Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **16 November 2006**

THE APPEALS CHAMBER

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 THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Response of Victims a/0001/06, a/0002/06 and a/0003/06 to the appeal of the Defence from the Decision on the application for interim release of Thomas Lubanga Dyilo

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for Mr Thomas Lubanga Dyilo
Mr Jean Flamme
Ms Véronique Pandanzyla

Legal Representatives of Victims a/0001/06 to a/0003/06
Mr Luc Walleyn
Mr Franck Mulenda

Legal Representative of Victim a/0105/06
Ms Carine Bapita Buyangandu

NOTING the Defence motion entitled "Defence Appeal Against the *Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*", filed on 26 October 2006,

NOTING regulations 24(2) and 34 of the Regulations of the Court,

RECALLING the "Observations of victims a/0001/03, a/0002/03 and a/0003/03 regarding the challenge to jurisdiction raised by the Defence in the Application of 23 June 2006"[1] and also the "Observations of victims a/0001/06, a/0002/06 et a/0003/06 in respect of the application for release filed by the Defence"[2]

The Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06 respond as follows:

1. Duty to periodically review the detention of a suspect pursuant to article 60(3) of the Rome Statute

1. The Defence alleges that the Chamber committed a procedural error for not applying rule 118(2) of the Rules of Procedure and Evidence which, read in conjunction with article 60(3) of the Rome Statute, requires the Pre-Trial Chamber to re-examine its ruling on the release or detention of a person "*at least every 120 days*".

2. The Defence claim that the term "ruling" used in the English text of article 60(3) of the Rome Statute applies not only to a decision taken by the Pre-Trial

[1] See "Observations of victims a/0001/03, a/0002/03 and a/0003/03 regarding the challenge to jurisdiction raised by the Defence in the Application of 23 June 2006", No. ICC-01/04-01/06-349, 24 August 2006.
[2] See "Observations of victims a/0001/06, a/0002/06 et a/0003/06 in respect of the application for release filed by the Defence", No. ICC-01/04-01/06-530, 9 October 2006.

Chamber upon an application for release brought under article 60(2) of the Statute,[3] but also to the warrant of arrest itself,[4] has no basis in law.

3. Firstly, the French text of article 60(3) of the Rome Statute which, pursuant to article 128 of the Statute, is equally authentic, is very clear and requires the Pre-Trial Chamber to "*réexamine[r] périodiquement sa* ***décision*** *de mise en liberté ou de maintien en detention*."[5]

4. Secondly, the warrant of arrest is not a ruling on the **detention**, but a process intended to have a person **place**d in detention. The terms "detention" and "release" used in article 60(3) of the Rome Statute necessarily imply that the person is already in detention, and has made an application for interim release under article 60(2) of the Statute.

5. Finally, the ruling referred to in article 60(3) of the Statute is clearly that referred to in the previous paragraph of the same article which, as its title indicates, only applies to the stage of the proceedings which starts with the surrender to the Court of a person who is the subject of a warrant of arrest, or that person's appearance before the Court.

6. Accordingly, the duty of the Pre-Trial Chamber to periodically review any ruling to detain Thomas Lubanga Dyilo only starts from the Chamber's first relevant ruling, in other words, in this case, from 18 October 2006,[6] the date on which the Chamber ruled on the first application for interim release, i.e. that of 20 September

[3] Ibid., para. 5, p. 3
[4] See the "Defence Appeal against the 'Décision sur la demande de mise en liberté provisioire de Thomas Lubanga Dyilo'", No. ICC-01/04-01/06-618 of 26 October 2006, para. 10, p. 4
[5] Emphasis added.
[6] See the "Decision on the Application for the interim release of Thomas Lubanga Dyilo", No. ICC-01/04-01/06-586, 18 October 2006.

2006. On this point, it should be noted that the Defence itself acknowledged that: "*Mr Thomas Lubanga Dyilo's application of 23 May 2006 does not seek interim release*."[7]

7. Thus, it must be noted that in the absence of any application for the interim release of Thomas Lubanga Dyilo, the Pre-Trial Chamber could not rule on such an application and could therefore not re-examine its ruling either, without ruling *ultra petita*.

2. Duty to ensure that pre-trial detention is not unreasonable under article 60(4) of the Rome Statute

8. The Defence argues that the Pre-Trial Chamber failed in its duty under article 60(4) of the Rome Statute to ensure that a person is not detained for an unreasonable period prior to trial.

