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Date: **24 August 2006**

PRE-TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public

**Observations of Victims a/0001/06, a/0002/06 and a/0003/06 Regarding the
Challenge to Jurisdiction Raised by the Defence in the Application of 23 May 2006**

The Office of the Prosecutor

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1. Introduction

1. In its decision of 24.7.2006, Pre-Trial Chamber I invited the victims to submit their observations regarding the challenge to the jurisdiction of the Court raised by the Defence under article 19 (2) (a) of the Statute, with particular reference to the following points:
 - i) the alleged illegal detention of Thomas Lubanga Dyilo by the DRC authorities before 16 March 2006, and
 - ii) the alleged irregularities in the subsequent arrest and delivery to the Court of Thomas Lubanga Dyilo in execution of the arrest warrant issued against him by Pre-Trial Chamber I on 10 February 2006.

2. In submitting an “application for release” dated 23.5.2006, the Defence requested the Chamber to order the release of Mr Thomas Lubanga Dyilo, without detailing the legal basis for the request.

3. In its submissions of 31.5.2006, the Defence recalled that it had not presented an application for interim release, but an “*application for release*¹”.

4. In its submissions of 10.7.2006, the Defence clarified the legal basis of its application, with particular reference to the jurisdiction of the Court: “*The request for release is **not** based on a challenge to jurisdiction, as the Prosecutor wrongly asserts. On the contrary, the Defence requests the Pre-Trial Chamber, **in the exercise of its authority**, to release the accused and to declare the public prosecution inadmissible, by applying the above-mentioned theory of abuse of process. The Defence has characterised its application from the beginning as an “application for release”. In view of the above-*

¹ Submissions of the Defence of 31.5.2006 relative to the Order of 29.5.2006, page 2

mentioned submissions, it extends the request to have the public prosecution declared inadmissible²".

5. Nevertheless, in its submissions of 17.7.2006, the Defence modified the legal basis of its application by defining it a "request for compensation" within the meaning of article 85 (1) of the Statute, but especially in re-characterising the scope of the application dated 10.7.2006 (initially formulated as a challenge to admissibility) to a challenge to jurisdiction, based more precisely on a lack of personal jurisdiction with regard to the accused³, which initiated proceedings in accordance with article 19 of the Statute.
6. At the very least, it appears that the Defence seems to be encountering serious difficulties in finding a legal basis for its application, which it is still refusing to characterise as an application for interim release within the meaning of article 60 (2) of the Statute.
7. An irregularity that was committed at the time of the arrest or detention of an accused person should not have any consequence on the jurisdiction of the International Criminal Court, in particular on the personal jurisdiction established by article 12 (2) (b) of the Statute which states that the Court may exercise its jurisdiction if the State which is a Party to the Statute and of which the person accused of the crime is a national has recognised the jurisdiction of the Court in accordance with paragraph 3 of the same article.
8. Even if the accused were not a Congolese national, the Court would nevertheless have jurisdiction on the basis of article 12 (2) (a) because the crimes of which the

² Defence Submissions of 10.7.2006, p. 8

³ Defence Submissions of 17.7.2006, para. 8

person is accused were committed on the territory of the Democratic Republic of the Congo.

9. No provision of the Statute states that the Court will lose its jurisdiction over such a person, even if that person was arrested or detained illegally, or even arbitrarily, which should cause any challenge to jurisdiction based on an irregularity committed at the time of the accused's arrest or detention to be rejected.
10. The legal representatives of the victims are therefore responding only in the alternative to the arguments developed by the Defence.
11. They recall that the personal interests of the victims are affected by a possible termination of the proceedings and/or release of the accused, which might create a risk of him re-offending in respect of the crimes of which he is accused, in particular, of reconstituting the forces of his militia by enlisting former child soldiers who have returned to their families or are being accommodated in reception centres for demobilised child soldiers, and that releasing the accused may permit victims or their family members to be intimidated and prevent them from receiving justice.

II. Alleged Illegal Detention of Thomas Lubanga Dyilo by the DRC Authorities Before 16.3.2006

12. In its application for release, the Defence refers to irregularities which, it alleges, render illegal the accused's detention in the DRC prior to 16.3.2006, in particular, violations of the Congolese Constitution, the Congolese Code of Criminal

Procedure, the Military Legal Code and the International Covenant on Civil and Political Rights.

