



Original: **French**

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

Date: **15 July 2008**

THE APPEALS CHAMBER

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

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

Public Document

**Defence Response to the "Prosecution's Document in Support of Appeal against
'Decision on the release of Thomas Lubanga Dyilo'"**

Source: Mr Thomas Lubanga Dyilo's Defence Team

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of Victims

Counsel for Victims a/0001/06 to
a/0003/06 and a/0105/06
Mr Luc Walley
Mr Frank Mulenda
Ms Carine Bapita Buyangandu

Legal Representatives of 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

BACKGROUND

1. On 13 June 2008, the Trial Chamber ordered a stay in the proceedings against Mr Thomas Lubanga.¹
2. On 2 July 2008, the Chamber ordered the release of the accused.²
3. On 3 July 2008, the Prosecutor indicated his intention to appeal the Decision ordering the release of the accused and requested the Appeals Chamber to order that the decision have suspensive effect.³
4. On 7 July 2008, the Appeals Chamber granted the Prosecutor's request for suspensive effect of the Decision on the release of the accused.⁴
5. On 10 July 2008, the Prosecutor filed the "*Prosecution's Document in Support of Appeal against 'Decision on the release of Thomas Lubanga Dyilo'*".⁵
6. The Defence objects to the Prosecutor's appeal for the following reasons:

OBSERVATIONS

- 1) **The immediate and unconditional release of the accused is the 'logical consequence' of the impossibility of a fair trial.**

- a) **The Decision to impose a stay in the proceedings *sine die* necessarily suspends the effects of the warrant of arrest in relation to detention.**

7. As the Trial Chamber points out, the suspension *sine die* of the proceedings due to the "present impossibility of trying the accused fairly" removes the justification for

¹ ICC-01/04-01/06-1401.

² ICC-01/04-01/06-1418.

³ ICC-01/04-01/06-1419 OA12.

⁴ *Idem.*

⁵ ICC-01/04-01/06-1429 OA12.

keeping the accused in detention, as each of the requirements of article 58(1)(b) necessarily presupposes that the case will proceed, and that there is the prospect of a trial taking place within a reasonable time:⁶

- 1) In light of the finding that it is impossible to hold the trial, there can be no justification for keeping the accused in detention in order to ensure his appearance at trial;
- 2) Nor can there be any justification for keeping the accused in detention in order to safeguard the investigation and the proceedings, given that these have been suspended.
- 3) “In the absence of the prospect of a trial, the accused cannot be held in custody”⁷ on the sole ground of preventing him from committing further crimes.

8. It follows that the Chamber was right in concluding that “the logical – indeed the inevitable – consequence of the Decision [to suspend proceedings] is that the only correct course is to order the release of the accused”.⁸

b) The appeal against the Decision to suspend proceedings cannot affect the release of the accused.

9. Although the Prosecutor has appealed the Decision of 13 June 2008, to date the Appeals Chamber has issued no order giving the appeal suspensive effect.

10. It follows therefore that, notwithstanding the appeal, the Decision must be fully implemented, in particular with regard to its “logical – indeed inevitable – consequence”, the release of the accused.

⁶ ICC-01/04-01/06-1418, paras. 29, 30 and 31.

⁷ *Idem*, para. 30 *in fine*.

⁸ *Ibidem*, para. 34.

11. Contrary to what the Prosecutor contends, it was incumbent upon the Trial Chamber to apply all the consequences of its Decision of 13 June 2008, since only the Appeals Chamber has the power to suspend implementation of that Decision.

12. The Trial Chamber was therefore correct in holding that, “[n]otwithstanding the grant of leave to appeal the Decision, the inevitable result is that the Chamber must order the immediate release of the accused”.⁹

2) In the alternative, the accused should be released under article 60 of the Statute.

13. In any event, whatever the outcome of the appeal against the Decision to suspend proceedings, the Appeals Chamber will note that the circumstances justify the release of the accused under article 60. The Defence will now recall the submissions made by it in its Observations of 27 June 2008.¹⁰

- Article 60(2)

14. It has been established that “*de jure* detention should be the exception and not the rule as regards prosecution before an international court”.¹¹

15. In the unlikely event of the Appeals Chamber dismissing the arguments set out above, the Defence seeks the release of the accused under article 60(2). In this regard it reiterates its Observations as filed on 19 May 2008,¹² to which the Chamber refers in its Decision of 29 May 2008.¹³

⁹ *Ibidem*, para. 32.

¹⁰ ICC-01/04-01/06-1415.

