also cited as a reason to believe that he might flee the fact that the applicant had expressed reservations about the "judicial examination" conducted into him.

The Defence is deeply concerned by such reasoning.

It follows that the Chamber took into consideration the possibility that the applicant had been arbitrarily arrested and that he might subsequently be released. That this reasoning formed part of the ICC's decision to issue an arrest warrant is tantamount to saying that the ICC did not meet its obligations as set out in this application, that is, to ensure that arrests and detentions effected under national law are lawful.

The fact remains that the applicant's transfer to the international court has made it impossible for him to apply to the competent national judge for release.

He was thus deprived of one of his fundamental rights by his very arrest by an international body.

2.2. Violation of the Rome Statute

21.

Article 55 (1) (d) of the Statute provides that:

> "*In respect of an investigation under this Statute, a person … d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute*."

The applicant's arrest and detention were **acknowledged** to be arbitrary by the Congolese judicial authorities, where applicable.

Article 55 (1) (d) of the Statute has therefore been violated.

The Prosecutor of the ICC, who has unlimited access to ongoing proceedings relating to crimes within the ICC's jurisdiction in accordance with article 36 of the cooperation agreement between his Office and the DRC, has evidently taken note of the issue of unlawfulness raised by the applicant and, acting counter to the relevant provisions of law, has decided to disregard that unlawfulness.

Furthermore, the Prosecutor was invited by Pre-Trial Chamber I in its decision of 9 March 2006 concerning supporting materials in connection with the Prosecution's application, to provide more information about the proceedings in the DRC.

He has thus rendered the arrest itself, which was carried out at his request by the International Criminal Court, illegal.

22.

Article 59 provides that:

> *"1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question **in accordance with its laws** and the provisions of Part 9.*
>
> *2. A person arrested shall be brought promptly before the **competent** judicial authority in the custodial State which shall **determine**, in accordance with the law of that State, that:*
>
> *(a) The warrant applies to that person;*
> *(b) The person has been arrested in accordance with the proper process; and*
> *(c) The person's rights have been respected.*
>
> *3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender."*

A flagrant violation of these provisions has occurred.

- the applicant was **not** arrested in accordance with its laws,
- he did **not** appear before the competent judicial authority,
- the authority before which he appeared disregarded the fact that the applicant had not been arrested according to the normal procedure, in spite of the fact that this was acknowledged in the reasons given in its order,
- that same authority failed to have regard for the fact that the applicant's rights had not been respected.

One of the direct consequences of the fact that the applicant did not appear before the competent authority in accordance with the procedures laid down is that this made it impossible for him to request provisional release before his country's courts.

23.

Article 89 (1) of the Statute has been violated, as argued above.

It follows that the applicant's detention by the International Criminal Court is unlawful since his arrest was effected with no regard for the articles of the Statute of the Court.

Mr Thomas Lubanga Dyilo must therefore be released.

2.3. Violation of the Rules of Procedure and Evidence

2.3.1. Service of the arrest warrant

24.

Rule 117 entitled "Detention in the Custodial State" stipulates:

> *" The Court shall take measures to ensure that it is informed of the arrest of a person in response to a request made by the Court under article 89 or 92. Once so informed, the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute. The documents shall be made available in a language that the person fully understands and speaks."*

The 16 March 2006 record of *service of the ICC Prosecutor's request* refers to the service of *our decision to accede to the ICC's request* upon the applicant.

and states that:

> *and, so that the party concerned may not plead ignorance, present to him the said request and all supporting materials for him to be apprised thereof.*

25.

It was therefore the primary duty of the Court to ensure that the applicant's detention in the DRC was lawful. It is clear that the Court did not fulfil this duty and did not verify the lawfulness of the proceedings relating to the arrest and detention of the applicant in the DRC.

On the contrary, it has of course allegedly taken the measures necessary to regularise the proceedings, to the extent that this was allegedly still possible.

26.

Furthermore, the Court evidently did not ensure that the arrest warrant it issued was served **on Congolese territory**.

In its title, the 16 March 2006 record refers only to *service of the ICC* ***Prosecutor's request*** and in its statement of reasons only to the *submission* of the **request** whereas the applicant had to **receive** a copy of the **arrest warrant** and not of the Prosecutor's request.

The *ratio legis* for effecting such service on the national territory of the party concerned is to ensure that he is in a position to be apprised of the charges brought against him by the ICC and to exercise all the rights set down, in particular, in article 89 (2) of the Statute and rule 117 **before departure from his national territory**.

The record of 16 March 2006 shows that the arrest warrant was not appropriately served on the applicant in a timely fashion and on the territory of the DRC.

Quite on the contrary, the arrest warrant was served only on 17 March 2006 outside the territory of the DRC.

As a result of these omissions it is clear that the applicant was unable to exercise all his rights on his national territory.

The violation of these fundamental rights renders the applicant's arrest null and void. He must therefore be released without any further delay.

2.3.2. Disclosure – rule 11

27.

In a request dated 20 March 2006, through his Duty Counsel, the applicant requested access to the Prosecutor's entire case file against him, and more specifically the:

- Prosecution's Application dated 13 January 2006 and the appended documentation,
- Documentation entitled *Prosecution's Submission of Further Information and Materials*
- Documentation entitled *Further Information and Materials.*

28.

In her order dated 23 March 2006, the single judge in Pre-Trial Chamber I decided that Duty Counsel must be given a list identifying each piece of incriminating or exculpatory evidence as soon as practicable and access to each piece of this evidence as soon as practicable.

That same order further established an **interim system** of disclosure pending the observations of the Prosecution and Defence.

29.

