

**Cour
Pénale
Internationale**
**International
Criminal
Court**

No.: ICC-01/04

Date: 25 January 2006

Original: English

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

**Under Seal
Ex Parte, Prosecutor Only**

Prosecution's Submission of Further Information and Materials

The Office of the Prosecutor

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Background

1. On 12 January 2006, the Prosecution filed the “Prosecutor’s Application for Warrants of Arrest, Article 58” (the “Application”), requesting, *inter alia*, that arrest warrants be issued for Thomas LUBANGA DYILO and Bosco NTAGANDA. In the Application, the Prosecution provided information on the investigations by the DRC authorities against both of them,¹ and offered, if the Pre-Trial Chamber so wished, to provide further information on the factual background of the DRC proceedings.²
2. On 23 January 2006, the Pre-Trial Chamber rendered the “Decision concerning Supporting Materials in Connection with the Prosecution’s Application for Warrants of Arrest pursuant to Article 58” (the “Decision”). In its Decision, the Pre-Trial Chamber, considering³ paragraphs 184 and 185 and footnotes 27 and 28 of the Application, invited the Prosecution to, by 25 January 2006 at the latest, provide further information and materials⁴ and to elaborate on the Prosecution’s submission in paragraph 186 of the Application.

Transmission of the DRC arrest warrants against Thomas LUBANGA DYILO and Bosco NTAGANDA and of further materials

3. For the information of the Pre-Trial Chamber, the Prosecution attaches⁵ the copy of the DRC file on Thomas LUBANGA DYILO’s detention⁶ and a copy of the DRC arrest warrant against Bosco NTAGANDA of 12 April 2005.⁷ The detention file on Thomas LUBANGA DYILO contains the DRC arrest warrants against him of 19 March 2005 and of 29 March 2005.

¹ See Application, at paras. 184 and 185.

² See Application, at footnotes 27 and 28.

³ See Decision, at page 3.

⁴ As detailed in the Decision, at page 4.

⁵ The provision of materials in the context of the present submission has its legal basis in Article 19(1) of the Rome Statute and the related offer of the Prosecution in footnotes 27 and 28 of the Application.

⁶ Attached as - Under Seal, *Ex Parte*, Prosecution only - Annex 1.

⁷ Attached as - Under Seal, *Ex Parte*, Prosecution only - Annex 2.

4. For the information of the Pre-Trial Chamber, the Prosecution further attaches a copy of the “MEMO A L’INTENTION DE L’AUD GEN” together with a copy of the “NOTE SYNOPTIQUE SUR ETAT DE LA PROCEDURE – DOSSIER DE L’ITURI” of 10 August 2005 (“Note Synoptique”).⁸

Urgency of the Application

5. The Prosecution re-emphasizes the urgency of the Application in respect to both Thomas LUBANGA DYILO and Bosco NTAGANDA.
6. The current general political situation in the DRC appears to be unstable. The DRC is an institutionally weak State. There are no certainties as to the evolution of the political situation. At this stage, it appears that any event can alter the situation on short notice, and any general change of authorities could modify the stability of the current situation. The electoral process - comprised of presidential, parliamentary and provincial elections - along with the current debate on the electoral law and the upcoming campaigns are potentially additional destabilizing circumstances. The first of these elections, the election of the President, is currently scheduled for about late April 2006 to mid May 2006.
7. It can reasonably be anticipated that this situation of instability has the potential to impact on the situation of high profile prisoners, including of Thomas LUBANGA DYILO. It may also impact on the willingness and/or the ability of the DRC authorities to make efforts to execute both their arrest warrant against Bosco NTAGANDA or, provided that the Pre-Trial Chamber grants the Prosecution’s Application, the arrest warrant of this Court.

⁸ Attached as - Under Seal, *Ex Parte*, Prosecution only - Annex 3.