13. The Statute of the International Criminal Court does not give it the authority to sanction a deprivation of liberty on the part of the national authorities outside an investigation by the Prosecutor and without a request of the Court being addressed to the State Party; the Court therefore does not have jurisdiction to control court process in a State Party.
14. Article 55 (1) (d) states that **in an open investigation under the Statute of the Court** a person 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 the Statute**.
15. The house arrest allegedly ordered against the accused as of 13.8.2003 and his detention in the *Centre Penitenciaire de Kinshasa* between 2.3.2005 and 16.3.2006 did not arise within the scope of an investigation initiated by the Court but resulted from decisions of the Congolese authorities alone, and cannot therefore be attributed to an organ of the Court.
16. Moreover, an **illegal** detention under national law is not necessarily **arbitrary** detention within the meaning of article 55 or article 9 of the International Covenant on Civil and Political Rights.
17. The application does not explain how the accused's arrest in the Congo could be considered arbitrary but only on which basis it could be considered illegal,

thereby merging the notion of arbitrariness according to the above-mentioned international instruments with the formal requirements of national law.

18. The victims have difficulty in expressing their views on the proceedings in the DRC, given that they do not have all the information in the file; nevertheless, they observe that although the provisions of the Transitional Constitution of 4.4.2003 in fact guaranteed the basic rights and freedoms more effectively than the Military Judicial Code, it must be noted that this Constitution came into being after the Military Judicial Code of 18.11.2002, and stated that *“Any law that is inconsistent with the present Constitution, insofar as such inconsistency has been established by the Supreme Court of Justice, shall be null and void”*⁴.

19. The Supreme Court of Justice of the DRC has never ruled on this issue, so that the unconstitutionality of some provisions of the military code cannot, unfortunately, be invoked.

20. Moreover, military justice apparently held that it has jurisdiction over the crimes ascribed to the accused, because, since the 1972 Code of Military Justice came into effect, only military courts have jurisdiction over war crimes, crimes against humanity, crimes of genocide and related crimes⁵.

21. Specific jurisdiction of military courts exists in other countries⁶, and does not itself constitute a violation of the rights of the Defence: this jurisdiction has been

⁴ Article 2, paragraph 2 of the Transitional Constitution, promulgated on 4.4.2003 and published in the Official Journal special edition in April 2003. See also article 162 of the new Constitution of 15 February 2006 which makes the Constitutional Court the sole judge of the constitutionality of a law.

⁵ Code of Military Justice of 1972 (repealed), articles 501 to 505.

⁶ In Switzerland, article 109 of the Military Criminal Code. See for example the Military Court of Cassation, judgement of 27 April 2001 in *Niyonteze*. Published in Sassoli and Bouvier, *Un droit dans la guerre?*, ed. ICRC, p.1758

confirmed in the Congolese Military Criminal Code of 18 November 2002, which came into force on 18 March 2003⁷, after the accused was arrested.

22. In judging the conditions of the accused's detention in the DRC, it is not possible to lose sight of the nature of the war crimes and crimes against humanity that were committed on the territory of the Democratic Republic of the Congo in recent years, in particular, those ascribed to the accused, which are so serious that any violations of the accused's procedural rights could not lead to a straightforward release or stop any proceedings making it possible to determine his responsibility.

23. The fact that some procedural guarantees were not respected could also be linked to the crisis situation of the Congolese judicial system, which was precisely one of the elements which led the Congolese government to refer the country's situation to the International Criminal Court, and which was taken into account by the Pre-Trial Chamber in its decision of 24.2.2006⁸.

24. At the time of the accused's arrest, the Democratic Republic of the Congo was in a state of internal armed conflict⁹ which could probably be viewed as a state of public emergency in accordance with article 4.1 of the International Covenant on Civil and Political Rights.

25. Since even the world's most stable countries have retained (in the European Convention on Human Rights) the possibility of derogating from certain rights of

⁷ Article 161 of the Military Criminal Code of 18 November 2002 states that "Where there is indivisibility or a relationship of offences with the crimes of genocide, war crimes, or crimes against humanity, military courts have sole jurisdiction". See also article 207.

⁸ ICC-01/04-01/06-8, paras. 34-35.

⁹ Ibidem, para.

persons arrested in times of emergency¹⁰, it would be outrageous and contrary to the aims of the Rome Statute if a person suspected of the gravest crimes committed in the Democratic Republic of the Congo could enjoy impunity because the country is experiencing difficulties in ensuring that its judicial system can function and also is respecting all the legal provisions in force.