9. Notwithstanding that at the Status Conference on 26 September 2006, Counsel for the Defence requested that the confirmation hearing be postponed for nine months[8], the Legal Representatives of the Victims will not comment on whether, in this case, the Prosecutor is responsible for an inexcusable delay.[9] However, it should be noted that article 60(4) of the Rome Statute does not specify what might be considered an "inexcusable delay".

[7] See the "Submissions relative to the Order of 29/05/2006", No. ICC-01/04-01/06-131, 31 May 2006, p.2. See also the "Application for release" submitted by the Defence, No. ICC-01/04-01/06-121 of 23 May 2006.

[8] See the "Transcript of the status conference of 26 September 2006", No. ICC-01/04-01/06-T-20, p. 18, lines 18-20: "I first spoke of six months. Six months is the time necessary to study the documentation, the evidence provided by the Prosecutor, and an additional three months which would be necessary for travel to speak with possible witnesses to constitute our case". See also the "Application to postpone the confirmation hearing", No. ICC-01/04-01/06-684, 8 November 2006

[9] See the "Defence Appeal against the "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"", op. cit. *supra* footnote 3, para 45-50, pp. 13-15

10. The International Criminal Tribunal for the Former Yugoslavia (the "ICTY") has held that "Pre-trial detention cannot extend beyond a reasonable period of time."[10] But, here again, absent any yardstick to gauge the reasonableness of the duration, the ICTY Trial Chamber identified the seven factors which "*are to be considered when determining whether the duration of detention is no longer reasonable*"[11]:

> *"These factors are: (1) the actual length of detention; (2) the length of detention in relation to the nature of the offence, the penalty prescribed and to be expected in the event of conviction and national legislation on the deduction of the period of detention from any sentence passed; (3) the material, moral or other effects of detention upon the detained person beyond the normal consequences of detention; (4) the conduct of the accused relating to his role in delaying the proceedings and his request for release; (5) the difficulties in the investigation of the case, such as its complexity in respect of the facts or the number of witnesses or accused and the need to obtain evidence abroad; (6) the manner in which the investigation was conducted; and (7) the conduct of the judicial authorities."*[12]

11. Contrary to what the Defence claims,[13] it should be noted that the relevant criteria were examined by Pre-Trial Chamber I when it addressed the reasonableness of Thomas Lubanga Dyilo's pre-trial detention as it considered the actual length of the detention and its relation to the nature of the alleged crimes, the complexity of the case, the manner in which the investigation had been conducted and the conduct of the organs of the Court.[14] In addition, assessing what constitutes an unreasonable period of custody pending trial can only be addressed on a case-by-case basis and can never be done in the absolute. Thus, for example, Trial Chamber III of the

[10] See International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Zejnil Delalic*, *Zdravko Music*, *Hazim Delic and Esad Landzo*, "Decision on motion for provisional release filed by the accused Zejnil Delalic", Case No. IT-96-21, 25 September 1996, para. 26
[11] Ibid., para. 26
[12] Ibid.
[13] See the: "Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", op. cit. *supra* footnote 3, para. 43-44, pp. 12-13
[14] See the "Decision on the application for the interim release of Thomas Lubanga Dyilo", op. cit. *supra* footnote 7, pp. 6-8

International Criminal Tribunal for Rwanda, when applying the above-mentioned criteria, held that a pre-trial detention period of over seven years was reasonable.[15]

12. As for the Defence claim that the period spent in custody by Thomas Lubanga Dyilo in the Democratic Republic of the Congo should have been taken into account by the Chamber in assessing the reasonableness of the applicant's pre-trial detention, we would refer to the submissions in the "Observations of victims a/0001/03, a/0002/03 and a/0003/03 regarding the challenge to jurisdiction raised by the Defence in the Application of 23 June 2006."[16] In addition, we cannot agree with the Defence interpretation of article 78(2) of the Rome Statute[17], which only applies when the [competent Chamber] imposes "*a sentence of imprisonment*" and therefore cannot in any event apply in this case.

13. Finally, without calling into question the principle that "*any violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR,*"[18] it should be pointed out that where the ad hoc tribunals considered that they themselves had infringed the rights of the accused, they always held that releasing the accused would be a disproportionate remedy in relation to the acts for which the accused was being prosecuted and that the accused would be entitled to

[15] See International Criminal Tribunal for Rwanda, *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, "Decision on Defence Motion for Stay of Proceedings (Article 20 of the Statute)" (Trial Chamber III), 3 June 2005, para. 26. In this particular case, André Rwamakuba was surrendered to the tribunal on 22 October 1998 (see ibid., para. 2) and his trial did not begin until 9 June 2005. The decision of the International Criminal Tribunal for Rwanda is available on the Tribunal website at the following URL: http://69.94.11.53/ENGLISH/cases/Rwamakuba/decisions/030605.htm

[16] See "Observations of victims a/0001/03, a/0002/03 and a/0003/03 regarding the challenge to jurisdiction raised by the Defence in the Application of 23 June 2006", op. cit. *supra* footnote 1, para. 28-49, pp. 9-15.

