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No.: **ICC-01/04-01/06**
Date: **20 September 2006**

PRE-TRIAL CHAMBER I

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

Registrar: **Mr Bruno Cathala**

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

Public Document

Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Ekkehard Withopf, Senior Trial Attorney
Counsel for the Victims a/0001/06 to a/003/06
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Counsel for the Defence
Mr. Jean Flamme
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1. **Introduction:**

1. On 18 September 2006, the Single Judge issued a decision[1] postponing the Status Conference scheduled for 19 September 2006, until 26 September 2006; that is, two days before the confirmation hearing on 28 September 2006.
2. It appears that the postponement was motivated by the fact that in a prior decision pertaining to the Prosecution's Rule 81 requests, the Single Judge had also postponed the Prosecution deadline for filing certain categories of evidence until 25 September 2006.
3. The Single Judge delineated the topics to be addressed during the Status Conference, but did not address the single most important topic for the Defence – the date of the confirmation hearing.
4. Given the spate of recent postponements and suspension of deadlines, the Defence is swimming in a quagmire of uncertainty regarding the timeframes for disclosure, and the modalities of the confirmation hearing. The Defence still does not know whether the Prosecution intends to call live witnesses, if so, how many, and the expected time and format for submissions including legal arguments.
5. This uncertainty is extremely deleterious for Defence preparation, as the Defence is not in a position to devise its submissions, to prioritise its tasks, or even to plan its schedule for attendance in The Hague (or the possibility of missions to the DRC).
6. The Defence therefore respectfully requests that the Single Judge, as a matter of urgency, specify whether the confirmation hearing will take place on the 28th September 2006, and order appropriate relief to safeguard the rights of Thomas Lubanga Dyilo. In this regard, the Defence refers to the right of Thomas Lubanga Dyilo to expeditious proceedings and to be accorded the presumption of liberty (according to which detention should be the exception), and the right of the Defence team to be informed in detail of the nature of the charges and to have adequate time and facilities to respond to the charge.

2. Submissions

2.1 The apparent abandonment of the timetable for the confirmation hearing

[1] Decision on the Postponement of the Status Conference Scheduled for 19 September 2006, ICC-01/04-01/06

7. On 24 May 2006, the Pre-Trial Chamber decided to postpone the initial date for the confirmation hearing, pursuant to a Prosecution filing dated 12 May 2006, in which the Prosecution informed the Chamber that it would not be in a position to disclose to the Defence the identities of certain witnesses on which the Prosecution intended to rely at the confirmation hearing and the unredacted version of their statements prior to the implementation of protection measures on 28 July 2006.[2]
8. The Single Judge cited the submission of the Prosecution to the effect that "the Defence must have access to the identities and the unredacted versions of the statements of the witnesses referred to in the Prosecution's Submission and the Prosecution's Request because otherwise "it will not be a position to adequately consider the evidence of these witnesses".[3]
9. The Single Judge also agreed with the Prosecution "in that the identities of the said witnesses must be included in the Prosecution Charging Document and List of Evidence that the Prosecution must file 30 days before the confirmation hearing".[4]
10. The Single Judge therefore ordered that the new date for the confirmation hearing would be 28 September 2006. According to the revised timetable for disclosure, the Prosecution were ordered to *inter alia*:
    i. ensure that exculpatory materials falling under article 67(2) are disclosed as soon as possible, and no later than 28 August 2006;
    ii. disclose the names and statements of all witnesses (not subject to Rule 81) by 28 August 2006;
    iii. file the charging document and list of evidence by 28 August 2006; and
    iv. file all Rule 81 applications by 28 August 2006;

11. The Prosecution has continued to disclose exculpatory documents to the Defence beyond the stipulated deadline of 28 August 2006, the latest disclosures being 11[5] and 19 September 2006.[6] The Prosecution has not specified (at least, not to the Defence) why it was not in position to disclose such materials at an earlier stage. In fact, it also appears that the Prosecution *proprio motu* redacted the identities of persons from the last disclosure batch. The Defence has contacted the Prosecution to verify whether the

