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Date: **26 October 2006**

PRE-TRIAL CHAMBER I

Before: **Judge Erkki Kourula, Presiding Judge**
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Navi Pillay
Judge Sang-Hyun Song

Registrar: **Mr Bruno Cathala**

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

Public Document

Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
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1. On 20 September 2006, the Defence filed the "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo". The Defence requested, *inter alia*, the Pre-Trial Chamber to order that Thomas Lubanga Dyilo be immediately granted provisional release.[1]
2. On 22 September, the Single Judge issued the "Decision Establishing a Deadline in relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo" (22 September 2006 Decision),[2] and set both the Prosecution and the Representatives of the victims a deadline to file a response by 9 October 2006. On 9 October 2006, the Prosecution filed its 'Response to the Defence Request for Interim Release', requesting the Pre-Trial Chamber to dismiss the Defence's Request.[3] On the same day the representatives of the victims a/0001/06, a/0002/06 and a/0003/06 filed their observations on the Defence Request[4] also requesting that the Chamber reject the Defence Request.
3. The Defence subsequently filed a Request for authorisation to file a Reply to the Responses of the Prosecution and the Victims.[5]
4. On 18 October 2006, the Pre-Trial Chamber issued its "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo".[6] In this Decision, the Chamber denied the Defence Request for file a Reply to the Responses of the Prosecution and Victims and rejected the Defence Request for Provisional Release. The Defence hereby files its appeal against that Decision.
5. Firstly, the Chamber decided that the Defence Request based on the failure of the Chamber to respect the requirements of Article 60(3) and Rule 118(2) was without merit. According to the Chamber the obligation upon the Chamber to periodically review its ruling on the release or detention of the person, which must be carried out every 120 days, only applies after there has been a request for interim release and a subsequent decision on this request by the Pre-Trial Chamber. The Decision then explained that as this was the first request for interim release under Article 60(2) the

[1] Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo, ICC-01/04-01/06-452, 20 September 2006, at paragraphs 33-49 (Defence Request)
[2] Decision Establishing a Deadline in relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo, public, 22 September 2006. ICC-01/04-01/06-465
[3] Prosecution Response to the Defence Request for Interim Release, 9 October 2006, ICC-01/04-01/06-531
[4] Observations des victims a/0001/06, a/0002/06 et a/0003/06 sur la demande de mise en liberté introduit par la defense, 9 October 2006, ICC-01/04-01/06-530
[5] Requête demandant l'autorisation de répondre au Bureau du Procureur et aux représentants des victimes a/0001/06 à a/0003/06, 13 October 2006. ICC-01/04-01/06-571
[6] Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo, 18 October 2006 (Decision), ICC-01/04-01/06-586

Chamber has not violated Article 60(3). The Defence submits that this is an error of law as the expression 'ruling on the release or detention of the person' as detailed in Article 60(3) is not limited to express decisions on detention issued in response to motions for provisional release filed under Article 60(2).

6. Secondly, the Chamber also rejected the Defence request for interim release from an unreasonable period of detention due to inexcusable delay by the Prosecutor under Article 60(4). However, the Chamber appeared to subordinate this provision to Article 60(2) and the conditions therein. The Chamber committed a clear error of law in this respect, as the possibility for interim release envisaged in this article is completely free-standing and separate from a request for provisional release under Article 60(2). In assessing whether the detention was for an unreasonable period the Chamber also erred in not considering the time that the suspect was detained or under house arrest in the Democratic Republic of Congo. Finally, in examining whether the delay was unreasonable it accorded too much weight to the amount and location of evidence in justifying the more than seven months of pre-confirmation hearing detention.
7. Thirdly, in assessing whether the conditions of Article 58(1) are met, which would justify continued detention under Article 60(2), the Pre-Trial Chamber considered and gave too much weight to irrelevant factors and failed to consider relevant factors.

1. The obligation to periodically review the detention of a suspect under Article 60(3)

8. The Defence highlighted in their original Request that under Article 60(3) the "Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person" and that this period amounts to at least every 120 days under Rule 118(2). As the last decision issued by the Chamber concerning the detention of Thomas Lubanga Dylio was issued on 10 March 2006 the mandate of the Registry to keep Thomas Lubanga Dylio in detention effectively expired on 10 July 2006. He has therefore been detained illegally by the Court for the last 3 months and 10 days."[7]
9. Neither the Prosecution nor the Victims representatives made any submissions in relation to this issue. However, the Pre-Trial Chamber simply decided that as the Defence had filed no previous request based on Article 60(2) then they were under no duty to review their decision on this issue. The Defence submits that this narrow interpretation of Article 60(3) has the effect of abrogating the responsibility of the Pre-Trial Chamber to uphold the rights of those detained under its authority.

