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**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

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

**Public  
with Public Annexes 1 to 4**

**Prosecution's submissions on the pre-trial detention of Thomas Lubanga Dyilo in  
light of the Appeals Chamber's judgment of 21 October 2008**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**

**Counsel for the Defence**

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims**

Mr Luc Walley

Mr Franck 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**

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**REGISTRY**

**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

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## **Introduction**

1. The Trial Chamber ordered the parties to make submissions on the pre-trial detention of the accused. In compliance with that order, the Prosecution submits that the accused should remain in custody pending trial for the following reasons:
  - (i) detention is required under Article 58(1) to ensure the accused's appearance at trial and to ensure that he does not obstruct the proceedings. Consequently, the statutory grounds for interim release in Article 60(2) are not satisfied;
  - (ii) the need for pre-trial detention is not altered by the conditional stay of proceedings, since under the current circumstances there is a realistic prospect that the stay can be lifted in the near future and the trial thereafter can begin expeditiously; and
  - (iii) the accused has not been detained for an unreasonable period, nor has there been inexcusable delay by the Prosecutor, so the statutory grounds for considering release pursuant to Article 60(4) are not met.
2. The Prosecution opposes any release, but should the Trial Chamber consider it necessary to order the release of the accused, the Prosecution submits that conditions should be imposed and, pursuant to Rule 119(3), the Prosecution would seek to provide views on such conditions and location of conditional release.

## Procedural Background

3. On 13 June 2008, the Trial Chamber stayed the proceedings, clarifying that “until this stay is lifted (either by this Chamber or by the Appeals Chamber), the trial process in all respects is halted”.<sup>1</sup> On 14 July 2008, the Prosecution appealed that decision.<sup>2</sup>
4. On 2 July 2008, the Trial Chamber ordered the release of the accused.<sup>3</sup> The same day, the Prosecution appealed that decision.<sup>4</sup> The release order itself was stayed on 7 July 2008.<sup>5</sup>
5. On 21 October 2008, the Appeals Chamber issued its Judgment on the 13 June 2008 Stay (“21 October 2008 Appeal Judgment on Stay”).<sup>6</sup> It dismissed the appeal.
6. That same day, the Appeals Chamber decided the Prosecution appeal from the 2 July 2008 decision ordering the accused’s release (“21 October 2008 Appeal Judgment on Release”).<sup>7</sup> Upholding that appeal, the Appeals Chamber explained that:
 

(...) the Trial Chamber, when ordering the unconditional release of Mr. Lubanga Dyilo, failed to take the conditional character of the stay it had imposed properly into account.<sup>8</sup>
7. The Appeals Chamber then remanded the matter back to the Trial Chamber “for a new determination, in light of paragraphs 37 to 42 of the present judgment, as to whether or not Mr. Lubanga Dyilo should remain in the custody of the Court, or whether he should be released, with or without

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<sup>1</sup> See ICC-01/04-01/06-1401, at para. 94. Paragraphs 3-6 of that decision detail the procedural history.

<sup>2</sup> ICC-01/04-01/06-1434. As this document did not comply with certain formal requirements, the Prosecution re-filed the document on 24 July 2008 (ICC-01/04-01/06-1446-Anx1).

<sup>3</sup> ICC-01/04-01/06-1418, para. 35. For details of the procedural history, the Prosecution refers to paragraphs 1 to 3 of the Decision.

<sup>4</sup> ICC-01/04-01/06-1419 OA12.

<sup>5</sup> ICC-01/04-01/06-1423 OA12.

<sup>6</sup> ICC-01/04-01/06-1486 OA13. For details of the procedural history, the Prosecution refers to paragraphs 6 to 12 of that Judgment.

<sup>7</sup> ICC-01/04-01/06-1487 OA12. For details of the procedural history, the Prosecution refers to paragraphs 2 to 6 of that Judgment.

