SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR

v.

THOMAS LUBANGA DYILO

OBSERVATIONS OF THE DEMOCRATIC REPUBLIC OF THE CONGO

Official Court Translation

I. PROCEDURAL BACKGROUND OF THE PROCEEDINGS BEFORE PRE-TRIAL CHAMBER I

1. The proceeding which gave rise to the intervention of the Pre-Trial Appeals Chamber and the Government of the Democratic Republic of the Congo through the document entitled *Appeals Chamber's Request and Directions* (Ref ICC-01/04-01/06-512) originated in the application for release lodged by the Defence on 23 May 2006.

2. The application was essentially based on a challenge to the jurisdiction of the Court, which was itself based, *inter alia*, on the alleged illegal detention of Mr Thomas Lubanga Dyilo by Congolese authorities prior to 16 March 2006 and the alleged irregularities in the subsequent arrest and surrender of Mr Thomas Lubanga Dyilo to the Court in execution of the warrant of arrest issued against him by Pre-Trial Chamber I on 10 February 2006.

3. The various submissions and replies of the Defence in support of its application were the subject of *inter partes* exchanges with the result that on 24 July 2006, Pre-Trial Chamber I rendered its decision inviting the DRC, *inter alia*, to submit its observations with respect to the final Defence submissions, in particular, with respect to the challenge to jurisdiction pursuant to article 19(2)(a) of the Rome Statute and, notably, with respect to the following:

a. the alleged illegal detention of Mr Thomas Lubanga Dyilo by DRC authorities prior to 16 March 2006;

b. the alleged irregularities in the subsequent arrest and surrender of Mr Thomas Lubanga Dyilo to the Court in execution of the warrant of

arrest issued against him by Pre-Trial Chamber I on 10 February 2006.

4. Considering itself sufficiently informed and able to address the grounds raised by the Defence further to the parties' and other participants' replies and observations, on 3 October 2006, Pre-Trial Chamber I rendered its "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute" (ICC-01 /04-01/066512) dismissing the challenge to jurisdiction and rejecting the application for release.

5. On 9 October 2006, the Defence filed its "Requête d'appel du Conseil de la Défense de la "Decision on the Defence Challenge to the jurisdiction of the court pursuant to art. 19(2)(a) of the Statute" du 3 octobre 2006" (ICC-01/04-0106-532) appealing against the said "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute."

II. PROCEDURAL BACKGROUND OF THE PROCCEDINGS BEFORE THE APPEALS CHAMBER

6. As a result of the appeal, on 13 October 2006, pursuant to rule 156(2) of the Rules of Procedure and Evidence of the ICC, the Appeals Chamber issued its "Appeals Chamber's Request and Directions" (ICC-01/04-01/06-569) or "*Demande et Instructions de la Chambre d'appel aux participants*."

7. In said document, the Appeals Chamber directed the DRC, *inter alia*, as the referring State, to submit its observations on the appeal, having regard to the following documents forwarded to it by the Registrar of the Court:

(a) the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2) of the Statute" (ICC-01/04-06-512);

(b) the "Requête d'appel du Conseil de la Défense de la "Decision on the Defence Challenge to the jurisdiction of the court pursuant to art. 19(2)(a) of the Statute" du 3 octobre 2006" (ICC-01/04-06-532);

(c) the "Appeals Chamber's Request and Directions" (ICC-02/04-06-569).

III. OBSERVATIONS CONCERNING THE GROUNDS OF APPEAL

A. *AS TO FORM*

8. Article 82(1)(a) of the Statute entitles the Defence to appeal the decision of 3 October 2006. There are no pertinent observations to be made on the admissibility of the appeal in this regard.

9. Rule 154(1) of the Rules of Procedure and Evidence limits the time to file an appeal to five days from the date upon which the appellant is notified of the decision. Whilst it is impossible, in this regard, for the Government of the DRC to determine in absolute terms whether the appeal is admissible, in so far as it is not in possession of all the material in the record, the Government of the DRC nevertheless has reasonable grounds to believe that simply by determining the time which elapsed between the date of the decision and that of the appeal, the appeal period was respected; accordingly, the appeal shall be deemed admissible.

B. ON THE MERITS

10. ***Ground One*: According to the Defence, [TRANSLATION] "the impugned decision considers that it is unnecessary to review the lawfulness of Mr Thomas Lubanga's arrest and detention prior to 16 March 2006 in the absence of "concerted action" between the DRC and the Court prior to this date and in the absence of torture or serious mistreatment of the person charged." The Defence considers that [TRANSLATION] "the decision is at variance with the 24 July 2006 decision of that same Pre-Trial Chamber inviting the DRC, *inter alia*, to submit its observations concerning the allegation of unlawful detention of Thomas Lubanga Dyilo by DRC authorities prior to 16 March, without any distinction."**