[7] Defence Request, paragraph 33

1.1 – The warrant of arrest amounts to a ruling in the sense of Article 60(3)

10. The Pre-Trial Chamber states in its Decision that the decision maintaining detention referred to in Article 60(3) and Rule 118(2) must not be confused with a warrant of arrest in the sense of article 58 of the Statue which orders the initial provisional detention of Thomas Lubanga.[8] However, there is nothing in the Statute of Rules which supports this extremely limited interpretation of the obligations of the Pre-Trial Chamber.
11. The text of Article 60(3) refers to a "ruling" and not to a "decision". It can therefore be surmised that the word "ruling" was used to encompass any different action of the Pre-Trial Chamber which had the result of keeping Thomas Lubanga in detention. This interpretation guarantees the right of the detainee to challenge his or her detention regardless of the form of the ruling under which he is being detained.
12. This interpretation is also consistent with the interrelationship between articles 58 and 60 of the Statute. Article 60(2) expressly refers to the conditions in Article 58(1) in relation to whether a request for interim release should be granted. Therefore it would appear to be illogical to exclude the decision to detain Mr Lubanga in Article 58(1) from those which must be periodically reviewed under Article 60(3).
13. The Defence therefore submits that the Chamber should not be permitted to evade its obligation to review a ruling on detention purely on the basis that this ruling is not a decision in response to a Defence motion for provisional release under Article 60(2). As a consequence of the Chamber's failure to review Mr Lubanga's detention he has been illegally detained since 10 July, namely 120 days after the warrant of arrest. The Defence therefore submits that he should be granted interim release immediately.

1.2 – The Defence has already filed a request for release in May 2006

14. The Defence also submits that it has already filed a request for release on 23 May 2006.[9] Whilst the Defence clarified this motion as a challenge to jurisdiction, rather than a request for provisional release in the sense of Article 60(2), the Chamber was still under an obligation to review the application and render a decision on this request. The Chamber proceeded to examine the issue, request observations from the

[8] Decision, at page 5
[9] Defence Application for Release, ICC-01/04-01/06-121, 23 May 2006

DRC and the victims[10] and only finally rendered its Decision on this issue only on 3 October 2006[11] against which the Defence has filed an appeal.[12]

15. The Defence submits that the Pre-Trial's decision on this application for release, which was filed originally on 23 May 2006, amounts to a ruling in the sense of Article 60(3). Although, it was only issued on 3 October, and therefore 120 days hasn't elapsed since that date in order to trigger the Chamber's duty to intervene, the failure of the Trial Chamber to issue a Decision on this issue at an earlier date can not be used against the suspect to deny him the right to review of his detention under this statutory provision.

1.3 – The Pre-Trial Chamber is under a duty to ensure the respect of the rights of detainees

16. The Defence also submits that independently of any motion by the Defence, the language of Article 60(3) mandates that 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 person'. The contrast between the two words in this provision is clear. Whilst Defence Counsel can submit requests for provisional release for their client at any time, in addition to and regardless of Defence Counsel's actions, the Pre-Trial Chamber shall periodically review its ruling on detention.

1.4 - Conclusion

17. Therefore, the Defence is of the view that the Pre-Trial Chamber has erred in law by failing to review the detention of Thomas Lubanga Dyilo on 10 July 2006 at the latest. The Defence submits that the failure to review this ruling must result in his immediate provisional release.

2. The Defence Request under Article 60(4)

2.1 – Article 60(4) is not subordinate to Article 60(2)

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[10] Décision invitant la République démocratique du Congo et les victimes de l'affaire an cause a présenter leurs observations sur les procédures menées en vertu de l'article 19 du Statut 24 July 2006, ICC-01/04-01/06-206

[11] See Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, 3 October 2006, ICC-01/04-01/06-512