<sup>8</sup> *Ibid*, at para. 44.

conditions, taking into account all relevant factual developments at the time of the new determination. Pending the new determination by the Trial Chamber, Mr. Lubanga Dyilo shall remain in the custody of the Court.”<sup>9</sup>

8. Following the remand, on 22 October 2008 the Trial Chamber ordered the parties to make submissions on the pre-trial detention of the accused in light of the Appeals Chamber’s Judgment.<sup>10</sup>

### **Submissions**

#### *I. Continued Detention is Necessary to Ensure that the Accused will be Present at Trial and that He will not Intimidate Witnesses or Obstruct Justice.*

9. In May 2008, a few weeks before it stayed the trial, the Trial Chamber rejected a defence request for release.<sup>11</sup> It found that “there are reasonable grounds to believe that [the accused] committed a crime within the jurisdiction of the Court”, that the accused “faces grave charges”, and that “if [he were to be] released [he would be] likely to return to the Democratic Republic of the Congo, with the probable consequence that the court would no longer be able to ensure his attendance at trial”.<sup>12</sup> For those reasons, continued detention was required pursuant to Article 58(1)(a) and (b).<sup>13</sup>
10. These findings reflected still-applicable concerns about the release of the accused. Nothing has changed with respect to the nature of the charges confirmed against the accused.<sup>14</sup> There has also been no change in circumstances since May 2008 which could indicate that, if released, there will

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<sup>9</sup> *Ibid*, at para. 45.

<sup>10</sup> “Urgent Order for submissions on the detention of Thomas Lubanga Dyilo”, ICC-01/04-01/06-1489.

<sup>11</sup> ICC-01/04-01/06-1359.

<sup>12</sup> *Ibid*, at paras. 13, 14, 15. In a subsequent decision, the Trial Chamber held: “The arrest warrant was issued pursuant to Article 58(1) of the Statute. The factual and legal elements which affect the validity of the warrant are unaffected by the Chamber’s Decision to impose a stay on the proceedings [...]. At all times, there have remained reasonable grounds to believe that Mr Thomas Lubanga Dyilo is criminally responsible under Article 25(3)(a) of the Statute for the crimes set out in the arrest warrant, as amended by the Decision Confirming the Charges”, ICC-01/04-01/06-1418, 2 July 2008, para. 28.

<sup>13</sup> *Ibid*, at para. 15.

<sup>14</sup> ICC-01/04-01/06-1487 OA12, para. 38.

be any way to ensure his attendance at trial. The need to protect witnesses from intimidation or interference, moreover, is equally if not more pressing as the trial draws near. In May 2008, the accused knew the identities of 11 witnesses. He now has the names of all 31 prosecution witnesses and an additional 18 witnesses who have provided potentially exculpatory information but also incriminatory information.<sup>15</sup> The security of some of these witnesses may be at risk.

II. There is a Realistic Prospect that the Stay can Soon be Lifted, thus Ending the Ongoing Delay

11. The Appeals Chamber has ruled that in a situation such as this, the Trial Chamber “will have to consider all relevant circumstances” including “whether further developments since the imposition of the conditional stay make it likely that the stay might be lifted in the not-too-distant future.”<sup>16</sup> As the Prosecution demonstrates below, “further developments” since June 2008 make it more likely that the stay will soon be lifted. Therefore, detention of the accused remains justified.

12. In its 3 September 2008 “Decision on the Prosecution’s Application to Lift the Stay of Proceedings”, the Trial Chamber held that “before lifting the stay in the proceedings, the Trial Chamber must be satisfied, first, that it can adequately review – on a continuing basis – the Documents in question, in a way which is susceptible to a meaningful appeal, and, second, that there is a real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory”.<sup>17</sup>

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<sup>15</sup> The Prosecution does not intend to rely on this incriminatory information in this case.

<sup>16</sup> ICC-01/04-01/06-1487 OA12, para. 37.

<sup>17</sup> ICC-01/04-01/06-1467, para. 30.

