Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **29 May 2008**

**TRIAL CHAMBER I**

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

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

**Public**
**URGENT**
**Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)**



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**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The 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 Mabille
Mr Jean-Marie Biju-Duval

**Legal Representatives of the Victims**
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**
Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**



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## Procedural History

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"[1] the defence sought, *inter alia*, an order for the "provisional release" of the defendant, Mr Thomas Lubanga Dyilo ("Defence Request").[2]

2. On 9 October 2006 the Office of the Prosecutor ("prosecution") and the legal representatives of Victims a/0001/06 to a/0003/06 separately filed their responses,[3] 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"[4] ("Decision") on 18 October 2006. This Decision was subsequently upheld on appeal[5] and reviewed by Pre-Trial Chamber I on 14 February 2007[6] and, following the request of Trial Chamber I[7] ("Chamber"), reviewed again on 11 June 2007.[8] Thereafter, on 9 October 2007 and on 1 February 2008 the Chamber reviewed the detention status of Mr Thomas Lubanga Dyilo.[9] All the reviews provided for the continued detention of the defendant.

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[1] 20 September 2006, ICC-01/04-01/06-452
[2] *Ibid*, paragraph 55 (vii).
[3] Prosecution's response to the defence request for interim release, 9 October 2006, 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, 9 October 2006, ICC-01/04-01/06-530.
[4] 18 October 2006, ICC-01/04-01/06-586-tEN.
[5] 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.
[6] Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo", 14 February 2007, ICC-01/04-01/06-826.
[7] Request for Review of Detention, 6 June 2007, ICC-01/04-01/06-921.
[8] Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", 11 June 2007, ICC-01/04-01/06-924.
[9] Decision reviewing the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo", ICC-01-04-01-06-976, 9 October 2007; Decision reviewing the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo", 1 February 2008, ICC-01/04-01/06-1151.



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4. At the Status Conference of 6 May 2008, the Chamber requested the parties to make submissions on the matter of the pre-trial detention of Thomas Lubanga Dyilo by 19 May 2008.[10] Written submissions from both parties were filed on 19 May 2008.[11]

## Relevant Provisions

5. 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:

> 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.

6. The conditions set out in Article 58(1) of the Statute 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.

7. 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.

[10] Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, page 60.
[11] Prosecution's submission on the review of Thomas Lubanga Dyilo's Pre-Trial detention, 19 May 2008, ICC-01/04-01/06-1337; Observations de la Défense sur le réexamen du maintien en detention de Monsieur Thomas Lubanga, 19 May 2008, ICC-01/04-01/06-1338.



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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.

8. 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.

9. 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) of the Statute 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.

## Submissions

*Prosecution*

10. The prosecution submitted that since the Chamber's decision considering this matter in February 2008 there had been no substantial change in the circumstances with regard to the pre-trial detention of the accused.[12] Further, the prosecution argued that, pursuant to the prosecution's obligation of disclosure, the accused has been appraised of the identities of the witnesses the prosecution intends to call during trial, and that releasing the accused at this stage may put him in a position to exert pressure on those witnesses,

[12] Prosecution's submission on the review of Thomas Lubanga Dyilo's Pre-Trial detention, 19 May 2008, ICC-01/04-01/06-1337, paragraph 20.



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thereby obstructing the proceedings.[13] The prosecution contended that the circumstances prior to the confirmation of the charges were such that it was deemed necessary to remand the accused in custody, and that following the confirmation of charges there now exist firmer evidential grounds justifying the continued detention of the accused.[14]

11. Regarding the requirement that the Chamber should determine the reasonableness or otherwise of the period of detention, the prosecution noted the novelty of the trial procedure, the need to implement the right of victims to participate, the duty to protect witnesses and the volume of evidence as factors which contribute to the complexity of the case, which was considered by the Appeals Chamber to be a legitimate factor in determining the reasonableness of the length of pre-trial detention.[15] Finally, the prosecution noted that in its February 2008 decision, the Chamber did not find that the preparation for trial had been delayed by the prosecution. In all the circumstances the prosecution submitted that there are no grounds justifying the interim release of the accused.[16]