[12] Defence Appeal on Jurisdiction, 26 October 2006

18. In examining the statutory provisions on interim release under the Statute, the Chamber also assessed the Defence request for interim release due to an 'inexcusable delay by the Prosecutor' in terms of Article 60(4). The Defence appeals the substance of the Pre-Trial Chamber's reasoning on this issue below. However, in its Decision the Chamber appeared to subordinate this provision to Article 60(2) and the conditions therein. The Chamber committed a clear error of law in this respect, as the possibility for interim release envisaged in this article is completely free-standing and separate from a request for provisional release under Article 60(2).
19. The Decision notes that the Defence requests the Chamber to order the interim release of Thomas Lubanga Dyilo, under Article 60(4) of the Statute which states that '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'.[13] The Decision then proceeds to refer to Article 60(2) of the Statute which permits the person subject to a warrant of arrest to apply for interim release, but states that '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'.
20. The Defence submits that an examination of a request under Article 60(4) should be examined completely independently of Article 60(2) and therefore the conditions of Article 58(1). The correct interpretation of Article 60(4) is that if there has been 'inexcusable delay' by the Prosecutor, the Court shall consider releasing the person, regardless of whether the conditions in article 58(1) are still met. In that sense it is a free standing provision from Article 60(2) and there should be no examination of the conditions in article 58(1). The rationale behind this free-standing provision is that the suspect, who has not even been charged, has a right to seek interim release even if the conditions of Article 58(1) are met, if the delay is inexcusable and attributable to the Prosecutor. Any other interpretation, such as subordinating Article 60(4) to Article 60(2) would mean that as long as the Prosecutor could convince the Chamber that the conditions in Article 58(1) still existed, the suspect could be kept in detention indefinitely. The right of the suspect to be released in Article 60(4), to be effective, has to therefore be completely independent.
21. In this regard the Defence submits that rights must be effectively guaranteed rather than be merely theoretical. The right must be interpreted in a way which is "most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the

[13] at page 5

Parties."[14] The right to seek interim release under Article 60(4) must therefore be interpreted in a way that allos the suspect to effectively challenge his detention.

22. It is not clear from the Decision whether the examination of Article 60(4) was subordinate to Article 60(2). However, to the extent that the Decision in any way subordinated the right to seek interim release under Article 60(4) to the application of Article 60(2), it should be reversed.

2.2 – There has been an unreasonable period of detention prior to the confirmation of charges

2.2.1 – Time spent in ICC custody amounts to an unreasonable period

23. Mr Lubanga is a suspect and not an accused. Therefore the concept of 'inexcusable delay' must be assessed with regards to those who have this status rather than be confused with the length of a procedure when someone has been formally indicted. Had the Pre-Trial Chamber properly examined the request under Article 60(4), it would have been obliged to order the immediate release of Thomas Lubanga Dyilo as the cause of the delay has entirely been attributable to the actions of the Prosecutor.

24. In its Decision, the Pre-Trial Chamber merely stated that the period of detention to consider in this case in the sense of the application of Article 60 of the Statute, started on 16 March 2006, the date that Thomas Lubanga Dyilo was surrendered to the Court. Assuming that this analysis is correct, which the Defence disputes below, Mr Lubanga has still remained in detention for over seven and a half months at the time of this appeal, with the confirmation hearing a further 2 weeks away. This length of time is far in excess of that which is considered a reasonable length of time for a suspect to remain in detention even before charges are confirmed against him.

25. The assessment of what amounts to an unreasonable period must be undertaken by reference to the ICC Statute and its antecedents. However, comparison with national legislation can also help the Chamber to assess what amounts to an inexcusable delay. Furthermore, as the Pre-Trial Chamber accepted in its Decision, the interpretation of the Statute must be consistent with internationally recognised human rights under Article 21(3). An examination of these principles confirms that the pre-confirmation hearing of Mr Lubanga has certainly lasted for an unreasonable period.

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[14] Wemhoff v Germany (2122/64) [1968] ECHR 2 (27 June 1968) (all ECHR caselaw cited in this appeal is available on the HUDOC website at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en&action=saved-run&saved=hejud-12weeks-dnf)

26. In the Draft Statute of the International Criminal Court, Article 28(2) considered that 90 days was a reasonable amount of time to be held before confirmation of the indictment.[15] If no charge is brought against the suspect during this time period then the suspect must be released.

27. In its report, the Preparatory Commission considered that the appropriate limit for detention before the confirmation of the charges was 60 days with the possibility of extending this to a maximum of 90 days.[16]

28. At the ICTY the Rules of Procedure and Evidence are very clear in limiting the time that a 'suspect' rather than an 'accused' may spend in detention. The Defence takes this opportunity to cite this provision in full as it provides a clear and well-defined procedure for keeping a suspect in detention.

Rule 40 *bis*
Transfer and Provisional Detention of Suspects

(D) The provisional detention of a suspect shall be ordered for a period ***not exceeding thirty days*** from the date of the transfer of the suspect to the seat of the Tribunal. At the end of that period, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a period ***not exceeding thirty days, if warranted by the needs of the investigation***. At the end of that extension, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a further period not exceeding thirty days, if warranted by special circumstances. The ***total period of detention shall in no case exceed ninety days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the requested State***.