13. As the Chamber is aware, the providers have now consented to provide all of the documents in unredacted form to the judges for their review,<sup>18</sup> and the defence does not object to that review.<sup>19</sup>
14. In light of the substantial developments indicated above and the real prospect that the trial can be held, the Prosecution submits that the accused should remain in detention.

III. Release is not Required under Article 60(4).

*(A) The Accused has not been Detained for an Unreasonable Period*

15. The Statute and the applicable jurisprudence do not define a fixed term beyond which detention automatically will be deemed unreasonable. It will always depend on circumstances.<sup>20</sup>
16. The Appeals Chamber has confirmed that the evaluation of reasonableness is made on the particular facts, stating that “the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case”.<sup>21</sup> The ECHR has also repeatedly emphasised the need to assess whether a period of pre-trial

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<sup>18</sup> ICC-01/04-01/06-1477-Conf-Exp and annexes; public redacted version, ICC-01/04-01/06-1478 and annexes, para. 2.

<sup>19</sup> ICC-01/04-01/06-1484, 21 October 2008.

<sup>20</sup> Khan, “Article 60”, in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed) (Verlag C.H.Beck oHG, Munich, 2008), p. 1166. Rather, the negotiators of the Rome Statute rejected inclusion in the Statute of a fixed term beyond which detention would be deemed unreasonable. An earlier proposal had suggested limiting pre-trial detention to one year, with the ability to extend that period by leave of the Pre-Trial Chamber (or Presidency) if the Prosecutor established that he or she would be ready for trial within that additional year and upon a showing of good cause for the delay. The final provision deliberately omitted any definitive maximum period for pre-trial detention.

<sup>21</sup> “Judgment on the Appeal of the Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled ‘Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, ICC-01/04-01/06-824, 13 February 2007, para. 122.

detention is reasonable on a case-by-case basis, taking into account the special features of each situation.<sup>22</sup> Both the ICTY<sup>23</sup> and ICTR concur.<sup>24</sup>

17. “The factors which may be taken into consideration are extremely diverse”,<sup>25</sup> and can include the “complexity and special characteristics of the investigation” and the “difficulties intrinsic in the investigation” of certain crimes,<sup>26</sup> and “the seriousness of the alleged offence”.<sup>27</sup> The ECHR has reaffirmed that the rights of the accused “must not stand in the way of the efforts of the judges to clarify fully the facts in issue, to give both the defence and the prosecution all facilities for putting forward their evidence and stating their cases”.<sup>28</sup> In applying these factors, the ECHR has found that periods of detention of four years,<sup>29</sup> three years and five months,<sup>30</sup> and three years and two months<sup>31</sup> were not unreasonable in those cases.

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<sup>22</sup> See e.g. *Van der Tang v Spain*, 22 June 1995, para. 55; *Wemhoff v Germany*, 27 June 1968, para. 10; *W v Switzerland*, 26 January 1993, para. 30; further Emerson & Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, London, 2001), p. 333. The Inter-American Commission on Human Rights has similarly held that “[t]he reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider.” - *Firmenich v. Argentina*, Resolution No. 17/89, 13 April 1989.

<sup>23</sup> See e.g. *Prosecutor v Delalic et al*, IT-96-21, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic, 25 September 1996, para. 26.

<sup>24</sup> See e.g. *The Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 11; *The Prosecutor v. Mugenzi et al.*, ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release and in Addition Severance, 8 November 2002, para. 33.

<sup>25</sup> *Wemhoff v Germany*, 27 June 1968, para. 10.

<sup>26</sup> *Van der Tang v Spain*, 22 June 1995, paras. 55 and 75; see also *W v Switzerland*, 26 January 1993, para. 42; *Wemhoff v Germany*, 27 June 1968, paras. 14 and 17. Complexity can include factors such as the difficulty of the legal issues involved, the need to obtain evidence from abroad, and the volume of evidence: see Emerson & Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, London, 2001), p. 352 and authorities cited therein. National jurisdictions have also recognised that “[c]omplex cases, however, will justify delays longer than those acceptable in simple cases” (Canada, *R. v. Askov*, [1990] 2 SCR 1199, p. 3).