11. **Observations of the DRC:** Is there a genuine contradiction when, in an effort to deal with the parties' submissions as it did on 3 October 2006, Pre-Trial Chamber I invited the other "participants," including the DRC, to submit observations with respect to the final submissions of the Defence? The answer is no. Indeed, at law, the decision of 24 July 2006 should be viewed as an "interlocutory" or "incidental" decision, a concept well known in the main contemporary legal systems. This type of decision enables resolution of a case to be prepared by ordering or rejecting either interim measures which are always subject to review or investigation proceedings which are intended to ensure that the case is ready for trial. Such was the case for the 24 July 2006 decision by which Pre-Trial Chamber I sought to obtain further information and insight on what the Defence was alleging in its submissions. Needless to say that the decision of 3 October 2006 was taken on the basis of information and evidence received from "participants" pursuant to the decision of 24 July 2006. There is

therefore no contradiction between the interlocutory decision of 24 July 2006 and the "final interlocutory" decision of 3 October. The Appeals Chamber should therefore dismiss this ground for lack of relevance. It would be a misrepresentation of the Pre-Trial Chamber's reasoning to state that the impugned decision states that the lawfulness of Mr Thomas Lubanga Dyilo's arrest and detention in the DRC prior to 14 March 2006 need not be reviewed in the absence of "concerted action" between the DRC and the Court prior to this date and in the absence of torture or serious mistreatment of the person charged. Indeed, from a careful reading of the impugned decision, it is clear that the Defence has sought to isolate this ground from the remainder of the Pre-Trial Chamber's reasoning. The Pre-Trial Chamber did not intend to avoid the issue of review by the Court of the lawfulness of the proceedings conducted in the DRC prior to the Court's co-operation request. Quite the contrary, by this "recital", the Pre-Trial Chamber sets out the conditions required by the Statute and the cases referred to by the Defence for the Court to review the lawfulness of national proceedings which seriously violate internationally recognised human rights. Furthermore, the Court essentially focused all its reasons on these conditions in order to better address the parties' arguments relating thereto. Hence, there is no conflict with the decision of 24 July 2006 given that, in this decision, the Court disagreed with the allegation that Mr Thomas Lubanga Dyilo's arrest and detention prior to and after 14 March 2006 was unlawful; the Chamber was simply requesting the views of other participants with respect to this Defence argument. In its decision of 3 October 2006, the Chamber established that the conditions under which the Court may review the lawfulness of the previous proceedings before the judicial authorities of the DRC, namely the *Auditeur Général*, were not fulfilled. Accordingly, this ground lacks relevance.

12. ***Ground Two:*** **[TRANSLATION] "The Defence further submits that Pre-Trial Chamber I failed to provide sufficient reasons for its decision in its recitals; more specifically, that it failed to address the grounds raised by the Defence, in particular, those raised in its submission of 10 July 2006 (particularly in paras. 9 to 13) and in its submission of 8 September 2006 (particularly in paras. 12 to 22), thus infringing the right of the accused to a fair trial."**

13. ***Observations of the DRC***

i) The Government of the DRC is of the opinion that reasons are the basis of any court decision. This is a requirement under article 21 of the Constitution of the DRC which states that "[TRANSLATION] A judgment shall be rendered in writing and shall be accompanied by a reasoned opinion (…)." The Rome Statute contains the same requirement, even more strongly worded, particularly in article 74(5): "The decision shall be in writing and shall contain a full and reasoned statement of the […] Chamber's findings on the evidence and conclusions."

ii) In view of article 74(5) of the Rome Statute, reasons go to the merits of the matter, to the evidence provided in support of the merits as well as the acceptance or rejection of the parties' submissions (objections raised and all other defences). However, it is accepted in most of the main contemporary legal systems that a judge is only bound to address the claims actually made either by the Prosecutor or the defence. The judge is not required to address each of the parties' arguments by providing specific and separate reasons (see S. Corniot, *Dictionnaire de Droit*, Tome II,

2ème Ed, See Jugement-motifs, Librairie Dalloz, Paris 1966, pp. 15-17).

iii) Therefore, the Defence is wrong to complain that Pre-Trial Chamber I failed to "specifically" address the grounds raised in its submissions of 10 July and 8 September 2006, paragraphs 9 to 13 and 12 to 22, respectively. Indeed, the Defence submissions of 10 July 2006 were re-characterised further to the Order of 13 July 2006 , such that it is quite logical to assume that the final submissions of 17 July 2006 called into question the previous arguments which were not expressly repeated therein. It is recalled that in its submissions of 17 July 2006, the Defence re-characterised its application as a challenge to the jurisdiction of the Court based on the abuse of process doctrine. Indeed, the Chamber addressed the various Defence claims. It addressed the allegation that Mr Thomas Lubanga Dyilo was unlawfully detained by DRC authorities prior to 14 March 2006. It also addressed the alleged irregularities in both the subsequent arrest of Mr Thomas Lubanga Dyilo in execution of the co-operation request from the Court, and the respect of Thomas Lubanga Dyilo's rights. In its efforts to address the Defence arguments, the Chamber provided a sufficient explanation of the scope of a jurisdictional challenge, the abuse of process doctrine and the cases referred to by the Defence (ICTR, European Court of Human Rights…). The submissions of 8 September 2006 relate to the DRC's observations of 25 August 2006 and to those of the victims. The latter were in fact responding to the arguments based on lack of jurisdiction, itself based on the abuse of process doctrine, the alleged unlawful detention prior to 14 March 2006 and the alleged irregularities in the subsequent arrest and surrender of Mr Thomas Lubanga Dyilo to the Court. In short, the Chamber based its decision on a series of reasons