¹¹ *The Prosecutor v. Hadžihasanović et al.*, Case: 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, (Application no. 33977/96), 26 July 2001, para. 84.

¹² ICC-01/04-01/06-1338.

¹³ ICC-01/04-01/06-1359.

16. In the event that the proceedings should be resumed, or while the appeal is ongoing, Mr Thomas Lubanga Dyilo will remain at the Court's disposal and is prepared to remain in the Netherlands to this end.

17. The Defence adds that the accused is not in possession of a passport or travel documents, and is currently subject to a measure imposed by the United Nations Security Council banning him from all international travel.¹⁴ Such being the case, it is impossible for him to leave the Netherlands. Moreover, the Chamber may, if it deems appropriate, impose certain conditions on the release of an accused.¹⁵

18. It follows that the conditions set out in article 58(1) are not satisfied, and that an order should be made for the warrant of arrest to be lifted.

Article 60(4)

19. The Defence observes that, in its Decision of 29 May 2008, the Trial Chamber states "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)".¹⁶ Furthermore, in ordering that the accused continue to be detained, the Trial Chamber cites the "imminent start date".¹⁷

20. The Trial Chamber has on many occasions pointed out the slowness of the steps taken by the Prosecutor in approaching his sources in order to lift the restrictions imposed by confidentiality agreements, and the delays in which this has resulted.¹⁸ The same applies to the late implementation of protective measures for certain witnesses.¹⁹

¹⁴ S/RES/1533 (2004); Also see "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."

¹⁵ Rule 119.

¹⁶ ICC-01/04-01/06-1359, para. 17.

¹⁷ *Idem*, para. 18.

¹⁸ This issue was brought before the Pre-Trial Chamber in April 2006. (ICC-01/04-01/06-T-4-EN, page 7). On 26 December 2006 the Single Judge issued a decision requesting that the Prosecutor obtain the consent of the sources to disclose to the Defence in an unredacted form the documents protected under article 54(3)(e) and

21. However, and above all, whatever the hypothetical procedural developments in the future, the new situation – resulting from the stay in the proceedings attributable to the Prosecutor – has the effect of preventing the start of the trial and, at the very least, of postponing the proceedings *sine die*.

22. This *sine die* postponement of proceedings that have already been delayed “for an unreasonable period” strikingly demonstrates the “inexcusable delay by the Prosecutor”, which, pursuant to article 60(4), justifies the release of the accused.

which fall within the scope of article 67(2) and rule 77. (ICC-01/04-01/06-490). The Prosecutor first informed the Trial Chamber of the issue of confidential documents of the type referred to in article 54(3)(e) in a written submission dated 11 September 2007, para. 25; this submission was discussed at the Trial Chamber hearing of 1 October 2008, at which the Trial Chamber queried the lateness of the requests to lift restrictions (ICC-01/04-01/06-T-52-ENG, pp. 13-14, lines 25 et seq. On 9 November 2007, the Trial Chamber stated that “from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay. Generally, the late requests by the prosecution to lift the confidentiality agreements should not be allowed to endanger the accused’s right to be tried without undue delay and to adequate time and facilities for preparation.” (ICC-01/04-01/06-1019, para. 19). See also ICC-01/04-01/06-T-86-ENG, p.37, lines 13-17 and ICC-01/04-01/06-T-88-ENG, p. 1, lines 20 et seq.

¹⁹ “[T]he process for the outstanding 24 witnesses was commenced significantly and unjustifiably late. This delay must similarly not be allowed to endanger the accused’s right to a fair and expeditious trial.” (ICC-01/04-01/06-1019), para. 20, reiterated by the Chamber ICC-01/04-01/06-1311, para.81). “The consequence of this disagreement over the decisions taken by the Unit, which the Chamber has been asked to resolve at this markedly late stage in the proceedings, is that the disclosure by the prosecution of the non-redacted evidence of the witnesses whose applications to the programme were refused has been delayed, and the prosecution only very recently took steps [REDACTED], or otherwise.” (Emphasis added, ICC-01/04-01/06-1311-Anx1, para. 80). See also Transcript of 13 February 2008, ICC-01/04-01/06-T-75-ENG, pp. 2 and 16, lines 4 et seq.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

DISMISS the Prosecutor's Appeal.

CONFIRM the immediate release of Mr Thomas Lubanga.

ORDER the Registrar to take the necessary steps to implement this Decision.

[signed]

Ms Catherine Mabile, Principal Counsel

Dated this 15 July 2008

At The Hague