<sup>27</sup> *Van der Tang v Spain*, 22 June 1995, para. 60.

<sup>28</sup> *Wemhoff v Germany*, 27 June 1968, para. 17. The ECHR made similar rulings in *Van der Tang v Spain*, 22 June 1995, para. 72 and *W v Switzerland*, 26 January 1993, para. 42 (holding that it “must not hinder the efforts of the court to carry out their tasks with proper care”); further Emerson & Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, London, 2001), p. 333. The ICTR has likewise held that “The Accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged” - *The Prosecutor v. Mugenzi et al.*, ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release and in Addition Severance, 8 November 2002, para. 32.

<sup>29</sup> *W v Switzerland*, 26 January 1993.



18. This is consistent with the approach of the ICTY, which identified a number of relevant factors to consider when evaluating the circumstances surrounding a period of delay.<sup>32</sup>

19. The SCSL<sup>33</sup> and the ICTY<sup>34</sup> recognized that these factors are particularly applicable in the context of the prosecution of serious international crimes<sup>35</sup> when considering whether pre-trial detention is reasonable. The ICTR has also upheld extensive periods of pre-trial detention – including, in one case, 39 months,<sup>36</sup> and in another, more than five years<sup>37</sup> – as reasonable in light of the

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<sup>30</sup> *Wemhoff v Germany*, 27 June 1968.

<sup>31</sup> *Van der Tang v Spain*, 22 June 1995.

<sup>32</sup> *Prosecutor v Delalic et al*, IT-96-21, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic, 25 September 1996, para. 26: (i) the actual length of detention; (ii) 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; (iii) the material, moral or other effects of detention upon the detained person beyond the normal consequences of detention; (iv) the conduct of the accused relating to his role in delaying the proceedings and his request for release; (v) 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; (vi) the manner in which the investigation was conducted; and (vii) the conduct of the judicial authorities. These factors were originally identified by the European Commission of Human Rights.

<sup>33</sup> *Prosecutor v Norman et al*, SCSL-04-14-AR65, Appeal against Decision Refusing Bail, 11 March 2005, para. 31, referring to “the practical difficulties facing international criminal justice”.

<sup>34</sup> *Prosecutor v Brdjanin*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 September 2000, p. 3, stating that “account has to be taken of the different circumstances and situations” of international criminal tribunals (as opposed to national courts). In addition, see *Prosecutor v Kovacevic*, IT-97-24, Decision on Defence Motion for Provisional Release, 20 January 1998, para. 24, recognizing “the difficulties inherent in investigating a case thousands of kilometers away and without the assistance of a police force” (see also *Prosecutor v Delalic et al*, IT-96-21, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic, 25 September 1996, para. 30; *Prosecutor v Jokic*, IT-01-42-PT, Order on Miodrag Jokic’s Motion for Provisional Release, 20 February 2002, para. 25.)

<sup>35</sup> Commentators have recognized that the nature of the cases before this Court may themselves cause delay. “Prosecuting massive violations of international humanitarian law is particularly difficult and delay can be occasioned for a variety of reasons. Access to witnesses, conducting site visits, obtaining documents and delays and difficulties with translation are just some of the problems intrinsic to the bid of establishing international criminal justice. Delay in many of the above will have nothing to do with any fault on the part of the Prosecutor, but will be an inescapable corollary of the commencement of an investigation.” Khan, “Article 60”, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed), (Verlag C.H.Beck oHG, Munich, 2008), p. 1168. See also Marchesiello, “Proceedings before the Pre-Trial Chambers”, in Cassese (et al.) (eds) *The Rome Statute of the International Criminal Court* (OUP, Oxford, 2002), p. 1239, footnote 8, referring to “the unusual difficulties and obstacles – investigative, logistical and procedural – the Prosecutor is confronted with in establishing international criminal justice”.

<sup>36</sup> *The Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision On Bizimungu's Motion for Provisional Release Pursuant to Rule 65 of the Rules, 4 November 2002, paras. 7, 32-33.