[2] 'Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set out in the Decision on the Final System of Disclosure' dated 24 May 2006 ICC-01/04-01/06 at page 2.
[3] Citing para 9 of OTP request .
[4] Page 4.
[5] Communication of the Disclosure Note following Disclosure to the Defence of Potentially Exculpatory Evidence pursuant to Article 67(2) of the Rome Statute on 11 September 2006 ICC-01/04-01/06-426
[6] Communication of the Disclosure Note following Disclosure to the Defence of Potentially Exculpatory Evidence pursuant to Article 67(2) of the Rome Statute on 15 September 2006 ICC-01/04-01/06-444

redactions were implemented with prior authorisation from the Chamber, and is waiting for the response.

12. In the decision dated 7 September 2006, the Single Judge observed that "by 7 September at the latest, the Defence will have access to an electronic version of that evidence with the particulars provided for in the Final Decision of the E-Court Protocol'.[7] The provision of this information in a format which was consistent with the E-Court Protocol had been delayed as a result of the fact that the Prosecution had unilaterally decided not to comply with the protocol attached to the Single Judge's decision of 15 May 2006. This non-compliance occasioned delays whilst the Single Judge sought the views of the parties and considered her final position. In any case, in the final decision on the E-Court Protocol, the Single Judge extended the deadline for filing evidence in accordance with the E-Court protocol until 4 September 2006.[8] In addition, on 31 August 2006, the Prosecution requested a further extension of time to file the evidence on the grounds that it had not coded any of its evidence in a manner consistent with the Protocol, (not even in anticipation of the final outcome on the format of the Protocol). The Single Judge granted the Prosecution a new deadline of 7 September 2006 to file the formatted materials.[9]
13. The question as to whether the Defence was in a position to physically access this evidence through ringtail by this date will be addressed in section 2.2.
14. On 15 September 2005, the Defence became aware that the Single Judge had issued an oral order during an ex parte hearing, permitting the Prosecution to file additional Rule 81 requests beyond the stipulated deadline of 28 August 2006.[10] The Defence was not informed of the reason for this extension of time. It is however, apparent that the Defence will not be in a position to access these statements until a point in time after 25 September 2006.
15. In this connection, the Defence is of the view that the prosecutor bears special responsibility for the delays in processing Rule 81 applications, as a result of the Prosecution's prior practice of *proprio motu* redacting several documents. This practice forced the Defence to file a motion contesting the legality of this practice,

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[7] Page 6.
[8] Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation During the Confirmation Hearing dated 28 August 2006, ICC-01/04-01/06-360
[9] Decision on the Prosecution Request for Extension of Time, Clarification and Provision of Information, 1 September 2006, ICC-01/04-01/06-376
[10] The order is referred to in Decision Inviting the Prosecution to Revise Proposed Redactions under Rule 81 ICC-01/04-01/06-438

with the result that the prosecutor delayed submitting an application under Rule 81 for these documents until 29 August 2006.[11]

16. In addition, the Defence notes that in a decision dated 5 September 2006, the Single Judge refers to the fact that the Prosecution had failed to consult with the Victims and Witnesses Unit (VWU) before filing its application in relation to these persons (as they were required to do so in accordance with the Single Judge's decision of 19 May 2006). The Singe Judge thus directed them to refer the persons to the VWU for an assessment, which was to be conducted by 11 September 2006, that is, more than 14 days after the deadline for filing Rule 81 applications.[12]
17. The Defence would like to refer to Rule 121 (8), which stipulates that the Pre-Trial Chamber "shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired." If this rule is to have any force, the Chamber must take a clear stance as to whether the confirmation will take place on the 28 September 2006, and the consequences of all the extensions of time it has granted.
18. Moreover, due to the proliferation of ex parte hearings, the Defence cannot escape the conclusion that fundamental decisions which significantly impact on the disclosure process and the timing of the confirmation hearing (and thus the rights of the Defence) are being taken behind closed doors. It might be perfectly obvious to the Prosecution and the Registry that the confirmation hearing will be delayed – it is *not* obvious to the Defence. The failure to provide information to the Defence in a timely manner is also extremely stressful for Thomas Lubanga Dyilo, who is currently waiting in detention without knowing when and if the charges will be confirmed.