*Defence*

12. The defence submitted that the Chamber should take account of numerous circumstances in its consideration of the continued pre-trial detention of the accused.[17] First, the defence stated that the accused has been deprived of his liberty for over 4 year and 9 months of which 2 years and 2 months under the authority of the Court.[18] Second, it noted that the charges against the accused

[13] *Ibid*, paragraph 22.
[14] *Ibid*, paragraph 23.
[15] *Ibid*, paragraph 24
[16] *Ibid*, paragraph 27.
[17] Observations de la Défense sur le réexamen du maintien en detention de Monsieur Thomas Lubanga, 19 May 2008, ICC-01/04-01/06-1338, paragraph 2.
[18] *Ibid*



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were confirmed over a year ago[19] and that the Chamber had postponed the date of the start of trial from 31 March 2008 to 23 June 2008 due, *inter alia*, to the failure by the prosecution to disclose the totality of the incriminatory witness statements 12 weeks in advance of the trial.[20] It contended that Rule 119 provides numerous conditions for release to safeguard the appearance of the accused and the protection of witnesses and victims. Finally, it submitted that the conditions set out in Article 58(1)(b) are not met and that the continued detention of Mr Thomas Lubanga Dyilo is not necessary.[21]

## Analysis

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

13. 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"[22] that:

> 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 [...][23]

On this basis, the Chamber is of the view that the requirement of Article 58(1)(a) that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" is met in this instance.

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

14. In relation to the requirements of Article 58(1)(b), the Chamber is persuaded

[19] *Ibid*
[20] *Ibid*
[21] *Ibid*, paragraph 3.
[22] 29 January 2007, ICC-01/04-01/06-803-tEN.
[23] *Ibid*, pages 156-157.



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by the prosecution argument that the defendant faces grave charges and if released is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to ensure his attendance at trial.

15. Accordingly, the requirements of sub-paragraphs a and b of Article 58(1) are met.

*Article 60(4)*

16. 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)."[24]

17. The defence submissions regarding the failure of the prosecution to fulfil its disclosure obligations and the impact of that failure on the trial date are relevant factors to be considered. The Chamber takes note of the delays which have moved the start of trial from 31 March 2008 until 23 June 2008 and it has previously highlighted a lack of timely disclosure by the prosecution, delays in the implementation of protection measures and pending appeals as all contributing to the postponement of the trial.[25] It follows that the prosecution has been responsible for some delay in the proceedings and the Chamber cautions that further delays due to lack of disclosure on the part of the prosecution will be taken into account in future reviews of the overall period of detention under Article 60(4). However, the present delay has also been significantly contributed to by circumstances beyond the prosecution's control, namely the pending appeals of both parties currently before the

[24] 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.
[25] Transcript of hearing on 13 February 2008, ICC-01/04-01/06-T-75-ENG, pages 2-4.



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Appeals Chamber.

18. Article 60(4) requires the Chamber to consider interim release if it finds that the accused has been detained unreasonably due to inexcusable delay by the prosecution. In light of the matters rehearsed above, the Chamber does not conclude that the delays to the commencement of trial are attributable solely to the prosecution; nor is it persuaded that those delays that are attributable to the prosecution are, at this time, inexcusable. Therefore, balancing all the factors set out above, including the real possibility that the Court is likely to be unable to ensure the accused's presence at trial if he is released and the imminent start date, the Chamber concludes it is inappropriate, on this review, to order the interim release of the accused.

## Conclusion

19. Accordingly, for the reasons set out above, the Chamber **decides that Thomas Lubanga Dyilo shall continue to be detained.**



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

**Judge Adrian Fulford**

**Judge Elizabeth Odio Benito**

**Judge René Blattmann**

Dated this 29 May 2008

At The Hague, The Netherlands



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