<sup>37</sup> *The Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion for the Provisional

serious nature of the crimes charged<sup>38</sup> and the complexity of the investigations and proceedings.<sup>39</sup>

20. The Prosecution thus submits that the detention of the accused for 29 months is not *per se* unreasonable or contrary to human rights principles. Nor, when one considers the actual circumstances in this matter, may one conclude that the length of detention in this case is in fact unreasonable.

21. The accused was transferred to the Court on 17 March 2006. His appointed counsel required time to prepare for the confirmation hearing. After a series of status conferences, the hearing began on 9 November 2006 and extended for several weeks, finally concluding on 28 November. The Pre-Trial Chamber confirmed the charges on 29 January 2007.<sup>40</sup>

22. Shortly after confirmation, in early February 2007 counsel became unavailable.<sup>41</sup> On 20 February counsel filed a formal request to withdraw and to stay all proceedings pending appointment of new counsel; the Pre-Trial Chamber granted this request on 21 February.<sup>42</sup> It took several months to

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Release of the Accused, 21 February 2001, paras. 8, 11-12. The same factor has also been considered in the ICTY: see e.g. *Prosecutor v Kovacevic*, IT-97-24, Decision on Defence Motion for Provisional Release, 20 January 1998, para. 24.

<sup>38</sup> *The Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision On Bizimungu's Motion for Provisional Release Pursuant to Rule 65 of the Rules, 4 November 2002, para. 32; *The Prosecutor v. Ndayambaje*, ICTR-98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 October 2002, para. 23; see also *Prosecutor v Cermak and Markac*, IT-03-73-PT, Decision on Motions for Provisional Release, 29 April 2004, paras. 9-11.

<sup>39</sup> *The Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision On Bizimungu's Motion for Provisional Release Pursuant to Rule 65 of the Rules, 4 November 2002, paras. 32; *The Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 12 (including "number of Motions filed by both Parties, on such various issues as, inter alia, protective measures for witnesses, challenges to the jurisdiction of the Tribunal and to the jurisdiction of the Trial Chamber, withdrawal of Lead Counsel"); *The Prosecutor v. Ndayambaje*, ICTR-98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 October 2002, para. 23. As the ICTY has observed, "[t]he complexity of cases before the Tribunal and the fact that the Tribunal is located a great distance from the former Yugoslavia means that pre-trial proceedings are often lengthy" – *Prosecutor v Jokic*, IT-01-42-T, Order on Miodrag Jokic's Motion for Provisional Release, 20 February 2002, para. 25. The ICC Appeals Chamber has also recognised that the complexity of the cases can be taken into account when assessing the reasonableness of the period of detention – ICC-01/04-01/06-824 OA7, 13 February 2007, para. 123.

<sup>40</sup> ICC-01/04-01/06-803.

<sup>41</sup> ICC-01/04-01/06-816, 9 February 2007, footnote 8; ICC-01/04-01/06-815-Corr, 12 February 2007, p. 2.

<sup>42</sup> See ICC-01/04-01/06-844 OA8, 9 March 2007, para. 1.

finalize the appointment of the new defence counsel, on 22 June.<sup>43</sup> On 7 August, the new counsel informed the Court that her team would be constituted by the start of September, and requested two months to familiarise themselves with the record.<sup>44</sup>

23. The Presidency had constituted the Trial Chamber on 6 March 2007.<sup>45</sup> However, at the express request of the defence,<sup>46</sup> the Presidency suspended the transmission of the record of the pre-trial proceedings to the Trial Chamber until 5 June 2007.<sup>47</sup>

24. Since then, the Trial Chamber has had to consider a number of complex and novel legal issues including disclosure (unrelated to Article 54(3)(e)), victim participation, trial *in situ*, witness protection, witness familiarization, and the manner in which evidence was to be submitted.<sup>48</sup> Prior to July 2008 there were also 11 interlocutory appeals – filed by the defence as well as the prosecution – relating to various pre-trial matters.