26. In a situation of armed conflict, the rules governing the detention of a person accused of war crimes are to be judged more on the basis of the law of armed conflicts, and more specifically the 1949 Geneva Conventions and additional protocols, than on the basis of instruments ensuring human rights.

27. With reference to the detention of persons without trial on the Guantanamo base, the Chairperson of the Working Group on Arbitrary Detention and the Special Rapporteur of the Economic and Social Council write: *“The Chairperson of the Working Group and the Special Rapporteur would not use the term “enemy combatant”, they share the understanding that any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the lex specialis justifying deprivation of liberty which would otherwise, under human rights law as enshrined by article 9 of ICCPR, constitute a violation of the right to personal liberty.”¹¹*

¹⁰ European Convention on Human Rights, article 15

¹¹ Working Group on Arbitrary Detention, ECOSOC, Report of 15.2.2006, E/CN.4/2006/120, p.27. While noting a series of serious violations of the detainees, the Working Group does not recommend their release...

III. Alleged Irregularity in the Subsequent Arrest and Delivery to the Court of Thomas Lubanga Dyilo in Execution of the Arrest Warrant Issued Against Him by Pre-Trial Chamber I on 10.2.2006

28. The Defence first alleges that the execution of the arrest warrant issued by the Court is in some way flawed by the fact that it “benefited” from the irregularities that vitiated the accused’s detention in his own country.

29. In fact, the Democratic Republic of the Congo was obligated to deliver the accused to the Court, regardless of the legal or illegal nature of his detention and regardless of whether its domestic legislation was adhered to in the period preceding the issuing of the arrest warrant; it would even have been obligated to arrest him and deliver him to the Court if he had been free or if he had been detained arbitrarily by forces outside the State’s control.

30. Moreover, the outcome of the application for release itself was that before delivering the accused to the Court, the *Auditeur général* of the FARDC (Armed Forces of the DRC) decided *to close the legal proceedings initiated against the defendant by the Auditorat général so as to facilitate the joinder of the proceedings at the ICC level and the proper application of the “non bis in idem” principle.*

31. The term “close the proceedings” in this context manifestly does not mean closing the investigation on account of a procedural regulation; it means closing proceedings at national level, which necessarily also implies that the detention ordered within the context of national proceedings was ended.

32. While Defence Counsel writes in his application that “*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*¹²” it must be noted that this is indeed what happened: if a detainee released by a judicial authority must be arrested for another reason (in the present case, the warrant of the Court), it is not necessary to authorise him to exit the prison in order to arrest him subsequently on the outside, since one order for detention can replace another.
33. The victims’ representatives make reference to the Prosecutor’s response concerning the procedure for executing the Court’s warrant, but in any case, even a violation of the Statute or of the Rules of Procedure and Evidence (which did not take place) should not necessarily result in the end of proceedings or the release of the accused.
34. At the time of his arrest, the accused appeared before the *Premier Avocat Général* of the Armed Forces of the DRC (FARDC), the authority with jurisdiction to validate the request for delivery to the Court, and during the hearing, he was assisted by a counsel as set out in the application for release¹³.
35. According to the application itself, the applicant’s Counsel did not on that occasion contest the arrest warrant issued by the Court, but only the previous detention within the scope of the national judicial investigation.
36. On that occasion, the accused was entitled to invoke the “*non bis in idem*” principle and to request that his case be heard by the national courts in

¹² Application for Release, point 20

¹³ Application for Release, point 6

accordance with article 17 of the Statute and rule 117, which he manifestly did not do on that occasion¹⁴.

37. At Mr Thomas Lubanga Dyilo's first appearance, when the presiding judge questioned him about his delivery to the Court¹⁵ and verified whether he had been informed of the crimes ascribed to him¹⁶, in accordance with article 60 of the Rome Statute¹⁷, the responses leave no doubt as to the validity of the proceedings, which contradicts the Defence's claim that "[t]he applicant has therefore been detained for more than two months without being informed promptly of the cause of the charges against him"¹⁸.

38. In the alternative, the victims' representatives refer to the principle of "*male captus, bene detentus*"¹⁹ which has been consistently applied before international²⁰ and national²¹ courts.

