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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
*v. Thomas Lubanga Dyilo***

Public Document

**Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to
article 19 (2) (a) of the Statute**

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

Legal Representatives for Victims

a/0001/06 to a/0003/06

Mr Luc Walley

Mr Franch Mulenda

Counsel for the Defence

Mr Jean Flamme

Ms Véronique Pandanzyla

Other Participant

Democratic Republic of the Congo

PRE-TRIAL CHAMBER I (“the Chamber”) of the International Criminal Court (“the Court”);

NOTING the “Application for Release”¹ filed by the Defence on 23 May 2006, in which the Defence requested the release of Thomas Lubanga Dyilo;

NOTING the “Ordonnance relative à la requête aux fins de mise en liberté”² issued by the Chamber on 29 May 2006;

NOTING the “Submissions relative to the Order of 29.5.2006”³ filed by the Defence on 31 May 2006, in which the Defence specified that the request was not an application for interim release pursuant to article 60 of the Rome Statute (“the Statute”) but rather an application for release under rule 185 of the Rules of Procedure and Evidence (“the Rules”);

NOTING the “Prosecution’s Response to Application for Release”⁴ filed by the Prosecution on 13 June 2006, whereby the Prosecution submitted its observations on the Application for Release and in which it assumed that the application was a challenge to the jurisdiction of the Court pursuant to article 19 of the Statute;

NOTING the “Demande de Réplique à la Réponse du Procureur du 13 juin 2006 à la Requête de mise en liberté”⁵ filed by the Defence on 19 June 2006;

¹ ICC-01/04-01/06-121.

² ICC-01/04-01/06-128.

³ ICC-01/04-01/06-131.

⁴ ICC-01/04-01/06-149-Conf.

⁵ ICC-01/04-01/06-159-Conf.

NOTING the “*Décision sur la requête de la Défense sollicitant l'autorisation de déposer une réplique*”⁶ issued by the Chamber on 29 June 2006;

NOTING the “*Conclusions en réplique à la réponse du Procureur à la demande de mise en liberté*”⁷ filed by the Defence on 10 July 2006, in which the Defence states that the Application for Release is grounded, on the one hand, on article 55 (1) (d) *juncto* article 85 of the Statute, and, on the other hand, on the inadmissibility of the case against Thomas Lubanga Dyilo;

NOTING the “*Order relating to the Application for Release*”⁸ issued by the Chamber on 13 July 2006;

NOTING the “*Conclusions suite à l'ordonnance du 13 juillet 2006*”⁹ filed by the Defence 17 July 2006, whereby the Defence re-characterises its application as a challenge to the jurisdiction of the Court pursuant to article 19 2 (b) of the Rome Statute (“the Statute”) based on the abuse of process doctrine;

NOTING the “*Décision invitant la République démocratique du Congo et les victimes de l'affaire en cause à présenter leurs observations sur les procédures menées en vertu de l'article 19 du Statut*”¹⁰, issued by the Chamber on 24 July 2006, whereby the Chamber invites the Democratic Republic of the Congo (“the DRC”) and the victims of the case to submit their observations on the challenge to the jurisdiction of the Court in application of article 19 of the Statute;

⁶ ICC-01/04-01/06-173.

⁷ ICC-01/04-01/06-188-Conf.

⁸ ICC-01/04-01/06-191.

⁹ ICC-01/04-01/06-197.

¹⁰ ICC-01/04-01/06-206.

NOTING the “Request to file a reply to any observations filed by the Government of the Democratic Republic of Congo and Victims”¹¹ filed by the Defence on 28 July 2006, in which the Defence requests leave to file a reply to any observations filed by the DRC and the victims;

NOTING the “Observations de la République Démocratique du Congo”¹² filed by the *Auditeur Général des Forces Armées de la République Démocratique du Congo* on 25 August 2006, in which the Court is requested (i) to deny the Defence challenge to the jurisdiction of the Court on the ground that the said challenge has no legal basis; (ii) to reject the Defence assertion based on the alleged illegal detention of Thomas Lubanga Dyilo in the DRC; (iii) to reject the Defence assertion concerning the irregularities surrounding the arrest and surrender to the Court of Thomas Lubanga Dyilo; and (iv) to declare the Defence Application for Release admissible but without merit and thereby dismiss the request;

NOTING the “Observations des victimes a/0001/06, a/0002/06 et a0003/06 quant à l’exception d’incompétence soulevée par la défense dans la requête du 23 mai 2006”¹³ filed by the Legal Representatives of Victims a/0001/06 to a0003/06 on 25 August 2006, in which they consider that the Court has jurisdiction in the present case and that the Defence motion challenging the jurisdiction of the Court must be denied;

NOTING the “Decision on the Defence’s Request to file a Reply”¹⁴ issued by the Chamber on 28 August 2006, in which it grants the request of the Defence to file a Reply to the observations filed by Government of the DRC and Victims a/0001/06 to a0003/06;

¹¹ ICC-01/04-01/06-215.

