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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

Public Document
Prosecution's Submission on the Review of
Thomas Lubanga Dyilo's Pre-Trial Detention

Source: [Office of the Prosecutor]

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. At the status conference of 6 May 2008, the Trial Chamber noted that, pursuant to Rule 118(2) of the Rules of Procedure and Evidence ("Rules"), the pre-trial detention of Thomas Lubanga Dyilo ("the Accused") was due for review by 31 May 2008.

2. The Trial Chamber, further, requested the Parties to make any submissions on this matter by 19 May 2008.

3. The Prosecution herewith makes submissions on the matter of the pre-trial detention of the Accused.

II. Procedural Background

4. The Prosecution will set out below the procedural developments in so far as they are relevant to the issue of the pre-trial detention of the Accused.

5. On 10 February 2006, Pre-Trial Chamber I issued a warrant for the arrest of the Accused which was subsequently notified to the Democratic Republic of the Congo.

6. On 17 March 2006, the Accused was transferred to the detention centre of the International Criminal Court in The Hague.

7. On 20 March 2006, the Accused appeared, for the first time, before Pre-Trial Chamber I and was informed that the confirmation hearing on the charges against him would be scheduled for 27 June 2006.

8. On 15 May 2006, Judge Sylvia Steiner, exercising the functions provided in Rule 121(2)(b), set a timetable for disclosure obligations in advance of the confirmation hearing.[1]

9. On 24 May 2006, Pre-Trial Chamber I postponed the confirmation hearing to 28 September 2006 in order to enable the Prosecution to comply with re-scheduled disclosure obligations.[2]

10. On 20 September 2006, Pre-Trial Chamber I rendered a further decision postponing the commencement of the confirmation hearing from 28 September 2006 to a date which was to be communicated to the parties.[3]

11. On 5 October 2006, Pre-Trial Chamber I postponed the confirmation hearing to 9 November 2006.[4]

12. On 18 October 2006, after taking into account the procedural history outlined above, Pre-Trial Chamber I rejected a Defence application for the interim release of the Accused stating, *inter alia*, that the length of the Accused's detention could not be considered unreasonable.[5]

13. Between 9 November 2006 and 28 November 2006, the confirmation hearing was conducted pursuant to Article 61(1) of the Rome Statute ("the Statute")

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[1] ICC-01/04-01/06-102.
[2] ICC-01/04-01/06-126.
[3] ICC-01/04-01/06-454.
[4] ICC-01/04-01/06-521.
[5] ICC-01/04-01/06-586.

and Pre-Trial Chamber I issued its "*Decision on the Confirmation of the Charges*" on 29 January 2007.

14. On 13 February 2007, the Appeals Chamber issued a judgement rejecting an appeal against the continued detention of the Accused resulting from the decision outlined in paragraph 12 hereinabove.

15. On 14 February 2007, Pre-Trial Chamber I reviewed, for the first time after a Defence application for interim release, the considerations justifying the Accused's detention and ordered its continuation.

16. On 6 June 2007, the Trial Chamber referred the review of the Accused's pre-trial detention to Pre-Trial Chamber I citing the fact that it did not have sufficient time prior to the 14 June 2007 to familiarise itself with the record in order to be able to reach a decision in a fair and effective manner.[6]

17. On 11 June 2007, therefore, after a second review pursuant to Rule 118(2), Pre-Trial Chamber I determined that notwithstanding the complexities of the case, the proceedings of the confirmation of the charges of the Accused had taken place in an expeditious manner and in accordance with the time regime set out in the Statute.[7]

18. On 9 October 2007, the Trial Chamber delivered its first decision in this matter and found that, as of 11 June 2007, the pre-trial detention of the Accused was reasonable and that preparations for trial had progressed expeditiously.[8]

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[6] ICC-01/04-01/06-921.
[7] ICC-01/04-01/06-924.
[8] ICC-01/04-01/06-976.