Particular urgency of the Application in respect to Thomas LUBANGA DYILO

8. The DRC proceedings against, amongst others, Thomas LUBANGA DYILO are the subject of serious and increasing criticism. The arrest of Thomas LUBANGA DYILO by the DRC authorities took place in the context of international pressure, arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005 close to the village of Ndoki in Ituri in the DRC.⁹ Pressure was exerted, *inter alia*, by MONUC, the diplomatic community including the Comité International d'Accompagnement de la Transition (CIAT), the UN Security Council and the civil society.
9. At the time, Thomas LUBANGA DYILO was arrested together with other leaders of the various Ituri based political and/or military movements, including of the UPC, FPLC, FNI, FRPI and PUSIC.¹⁰
10. Accordingly, the Ndoki incident constituted the indirect trigger for the arrest of Thomas LUBANGA DYILO. To the extent that information is available to the Prosecution, neither at the time of his arrest nor later has evidence emerged that clearly links Thomas LUBANGA DYILO to the Ndoki incident. Furthermore, the OTP has reliable information that the DRC authorities are not pursuing the investigation into crimes Thomas LUBANGA DYILO is alleged to be responsible for.¹¹
11. This situation has resulted in increased criticism from international NGOs, alleging that the detention of Thomas LUBANGA DYILO and the other leaders of the political and/or military groups may be irregular. In particular, Human

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¹⁰ In respect to the acronyms, the Prosecution refers to paras. 40 and 41 of the Application.

¹¹ For more details, see para 22(i).

Rights Watch (“HRW”) in its 15 December 2005 Report “Democratic Republic of Congo – Elections in sight: ‘Don’t Rock the Boat?’”¹² states:¹³

“In some of the few cases where justice has been pursued, authorities have failed to observe international standards of due process. In February and March a number of influential armed group leaders from Ituri were arrested in Kinshasa following the killing of nine U.N. peacekeepers. Several of those arrested, including Thomas Lubanga, Floribert Ngabu and Germain Katanga, were accused by Human Rights Watch and others of war crimes and crimes against humanity. Authorities arrested several of them without charge and held them for weeks before bringing any charges against them, in clear violation of Congolese legal procedures. By early December, they had been in detention for ten months but there has been no effort to bring them to trial. (...). In the absence of a functioning judicial system, persons guilty of past crimes, even extremely grave violations of international humanitarian law, can present themselves as worthy citizens deserving to be elected to office. Should such persons stand for elections and win important government posts, they will well be positioned to continue their abuses and to protect themselves from any punishment for past crimes.”

12. In its assessment of the situation, the Prosecution believes that the international criticism of the DRC proceedings may result in the DRC authorities soon being prepared to release Thomas LUBANGA DYILO. At the very least, such criticism is rendering the DRC judicial process highly precarious.

13. In compliance with the DRC law, Thomas LUBANGA DYILO’s detention has been and is renewed monthly by the competent military prosecutor.¹⁴ The DRC

¹² The report is available at <http://www.monuc.org/downloads/hrw15dec.pdf>, last accessed on 24 January 2006.

¹³ See pages 15 and 16.

¹⁴ See detention file on Thomas LUBANGA DYILO.

law requires that after twelve consecutive months of detention - thus on 19 March 2006 - a military judge from the competent *Tribunal* confirm the detention.¹⁵ Whilst OTP is not privy to information as to the possible intentions of the competent military judge, the apparent absence of investigative acts performed since the arrest of Thomas LUBANGA DYILO provides sufficient legal basis for that judge to authorize his release.

14. The Prosecution's assessment of the potentially imminent release of Thomas LUBANGA DYILO was reinforced by the repeatedly conveyed message of REDACTED and indicating that there is significantly decreasing interest in pursuing the investigation against Thomas LUBANGA DYILO. This information culminated in information, provided on 6 January 2006, reflecting an educated guess that, within the next three to four weeks, the DRC authorities might face increased difficulties to not release Thomas LUBANGA DYILO.

15. Careful analysis of the available information as detailed above made the Prosecution submit the statement in paragraph 187 of the Application that "(R)ecent information provided to the OTP indicates that it cannot be excluded that Thomas LUBANGA DYILO will be released in near future." The Prosecution maintains this statement and is very concerned that its assessment will materialize.¹⁶

Particular urgency of the Application in respect to Bosco NTAGANDA

16. The Prosecution re-iterates its submission in paragraph 211(iv) of the Application, namely that the whereabouts of Bosco NTAGANDA at the time of the Application were known to the OTP. OTP continues to closely monitor Bosco

¹⁵ The legal basis for this procedure forms Article 209 of the DRC *Loi N°023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire*.