29. This provision is mirrored in the ICTR Statute.[17] This procedure has a clear initial period of detention, the right for the Prosecutor to request a further period of detention if warranted by the needs of the investigation, and the right for one final request for an extension for thirty days, but only after an *inter partes* meeting with the Prosecutor and the suspect, who is assisted by Counsel. If at the end of this procedure, the indictment has not been confirmed, then the suspect shall be released. Therefore for

[15] Draft Statute for an International Criminal Court 1994; Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1994*, vol. II (Part Two). http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf
[16] Report Of The Preparatory Committee On The Establishment Of An International Criminal Court; A/Conf.183/2/Add.1 14 April 1998 http://www.un.org/law/n9810105.pdf
[17] Rule 40 *bis* (H) http://69.94.11.53/ENGLISH/rules/070605/070605.doc

International Tribunals who are clearly well-versed in the complexities of international criminal trials, ninety days is the absolute maximum for a length of detention for a suspect. The Defence would like to repeat that Mr Lubanga has been kept in the ICC detention unit since 16 March 2006.

30. Article 9(2) of the ICCPR provides that anyone 'who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.'[18] The purpose of this right is that it "counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect" by giving the suspect "the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings"; and "gives the suspect information he requires in order to prepare his defence."[19] In interpreting this provision the U.N. Human Rights Committee has held that detaining a suspect for 45 days without formally charging him amounted to a violation of this Article.[20] The Committee has made similar findings in other cases involving violations of Article 9(2) where the period in between arrest and detention was eight months.[21] The Defence submits that even if the Appeals Chamber were to apply an extremely restrictive approach and not take into account time spent by Mr Lubanga in detention in the DRC, the delay since 17 March 2006 since when Mr Lubanga has been in pre-confirmation hearing detention at the ICC detention unit clearly violates Article 9(2).

31. At the domestic level, even with regards to very serious crimes, legislators have understood that the right of a suspect not be held in detention before the confirmation of the indictment mandates that there must be strict limitations on this detention which can only be extended exceptionally and with good cause. In Germany, a re-examination of the reasons justifying pre-trial detention must be conducted after 6 months, failing which the warrant of arrest must be lifted.[22] Under the new Code of

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[18] http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

[19] Prosecutor v. Barayagwiza, Decision, 3 November 1999, paragraphs 80-81, http://69.94.11.53/default.htm cited with approval in Prosecutor v Juvénal Kajelijeli, ICTR-98-44A-A, Appeals Chamber Judgement, 23 May 2005, paragraph 229, http://69.94.11.53/default.htm

[20] Glenford Campbell v. Jamaica, Communication No. 248/1987: Jamaica. 07/04/92, "6.6 the Committee finds that the author was not "promptly" informed of the charges against him: one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirements of article 9, paragraph 2." http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6df5cdbdef265021c1256ad10042aadd?Opendocument

[21] See Moriana Hernandez Valentini de Bazzano, *Communication No. 5/197 : Uruguay. 15/08/79. CCPR/C/7/D/5/1977* (eight months between commencement of detention and filing of formal charges) http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/831f9ec6beb8fa62c1256ab200359479?Opendocument Monja Jaona, (eight months when the suspect was under house arrest) *Communication No. 132/198 : Madagascar. 01/04/85. CCPR/C/24/D/132/1982* *http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ef3e0bd958c2b818c1256ab9003294ad?Opendocument*

[22] § 121 StPO ; http://www.juriscope.org/publications/documents/pdf/proc-pen-all.pdf

Criminal Procedure of Bosnia and Herzegovina,[23] which is based on the ICC Statute and the procedure contained therein, detention before the confirmation of the charges is for a maximum of one month.[24] A further extension of up to a maximum of three months in total is only possible if the 'proceeding is ongoing for the criminal offence for which a prison sentence of ten (10) years may be pronounced or more, and if there are particularly important reasons' but this must follow a 'substantiated motion of the Prosecutor'. Whilst this law has subsequently been amended to allow for longer pre-trial detention this must follow a substantiated motion by the Prosecutor.[25]

32. The Defence therefore submits that in the light of this information, the Chamber should have found that Mr Lubanga has been detained for an unreasonable period in the sense of Article 60(4) purely based on the time that Mr Lubanga has been in the ICC detention unit, namely since 16 March 2006.

2.2.2 – The Chamber should also have included time spent in detention and house arrest in the DRC in assessing whether the detention was unreasonable

33. The Defence further submits that the Chamber in assessing the length of the pre-confirmation detention, should have also taken into account the time that Mr Lubanga has been in detention and house arrest in the DRC. If this time was taken into account the Chamber would have concluded that he has been in detention or house arrest as an uncharged suspect for over three years which the Defence submits is far in excess of any level that is acceptable in pre-confirmation proceedings.

34. Mr Lubanga was originally arrested by the Congolese military authorities on 19 March 2005. He was then held in detention for almost a year until he was surrendered to the ICC on 17 March 2005.