obviating the need for it to provide additional, more specific and separate reasons. Accordingly, it addressed the Defence arguments, albeit implicitly, but sufficiently (cf. "recitals", pp. 5-10).

14. ***Ground Three:*** **[TRANSLATION] "The Defence further submits that the Pre-Trial Chamber made an error of fact when it found that during his detention in the DRC, Mr Thomas Lubanga Dyilo was not seriously mistreated and/or tortured."**

15. ***Observations of the DRC***

(a) As to the law

The Government of the DRC notes that in criminal law, an error of fact occurs when a fact is not as apprehended either because it is misconstrued or because it is misapprehended. At the national level, such an error is, above all, a ground for a finding of not guilty which, from a practical standpoint, is subjective in nature, operates *in personam* and only benefits the offender who made the error. Under the Rome Statute, errors (of fact or law) are governed by article 32. They are also dealt with in articles 81(1)(a) and (b) as grounds for appeal by the parties, including the Prosecutor. Under the Rome Statute, a decision can be appealed if it is affected, *inter alia*, by an error of fact or law (articles 81 to 83). At the same time, an error of fact or law can also be a ground for excluding criminal responsibility (article 32).

(b) The present case

The Defence considers that the Chamber made an error of fact when it found that [TRANSLATION] "during his detention in the DRC Mr Thomas Lubanga Dyilo was

not seriously mistreated and/or tortured." Notwithstanding the fact that a finding of fact cannot [in French] be made in the conditional tense, the Government of the DRC observes that the fact alleged by the Defence is not stated in the same terms in the impugned decision, so that the resulting error cannot be ascribed to the Chamber. On the other hand, in an effort to address the Defence claims, which include a jurisdictional challenge based on the abuse of process doctrine, taking into account the serious violations of Thomas Lubanga Dyilo's rights (cf. 2nd recital, page 9/12 of the decision of 3 October 2006), Pre-Trial Chamber I defined the scope of this doctrine which, to its understanding, is 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" (cf. 2nd recital, page 10/12). However, in this case, the Chamber observed that no evidence was adduced to indicate that Thomas Lubanga Dyilo had been tortured or seriously mistreated or that his arrest and detention prior to 14 March 2006 resulted from concerted action between the Court and the DRC authorities. Accordingly, the impugned decision is not affected by any error of fact, the Defence itself having failed to provide proof of torture or serious mistreatment in this case.

16. ***Fourth Ground:*** **[TRANSLATION]*"The Defence further submits that the impugned decision commits an error of fact and law when it states that the Statute and Rules were respected in relation to the surrender of Mr Thomas Lubanga Dyilo to the Court."***

17. ***Observations of the DRC***

(a) As to the law

An error of law occurs when the law differs from what is assumed either by reason of ignorance of the very existence of the law or because of misinterpretation.

(b) The present case

The Defence submits that Pre-Trial Chamber I committed an error of fact and law when it considered that the Statute and the Rules had been respected in relation to the surrender of Mr Thomas Lubanga Dyilo to the Court. Yet, in its reasons for the impugned decision, Pre-Trial Chamber I extensively reviewed article 59 of the Statute, the provision which governs the issue raised by the Defence. Is it possible that the Chamber's three judges have no knowledge of the substance of article 59 of the Statute or that they misconstrued it? The impugned decision's articulation of the obligations of the custodial State and of how it conducted itself when it surrendered the arrested person as well its description of the Pre-Trial Chamber's jurisdiction do not support this ground of appeal. The "recitals" pertaining to the lawfulness of the arrest and surrender are indeed consistent with the Statute and the Rules of Procedure and Evidence.

FOR THESE REASONS,

And for any other reasons to be provided at the behest of the Appeals Chamber:

MAY IT PLEASE THE APPEALS CHAMBER:

1) **To find that the Defence appeal is admissible as to form;**
2) **To find that it has no merit and to dismiss it outright;**
3) **To affirm the impugned decision in all respects.**

For the Government of the DRC,

[signed]

Brigadier-General Joseph PONDE ISAMBWA
Auditeur Général of the High Military Court

[stamped Democratic Republic of the Congo, Congolese Armed Forces, *Auditorat Général,* Ministry of National Defence]