¹² ICC-01/04-01/06-348.

¹³ ICC-01/04-01/06-349.

¹⁴ ICC-01/04-01/06-359.

NOTING the “Prosecution’s response to the Observations of the DRC and the Observations of the Victims in Application of Article 19 of the Statute”¹⁵ filed by the Prosecution on 7 September 2006;

NOTING the “Defence Response to the Observations of the DRC and the Observations of the Victims in the Application of Article 19 of the Statute”¹⁶ filed by the Defence on the 8 September 2006;

NOTING articles 19, 21, 55, 58, 59 and 85 of the Statute and rules 58, 59 and 86 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING that, in the present case, the Defence allegations are confined to (i) the alleged arbitrary arrest by the DRC authorities on 13 August 2003 and the alleged subsequent illegal detention of Thomas Lubanga Dyilo in the DRC prior to 16 March 2006; and (ii) certain alleged irregularities in the execution of the Court’s cooperation request for the arrest and surrender of Thomas Lubanga Dyilo (“the Court’s Cooperation Request”) sent to the DRC on 14 March 2006;¹⁷

CONSIDERING that the Defence is challenging the jurisdiction of the Court under article 21 (3) of the Statute and on the basis of the abuse of process doctrine;¹⁸ and that, in relation to the arrest and surrender to the Court of Thomas Lubanga Dyilo in execution of the Court’s Cooperation Request, the Defence alleges that Thomas Lubanga Dyilo’s rights under article 59 (2) of the Statute were infringed;

¹⁵ ICC-01/04-01/06-401-Conf

¹⁶ ICC-01/04-01/06-406-Conf

¹⁷“Report from the Registrar on the Execution of the Request for Arrest and Surrender”, filed by the Registry on 23 March 2006, ICC-01/04-01/06-53-Conf. See in particular ICC/-01/04-01/06-53-Conf-Anx2, p.1, and ICC-01/04-01/06-53-Conf-Anx5.5, p. 3.

¹⁸ ICC-01/04-01/06-197.

CONSIDERING that, according to article 59 (2) of the Statute, “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”;

CONSIDERING that in the Chamber’s view, the words “in accordance with the law of the State” means that it is for national authorities to have primary jurisdiction for interpreting and applying national law¹⁹;

CONSIDERING however, that this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which, like those here, are referred directly back to that national law by the Statute²⁰;

CONSIDERING that, pursuant to article 59(2) of the Statute, the competent DRC authorities were obliged to determine whether, in the execution of the Court’s Cooperation Request, Thomas Lubanga Dyilo’s rights were respected and the arrest was carried out with due regard for the proper process;

CONSIDERING nevertheless that article 59 (2) of the Statute does not impose any obligation on the competent DRC authorities to review the lawfulness of the arrest and detention of Thomas Lubanga Dyilo prior to 14 March 2006 insofar as that detention was related solely to national proceedings in the DRC;

¹⁹ECHR, Klaus Altmann v/ France, Decision of 4 July 1984 on the admissibility of the application, application N°10689, 1984, p.234.

²⁰ ECHR, Winterwerp v/, The Netherlands, 24 october 1979, para. 46.