35. He was also previously held in administrative detention (house arrest) from 13 August 2003 onwards.

[23] Criminal Code of Bosnia and Herzegovina, http://www.sudbih.gov.ba/files/docs/zakoni/en/Zakon_o_krivicnom_postupku_-_3_03_-_eng.pdf

[24] Article 135, Ibid

[25] See Article 135 amended (46/06), 16 June 2006. The new article 135 now provides that "(4) Exceptionally and in an extraordinarily complex case concerning a criminal offense for which a long-term imprisonment is prescribed, custody may again be extended for no longer than three (3) months after the extension of the custody referred to in Paragraph 3 of this Article. Such an extension may occur twice consecutively, following a substantiated motion of the Prosecutor for each extension, which needs to contain the statement of the Collegium of the Prosecutor's Office about the necessary measures that have to be undertaken in order to complete the investigation (Article 225, Paragraph 3)."
http://www.sudbih.gov.ba/files/docs/zakoni/en/izmjene_zakona_o_krivicnom_postupku_-_46_06_-_eng.pdf

36. The Defence has previously made submissions on administrative detention in this in its challenge to jurisdiction[26] and incorporates those submissions on this issue. It simply wishes to take this opportunity to highlight that for the purposes of establishing whether there has been an unreasonable delay, there is nothing in the text of Article 9 of the ICCPR which would exclude those situations where the person concerned was under house arrest rather than actual detention. Indeed, as noted above, the Human Rights Committee found that there was a violation of Article 9(2) when the person in question was under house arrest.[27]
37. The Defence is of the view that if the Pre-Trial Chamber had taken the time into account when Mr Lubanga was under house arrest or detention in the DRC it would have held that there was a clear violation of his right to be tried without undue delay.
38. The Defence submits that according to the ICC Statute, and in interpreting the provisions of the Stutute in line with the jurisprudence of international tribunals, the Pre-Trial Chamber should have included this time in its consideration of the delay in these proceedings.
39. Under Article 78(2) of the Statute 'In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.' The Defence submits that the use of the word may in this context does allow the Trial Chamber to exercise its discretion in deciding whether or not to take this time into account. However, the Defence is of the view that the presumption is that the time will be taken into account and the burden will be on the Chamber to provide the reasons why this time would not be taken into account.
40. This is indeed the approach taken by the ICTY Appeals Chamber in the *Tadic* case. It stated that 'fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal's formal request for deferral.'[28] This period was included within the amount of time that the Court deducted from the sentence that it imposed, an approach that has been upheld by other International Tribunals.[29]

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[26] See paragraphs 53-54 of Defence Response to the Observations of the DRC and the Observations of the Victims in Relation to Article 19 of the Statute, 8 September 2006, ICC-01/04-01/06-406-Conf
[27] See Monja Jaona, (eight months when the suspect was under house arrest), footnote 21
[28] Prosecutor v Dusko Tadic, Judgement in Sentencing Appeals, paragraph 38 http://www.un.org/icty/tadic/appeal/judgement/index_2.htm
[29] See Prosecutor v Juvénal Kajelijeli, ICTR-98-44A-A, Appeals Chamber Judgement, at paragraph 323 including within the time it deducted from the sentence imposed the 95 days in the custody of the Republic of

41. There is nothing in the ICC Statute that should limit taking account of this time spent in detention to matters of sentencing. Such an approach would violate Mr Lubanga's right to a remedy for violations of his rights if the charges were not confirmed or if he was acquitted upon those charges if they eventually proceeded to trial. Every single day that Mr Lubanga remains in detention further increases the violation of his rights.
42. That the right an effective remedy for human rights violations exists is clear from the ICTR Appeals Chamber in holding that 'any violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR'.[30] If the time that Mr Lubanga spent in detention is not included he will be deprived of this right.[31]

2.2.3 – Relevant factors in considering whether a period of detention is 'unreasonable'

43. The reasoning behind the Chamber's Decision that keeping Mr Lubanga in detention since 17 March 2006 did not amount to an unreasonable period, appeared to be based on the fact that the majority of evidence was located abroad and that there was a significant amount of evidence. The Defence submits that these factors, whilst they may be relevant to domestic proceedings where such an occurrence is rare, cannot be determinative in international criminal proceedings. As such, in issuing this Decision the Pre-Trial Chamber "gave weight to extraneous or irrelevant considerations" or failed to give weight or sufficient weight to relevant considerations"[32] and consequently the Decision should be reversed by the Appeals Chamber.