2.2 The inability of the Court to provide resources in a timely manner in order to facilitate Defence preparation for the confirmation hearing

19. The Defence would like to preface this section by expressing its appreciation for the efforts made by the Registry, and the IT section over the last weeks.
20. Nonetheless, their industry and good faith efforts can not obscure the reality that the Defence did not have functional access to Prosecution evidence through ringtail until the evening of 12 September 2006.

[11] Prosecution's Request for Authorization of Redactions in Documents Previously Disclosed to the Defence, dated 29 August 2006
[12] Decision concerning the compliance by the Prosecution with the pre-requisites to file Rule 81(4) motions, ICC-01/04-01/06-389

21. In the decision dated 7 September 2006, the Single Judge observed that "by 7 September at the latest, the Defence will have access to an electronic version of that evidence with the particulars provided for in the Final Decision of the E-Court Protocol'.[13]
22. In terms of the question as to whether such evidence could be uploaded into a Defence ringtail server by that date, the Defence respectfully observes that the Single Judge's observations to this effect may have been based on the aspirations of the Registry rather than completed work reports.
23. The Defence would thus like to advise the Single Judge of the actual timetable for completion of the creation of a collaborative Defence ringtail system and limited network access for Defence, which the Registry eventually agreed were necessary to facilitate Defence preparation:

IT issues – Pending and resolved.

1. Computer accounts for Defence team members
   - Lead Counsel and Legal Assistant (previously established)
   - Case Manager and Pro Bono Legal Assistant Wednesday 13 September 2006

2. Collaborative Space of court records for Defence team
   - Available from 11 September for all members with login.

3. Collaborative space for Defence Team users and OPCD users to share files.
   - No resolution as yet. The OPCD does not have access to the Defence folders on the Z drive, and therefore cannot share research findings.

4. Access to ringtail for Defence team members
   - Access granted on Tuesday evening (12 September).
   - Administration rights set up on Wednesday 13 September 2006 to be able to edit the program and add more fields
   - Training on afternoon of Thursday 14 September
   - Training manual provided on Tuesday 12 September 5pm

5. Provision of email accounts
   - Case Manager – Wednesday 13 September 5pm access granted
   - Rest of team – Thursday 14 September
   - Training on using encryption software for sending and receiving secure emails provided on 20 September

6. Access to Livenote
   - Provided on 5pm Tuesday 12 September

[13] Page 6.

- Training manual provided on Tuesday 12 September 5pm
- Training provided – Tuesday 19 September

7. Internet on Defence network (necessary for legal research)
   - Not working until Wednesday 13 September

8. Access to printers on computers in Defence office
   - Only able to print from one computer
   - Two computers can't print from at all because of the limited access to the ICC network granted to the Defence.
   - Solution pending.

24. The Defence is extremely grateful that the new system has been implemented. Although there are disadvantages inherent in the fact that it is only accessible through ICC computers (which the Defence understands will be fixed in time) – the benefits of the new system have been immediately apparent. The Ringtail system manual trumpets its primary advantage as being the ability to allow litigation teams to analyse evidence in a collaborative manner. The Defence is finally able to avail itself of that service (albeit only when the Defence team is physically present in The Hague). Nonetheless, whilst the decision as to whether these measures should be implemented was debated, and whilst the final decision was implemented, the Defence lost several crucial months of preparation.[14]

2.3 The lack of any details regarding the agenda and format of the confirmation hearing

25. Article 61 provides the following information regarding the confirmation hearing:
    - the Court shall hold a hearing to confirm the charges in the presence of the prosecutor, the Defence and the person whom the Prosecutor seeks to have charged;
    - At the hearing, the Prosecutor shall submit sufficient evidence to support the charge. The Prosecutor may rely on documentary or summary evidence; and
    - The Defence may object to the charges, challenge the evidence, and present its own evidence.