CONSIDERING that according to the Report of the Registrar, signed by Thomas Lubanga Dyilo, the Registrar transmitted to the *Procureur Général de la République* the Court's Cooperation Request on 14 March 2006;²¹

CONSIDERING that, prior to the transmission of the Court's Cooperation Request, Thomas Lubanga Dyilo was detained in relation to proceedings before the Congolese Military Courts;²² and that therefore, according to articles 42 to 47 *juncto* 207 of the Congolese *Code Judiciaire Militaire*, the competent Congolese organ pursuant to article 59 (2) of the Statute was the *Auditeur Général des Forces Armées de la République Démocratique du Congo* or his representative before the Congolese Military Courts (*Auditeur Militaire*);

CONSIDERING that on 14 March 2006 the *Procureur Général de la République* transmitted to the *Auditeur Général des Forces Armées de la République Démocratique du Congo* the Court's Cooperation Request for execution;²³

CONSIDERING that on 14 March 2006, execution of the Court's Cooperation Request by the DRC authorities was set into motion and, as a result, on 16 March 2006, Thomas Lubanga Dyilo was taken from the *Centre Pénitentiaire et de Rééducation de Kinshasa* and brought before the *Premier Avocat Général des Forces Armées de la République Démocratique du Congo* acting as the representative and under the instructions of the *Auditeur Général des Forces Armées de la République Démocratique du Congo*;²⁴

²¹ Report of the Registrar, annex 2, p. 1, and annex 5.5, p. 3.

²² Report of the Registrar, annex 5.5, p.1.

²³ Report of the Registrar, annex 5.5, p. 3 and annex 5.6, p. 2.

²⁴ Report of the Registrar, annex 5.5, p. 1.

CONSIDERING that the *Premier Avocat Général des Forces Armées de la République Démocratique du Congo*:

- (i) notified Thomas Lubanga Dyilo that as of that moment he was under arrest pursuant to an arrest warrant issued by the Court;
- (ii) provided to Thomas Lubanga Dyilo all materials attached to the Court's Cooperation Request, including (a) a copy of the arrest warrant for Thomas Lubanga Dyilo issued by this Chamber on 10 February 2006, (b) a copy of the Chamber's Decision of 10 February 2006, (c) a copy of the relevant provisions of the Statute and the Rules in a language that Thomas Lubanga Dyilo understands and speaks, including those relating to his rights under the Statute and the Rules; and
- (iii) informed Thomas Lubanga Dyilo of his right to oppose his arrest under a Court's arrest warrant and his surrender to the Court;²⁵

CONSIDERING that Thomas Lubanga Dyilo did exercise his right to oppose his arrest under a Court's arrest warrant and his surrender to the Court;²⁶ and that, prior to confirming Thomas Lubanga's Dyilo's arrest and surrender to the Court, the *Auditeur Général des Forces Armées de la République Démocratique du Congo* ruled on the merits of the grounds put forward by Thomas Lubanga Dyilo in support of his claim;²⁷

CONSIDERING therefore that in executing the Court's Cooperation Request, Thomas Luganga Dyilo was promptly brought before the Congolese national authority which, because he was being detained at that time in relation to national proceedings before the Congolese Military Courts, was competent under Congolese

²⁵ Report of the Registrar, annex 5.5, p.3, and annex 5.6.

²⁶ Report of the Registrar, annex 5.6, p. 4.

²⁷ Report of the Registrar, annex 5.6, p. 5.

law to conduct the proceedings in the custodial State provided for in article 59 (2) of the Statute; and that, in the view of the Chamber, contrary to the Defence's claim, no material breach of article 59 (2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request;

CONSIDERING further that during Thomas Lubanga Dyilo's First Appearance on 20 March 2006, the Presiding Judge of the Chamber asked him if he had been informed of the crimes of which he was charged and whether the arrest warrant had been read to him; and that Defence Counsel, speaking for Thomas Lubanga Dyilo, stated that the arrest warrant had indeed been read to him;²⁸

CONSIDERING that the Defence is currently challenging the jurisdiction of the Court by stating that "Article 21 (3) [...] vests the Court with the obligation to consider whether its exercise of personal jurisdiction over Thomas Lubanga Dyilo is consistent with such general principles of human rights, or whether, given the serious violations of his human rights, it would be an abuse of process to exercise personal jurisdiction over him in such circumstances"²⁹,

CONSIDERING that article 21 (3) of the Statute states that the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights"; and that, according to those standards, any violations of Thomas Lubanga Dyilo's rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities³⁰;

²⁸ ICC-01/04-01/06-T-3 pp. 6-7

²⁹ ICC-01/04-01/06-406, para. 8.

