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No.: ICC-01/04-01/06

Date: 9 October 2007

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**Registrar:** Mr Bruno Cathala

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

**Public**

**Decision reviewing the "Decision on the Application for the Interim Release of  
Thomas Lubanga Dyilo"**

**Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy  
Prosecutor  
Mr Ekkehard Withopf, Senior Trial  
Lawyer

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims**

a/0001/06 to a/0003/06 and a/0105/06  
Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu

## Background

1. On 20 September 2006 in its filing "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo"<sup>1</sup> the defence sought, *inter alia*, an order for the "provisional release" of the defendant, Mr Thomas Lubanga Dyilo ("Defence Request").<sup>2</sup>
2. On 9 October 2006 the Office of the Prosecutor ("prosecution") and the legal representative of victims a/0001/06, a/0002/06 and a/0003/06 separately filed their responses,<sup>3</sup> asking Pre-Trial Chamber I to dismiss the Defence Request.
3. Pre-Trial Chamber I rejected the Defence Request for interim release in its "Decision on the Application for the interim release of Thomas Lubanga Dyilo"<sup>4</sup> ("Decision") on 18 October 2006. The Decision has subsequently been upheld on appeal<sup>5</sup> and reviewed by Pre-Trial Chamber I on 14 February 2007<sup>6</sup> and, following the request of Trial Chamber I<sup>7</sup> again on 11 June 2007.<sup>8</sup> Both reviews of the Decision provided for the continued detention of the defendant.
4. The right of the defendant to apply for interim release pending trial is enshrined in Article 60(2) of the Rome Statute ("Statute") which provides:

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<sup>1</sup> ICC-01/04-01/06-452.

<sup>2</sup> *Ibid*, paragraph 55 vii).

<sup>3</sup> Prosecution's Response to the Defence Request for Interim Release, ICC-01/04-01/06-531, and Observations of victims a/0001/06, a/0002/06 and a/0003/06 in respect of the application for release filed by the Defence, ICC-01/04-01/06-530- tEN.

<sup>4</sup> ICC-01/04-01/06-586-tEN.

<sup>5</sup> Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824.

<sup>6</sup> Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo", ICC-01/04-01/06-826.

<sup>7</sup> Request for Review of Detention. 6 June 2007, ICC-01/04-01/06-921.

<sup>8</sup> Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", ICC-01/04-01/06-924

*“A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.”*

5. The conditions set forth in Article 58(1) are that:

*“(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and*

*(b) The arrest of the person appears necessary:*

*(i) To ensure the person’s appearance at trial,*

*(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or*

*(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.”*

6. Article 60(3) of the Statute requires the Pre-Trial Chamber to review periodically its decision on interim release:

*“The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.”*

Rule 118(2) of the Rules of Procedure and Evidence (“Rules”) stipulates that such review shall be undertaken at least every 120 days:

*“The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or prosecutor.”*

7. In addition, Article 60(4) of the Statute provides:

*“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 releasing the person, with or without conditions.”*

8. While the Statute and Rules require only the Pre-Trial Chamber to undertake this periodic review of any decision on interim release, Article 61(11) vests the relevant powers of the Pre-Trial Chamber in the Trial Chamber as follows:

*“Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.”*

Accordingly, the Chamber has undertaken a review of the Decision, as provided below.

### **The Requirements of Article 58(1)(a)**

9. In its review of the Decision, and in particular of the continued application of the conditions set out in Article 58(1), the Chamber has been assisted by the finding of the Pre-Trial Chamber in its “Decision on the confirmation of charges”<sup>9</sup> that:

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<sup>9</sup> ICC-01/04-01/06-803-tEN, 29 January 2007.

*“there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities...”<sup>10</sup>*

On this basis, the Trial Chamber is of the view that the requirements of Article 58(1)(a) of “reasonable grounds to believe” are met in this instance.

### **The Requirements of Article 58(1)(b)(i)**

10. In consideration of the requirements of Article 58(1)(b)(i), the defendant faces grave charges and if released he is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to secure his attendance at trial. Furthermore, the Chamber concludes that the defendant is highly unlikely to attend his trial voluntarily. For these reasons it is necessary to continue to detain the defendant.

### **Article 60(4)**

11. The Appeals Chamber has held that *“there is, in addition [to the review conducted under Article 60(3)] an obligation upon the Pre-Trial Chamber to review the overall period of the detention of the suspect under article 60(4).”<sup>11</sup>*

12. The Trial Chamber in considering this provision has concluded that the detention of the accused has not been for an unreasonable period due to inexcusable delay by the prosecution. The Pre-Trial Chamber in its latest

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<sup>10</sup> Ibid, pages 156-57.

<sup>11</sup> Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824, paragraph 98; see also paragraphs 118-124.

review of the detention status of the accused found that the period of detention as of 11 June 2007 was reasonable and that no inexcusable delay had been caused by the prosecution.<sup>12</sup> Since then, preparations for trial have progressed expeditiously.<sup>13</sup> In addition, it has not been suggested that any delays in the preparation for trial have been caused by the prosecution.<sup>14</sup> In these circumstances, the Trial Chamber has determined that there has been no breach of Article 60(4).

## Conclusion

13. Accordingly, in light of the reasoning set out above, the Chamber **decides that Thomas Lubanga Dyilo shall continue to be detained.**

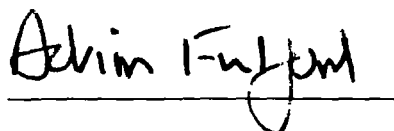
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<sup>12</sup> Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", ICC-01/04-01/06-924, page 8.

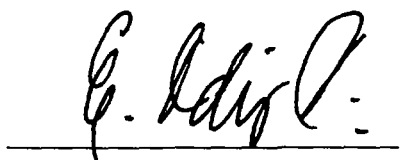
<sup>13</sup> Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC-01/04-01/06-947.

<sup>14</sup> "Réponse de la Défense à l'invitation de la Chambre de Première Instance à présenter des conclusions sur des questions devant être tranchées à un stade précoce de la procédure" filed by the defence on 7 August 2007, ICC-01/04-01/06-940; "Demande d'extension de délai" filed by the legal representatives of victims a/0001/06 to a/0003/06 and a/0105/06 on 4 October 2007, ICC-01/04-01/06-969.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 October 2007

At The Hague, The Netherlands