[14] The Defence would like to note that it informed the Registry as early as May this year, that the laptop hosted system for Ringtail was completely unfeasible and would render Defence collaboration impossible. The Defence reiterated its concerns regarding these use of this system for the Defence in its comments on the E-Court protocol submitted in June.

26. Rule 121(9) provides that "the Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law […] no later than three days before the date of the hearing." Rule 122(1) further stipulates that the "Presiding Judge shall determine how the hearing is to be conducted and, in particular, may establish the order and conditions under which he or she intends the evidence contained in the record of the proceedings to be presented".
27. At this stage, the Defence does not have any information in relation to whether there will be opening submissions on the merits, the time allocated to each party for examination, cross-examination, and re-examination (or indeed, whether the court will follow this sequence), and whether the Prosecution intends to file written submissions on legal or factual issues. In fact, the Defence does not know for certain whether there will be any live witnesses presented by the Prosecution, or whether the application of victims to participate will be granted. In the event that there will be no live witnesses, the Defence submits that it may be in the interests of expediting and focusing the hearing to require the Prosecution to file its factual submissions in written form in advance of the hearing. This would allow the Chamber and the parties to focus during the hearing on specific elements of the evidence which might be contested.
28. In addition, since the Chamber and the Prosecution have met several times on an ex parte basis to discuss various aspects of the evidence in the context of the initial application for the arrest warrant, and the question of redactions, they are far more familiar with the evidence than the Defence. The Defence therefore submits that it would be in the interests of facilitating the ability of the Defence to fully consider and challenge the evidence to allow the Defence to file a written brief on factual issues after the hearing.
29. In terms of the question of legal issues, the Prosecution foreshadows in his filing of 28 August 2006 that he considers that three different modes of liability could be applicable. The Prosecutor does not however elaborate on the nature of these modes of liability, and the Defence would submit that such observations, presented outside the context of the charge, should be disregarded for the purposes of the confirmation hearing.
30. In any case, Prosecution has had several months to research and develop legal theories regarding these modes of liability and the precise legal elements of the alleged crime. If the Prosecution were to (orally) present such submissions for the first time during the confirmation hearing, the Defence would be completely ambushed and would have

no ability to verify whether the case law cited is correct or to prepare counter legal arguments in relation to such complex topics.

31. In this regard, the Defence strongly submits that it would be contrary to the right of the Defence to being informed in detail and in advance of the nature of the charge and to be able to respond fully and effectively to the legal as well as the factual basis of the charge to force the Defence to respond in such a manner to previously undisclosed legal submissions.
32. The Defence therefore respectfully request that the Chamber issue an order, that if the Office of the Prosecutor intends to make legal submissions, these should be filed in a written format in advance of the confirmation hearing. In the view of the Defence, such legal arguments should have been filed contemporaneously with the charge, since without them, the relevance of certain factual allegations is opaque at best, and thus violates the right of the Defence to be informed of the nature and details of the charge. The Defence therefore submits that it should have the benefit of receiving the Prosecution legal submissions, and having sufficient time to prepare its response, before being required to file its own legal submissions.

2.4 The fact that Thomas Lubanga Dyilo, an uncharged individual, remains in detention, and the Chamber has not issued a decision regarding the legality of his detention as required by the Statute and Rules

33. Article 60(3) provides that the "Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person". Rule 118(2) further elaborates that the "Pre-Trial Chamber shall review its ruling in the release or detention of a persons […] at least every 120 days". The last decision issued by the Chamber concerning the detention of Thomas Lubanga Dyilo was issued on 10 March 2006. The mandate of the Registry to keep Thomas Lubanga Dyilo in detention effectively expired on 10 June 2006. He has therefore been detained illegally by the Court for the last 3 months and 10 days.
34. Article 60(4) of the Statute provides that the "Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider release the person, with or without conditions".
35. In the view of the Defence, the first limb article requires a proactive approach from the Pre-Trial Chamber - the Chamber must issue such orders as are necessary to expedite

the proceedings, and if that is not possible, it should ensure that the person is not kept in detention. This positive obligation implies that the Court can not simply wait to see if there will be a long delay, and then consider whether to release the person.