Benin from the arrest on 5 June 1998 to the Appellant's transfer to the Tribunal on 7 September 1998 when the accused was a suspect. http://69.94.11.53/default.htm;

[30] Kajelijeli Appeals Chamber Judgement, at paragraph 255, Prosecutor v Semanza, Jean Bosco Barayagwiza v Prosecutor, ICTR-97-19-AR72, 31 March 2000, Decision on Prosecution's Request for Review or Reconsideration, paragraphs 74-75, http://69.94.11.53/default.htm; Prosecutor v. Semanza, Case No. ICTR-97-20-A, 31 May 2000 Decision, at paragraph 135 'The Appeals Chamber nevertheless finds that any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy.' All cited with approval in Prosecutor v André Rwamakuba Case No. ICTR-98-44C-T, Trial Chamber Judgement, at paragraph 218 http://69.94.11.53/default.htm

[31] In this regard the Defence incorporates by reference its submissions in Section 2.5 of the Defence Appeal on Jurisdiction, dated 26 October 2006

[32] Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (Milosevic Decision on Defence Counsel) at paragraph 10, http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm, citing *Prosecutor v. Milosevic*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 18 April 2002 (hereinafter "Refusal to Order Joinder"), http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm; cited itself with approval in Prosecutor v. Vojislav Seselj, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, Case No. IT-03-67-AR73.3, 20 October 2006, at paragraph 7 http://www.un.org/icty/seselj/trialc/decision-e/061020e.pdf

44. It is axiomatic to state that in an international criminal law case the majority of evidence will be located abroad or that there will be a significant amount of evidence. In fact one of the rationales for international criminal tribunals is that they will be able to cope with the extra demands of large and complex cases because they will have the infrastructure to sort, store and use the evidence in large and complex cases. This is surely one of the main reasons why the ICC has invested so much money in the ringtail ecourt system. Moreover, as by its very nature an international tribunal is generally not in the country where the crimes occurred, a large amount of the evidence in the case will be located in a different country to where the crimes have allegedly been committed. To put it bluntly, this will not come as a surprise to either the Prosecutor or the Chamber. Therefore to then use this argument as a justification for having an inordinately long pre-trial detention is fundamentally unfair to Mr Lubanga. The result is that his right not be detained for an unreasonable period would be protected more at the domestic level than at the international level.

2.3 The inexcusable delay has been the fault of the Prosecution

45. In its Decision the Chamber stated, seemingly not in its interpretation of Article 60(4) but in its general assessment of whether the pre-trial detention had lasted an unreasonable time, that the 'organs of the Court have acted with celerity and at no moment has the procedure remained inactive'.
46. The Chamber in this reasoning has failed to properly address the issue at hand. It may be that the procedure has always remained active. However, that does not and can not be the sole answer to whether there has been inexcusable delay. Article 60(4) speaks of an 'inexcusable delay' and does not speak of inexcusable inactivity. Whilst the inactivity may often cause the delay, it may equally be caused by the Prosecution repeatedly changing tactics, failing to disclose materials in a form which the Defence can review or failing to comply with the eCourt protocol.[33] Indeed the belief that failure to comply with court orders amounts to inexcusable delay is supported by commentaries on the Rome Statute.[34] This is equally the fault of the Prosecutor and equally results in an inexcusable delay. If the actions of the Prosecutor substantially increase the amount of time that the suspect remains in detention then the Defence submits that the delay becomes imputable to the Prosecutor.

[33] The Defence raised the issue of the Prosecution non-compliance with its eCourt protocol obligations in various status conferences
[34] See Otto Triffterer (ed) "Commentary on the Rome Statute of the International Criminal Court", at page 781

47. The Defence submits that the Chamber simply applied the reasoning that as long as the Prosecutor is doing something, and therefore is not inactive, there has not been inexcusable delay. The concept of delay needs to be assessed from the perspective of the suspect. The Defence submits therefore, that a delay of over seven and a half months at the time of writing must constitute an unreasonable delay when the detention concerns a suspect against which no charges have yet been confirmed.
48. In relation to the time that was spent by Mr Lubanga in detention in DRC, the Defence submits that for this entire time the Prosecutor was aware of his detention and benefited from it. The level of concerted action between the ICC Prosecutor and the Congolese Military Authorities who were holding Mr Lubanga was so great that the Defence submits that this time should have been included within the calculation of pre-trial detention in determining whether there has been inexcusable delay by the Prosecution. In a separate appeal, also presently before the Appeals Chamber, the Defence has proved that the Prosecutor was aware of the continued to detention of Mr Lubanga, greatly benefited from his detention in Congo.[35] The Defence therefore incorporates its submissions made on this issue in this appeal.
49. Furthermore, the Prosecutor did not have to apply for the warrant of arrest on 25 January 2006 but did so at that time clearly to deprive Mr Lubanga of his lawful right to challenge his arbitrary detention by the Congolese military authorities. Even in May 2006 when the confirmation hearing was originally scheduled, the Prosecution was clearly not ready for the indictment to be confirmed, as evidenced by their request to delay the confirmation hearing.[36] A fair and just Prosecutor would have allowed Mr Lubanga to challenge his detention in the DRC and would have waited until he had the evidence that he needed to confirm the indictment before submitting an application for the warrant of arrest. Instead, by submitting an application for an arrest warrant when he was clearly far from being able to actually proceed to the confirmation hearing the Prosecutor has been entirely responsible for Thomas Lubanga spending over seven months in detention as an uncharged suspect.
50. It is also clear that the Prosecution cannot use the large amount of work it has to perform to justify inexcusable delay in a suspect being charged. According to the ICTR Appeals Chamber in the *Kajelijeli* case