[17] See "Defence Appeal Against the "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", op.cit. *supra*, footnote 3, para. 38-41.

[18] See inter alia International Criminal Tribunal for Rwanda, *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgment (Appeals Chamber), 23 May 2005, para. 255.

financial compensation in the event of acquittal or a reduction in sentence in the event of conviction.[19]

14. In any event, the principle *male captus, bene detentus* is not applicable to Mr Thomas Lubanga Dyilo since he was arrested on the basis of a warrant of arrest validly issued by Pre-Trial Chamber I under the Rome Statute and the Rules of Procedure and Evidence and his surrender to the Court also appears to comply with the requirements of the relevant texts.

3. Possible consequences of granting interim release to Thomas Lubanga Dyilo

15. Granting interim release to Thomas Lubanga Dyilo in a European country would be tantamount to using the Court's intervention to temporarily put an end to the detention, by decision of Congolese authorities, of a person prosecuted for war crimes and crimes against humanity,[20] and then releasing him, even though his accomplices and co-perpetrators are still under prosecution in Congo. This would not be consistent with the aim of combating impunity as stated in the Rome Statute and would be likely to offend the feelings not only of the victims, but also of the people of Congo in general.

16. Finally, the Legal Representatives of Victims a/0001/03, a/0002/03 and a/0003/03 recall their concerns articulated in their "Observations on the application

[19] See inter alia International Criminal Tribunal for Rwanda, *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision (Appeals Chamber), 31 May 2000, para. 127 to 129 and the disposition, and Jean-Bosco *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR, Decision (Prosecutor's Request for Review or Reconsideration) (Appeals Chamber), 31 March 2000, para. 75. Decisions of the International Criminal Tribunal for Rwanda are available on the Tribunal's website at the following URL: http://www.ictr.org

[20] See the decisions of the *Auditorat général des forces armées* of the Democratic Republic of the Congo contained in document No. ICC-01/04-01/06-39-US, 18 March 2006, pp. 1-9.

for release submitted by the Defence"[21] which remain unchanged. Granting interim release to Thomas Lubanga Dyilo would enable him to resume leadership of the UPC, as he did when he was on supervised release in Kinshasa, and would enable him to obstruct the investigation and frustrate the proceedings before the Court even if he were to be handed back to Congolese authorities.[22]

17. Furthermore, if he were to be granted interim release, this might be seen by the victims as an encouragement to the UPC/FLPC to continue to commit war crimes as stated in the warrant of arrest issued by Pre-Trial Chamber I,[23] at a time when re-recruitment of child-soldiers is being reported.[24]

18. Finally, if Thomas Lubanga Dyilo were to be granted interim release, this would pose a direct threat to the victims who have taken risks in order to participate in the proceedings and who would not understand such a measure.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER:

[21] See "Observations of victims a/0001/06, a/0002/06 et a/0003/06 in respect of the application for release filed by the Defence", op. cit. *supra*, footnote 2, para. 11-15, pp. 4-6.
[22] Ibid., para. 11-12, pp. 4-5
[23] See "Warrant of Arrest", No. ICC-01/04-01/06-2, 10 February 2006. See also: "Observations of victims a/0001/06, a/0002/06 et a/0003/06 in respect of the application for release filed by the Defence", op. cit. *supra*, footnote 2, para. 15, p. 6
[24] Some child soldiers who had been demobilised have been re-recruited into the ranks of the UPC/FPLC. In the video presented by the Office of the Prosecutor during the hearing of 14 November 2006, No. EVD-OTP-00060, the UPC Pacification Minister, under the control of Thomas Lubanga Dyilo, reported these practices. See the English language version of the transcripts, No. 01/04-01/06-T-34, lines 20 et seq.

To dismiss the Defence appeal from the Decision on the application for interim release of Thomas Lubanga Dyilo.

[signed]

_____

Luc Walleyn and Franck Mulenda
Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06

Dated 16 November 2006

At The Hague, The Netherlands