36. On the basis of its analysis in section 2.1, the Defence is of the view that the delays in the disclose process are attributable to the Prosecution. In particular, the Defence refers to the Prosecution practice of non-compliance on several key matters (such as its practice of refusing to file evidence in accordance with the E Court protocol and its practice of *proprio motu* redacting materials rather than seeking the leave of the Chamber). This practice has forced the Defence to protest this non-compliance in written form, and seek relief from the Chamber, thus expending Defence resources and delaying the disclosure process.

37. The Defence also notes that it was solely at the discretion of the Prosecution to choose when to request the Court to issue an arrest warrant. A fundamental component of its decision to do so should have been the question as to whether the Prosecution was at that point in time, in a position to comply with its statutory obligations to disclose evidence and prosecute in a manner which was consistent with Thomas Lubanga Dyilo's right to expeditious proceedings.

38. The Defence further refers to article 21(3) of the Statute, which requires that the provisions of the Statute be interpreted in a manner which is consistent with internationally recognised human rights. In this regard, Article 5(3) of the European Convention on Human Rights provides that "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be (…) entitled to trial within a reasonable period or to release pending trial. Release may be conditioned by guarantees to appear for trial.˝ Article 6(1) of the ECHR further elaborates that "In the determination of (…) any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law˝.

39. Despite the interposition of "or˝ between the entitlement to trial within a reasonable period and release pending trial, the European Court has clarified that the right to a speedy trial and pre-trial provisional release are not alternatives. The objective of article 5(3) is to ensure that the provisional detention of accused persons must not be prolonged beyond a reasonable time through the pre-trial period and during the trial itself.[15] Pre-trial provisional release would not in itself satisfy this goal if the entire

[15] *Wemhoff v. Germany* (2122/64) [1968] ECHR 2 (27 June 1968) [All ECHR cases cited in this motion are freely available on the HUDOC website at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.]

proceedings were delayed beyond a reasonable time. Similarly, an expedited trial schedule does not cure a violation of the accused's right to be provisionally released before the trial proceedings commence, if the requisite conditions for provisional release have been met.

40. In terms of the nature of the accused's right to pre-trial provisional release, the European Court has repeatedly emphasized that pre-trial detention should be the exception, and provisional release the rule. Whilst a grounded suspicion that an accused has committed an offence might justify an initial period of detention, in order to hold an accused in detention beyond this initial stage, it is necessary for the State to comply with two cumulative criteria.[16]

41. Firstly, the reasons used by the State authorities to justify the accused's detention must be both relevant and sufficient. Regarding relevance, it is necessary for the State to establish that "there was a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty".[17] Examples of relevant justifications would be the risk of flight, the possibility that the accused might commit further offences, or the possibility that the accused might interfere with Prosecution investigations/witnesses.

42. The question as to whether these reasons are sufficient must be determined in accordance with the individual circumstances of the accused, and not *in abstracto*.[18] For example, the risk that the accused might abscond from the jurisdiction of the court can not be determined solely by reference to the gravity of the charged offences or the possible severity of sentence faced by the accused; the court must examine all relevant factors, for example, if it is possible to obtain guarantees in the form of a bail bond, or whether the accused has social or financial connections in the State in question which render it unlikely that he would wish to flee from the jurisdiction of the court.[19]

43. The relevance and sufficiency of the State's grounds for detention might decrease with the passage of time, and at a certain point, cease to constitute a valid justification for