[35] The level of cooperation and concerted action between the ICC Prosecutor and the DRC authorities is explained in Section 2.2 of the Defence Appeal

[36] Prosecution's Request Pursuant to Rule 121(7) for postponement of the Date of the Confirmation Hearing, 22 May 2006, ICC-01/04/01/06-114-Conf

> "The Appeals Chamber notes the Prosecution's submission, made at the Appeal Hearing, that the 95-days' delay in the Appellant's transfer to the custody of this Tribunal was due to the fact that the period in which the Appellant was arrested was an extremely busy one for the Prosecution with numerous ongoing investigations against dozens of suspects and numerous indictments being drafted simultaneously. While the Appeals Chamber is sympathetic to the workload carried by the Prosecution at that time, in no way does this fact justify the Appellant's arbitrary provisional detention in Benin without charge for 85 days, and detention in Benin without appearance before a Judge for a total of 95 days."[37]

2.4 The only remedy available is the immediate interim release of Mr Lubanga.

51. The Defence submits that as a consequence of the seven months of detention before the confirmation hearing, and the year long detention in the DRC beforehand, the only satisfactory remedy is that Mr Lubanga be immediately granted interim release. As the Defence highlighted above, every person whose rights have been violated has the right to a remedy. The Defence submits that a possible future reduction in sentence is not appropriate to compensate a person who has not even been charged with a crime yet.
52. Mr Lubanga has the right to a family life. By being kept in detention in a country far away from where he lives, he has very limited opportunity to see his family. Every extra day that he is held in detention is one less day that he can spend with his family. If he is acquitted of all charges at the end of any eventual trial, but yet has been denied provisional release in the meantime, he will have no possibility of recuperating the time he has lost.
53. Therefore the Defence submits that the only adequate remedy for the violation of Mr Lubanga's rights is immediate release.

3 – Interim release under Article 60(2) of the Statute

3.1 – The Pre-Trial Chamber took into account irrelevant factors in issuing its Decision

54. In its Decision the Pre-Trial Chamber also examined the request for provisional release under Article 60(2) and decided that as the conditions enumerated by Article

[37] Kajelijeli Appeals Chamber Judgement, paragraph 233

58(1) were met Thomas Lubanga could not seek interim release under this article. In carrying out this task the Chamber relied on the following factors in order to establish that the conditions in Article 58(1) were met, and therefore denied Mr Lubanga's request for provisional release under this article

- the seriousness of the crimes imputed to Mr Lubanga Dyilo
- that the principal links from Mr Lubanga remain with the DRC
- that there are reasonable grounds to believe that Mr Lubanga Dyilo was able to establish numerous national and international contacts due to his alleged Presidency of the UPC and creation of the FPLC
- that Mr. Lubanga knows the identity of certain witnesses

55. Again the Defence submits that in issuing this Decision the Pre-Trial Chamber "gave weight to extraneous or irrelevant considerations" or failed to give weight or sufficient weight to relevant considerations".

56. Firstly, the Defence highlights that the gravity of the charges cannot in itself justify pre-trial detention as has been held by various Chambers at the ICTY.[38] Therefore whilst the gravity of the charges is relevant, it is only in relation to the likelihood that the suspect will appear for trial that it can be taken into account, and not in isolation.[39]

57. In relation to the second factor, the Pre-Trial Chamber states that the principal links for Mr Lubanga are still with the DRC. However, as Defence Counsel has already requested in relation to a request for immediate release, Mr Lubanga is not requesting to be sent to that country. Instead he wishes to go to either Great Britain or Belgium.[40] An ICTY Trial Chamber has previously granted provisional release to an accused to an area distant from territory covered by the indictment at i twas lear that this was the determining factor in the decision.[41] Therefore the Defence submits that the Pre-Trial Chamber committed an error of fact in holding that these principal links remained with the DRC.