*(B) There has been no Inexcusable Delay by the Prosecution*

25. Under Article 60(4), the Chamber may only consider release if the accused has been “detained for an unreasonable period of time prior to trial due to inexcusable delay by the Prosecutor”. As demonstrated above, the accused has not been detained for an unreasonable period in the circumstances of this case. That should resolve the issue, since without detention for an unreasonable period, the Chamber need not address the issue of prosecutorial

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<sup>43</sup> ICC-01/04-01/06-928; also ICC-01/04-01/06-932, 6 July 2007.

<sup>44</sup> ICC-01/04-01/06-940, paras. 12, 22.

<sup>45</sup> ICC-01/04-01/06-831-Conf (referred to in ICC-01/04-01/06-920).

<sup>46</sup> ICC-01/04-01/06-840-Conf (referred to in ICC-01/04-01/06-920).

<sup>47</sup> ICC-01/04-01/06-920.

<sup>48</sup> On 5 September 2007, the Trial Chamber requested briefing on a sequence of 10 issues which required early determination (ICC-01/04-01/06-947). On each of these issues, the parties and participants provided written submissions, and they were also discussed at a series of status conferences between 29 October 2007 and 20 November 2007. In the course of this briefing schedule, at least a further five issues were identified which also required discussion or resolution prior to trial (see ICC-01/04-01/06-1029, 15 November 2007).

contribution to the delay.<sup>49</sup> In any event, as is also demonstrated above in paras 22 to 24, the period of detention is not due to an “inexcusable delay” on the part of the Prosecution.

26. The Trial Chamber has previously recognized that a range of factors contributed to the delay in these proceedings.<sup>50</sup> And as described below, the time spent addressing the issues related to disclosure of Article 54(3)(e) material cannot be attributable to prosecutorial conduct.

*The delay resulting from the inability to disclose materials protected by Article 54(3)(e) is not “inexcusable”*

27. To the extent that any portion of the delay is attributable to the Prosecution’s inability to disclose certain documents protected by Article 54(3)(e), that portion of the delay is not “inexcusable”. Delay caused by a different reading of Article 54(e)(e) is not a ground for release.

28. A delay is inexcusable if there is no reasonable excuse, explanation or justification for the conduct that caused the delay.<sup>51</sup> This requires something more than an unintentional delay.<sup>52</sup> Examples of inexcusable delays might include where the Prosecution affirmatively misleads the court or the accused, files frivolous applications or interlocutory appeals, mislays evidence, fails to properly investigate, or knowingly violates the Statute or Rules.<sup>53</sup>

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<sup>49</sup> As the Appeals Chamber has held, if “the period of detention was not unreasonable, the question of the inexcusable delay [is] moot.” ICC-01/04-01/06-824 OA7, 13 February 2007, para. 124.

<sup>50</sup> The Trial Chamber recognized that the delays had “been substantially contributed to by factors beyond the prosecution’s control” - ICC-01/04-01/06-1359, 29 May 2008, para. 17, see also para. 18.

<sup>51</sup> The *Oxford English Dictionary* (1989) defines “inexcusable” as “incapable of being excused or justified”.

<sup>52</sup> Khan, “Article 60”, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed), (Verlag C.H.Beck oHG, Munich, 2008), p. 1168. Similarly, *Black Law Dictionary* (8<sup>th</sup> ed) defines “inexcusable neglect” as “unjustifiable neglect; neglect that implies more than unintentional inadvertence” (Thomson West. St Paul, MN, 2004), p. 1061.

<sup>53</sup> Khan, “Article 60”, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed), (Verlag C.H.Beck oHG, Munich, 2008), p. 1167.