¹⁶ In this context, the Prosecution re-emphasizes the information provided to the Pre-Trial Chamber in para. 188 of the Application in relation to Thomas LUBANGA DYILO's awareness of the fact that he is being investigated by the OTP.

NTAGANDA's movements. It appears that he is repeatedly moving from one geographical area to another one, including by crossing State borders. In the event the Pre-Trial Chamber issues an arrest warrant against Bosco NTAGANDA, the Prosecution anticipates that there will be limited numbers of arrest opportunities. Accordingly, the earlier an arrest warrant is issued the better the chances are to execute it.

Further information concerning the DRC proceedings against Thomas LUBANGA DYILO and Bosco NTAGANDA

17. In the context of the DRC investigations, Thomas LUBANGA DYILO was interviewed. He denied the allegations made against him. Bosco NTAGANDA, being at large, has not been interrogated.
18. In addition to the Ndoki incident, the DRC investigations against Thomas LUBANGA DYILO relate to his alleged criminal responsibility for crimes allegedly been committed by FPLC troops in the course of or after military attacks from May 2003 onwards. The investigation of the OTP did not and does not focus on these alleged crimes.
19. Comparatively little additional information is available to the OTP in respect to the factual basis of the DRC arrest warrant against Bosco NTAGANDA: According to information REDACTED REDACTED the arrest warrant against Bosco NTAGANDA is based on limited evidentiary materials. None of the charges appear to overlap with OTP investigations.

Elaboration on the submission in paragraph 186 of the Application

20. The Prosecution reemphasises its view as detailed in paragraph 186 of the Application. The mere fact that the DRC Government since the submission of its

letter of referral has not informed the OTP that it is able genuinely to carry out the investigation, is legally sufficient to state that none of the relevant conditions of Article 17(1) of the Rome Statute are met.

21. The statement that the DRC authorities have not informed the OTP otherwise is based on the following facts: On 16 March 2004, the OTP received the letter of referral of the DRC Government, dated 3 March 2004. Since then, on a number of occasions, representatives of the OTP met with members of the Cabinet of the President of the DRC, members of the DRC Ministry of Justice, and members of both the office of the *Procureur Général de la République* and of the *Auditeur Général Militaire*. At such meetings, the DRC judicial system and its capabilities were repeatedly discussed. The DRC authorities never indicated that the developments in the DRC justified altering the statement made in the letter of referral.¹⁷ To the contrary, other than recent statements to the extent that the DRC authorities may be able to occasionally and with external support only¹⁸ investigate and prosecute smaller cases, they maintained their views as detailed in the letter of referral.

22. The DRC proceedings against Thomas LUBANGA DYILO and Bosco NTAGANDA very much reflect this situation:

- (i) In respect to Thomas LUBANGA DYILO, the DRC military prosecutors assigned to his case have repeatedly, including very recently,¹⁹ confirmed that almost no investigative efforts have taken place. In particular, REDACTED neither statements were taken nor were any other substantial investigative steps initiated. In addition, according to these statements, the general perception that investigations conducted by DRC authorities would be

¹⁷ As quoted in para. 186 of the Application.

¹⁸ Such external support would regularly include support from MONUC.

¹⁹ Meetings and conversations between the OTP and the office of the competent DRC military prosecutors took place in August 2005, September 2005, December 2005 and, recently, in January 2006.

biased, and thus resulting in biased decisions, present another barrier to their investigations.²⁰

- (ii) In respect to Bosco NTAGANDA, OTP has recently²¹ been informed REDACTED since the issuance of the arrest warrant against Bosco NTAGANDA on 12 April 2005, has not taken any witness statements or performed or initiated any investigative steps.²²

23. The statement that the DRC authorities are well aware of OTP's investigations is based on the fact that the OTP on numerous occasions, in compliance with the procedures set out in Part 9 of the Rome Statute, have sent requests for cooperation to the DRC authorities, providing the information necessary as set out in the Statute. In addition, repeated meetings between the OTP and representatives of the DRC authorities took place in order to facilitate OTP's work in the DRC, and in particular in Ituri.



Luis Moreno-Ocampo
Prosecutor

Dated this 25th of January 2006
At The Hague, The Netherlands

²⁰ Reference is also made to the Note Synoptique, at pages 11 and 12.

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²² REDACTED