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[38] See *Ilijkov v. Bulgaria*, European Court of Human Rights, Judgement of 26 July 2001, para. 81 as referred to in *Prosecutor v. Stanisic*, Case No. IT-03-69-PT, Decision on Provisional Release, 28 July 2004, para. 22, and in Prosecutor v. Haridinaj, Decision On Ramush Haradinaj's Motion For Provisional Release**,** 6 June 2005, at paragraph 24 (Haridinaj Provisional Release Decision) http://www.un.org/icty/haradinaj/trialc/decision-e/050606.htm#48

[39] Haridinaj Provisional Release Decision, at paragraph 29

[40] See Defence's Submissions Relative to the Order of 29 May 2006, ICC-01/04-01/06-108, at page 2. The Defence further wishes to inform the Appeals Chamber that it approached the Registry about the issue of contacting States regarding the possibility of Mr Lubanga being provisionally released there and was informed that the Registry would do so and it was waiting for the outcome of the interim release decision before doing so.

[41] Prosecutor v Brdjanin and Talic, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002, at paragraph 42, http://www.un.org/icty/brdjanin/trialc/decision-e/20155759.htm

58. In holding that thirdly, Mr Lubanga's alleged position allowed him to develop national and international links which he could use to avoid appearing before the Court, the Chamber erred as purely maintaining these contacts does not imply that the suspect will use them.[42] In absence of further proof that he would use these contacts to escape from justice the Pre-Trial Chamber abused its discretion in relying on this factor.
59. To rely on the fact that Mr Lubanga now knows the identities of certain witnesses as a factor to deny his request for interim release, is completely unfair to Mr Lubanga. It implies that all the Prosecution now has to do in order to prevent a suspect's request for interim release from being successful is to actually partially comply with its disclosure obligations. This should not be used in any way as a basis for denying the interim release of Mr Lubanga. This is strengthened by the fact that Mr Lubanga does not even wish at present to return to the DRC so any considerations as to the safety of the witnesses in this case cannot be used to justify his continued detention. Again use of this factor by the Pre-Trial Chamber has placed Mr Lubanga in the position of having to choose between the right to a fair trial and the right to be provisionally released. Mr Lubanga should not have to choose between these two fundamental rights.
60. Furthermore, the Pre-Trial Chamber failed to take into account the relevant factors from the jurisprudence of the international tribunals which mitigate in favour of interim release. The main factor that the Pre-Trial Chamber failed to take into account was whether Mr Lubanga would have voluntarily surrendered to the Court. As he was in detention at the time of his transfer to The Hague, he was not able to surrender voluntarily. This must not be used against him.[43] In fact Mr Lubanga has been a model detainee at the detention unit in The Hague and he takes part in all the hearings before the court to which he can be of assistance. All of this shows his good faith and supports the fact that he has no intention of frustrating the course of justice.

3.2 – The Chamber failed to apply the principles of necessity and proportionality to see whether there was a less restrictive means of ensuring Mr Lubanga's attendance at trial and the protection of witnesses

[42] Prosecutor v. Prlic et al., Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlic ("Prlic Trial Chamber Decision"), 30 July 2004, at paragraph 28 ' even if the Accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully' *http://www.un.org/icty/prlic/trialc/order-e/040730e-prl.htm*
[43] *Prosecutor v. Stanisic*, Case No. IT-03-69-PT, Decision on Provisional Release, 28 July 2004, paragraph 19

61. The Defence has highlighted that in any measure restricting the rights of Defence, the Chamber must apply the principles of necessity and proportionality to verify that the measure adopted is the least restrictive means of achieving the desired result.[44] The Defence submits that this principle applies equally here.
62. Article 60(2) states that the Chamber can order the interim release of the person with or without conditions. Therefore the Pre-Trial Chamber should have discussed whether there was a less restrictive method of achieving the twin aims of refusing Thomas Lubanga's provisional release than keeping him in detention. It could have imposed any conditions on Mr Lubanga under this article, and yet instead applied a more restrictive measure which results in his continued and seemingly indefinite detention. It doing so the Pre-Trial Chamber committed an error of law which the Defence submits should be reversed by the Appeals Chamber.

4 – Relief sought

63. The arrest and continued detention of Mr Lubanga first at the behest of the DRC authorities and subsequently formally by the ICC Prosecutor has resulted in him spending over three years in detention. The Defence respectfully requests the Appeals Chamber to put an end to this by reversing the errors of the Pre-Trial Chamber and granting him interim release with immediate effect.

[44] Cite to Defence appeal on Rule 81

For Mr. Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo

Dated this 26th day of October, 2006

At The Hague