39. It is common knowledge that the persons who were tried in Nuremberg and Tokyo after the Second World War were all in detention before a judicial

¹⁴ See the Application for Release, page 15

¹⁵ See the transcript of Mr Thomas Lubanga Dyilo's first court appearance, pp. 5-6

¹⁶ Ibid., pp. 6-7

¹⁷ At this point it is interesting to note that while the Defence notes in its application for release that "*the Court evidently did not ensure that the arrest warrant it issued was served on Congolese territory*" (p17), at Mr Thomas Lubanga Dyilo's first appearance before the Pre-Trial Chamber, the Presiding Judge asked "*May I just clarify whether the arrest warrant has been read to him?*" the duty counsel replied in the affirmative (p.7)

¹⁸ See the Application for Release, p.20

¹⁹ The maxim *male captus, bene detentus* expresses the principle that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court. See the Prosecutor v. Dragan Nikolic, case no. IT-94-2-PT, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, (Trial Chamber II), 9 October 2002, para. 70, <http://www.un.org/icty/nikolic/trials/decision-e/10131553.htm>.

²⁰ See The Prosecutor v. Dragan Nikolić, op. cit., paras. 70 to 93 et infra.

²¹ See inter alia: U.S. Supreme Court, *Ker v. People of the State of Illinois*, 6 December 1886, 119 U.S. 436 <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=119&invol=436>, U.S. Supreme Court, *Frisbie v. Collins*, 10 March 1952, 342 U.S. 519 <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=342&invol=519>, U.S. Supreme Court, *United States v. Alvarez-Machain*, 10 June 1992, 504 U.S. 655 <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=us&case=/us/504/655.html>; France: Cass. Crim., 4 June 1964, *Argoud*, International Law Journal, 1965, pp. 98-100, Cass. Crim., 6 October 1983, *Barbie* RGDIP 1984, p. 507 et s. Israel: Supreme Court of Israel, *Attorney General v. Eichmann*, 29 May 1962, 36 I.L.R. 304.

authority issued any warrant, and that the majority were in detention even before the International Tribunal was set up, without this ever having been considered a factor which would prevent the courts from trying those criminals²².

40. Some accused before the international criminal tribunals argued the illegality of their arrest with a view to being transferred to the court in question: Dokmanović²³, Todorović²⁴ and Nikolić²⁵ also put forward the irregularity of their arrest to request their release before the ICTY, as did Semanza²⁶, Kajelijeli²⁷ and Rwamakuba²⁸ before the ICTR.

41. After analysing in detail the *male captus, bene detentus* principle, in both the national and international arenas, Trial Chamber II in the Nikolić case found that *“this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated”* and that *“Whether such a decision should be taken also depends entirely on the facts of the case and cannot be decided in the abstract. Accordingly, the level of violence used against the Accused must be assessed. Here, the Chamber observes that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals was of such an egregious nature”*²⁹.

It thus rejects the allegations that his human rights were violated or that

²² See Salvatore Zappalà, *Human rights in international criminal proceedings*, Oxford University Press, p. 67

²³ See *The Prosecutor v. Mile Mrksić, Miroslav Radic, Veselin Sljivancanin and Slavko Dokmanović*, Case no. IT-95-13a-PT, *Decision on the Motion for Release by the Accused Slavko Dokmanovic* (Trial Chamber), 22 October 1997 <http://www.un.org/icty/dokmanovic/trialc2/decision-f/71022MS2.htm>.

²⁴ See *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Case no. IT-95-9, *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others* (Trial Chamber), 18 October 2000. <http://www.un.org/icty/simic/trialc3/decision-e/01018EV513778.htm>

²⁵ See *The Prosecutor v. Dragan Nikolic*, cfr. note 18.

²⁶ See *The Prosecutor v. Laurent Semanza* Case no. ICTR-97-20-A, *Decision* (Appeals Chamber), 31 May 2000, paras. 127 to 129 and the disposition <http://www.ictcr.org/ENGLISH/cases/Semanza/decisions/310500.htm>.

²⁷ See *The Prosecutor v. Juvénal Kajelijeli*, Case no. ICTR-98-44-1, *Decision on the defence motion concerning the arbitrary arrest and illegal detention of the accused and on the defence notice of urgent motion to expand and supplement the record of 8 December 1999 hearing* (Trial Chamber), 8 May 2000. This decision is available on the ICTR website at <http://www.ictcr.org/ENGLISH/cases/Kajelijeli/decisions/080500.htm>.