³⁰ See *Stocké v Germany* before the European Court of Human Rights, 11755/85 [1991] ECHR 25 (19 March 1991), para 51-54; ECHR, Klaus Altmann vs. France, Decision of 4 July 1984 on the admissibility of the application, application No. 10689, 1984, p. 234. Moreover, the International Criminal Tribunal for Rwanda has

CONSIDERING however that whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused;³¹ and that, to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case,³² has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal;³³

CONSIDERING, however, that in the course of the present proceedings under article 19 of the Statute, no issues has arisen to any alleged act of torture against or serious mistreatment of Thomas Lubanga Dyilo by the DRC national authorities prior to the transmission of the Court's Cooperation Request on 14 March 2006 to the said authorities; and that therefore the issue before the Chamber is to determine whether there was concerted action between the Court and the DRC authorities in

repeatedly stated that the Tribunal is not responsible for the illegal arrest and detention of the accused in the custodial State if the arrest and detention was not carried out at the behest of the Tribunal. See in particular the *Semanza Case Appeals Chamber*, 31 May 2000, Case No. ICTR-97-20-A, para.79, where a distinction is made between the time Semanza was held at the request of the Rwandan authorities and the time he was held at the request of the ICTR. See also the *Rwamakuba Case, Trial Chamber II*, 12 December 2000, "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused", Case No. ICTR-98-44-T, para.30 stating that, "[t]he Trial Chamber does therefore not consider that, from 2 August 1995 until 22 December 1995, when the Prosecutor notified the Namibian authorities of their knowledge that the accused was in their custody, the Tribunal was responsible for the accused's detention. The Tribunal having no jurisdiction over the conditions of that period of detention, any challenges in this respect are to be brought before the Namibian jurisdiction".

³¹ See *Prosecutor v. Dragan Nikolic Case*, "Decision on Interlocutory Appeal Concerning Legality of Arrest", 5 June 2003, Case No. IT-94-2-AR73, para. 30. See also *Juvenal Kajelijeli vs. The Prosecutor*, Case No. ICTR-98-44A-A, para. 206; and *Prosecutor vs. Slavko Dokmanovic*, "Decision on the Motion for Release by the Accused", 22 October 1997, Case No IT-95-13a-PT, paras. 70-75.

³² See *Jean Bosco Barayagwisa vs The Prosecutor*, Appeals Chamber, 3 November 1999, Case No. ICTR-97-19-AR72, paras. 74 – 77. See also *Juvenal Kajelijeli vs. The Prosecutor*, 23 May 2005, Case No. ICTR-98-44A-A para 206.

³³ See *Prosecutor vs. Dragan Nikolic Case*, "Decision on Interlocutory Appeal Concerning Legality of Arrest", 5 June 2003, Case No. IT-94-2-AR73, para. 30. See also *Juvenal Kajelijeli vs. The Prosecutor*, Case No. ICTR-98-44A-A, para. 206; and *Prosecutor vs. Slavko Dokmanovic*, "Decision on the Motion for Release by the Accused", 22 October 1997, Case No IT-95-13a-PT, paras. 70-75.

connection with the arrest and detention of Thomas Lubanga Dyilo prior to 14 March 2006³⁴;

CONSIDERING that there is no evidence indicating that the arrest and detention of Thomas Lubanga Dyilo prior to the 14 March 2006 was the result of any concerted action between the Court and the DRC authorities; and that the Court will therefore not examine the lawfulness of the arrest and detention of Thomas Lubanga Dyilo by the DRC authorities prior to 14 March 2006;

CONSIDERING therefore that no material breach of article 59 (2) of the Statute can be found in the procedure followed by the competent Congolese national authorities during the execution of the Court's Cooperation Request, and that there is no evidence indicating that the arrest and detention of Thomas Lubanga Dyilo prior to the 14 March 2006 was the result of any concerted action between the Court and the DRC authorities;


CONSIDERING therefore that the Defence challenge to jurisdiction is unfounded;

³⁴ ECHR, *Stocké v/ Federal Republic of Germany*, para 51-54; ECHR, *Klaus Altmann v/ France*, Decision of 4 July 1984 on the admissibility of the application, application N°10689, 1984, p. 234.

FOR THESE REASONS

DISMISSES the challenge to the jurisdiction of the Court raised by Thomas Lubanga Dyilo pursuant to article 19 (2)(a) of the Statute and therefore reject the request for release of Thomas Lubanga Dyilo.

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



Judge Claude Jorda
Presiding Judge



Judge Akua Kuenyehia



Judge Sylvia Steiner

Dated this Tuesday 3 October 2006

At The Hague

The Netherlands