19. On 1 February 2008, the Trial Chamber reiterated its findings of 9 October 2007, holding that the preparation for trial had not been delayed by the Prosecution and that the period of pre-trial detention remained reasonable.[9]

III Submissions

20. Pursuant to Article 58(1) of the Statute, a warrant of arrest will be issued and detention ensue to ensure an accused person's appearance at trial, to prevent the obstruction of court proceedings or to prevent continuing criminal conduct by the same accused. The Prosecution submits that there has been no substantial change in any of these considerations nor in any other circumstances since the last review of the Accused's pre-trial detention in February 2008. Accordingly, the statutory grounds for considering interim release, pursuant to Article 60(3) of the Statute, are not satisfied.

21. In its *"Decision on the Application for Interim Release of Thomas Lubanga Dyilo"* of 18 October 2006[10], Pre-Trial Chamber I ruled that the gravity of the charges with which the Accused is charged are of such a nature that there is a substantial risk that he may abscond from the jurisdiction of the Court. In this decision, Pre-Trial Chamber I further concluded that the Accused's seniority and his numerous contacts, both within the Democratic Republic of the Congo and without, would also readily enable him to abscond from the jurisdiction of the Court.

22. Furthermore, in light of disclosure obligations implemented by the Prosecution, the Accused has been appraised of the identities of prosecution witnesses. In these circumstances, were the Accused to be released, he would

[9] ICC-01/04-01/06-1151.
[10] ICC-01/04-01/06-586.

be in a position to exert pressure on those very same witnesses thereby obstructing the Court proceedings.

23. As observed above, the aforementioned considerations were deemed relevant by Pre-Trial Chamber I prior to the confirmation of the charges against the Accused. Now that the charges against the Accused have been confirmed, there exists a firmer evidential basis for arguing that these same considerations necessitate the continued detention of the Accused.

24. As mentioned above, in its *"Second Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo""* of 11 June 2007, Pre-Trial Chamber I took judicial note of the complexities of the case.[11] The complexity of a case has been recognized by the Appeals Chamber in its *"Judgment on the Appeal of the Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled "Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"* of 13 February 2007,[12] as a legitimate factor in determining the reasonableness of the length of pre-trial detention. The reasonableness of a period of detention is not to be determined in the abstract and, in the Prosecution's submission, the novelty of the trial procedure, the need to implement the right of victims to participate, the duty to protect the witnesses and the volume of evidence have, *inter alia*, cumulatively contributed to the complexity of the case.

25. The Prosecution, further, acknowledges the internationally recognised principle of human rights whereby any person detained or arrested is entitled to a trial within a reasonable time. It is submitted that, as recently as February 2008, the Trial Chamber has not found that preparations for trial have been

[11] ICC-01/04-01/06-924., p. 7.
[12] ICC-01/04-01/06-824, para. 123.

delayed by the Prosecution and, to this end, it should be noted that the trial is set down for 23 June 2008.

IV Comparative Jurisprudence

26. Comparative international jurisprudence has shown that the period of pre-trial detention is a discretionary consideration which has no bearing upon the assessment as to whether an accused will appear for trial if released.[13] In circumstances of general case complexity, as in the present instance, a pre-trial detention period of approximately two years "remains within acceptable limits and the interests of justice".[14] A period of five years pre-trial detention has not been deemed excessive [15] and, in principle, lengthy pre-trial detention has been determined not, in itself, to constitute "good cause for release".[16]

V *Conclusion*

27. In light of the above, and taking into account the need to ensure the appearance of the Accused at trial and the security of victims and witnesses, the Prosecution submits that there are no grounds justifying the interim release of the Accused.

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[13] *Prosecutor v. Hardinaj et al.*, ICTY Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release", 9 March 2006.

[14] *Prosecutor v. Innocent Sagahutu* et al., Case No. ICTR-00-56-T, Decision on Sagahutu's Preliminary Provisional Release and Severance Motions, 25 September 2002; and also *Prosecutor v. Johan Tarčulovski,* ICTY Case No.IT-04-82-AR.65.4, Decision on Johann Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007.

[15] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Decision on Application for Leave to Appeal Filed under Rule 65 (D) of the Rules of Procedure and Evidence, 13 June 2001.

[16] *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 October 2002, where the period of pre-trial detention exceeded 7 years, and also; .*Prosecutor v. Barayagwiza*, Case No. ICTR-97-20-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para.74.

Fatou Bensouda, Deputy Prosecutor

on behalf of

Luis Moreno-Ocampo, Prosecutor

Dated this 19th Day of May 2008

At The Hague, Netherlands