²⁸ See *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-A, *Decision* (Appeal against dismissal of motion concerning illegal arrest and detention) (Appeals Chamber), 11 June 2001. <http://www.ictcr.org/ENGLISH/cases/Rwamakuba/decisions/110602.htm>.

²⁹ *Ibid.*, para. 114

proceeding with the case would violate the fundamental principle of due process of law³⁰.

42. Trial Chamber III of the ICTR found in the case of *The Prosecutor v. André Rwamakuba* that “[any violation of the right of the Accused to be tried without undue delay] *it is only when the Accused was arrested by the Namibian authorities in compliance with the Chamber’s Warrant of arrest and order for transfer and detention, that he received the official notification of the charges against him*”³¹.

43. When the *ad hoc* tribunals found that there was a violation of the accused persons’ rights attributable to the Tribunal, they always considered that releasing the accused would constitute a disproportionate compensation in relation to the acts which were the subject of the proceedings and decided that financial compensation would be awarded to the accused if they were found innocent or their sentences would be reduced if convicted³², and that the violation can be attributed to the international court only as of the person’s arrest on application by the court in question.

44. Defence Counsel attaches great importance to the ICTR Appeals Chamber judgment of 3.11.1999 in the case of Jean Bosco Barayagwiza, neglecting to mention, however, that this decision was overturned following a review by the Appeals Chamber in which it also found that a violation of the rights of the accused, at least partly attributable to the international court, must not be remedied by releasing the accused, which would be entirely disproportionate.

³⁰ Ibid. para. 115

³¹ See *The Prosecutor v. André Rwamakuba* op. cit., para. 24

³² See *The Prosecutor v. Laurent Semanza*, op. cit., paras. 127 to 129 and the disposition. See also *The Prosecutor v. Jean-Bosco Barayagwiza*, Case ICTR 97-19-AR, Appeals Chamber, 31 March 2000, www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/31032000.htm, para. 75.

45. While confirming that *“the Appellant’s rights were violated, and that all violations demand a remedy”*, the Appeals Chamber held that *“violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded”*. Accordingly, the remedy ordered by the Chamber in the Decision, which consisted in the dismissal of the indictment and the release of the Appellant was altered and the Appeals Chamber decided that *“for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows: If the Appellant is found not guilty, he shall receive financial compensation; If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights”*³³.

46. It should however be recalled that, unlike the situation in the Barayagwiza case, any violations of the accused’s rights in the present case are in no way attributable to the Court, not even for a short time, since the accused was in The Hague barely 24 hours after a request for surrender was served in the DRC, such that it is not even necessary to make reference to the *male captus, bene detentus* principle.

47. Defence Counsel’s latest submissions demonstrate that he is not only claiming that the Court lacks jurisdiction but is also requesting his client’s release, defining his request as a “request for compensation” within the meaning of article 85 (1) of the Statute³⁴.

48. This article, however, refers not to releasing but to compensating persons who have been wrongly arrested by the Court; the term “réparation” in the French version of article 85 (1) translates as “compensation” in the English text, and the title of Part VIII leaves no doubt in the matter.

³³ Ibid., para. 75

³⁴ *Conclusions suite à l’ordonnance du 13.7.2006*, para. 5

49. Even a finding of lack of jurisdiction would not automatically lead to the accused being released, but possibly being returned to the Congolese authorities, as the ICTR found in the Barayagwiza judgment of 3.11.1999 referred to by the Defence³⁵.

IV. Conclusion

50. In conclusion, the victims' representatives consider that the International Criminal Court does indeed have jurisdiction to try the accused, and that the challenge to jurisdiction should be dismissed.

FOR THESE REASONS

MAY IT PLEASE THE PRE-TRIAL CHAMBER:

To dismiss the challenge to jurisdiction raised by the Defence and the subsequent application for release.

Luc Walley[n] [signed] and Franck Mulenda (not signed)
Counsel for victims a/0001/06, a/0002/06 and a/0003/06

Done on 24 August 2006

At Brussels and Kinshasa

³⁵ While it orders the termination of the proceedings, the decision (which has since been reviewed by the decision of 31.3.2000) nevertheless ordered the accused to be delivered to the Authorities of Cameroon, who had delivered him to the Tribunal. ICTR Appeals Chamber, 3.11.1999, www.icttr.org