[16] Barfuss v the Czech Republic Judgement on 31 July 2000 (Barfuss v the Czech Republic (3584/97 [2000] ECHR 402 (31 July 2000) § 66), Ilijkov v Bulgaria Judgement on 26 July 2001 (Ilijkov v Bulgaria (33977/96 [2001] ECHR (26 July 2001) § 77) and Grisez v Belgium Judgement on 26 September 2002 (Grisez v Belgium (35776/97) [2002] ECHR (26 September 2002) § 49),
[17] *Letellier v. France* (1992) 14 EHHR 83 at para 35.
[18] Wemhoff v Germany (2122/64) [1968] ECHR 2 (27 June 1968) § 10 and more recently: Contrada v Italy (27143/95) [1998] ECHR 73 (24 August 1998) § 54, Labita v Italy (26772/95) [2000] ECHR 160 (6 April 2000) § 152.
[19] *Smirnova v. Russia*, ECHR Judgement of 24 July 2003.

detention.[20] For that reason, the effluxion of time might in itself constitute a valid basis for challenging pre-trial detention,[21] and the accused should be provided with the opportunity to challenge his detention at reasonable intervals.[22]

44. Secondly, if the first criterion is met, the State must also demonstrate that the competent authorities have displayed "special diligence" in the proceedings.[23] The question as to whether the authorities have acted with special diligence is determined in light of the complexity of the proceedings, the behaviour of the detainee, and the behaviour of the relevant authorities. If the length of detention is solely attributable to the behaviour of the relevant authorities (i.e. the Prosecution), at a certain point, continued detention is no longer reasonable.[24] Delays occasioned by a shortage of equipment or personnel might be taken into consideration by the Court as displaying a lack of due diligence on the part of the relevant national authorities.[25]

45. Finally, article 5(3) is subject to the general requirements underscoring the Convention of necessity and proportionality: any measure imposed by the national authorities must be strictly tailored to the exigencies of the situation. If it is possible for the authorities to achieve their objective through a less severe measure, than the less severe measure is to be preferred.

46. The Defence submits that the above criteria were not, or at least, are no longer met in the particular circumstances of Thomas Lubanga Dyilo. Firstly, the fact that someone believes that they have been illegally detained and therefore wishes to challenge their detention merely evidences the fact that the person in question wishes to recognise a fundamental, internationally recognised legal right. It can not be cited as a factor in determining whether the person constitutes a flight risk. Secondly, although the Prosecution wishes to charge Thomas Lubanga Dyilo for a serious violation of international humanitarian law, the ICTY Appeals Chamber has repeatedly held that even extremely serious charges such as war crimes and crimes against humanity can not in themselves justify pre-trial detention.[26]

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[20] *Imre v. Hungary* Application No. 53129/99, ECHR December 2003, para. 47.
[21] *Neumeister v. Austria (No.1)* (1879-80) 1 EHRR 91
[22] *Bezicheri v. Italy* (1990) 12 EHHR 210.
[23] *Tomasi v. France* Judgement of 27 August 1992, Series A no. 241 p.35 para. 84
[24] Labita v.Italy, Application No. 26772/95, ECHR 200IV, paras. 152-53, Ilijkov v. Bulgaria, Application No. 33977/96, July 26, 2001.
[25] W v. Switzerland 1 254 (1883) 17 EHRR 60
[26] See also Prosecutor v. Stanisic, Decision on Provisional Release dated 28 July 2004, at para. 22. http://www.un.org/icty/simatovic/trialc/decision-e/040728-1.htm > The same legal reasoning was applied in the decision applying to Franko Simatovic, which was issued contemporaneously by the same Chamber. Both decisions were confirmed on appeal but are not available on the ICTY website (See press release 3 December 2004