To date, the Prosecutor has not disclosed any evidence of a strictly incriminating nature that is of use to the Defence.

The documentation supplied to the Pre-Trial Chamber in support of the request of 13 January 2006 has not been disclosed.

The applicant has therefore been detained for more than two months without being informed promptly of the cause of the charges against him.

The Prosecutor has thus violated article 67 of the Statute, as rendered applicable by rule 121 to all persons against whom an arrest warrant has been issued.

He has unacceptably kept the applicant in ignorance of the cause of the charges against him, thereby manifestly preventing him from exercising some of his rights in respect of his arrest and detention.

Moreover, he has failed to discharge the duties placed upon him by the order of 23 March 2006.

2.4. Responsibility of the ICC

30.

The basic rights of Mr Thomas Lubanga Dyilo have been fundamentally violated. Even if these violations initially occurred in the DRC, the ICC Prosecutor must also be held responsible for the extended period the applicant spent in arbitrary detention in the DRC, in compliance with article 55 (1) (d) of the Statute and further to his failure to intercede in the DRC. This holds all the more true since he was aware that he would apply to the Court for the applicant's arrest.

Moreover, the ICC clearly has the duty not to endorse or assist in the violation of fundamental rules of international law.

31.

Article 1 of the European Convention on Human Rights imposes upon member states a general obligation to protect the relevant rights of all persons under their jurisdiction (see Loizidou v. Turkey):[10]

> "the concept of 'jurisdiction' within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. The Court has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects

[10] Judgment of 18 December 1996 (merits), *Reports of Judgments and Decisions* 1996-VI, pp. 2234-35, § 52.

> there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention."[11]

Whilst acknowledging the practical difficulties arising out of "de facto" situations, the Court found that States were not, for all that, relieved of their obligations.

States are obliged to employ all their legal and diplomatic resources to oblige foreign states and international organisations to safeguard the rights and freedoms guaranteed by the Convention.

In one specific instance, the European Court accepted that a transfer of the accused to the ICTY would have the effect of extending the period of time he spent in detention in his own country.[12]

32.

In its advisory opinion concerning the consequences of the construction of a wall in the occupied Palestinian territory the International Court of Justice explained that the violations at issue had the following consequences:

> "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."

This also finds its basis in article 53 of the Vienna Convention on the Law of Treaties.

Accordingly, States may not render assistance or contribute to a violation of a fundamental rule of international law.

Article 12 of the draft declaration on the responsibility of international organisations as drawn up by the International Law Commission stipulates that an international organisation which aids or assists a state or another international organisation in the commission of an internationally wrongful act must be held responsible if:

- the organisation does so with full knowledge of its actions
- the act would be wrongful if committed by that organisation[13]

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[11] At para. 314.

[12] *Naletilić v. Croatia*, Decision on Admissibility (4 May 2000), Application no. 51891/99).

[13] A/CN.4/L.666/Rev.1, 1 June 2005, Responsibility of International Organizations, Titles and Texts of the Draft Articles Adopted by the Drafting Committee on 27 May 2005, Part One: The Internationally Wrongful Act of an International Organization.

It follows that since the ICC's mandate as set down in the statute encompasses the prevention of crime, the Court may not simultaneously punish crimes such as unlawful detention and deprivation of liberty as war crimes and crimes against humanity and yet draw advantage from the "fruits" of the applicant's unlawful detention.

33.

The European Court's case-law is such that with respect to articles 5(3) and 6(1) of the Convention a state can be obliged to take into consideration *de facto* circumstances predating the time that the state concerned was supposed to commence applying the articles.

The Court's case-law may be applied by analogy to the present instance insofar as the ICC takes the view that the matter came under its jurisdiction only as of the date the applicant was transferred to The Hague.

In essence, the European Court found that even if a state may not, in the true sense, be held liable for violations predating the Convention's entry into force, the applicant's current position constitutes an **extension of a previous offence**. The ICTR ruled likewise.

See Mansur v. Turkey[14]
Kalashnikov v. Russia[15]
Prosecutor v. Barayagwiza[16]

In the latter case, the Appeals Chamber found:

> *" … even if fault is shared between the three organs of the Tribunal – or is the result of the actions of a third party, such as Cameroon – it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights."*[17]

And:

> *"While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April – 16 May 1996 and 4 – 10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in*

[14] Judgement of 23 May 1995, Case No. 14/1994/461/542.
[15] Judgment of 15 July 2002, Application No. 47095/99.
[16] Appeals Chamber Decision of 3 November 1999 (ICTR-97-19).
[17] At para. 73.

provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated."[18]

2.5 Conclusions

34.

Article 6 (2) of the European Convention on Human Rights stipulates that all accused shall be presumed innocent.

It follows that provisional detention is an absolute exception.

In the case The Prosecutor v. Barayagwiza, the ICTR Appeals Chamber found that the right of the accused to be brought promptly before a judge so as to be able to challenge his arrest and detention had been violated.

The Prosecutor argued that, in terms of appropriate remedy, consideration should be given as to whether the accused should be entitled to the issuance of an order calling for an expeditious trial or should receive credit for the time he spent in provisional detention.

The Appeals Chamber dismissed these arguments and ordered the immediate release of the accused[19].

FOR THESE REASONS,

MAY IT PLEASE PRE-TRIAL CHAMBER I

To order the release of Mr Thomas Lubanga Dyilo

On behalf of Mr Thomas Lubanga Dyilo
His lawyer,

/signed/

Jean FLAMME
Defence Counsel

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[18] At para. 85.
[19] Decision of the Appeals Chamber dated 3 November 1999, Case No. ICTR-97-19.

Done this 23 May 2006
In Gent