29. In contrast with these examples of inexcusable conduct, the Prosecution has at all times acted in good faith and in accordance with its reasonable understanding of its legal obligations under the Statute.<sup>54</sup> In particular, the Prosecution's conduct since the Trial Chamber's decision of 29 May 2008 provides no basis for finding inexcusable delay.
30. As the Appeals Chamber recognized, it was always the expectation of the Prosecution<sup>55</sup> that the providers would agree to lift the restriction if the Prosecution needed to disclose the material, consistent with the Statute itself.
31. The Prosecution always made clear to the providers the need to disclose exculpatory material. Starting in 2004, the Prosecution brought to the attention of the United Nations ("UN"), both in the negotiation of the Relationship Agreement and with reference to specific requests, the need to take into account the Prosecution's obligation under Article 67(2). In particular, the Prosecution noted that if that obligation was triggered, it would seek to resolve the matter in consultation with the UN to ensure respect for both obligations under Articles 54(3)(e) and 67(2).<sup>56</sup> These terms were recalled in the MONUC MoU, signed on 8 November 2005.<sup>57</sup>
32. The first requests to the UN for lifting restrictions, and its first responses, occurred in 2005. The requests continued on a routine basis thereafter.<sup>58</sup> Even when the providers did not initially consent to disclosure, the Prosecution continued to request reconsideration. As a result, by June 2008 some 100

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<sup>54</sup> Indeed, no Court has found otherwise. Even when staying the proceedings, the Trial Chamber did not find that the Prosecution had acted in bad faith (ICC-01/04-01/06-1401, 13 June 2008, para.90). The Appeals Chamber confirmed that it "has no reason to doubt the good faith of the Prosecutor" (ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 96).

<sup>55</sup> ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 44.

<sup>56</sup> See, e.g., letter from the Office of the Prosecutor to the UN Office of Legal Affairs, 23 November 2004 (Annex 2).

<sup>57</sup> Article 10, paragraph 11: "In the event that the response of the United Nations to a request for its consent to the disclosure of such a document occasions difficulties to the Prosecutor, the Prosecutor and the Under-Secretary-General for Peacekeeping Operations shall, at the Prosecutor's request, consult with a view to finding an appropriate way to resolve the matter in a manner that accommodates the needs, concerns and obligations of the United Nations and of the Prosecutor".

<sup>58</sup> See, e.g., exchange of letters between the Office of the Prosecutor and the UN Office of Legal Affairs, dated 28 October 2005 and 30 December 2005 (Annexes 3 and 4).

documents containing potentially exculpatory information that were initially gathered under Article 54(3)(e) had been disclosed to the defence.<sup>59</sup> In addition, information providers such as the UN continually committed to resolving the matter in a manner that accommodated both the needs of the ICC and their own organisational mandate and responsibilities.<sup>60</sup>

33. The Prosecution maintained this course for two reasons: first, it believed in good faith that the information providers would lift the restrictions sufficiently to enable a fair trial to proceed; and second, in accordance with its reading of the Statute, it had no other means of providing the exculpatory information. Thus, the Prosecution continued to take the only steps within its power and specifically contemplated by the Statute to resolve the situation.

34. The Prosecution's reading of disclosure obligations in relation to Article 54(3)(e) could be considered in question, but it was not inexcusable.

*The Prosecution's conduct was based on a reasonable and good faith interpretation of its obligations*

35. As the Appeals Chamber acknowledged, the Prosecution, despite its good faith and transparency,<sup>61</sup> was unable to resolve its two conflicting obligations under the Rome Statute: (1) its duty to maintain confidentiality (protecting the materials from disclosure even to the Court) in accordance with its early assurances under Article 54(3)(e); and (2) its obligation to disclose evidence to the defence under Article 67(2) and Rule 77. The Prosecution did not attempt to disguise the problem or mislead the Court; rather, it openly acknowledged

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<sup>59</sup> See ICC-01/04-01/06-1446-Anx1 OA13, 24 July 2008, para. 16; ICC-01/04-01/06-1407, 23 June 2008, para. 13 and p. 5.

