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

Date: **4 July 2008**

THE APPEALS CHAMBER

Before: Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

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

Public Document – URGENT

**Defence Response to the Prosecutor's Application dated 3 July 2008 for
Suspensive Effect of the Decision Ordering the Release of Mr Thomas Lubanga**

Source: Mr Thomas Lubanga's Defence Team

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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BACKGROUND

1. On 2 June 2008, the Defence submitted to Trial Chamber I (“the Chamber”) an application for a stay of the proceedings and the release of the accused.¹
2. On 13 June 2008, the Chamber ordered a stay of the proceedings and deferred until 24 June 2008 its consideration of the release of the accused.²
3. On 2 July 2008, the Chamber ordered the release of Mr Thomas Lubanga.³
4. On 2 July 2008, the Chamber granted the Prosecutor leave to appeal the decision staying the proceedings issued by the Chamber on 13 June 2008.⁴
5. On 3 July 2008, the Prosecutor announced his intention to appeal the decision ordering the release of the accused and requested that the Appeals Chamber grant suspensive effect to the decision⁵ (“the Application”).
6. The Defence hereby objects to the application for suspensive effect submitted by the Prosecutor on the following grounds:

OBSERVATIONS

– Decisions granting release are immediately enforceable, notwithstanding appeal

7. Article 82 provides in principle that, amongst other decisions, decisions granting release are immediately enforceable, notwithstanding appeal, and that only an order of the Appeals Chamber may grant suspensive effect.

¹ ICC-01/04-01/06-1366.

² ICC-01/04-01/06-1401.

³ ICC-01/04-01/06-1418.

⁴ ICC-01/04-01/06-1417.

⁵ ICC-01/04-01/06-1419 OA12 + Anx.

8. Immediate enforcement of decisions granting release is essential, especially as the preventive detention of an accused must be viewed as an exception which can be implemented only if warranted by exceptional circumstances. The fact is that “*de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court”.⁶

– The Prosecutor does not raise any exceptional circumstance to warrant staying the enforcement of the decision on release for the duration of the appeal

9. Contrary to what the Prosecutor maintains, the decision on release which is under appeal is not based on the decision staying the proceedings as such. The Trial Chamber expressly rejected the Defence’s argument according to which the stay of the proceedings terminated the validity of the warrant of arrest. It is therefore inaccurate to claim that “the Decision on Release of the accused is exclusively founded on a prior [...] decision of the Trial Chamber to stay all proceedings”.⁷

10. The decision granting release is exclusively based on the observation that the accused cannot be guaranteed a fair trial.⁸ The stay of the proceedings is a consequence of this same observation, but, in the view of the Trial Chamber, is not as such the basis for release. This is the reason the Trial Chamber considered it inevitable that the accused be released, notwithstanding the appeal lodged against its decision of 13 June 2008.

11. The Prosecutor cannot seriously deny that non-disclosure of exculpatory evidence under article 67(2) stands in the way of a fair trial.

12. The objections against the decision of 13 June 2008 which the Prosecutor intends to raise before the Appeals Chamber, to demonstrate that a stay of the proceedings would not be the appropriate remedy for the difficulties encountered in respect of

⁶ *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, *Decision Granting Provisional Release to Enver Hadžihasanović*, 19 December 2001, para. 7; see also the International Covenant on Civil and Political Rights, article 9-3; *Ilijkov v. Bulgaria*, ECHR, (Req. No. 33977/96), 26 July 2001, para. 84.

⁷ ICC-01/04-01/06-1419 OA12, para. 13.

⁸ ICC-01/04-01/06-1418, para. 34.

disclosure, in no way affect the reasons for the Trial Chamber's ordering the release of the accused.

13. The appeal against the decision of 13 June 2008 cannot therefore be viewed as an exceptional circumstance warranting a waiver of the principle of immediate enforcement of decisions granting release.

– Upholding the fundamental rights of the accused must prevail over the Prosecution's concerns about the outcome of the appeal against the decision of 13 June 2008

14. It should be noted that, to date, no appeal has been formally lodged against the decision of 13 June 2008, no application for suspensive effect has been formalized and, lastly, no order of the Appeals Chamber has been issued on this matter. The decision must therefore be fully applied with everything this implies.

15. The Defence maintains that the Prosecutor has no relevant arguments and therefore cannot hope to have his appeal granted.

16. In such conditions, holding the accused in custody following a stay of the decision under appeal would cause him disproportionate and unjustified prejudice with regard to the interests which the stay is supposed to preserve.

– The accused provides guarantees that he will appear, such that his release does not jeopardize the possibility of a resumption of the proceedings

17. The Prosecutor submits that releasing the accused would consequently render moot any decision of the Appeals Chamber reversing the decision on the stay of the proceedings.⁹ In support of this claim, the Prosecutor refers to the Chamber's decision of 29 May 2008 confirming the accused's continued detention.¹⁰

⁹ ICC-01/04-01/06-1419 OA12, para. 10.

¹⁰ ICC-01/04-01/06-1359, para. 18.

18. The factors on which the Chamber based that decision cannot, now, be used to order the accused's continued detention during the appellate proceedings.

19. The Chamber had held that the imminent start of the trial was a factor justifying the continued detention of the accused.¹¹ As a result of the stay of the proceedings, it is now wholly uncertain whether any proceedings against the accused will in fact be resumed.¹²

20. Furthermore, on 29 May 2008, when reviewing the provisional detention of Mr Thomas Lubanga, the Chamber did not take account of the fact that the accused has no passport or travel documents and is currently subject to a measure of the United Nations Security Council prohibiting him from travelling internationally.¹³ As matters now stand, he cannot leave the Netherlands without a United Nations Security Council resolution.

21. In the event that the proceedings are resumed, or during the appeal which the Chamber may authorise, Mr Thomas Lubanga Dyilo will remain available to the Court and is prepared to remain in the Netherlands to this end.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO REJECT the Prosecutor's application for suspensive effect of the Decision ordering the release of Mr Thomas Lubanga.

¹¹ *Idem.*

¹² On 2 July 2008, the Trial Chamber noted that an accused cannot be held in custody if there is no prospect of a trial. It added that the outcome of an application to lift the stay of the proceedings was wholly uncertain. ICC-01/04-01/06-1418, paras. 31 and 32.

¹³ S/RES/1533 (2004); see also the "List of individuals and entities subject to the measures imposed by paragraphs 13 and 15 of Security Council resolution 1596 (2005), last updated on 24 April 2008".

_____[signed]_____
Catherine d. Mabile, Lawyer at the Court

Dated this 4 July 2008

At The Hague, The Netherlands