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THE APPEALS CHAMBER

Before: Judge Sang-Hyung Song, Presiding Judge
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko
Judge Sanji Mmasenono Monageng

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

Public Document

Observations of the OPCV as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 on the Issues Raised in the Interlocutory Appeal Lodged by the Prosecution against the Oral Decision of Trial Chamber I of 15 July 2010

Source: OPCV as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06

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

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I. Procedural history

1. On 8 July 2010, Trial Chamber I (“the Trial Chamber” or “the Chamber”) stayed the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* on grounds of abuse of process¹ (“the Decision staying the proceedings”).
2. On 14 July 2010, the Prosecution sought leave to appeal the Decision staying the proceedings.²
3. At the hearing of 15 July 2010, the Chamber granted the Prosecution leave to appeal the said decision; at the same time it also ordered the unconditional release of the accused (“the Decision”).³
4. On 16 July 2010, the Prosecution submitted an appeal against the Decision and asked the Appeals Chamber to order that its effect be suspended.⁴
5. On 22 July 2010, the Defence opposed the Prosecution’s application for suspensive effect.⁵
6. On 23 July 2010, the Appeals Chamber granted the Prosecution’s application and ordered that implementation of the Decision be suspended pending determination of the appeal.⁶

¹ See *Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (Trial Chamber I), No. ICC-01/04-01/06-2517-Red of 8 July 2010. (“the Decision staying the proceedings”).

² See “Urgent Prosecution’s Application for Leave to Appeal the Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, No. ICC-01/04-01/06-2520-Red, 14 July 2010.

³ See transcript of the hearing of 15 July 2010, No. ICC-01/04-01/06-T-314-ENG ET WT, page 14, line 3, to page 22, line 8 (“the Decision”).

⁴ See “Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect”, No. ICC-01/04-01/06-2522 OA17, 16 July 2010.

⁵ See “*Réponse de la Défense à la ‘Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect’, déposée le 16 juillet 2010*”, No. ICC-01/04-01/06-2531 OA17, 22 July 2010.

7. On the same day, the Prosecution filed its document in support of the appeal (“the Document in support of the appeal”), putting forward four distinct grounds of appeal:

- the Chamber erred in characterising the imposed stay as an “unconditional stay” (“the First Ground”);⁷
- the Chamber erred in failing to consider the issue of the detention of the accused by reference to the provisions of articles 58(1) and 60 of the Rome Statute (“the Second Ground”);⁸
- the Chamber erred in ordering the release of the accused without taking account of the circumstances relevant to the accused’s detention or release (“the Third Ground”);⁹ and
- the Chamber erred in interpreting the appeal lodged by the Prosecution as a demonstration of its refusal not to seek the lifting of the imposed stay (“the Fourth Ground”).¹⁰

8. On the same day, Principal Counsel for the Office of Public Counsel for Victims, as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 (“the Legal Representative”), requested leave from the Chamber to participate in the appeal lodged by the Prosecution against the Decision.¹¹

⁶ See *Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo* (Appeals Chamber), No. ICC-01/04-01/06-2536 OA17, 23 July 2010.

⁷ See “Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo”, No. ICC-01/04-01/06-2534 OA17, 23 July 2010, paras. 17-25 (the “Document in support of the appeal”).

⁸ *Idem*, paras. 26-31.

⁹ *Ibid.*, paras. 32-39.

¹⁰ *Ibid.*, paras. 40-46.

¹¹ See “Application by the OPCV in its Capacity as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to Participate in the Interlocutory Appeal Lodged by the Prosecution Challenging the Oral Decision of Trial Chamber I of 15 July 2010”, No. ICC-01/04-01/06-2535 OA17-tENG, 23 July 2010.

9. On 30 July 2010, the Defence filed its “Response to the ‘Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo’” (“the Defence Response”), requesting the Appeals Chamber to dismiss the Prosecution appeal, to uphold the Trial Chamber’s Decision ordering the release of Mr Thomas Lubanga Dyilo and to order the Registrar to make the necessary arrangements to implement that Decision.¹²

10. On 17 August 2010, the Appeals Chamber issued its *Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo*,¹³ granting the Legal Representative leave to participate in the present appeal¹⁴ and requesting her to file observations on the issues raised in the interlocutory appeal lodged by the Prosecution against the Decision by 4 p.m. on 23 August 2010.¹⁵

11. The Legal Representative accordingly submits the following observations relating to the interlocutory appeal lodged by the Prosecution against the Decision of 15 July 2010.

¹² See “Defence Response to the ‘Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo’ dated 22 July 2010”, No. ICC-01/04-01/06-2542-tENG, 30 July 2010 (“the Defence Response”).

¹³ See *Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo* (Appeals Chamber), No. ICC-01/04-01/06-2555 OA17, 17 August 2010.

¹⁴ *Idem.*, para. 19.

¹⁵ *Ibid.*, p. 3.

