Cour Pénale Internationale

International Criminal Court

Original: **French**

N°.: **ICC-01/04-01/06**
Date: **9 October 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR V. THOMAS LUBANGA DYILO

Public document

Observations of victims a/0001/06, a/0002/06 and a/0003/06 in respect of the application for release filed by the Defence

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
Mr Jean Flamme

Counsel for the Victims
Mr Luc Walleyn
Mr Franck Mulenda

NOTING the "*Request for further information regarding the confirmation hearing and for appropriate release to safeguard the rights of the Defence and Thomas Lubanga Dyilo*", filed by the Defence on 20 September 2006;

NOTING the decision of 22 September 2006 setting a time limit for the victims to file their responses;

1. Provisional and conditional release

1. At point 54 of his request, Counsel for the Defence uses the term "conditional release" provided for under rule 119. However, no condition is suggested and under "Relief sought", the Defence simply requests a "provisional release", which suggests an unconditional release, pursuant to rule 118.

2. Under articles 58 and 60 of the Statute, the Pre-Trial Chamber may issue and maintain a warrant of arrest in effect if it is satisfied that one only of the conditions listed under article 58(1) is met, or continues to be met.

3. Article 60 states that the Chamber may modify its ruling as to detention, release, or conditions for release, if it is satisfied that changed circumstances so require.

4. The Defence does not explain why the conditions which justified the warrant of arrest may no longer be met and simply refers to the "lengthy" detention period. A seven-month pre-trial detention period in an international criminal case is neither excessive nor exceptional compared with the usual length of time spent in detention before the ad hoc tribunals for example, where pre-trial detention up till the trial has

always been the rule. The ICTY, for example, has held that a period of 18 months of pre-trial detention was reasonable.[1]

5. The Pre-Trial Chamber can also not ignore the specific situation of Mr LUBANGA, in that he was not deprived of his liberty by decision of the Court, but was surrendered to the Court by the authorities of his home country, while he was already in detention for war crimes and crimes against humanity committed on the territory of that State.

2. Consequences of a possible provisional release

6. The release of the accused should not result in him being allowed unrestricted entry into the territory of the host state, nor to travel to another country, without the approval of the Democratic Republic of the Congo, which detained the accused prior to his surrender to the Court, otherwise the intervention of the Court would amount to placing a person suspected of international crimes beyond the reach of his or her judge thereby ensuring his or her impunity.

7. The other persons involved in the same case as the detainee are in detention and are waiting for the competent Military High Court to be properly constituted before they can be tried.[2] In fact, in this case, Thomas Lubanga is considered the prime suspect.

8. Although the Statute and the Rules of Procedure and Evidence do not explicitly govern the situation of a person released by the Court who, prior to his or her surrender, was being prosecuted in another State, it is possible to apply by way of analogy the provisions of rule 185(2) of the Rules of Procedure and Evidence which provides that the person

[1] ICTY, *Prosecutor v. Krajisnik*, Decision on motion for provisional release, IT-00-39 and 40-40, 8 October 2001.
[2] These persons include a general officer, which makes the Military High Court competent in accordance with article 120 of the Military Code.

should be returned to the State which originally surrendered him or her to the Court.

9. This was also the approach adopted by the International Criminal Tribunal for Rwanda in the *Barayagwiza* case.[3] The relevant decision, later reviewed by the Decision of 31 March 2000, whilst staying proceedings before the Tribunal ordered that the accused be returned to Cameroonian authorities who had surrendered him to the Tribunal.

10. Complementarity under article 1 of the Statute may not result in putting an end to proceedings initiated by a State Party without guaranteeing effective prosecution before the Court, when there is nothing at the current stage of the proceedings to suggest that prosecution in the DRC falls under articles 20(3)(a) and (b).

3. Victim concerns

11. The victims fear that if the accused were to be released by the Court, there would be a real danger that he might obstruct the investigation or the proceedings before the Court, frustrate the proceedings or continue to commit the crimes for which he is being prosecuted, even if he were to be transferred to Congolese authorities.

12. Congolese authorities could in fact decide to leave the accused at large upon a decision by the Court granting provisional release, given that these fears were the reason behind the warrant of arrest, *inter alia*. In any case, once back in the DRC or in a neighbouring country, the accused could once again take over the day-to-day running of the UPC under whose auspices the crimes with which he is charged were

[3] ICTR, Appeals Chamber, *The Prosecutor v. Barayagwiza*, 3 November 1999, www.ictr.org

committed, and which is still fully active on the ground in Ituri, more specifically in Bunia where the victims are located.

13. The "Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo", submitted to the Security Council on 13 June 2006, states that: "*In Ituri and North Kivu, cases of recruitment and re-recruitment by uncontrolled armed groups have been documented in the past months*"[4] and "*… in Ituri there have been constant allegations of recruitment by militia groups, especially of… UPC armed groups.*"[5] The same report goes on to say: "*From January 2004 to May 2006, more than 18,000 children have been released from forces and armed groups in the Democratic Republic of the Congo. Because of limited integration support and programmes, however, children are still vulnerable to new threats and harassments, including re-recruitment. The MONUC Child Protection Section and UNICEF continue to receive reports of abuses against children formerly associated with armed forces and groups perpetrated by elements from different armed groups and the Congolese armed forces.*

The abuses identified consist of arbitrary arrests, illegal detention and ill-treatment during deprivation of liberty by FARDC and threats of re-recruitment by armed groups or elements thereof which remain active. In addition, many children suffer from harassment by both FARDC and other armed groups, such as destruction of official demobilization certificates and sometimes forced payment of a ransom."[6]

14. Finally, fighting has resumed in Ituri and there have been further massacres. This situation concerns both the international community, which is worried about the conduct of the second round of the

[4] S/2006/389, Report of the Secretary General on children and armed conflict in the Democratic Republic of the Congo, pp. 6, 18. Underlined by the applicants.
[5] S/2006/389, pp. 7, 23.
[6] S/2006/389, pp. 7 and 8, 26 and 27

presidential and provincial elections, and the victims. In Bunia itself, there is a group called GEGERE which reportedly wishes to "avenge" Lubanga.

15. Under these circumstances, the provisional release of the accused could be construed as support for the group to which the accused belongs, but also as an encouragement to others to continue to commit war crimes such as those set out in the warrant of arrest issued by the Court. Such a situation would be contrary to the purposes for which the Court was established, which are set out in the Preamble to the Rome Statute:

> "*Affirming that the most serious crimes of concern to the international community as a whole [must not go unpunished]…*
>
> *Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,*
>
> *Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,*
>
> *Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.*"

FOR THESE REASONS,

MAY IT PLEASE THE PRE-TRIAL CHAMBER

To dismiss the request for provisional release submitted by the Defence.

[signed]

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Luc Walleyn and Franck Mulenda (absent at the time of signature)
Counsel for victims a/0001/06, a/0002/06 and a/0003/06

Dated 9 October 2006

At Brussels and Kinshasa