<sup>60</sup> See, e.g., letter from Director, General Legal Division (in charge of the UN Office of Legal Affairs) to the Prosecutor, dated 3 July 2008 (ICC-01/04-01/06-1431-Anx2, 11 July 2008), in which the UN states that it "is conscious of its commitment [...] to consult with you on your request in a situation of the present kind, with a view to identifying ways that might best enable you to comply with your disclosure obligations under the Court's Statute and Rules" and recalls that "[t]his commitment is a continuing one".

<sup>61</sup> ICC-01/04-01/06-1486 OA13, para. 95.

its possession of potentially disclosable information, engaged the Chambers on this dilemma, and provided them and the defence with the maximum information possible under the terms of the Statute and its agreements.<sup>62</sup> It also continued throughout the process to work with the providers in an effort to obtain consent to disclosure. But ultimately, because it lacked full provider consent by May 2008, its inability to meet its second obligation without violating the first caused the delay.<sup>63</sup>

36. The Prosecution submits that its interpretation of these seemingly conflicting provisions and its attempt to honor its obligations was in good faith and thus was not “inexcusable”.

37. The Prosecution submits that, prior to the recent judgment of the Appeals Chamber, the interaction between Articles 54(3)(e) and 67(2) was unclear, leaving uncertainty regarding how it could implement its rights and obligations under Article 54(3)(e). The Appeals Chamber recognized that a tension exists between Article 54(3)(e) and the obligations of the Prosecution under Article 67(2) and Rule 77<sup>64</sup> and provided affirmative guidance to all actors on how the difficulties should be addressed and resolved in the future.<sup>65</sup>

38. Given the Appeals Chamber’s finding that it “has no reason to doubt the good faith of the Prosecutor and acknowledges that his approach has been transparent”,<sup>66</sup> the Prosecution submits that its efforts to meet its obligations

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<sup>62</sup> See e.g. ICC-01/04-01/06-1248, 29 March 2008. Under the terms of some of the agreements, the Prosecution was not able to disclose the material itself to the defence or to the Chamber without the consent of the provider. This limited the extent to which the Prosecution could engage the Chamber at earlier stages of the proceedings.

<sup>63</sup> ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 96.

<sup>64</sup> ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 43. The Appeals Chamber recognized the importance of Article 54(3)(e) to the Prosecution, especially in the early stages of investigations conducted in challenging circumstances. In addition, it accepted that the Prosecution may not be able to predict, when gathering material under Article 54(3)(e), how that material will ultimately be used (para. 42).

<sup>65</sup> ICC-01/04-01/06-1486 OA13, 21 October 2008, paras. 44-45, 48.

<sup>66</sup> ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 96.

under both provisions (and any resulting delay) cannot be considered “inexcusable”.

*The Trial Chamber’s prior findings and the Prosecution’s conduct since 29 May 2008*

39. The Appeals Chamber’s findings regarding the Prosecution’s good faith effort to resolve the disclosure dilemma reinforce the Trial Chamber’s earlier findings. On 29 May 2008 the Trial Chamber found that any delay at that time which was attributable to the Prosecution was not inexcusable.<sup>67</sup>
40. Since that time, the Prosecution has acted with diligence to address all the concerns raised by the Trial Chamber. In light of the progress set out above, there is no basis to reconsider the 29 May 2008 Trial Chamber assessment, or to find that there has been “inexcusable delay by the Prosecutor” in this case.

IV. The Court should not Order the Defendant’s Conditional Release without Soliciting Further Views

41. For all these reasons, the Prosecution believes release should not be ordered. In the event that the Chamber contemplates conditional release, however, it must also consider the views of the relevant States, the victims, and perhaps the Registry. Because the accused’s release is, at this point, hypothetical, the Prosecution would ask to defer its views on appropriate conditions until the Court may solicit views pursuant to Rule 119(3) and Regulation 51.

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<sup>67</sup> ICC-01/04-01/06-1359, 29 May 2008, para. 18.



### Conclusion

42. The Prosecution submits that release of the accused, with or without conditions, is unwarranted under Article 60.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

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Luis Moreno-Ocampo  
Prosecutor

Dated this 31<sup>st</sup> day of October 2008  
At The Hague, The Netherlands