II. On the joinder of the appeals

12. The Legal Representative notes that the Prosecution asks that the present appeal be considered jointly¹⁶ with the appeal lodged against the Decision staying the proceedings.¹⁷

13. In this regard, the Legal Representative submits that it is not opposed to the appeals being so joined. Like the Prosecution,¹⁸ the Legal Representative takes the view that the issues relating to the stay of proceedings are closely linked to the release of the accused. The Legal Representative thus supports the Prosecution's position on the matter,¹⁹ but limits herself, in the context of the present submission, to submitting observations only on the issues relating to the release of the accused.

III. On the First Ground raised in support of the appeal

14. The Prosecution submits that the Chamber erred in characterising the imposed stay as an "unconditional stay".²⁰ The Legal Representative subscribes entirely to the arguments put forward by the Prosecution concerning the First Ground raised in support of the appeal and wishes to provide the following supplementary submissions.

¹⁶ See the Document in support of the appeal, *supra* footnote 7, paras. 8-9.

¹⁷ See "Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process", No. ICC-01/04-01/06-2544-Red OA18, 30 July 2010.

¹⁸ See the Document in support of the appeal, *supra* footnote 7, paras. 8-9.

¹⁹ *Idem*.

²⁰ *Ibid.*, paras. 17-25.

15. Firstly, the Legal Representative submits that, in its judgment of 21 October 2008,²¹ the Appeals Chamber identified two types of stay to the proceedings which might have consequences regarding the detention of an accused person, namely: a “permanent stay” and a “conditional stay”.²² According to the Appeals Chamber, a permanent (unconditional) stay of proceedings is never subject to conditions and is irreversible and absolute.²³ When such a stay is ordered, the person concerned should be released immediately, without conditions.²⁴ By contrast, a so-called “conditional” stay is characterised by the existence of obstacles which are a barrier to a fair trial at a given moment, and is thereby always time-restricted: if the obstacles which led to the stay in proceedings no longer persist, the stay is liable to be lifted at any time.²⁵ Once a Chamber has ordered a conditional stay to proceedings, the unconditional release of the person concerned is not the inevitable consequence.²⁶ The Legal Representative submits that this approach by the Appeals Chamber must continue to be applied in the instant case.

16. In this regard, the Legal Representative submits that, in its Decision staying the proceedings of 8 July 2010,²⁷ Trial Chamber I did indeed order a “conditional stay of proceedings” and not a “permanent stay of proceedings”. Thus in that decision, the Trial Chamber, while identifying the obstacles, which, in its opinion, were a barrier to a fair trial, took care to state expressly that “[w]hilst these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done”.²⁸ The Chamber furthermore stressed that “[w]hilst the stay of the proceedings is in place, the Chamber will deal with any application for leave to appeal on this or

²¹ See *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the Release of Thomas Lubanga Dyilo”* (Appeals Chamber), No. ICC-01/04-01/06-1487 OA12, 21 October 2008, para. 36.

²² *Idem*, paras. 36-37.

²³ *Ibid.*, paras. 33 and 36.

²⁴ *Ibid.*, para. 36.

²⁵ *Ibid.*, paras. 33 and 37.

²⁶ *Ibid.*, para. 37.

²⁷ See the Decision staying the proceedings, *supra* footnote 1.

²⁸ *Idem*, para. 31 (emphasis added).

any related issue that is filed”.²⁹ It clearly follows that, *firstly*, a fair trial is impossible while the current obstacles remain in place, that is to say, temporarily and not absolutely and/or definitively; and that, *secondly*, the Trial Chamber was prepared to consider any relevant issue that might be submitted to it while the stay of proceedings remained in place. Thus, the language used by the Trial Chamber in its decision on the stay of proceedings leaves no doubt that this stay falls under the category of “conditional stay” and not “permanent stay” as interpreted by the Appeals Chamber. Moreover, the two obstacles identified by the Trial Chamber as a barrier to a fair trial are not such as to be able automatically, definitively and irreversibly to prevent the Court from exercising jurisdiction over Mr Thomas Lubanga Dyilo. Thus, while emphasising its obligations regarding the protection of persons cooperating with the Court in support of its refusal to comply with the Chamber’s orders, the Prosecution stressed at all times that it recognised the Chamber’s authority.³⁰

17. However, at the hearing of 15 July 2010, the Trial Chamber stated on several occasions that the imposed stay was not subject to any conditions³¹ and that this stay could not be characterised as temporary.³² But the Chamber failed to provide any clear basis explaining the reasons for its change in approach to the matter and/or substantiating, with greater precision, the legal nature of its decision to stay the proceedings. The Legal Representative respectfully requests the Appeal Chamber to apply an appropriate characterisation to the said decision of Trial Chamber I.

18. The Legal Representative further submits in this regard that the principle of legal certainty, in conjunction with the principle of legal predictability, requires inter

²⁹ Ibid. (emphasis added).

³⁰ See “Urgent Prosecution’s Application for Leave to Appeal the Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, *supra* footnote 2, paras. 9, 25 and 36.