47. The Defence also submits that although it could perhaps be expected that the first ever case before the ICC would experience 'teething problems' – Thomas Lubanga Dyilo should not have to suffer the consequences of being the first person arrested by the ICC. As stated by the ECHR, a lack of resources or facilities cannot be relied upon by the authorities to justify failure to comply with the obligation of special diligence.
48. Finally, the Defence incorporates by reference the its arguments made in its earlier filings in the context of its challenge to personal jurisdiction, to the effect that for the purpose of calculating the total length of custody, the Chamber should also take into consideration the time period during which Thomas Lubanga Dyilo was detained in the DRC.
49. Although the decision on the Defence challenge to personal jurisdiction is still pending, the above referenced issues should in themselves require an interim measure in order to mitigate the continuing prejudice to Thomas Lubanga Dyilo's rights. He should thus be granted immediate conditional release, pending the decision of the Chamber in relation to the Defence request challenging personal jurisdiction.

3. Concluding Remarks;

50. In the view of the Defence, in determining whether the confirmation hearing should take place on the 28 September 2006, the question is not is the Defence ready, but rather, is the Court ready to take such measures as are necessary to facilitate the rights of the Defence and the rights of Thomas Lubanga Dyilo.
51. The profusion of disclosure applications and filings at such a late date have been of great concern for the Defence because the timing for actions were predicated on the notice required by the Defence to effectively review and analyse the Prosecution materials, develop its strategy and conduct any Defence inquiries in accordance with its right to present evidence and witnesses during the hearing. However, the above delays and logistical issues are not the responsibility of the Defence or attributable to the Defence; the Defence should thus not suffer the consequences.
52. The Defence has consistently maintained that it should not be forced to choose between Thomas Lubanga Dyilo's right to expeditious proceedings, and the right of the Defence to adequate time and facilities to prepare. A violation of either right must have an effective remedy.

CVO/P.I.S./923e available on http://www.un.org/icty/latest-e/index.htm). See also Prosecutor v. Popovic et al., Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release, dated 24 January 2006, at page 5. http://www.un.org/icty/popovic88/appeal/decision-e/060124.pdf

53. In this case, such a remedy entails:

- requiring that the Prosecution complies with deadlines and provides the Defence with all relevant information (including legal and factual written submissions pertaining to the charge) in a timeframe that allows the Defence adequate opportunity to fully consider the Prosecution position and develop its response; and
- providing the Defence with sufficient resources and notice of any key developments of the proceedings so that it prepare its Defence in an organised and timely manner.

54. In terms of the rights of Thomas Lubanga Dyilo, his right to expeditious proceedings, his right not to be held in detention (as a presumed innocent uncharged person) for an unduly lengthy period, and his right to be legally detained, have all been violated. As such, the Defence respectfully submits that the only appropriate remedy is for him to be granted immediate conditional release, pending the decision of the Chamber on his challenge to jurisdiction.

4. Relief Sought;

55. For the reasons set out above, the Defence respectfully requests the Honourable Pre-trial Chamber to:

i) Confirm whether it is possible for the confirmation hearing to take place on 28 September 2006, in a manner which is consistent with Thomas Lubanga Dyilo's rights under the Statute. To this end, the Defence suggests that it would desirable to move forward the Status Conference scheduled for 25 September 2006 to this Friday, 22 September 2006;

ii) If it is not possible to convene the confirmation hearing on the 28 September 2006, inform the Defence of the expected date of the hearing so that it can organise itself accordingly;

iii) Provide information regarding the format of the hearing so that the Defence can sufficiently prepare in advance of the hearing;

iv) Order the Prosecution to file any legal submissions it intends to make in written form, as soon as possible, and in any case

sufficiently advance of the hearing to enable the Defence to review the authorities and prepare its response before the hearing;

v) Grant the Defence the right to file legal and factual submissions in written form after the confirmation hearing;

vi) If neither party intends to rely on 'live witnesses', consider ordering that factual submissions be addressed in written form in order to expedite and focus the hearing; and

vii) Order that Thomas Lubanga Dyilo be immediately granted provisional release.

Defence counsel

Jean FLAMME

Dated this 20th day of September, 2006

At The Hague