³¹ See transcript of the hearing of 15 July 2010, No. ICC-01/04-01/06-T-314-ENG ET WT p. 10, lines 8-13, p. 11, lines 5-7, and p. 20, lines 22-24, and p. 21, lines 19-20.

³² Idem, p. 20, lines 22-24.

alia that the conclusions reached by the judges should be irrevocable, thus acquiring the force of *res judicata*, unless quashed or reversed by a higher court, since, undeniably, the legal process would otherwise lack clarity, consistency and predictability.³³ A Chamber is also in principle obliged to comply with its previous decisions and should only depart from these if there are compelling reasons which it considers to be overriding in the interests of justice.³⁴ Moreover, Trial Chamber I itself appears to accept the pertinence of those principles when it emphasises in particular that “[i]n order for the Chamber to ensure that the accused receives a fair trial, it is necessary that its orders, decisions and rulings are respected, unless and until they are overturned on appeal, or suspended by order of the Court”.³⁵

19. The Trial Chamber’s clearly controversial approach to its legal characterisation of the stay of proceedings ordered by it played a decisive role in its consideration of the issue of Mr Thomas Lubanga Dyilo’s release.³⁶ Thus on 15 July 2010, basing itself on the Decision staying the proceedings, the Chamber ordered the unconditional release of the accused.³⁷ In particular, the Chamber reached the conclusion that “[g]iven [...] that the Chamber has imposed an unconditional stay of proceedings, and bearing in mind the wholesale uncertainty of whether this case will restart at some future time, together with the length of time the accused has already been in custody, anything other than unrestricted release will be unfair”.³⁸

20. It follows that the Trial Chamber directly based its decision to order the immediate and unconditional release of the accused solely on the stay of proceedings. However, in ordering the release, the Chamber appears not to have

³³ See ECHR, *Salov v. Ukraine*, Application No. 65518/01, 6 September 2005, para. 93; *Brumarescu v. Romania*, Application No. 28342/95, 28 October 1999, para. 61.

³⁴ See ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 92. See also ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, paras. 107-109.

³⁵ See the Decision staying the proceedings, *supra* footnote 1, para. 28.

³⁶ See the Decision, *supra* footnote 3.

³⁷ *Idem*, p. 21, lines 24-25.

³⁸ *Ibid.*, p. 21, lines 19-23.

considered the legal nature of the stay of proceedings that it had itself ordered – a stay which clearly fell under the category of a “conditional stay” and not a “permanent stay” as defined by the Appeals Chamber.³⁹ In other words, the Trial Chamber appears to deny the obvious fact that a trial which has simply been stayed is deemed to resume its normal course sooner or later. Furthermore, the Chamber adopted this same erroneous approach in its Decision on the release of Mr Thomas Lubanga Dyilo of 2 July 2008,⁴⁰ an approach which was criticised by the Appeals Chamber in its judgment of 21 October 2008,⁴¹ and was the reason for the reversal of the said decision on the release of the accused by the Appeals Chamber and for its referral back to the Trial Chamber for the latter to make a fresh ruling, taking into consideration certain criteria omitted from the reversed decision.

21. In the instant case, the Legal Representative submits that the same error has been committed by the Trial Chamber and that, as a result, similar conclusions must be drawn. The Legal Representative further recalls the statement by the Appeals Chamber that “[i]n accordance with the provisions of the Statute, an arrested person remains in custody during the pendency of the proceedings unless his/her interim release is sanctioned by the Court under the provisions of article 60 of the Statute”,⁴² at the same time thus taking the view that the detention of the accused throughout proceedings is the rule rather than the exception. In this case, since the Decision staying the proceedings did not cause the proceedings to be terminated, but resulted in a “conditional” – and hence temporary – stay, the said principle established by the Appeals Chamber should continue to be applied.

³⁹ See *supra*, paras. 15-17.

⁴⁰ See *Decision on the release of Thomas Lubanga Dyilo* (Trial Chamber I), No. ICC-01/04-01/06-1418, 2 July 2008, paras. 34-35.

⁴¹ See *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the Release of Thomas Lubanga Dyilo”*, *supra*, footnote 21, paras. 31-37.

⁴² See *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006* (Appeals Chamber), No. ICC-01/04-01/06-772, 14 December 2006, para. 2.

IV. Second and Third Grounds raised in support of the appeal

22. The Prosecution further contends that the Chamber erred in failing to consider the issue of the accused's detention in light of the provisions of articles 58(1) and 60 of the Rome Statute,⁴³ and in ordering the release of the accused without taking into account the circumstances relevant to detention or release.⁴⁴

23. The Legal Representative wholly endorses the Prosecution arguments as regards the Second and Third Grounds raised in support of the appeal and wishes to provide the following supplementary submissions.

24. Firstly, the Appeals Chamber has clearly stated that "once a Chamber has ordered a conditional stay of the proceedings, the unconditional release of the person concerned is not the inevitable consequence. Instead, the Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in articles 60 and 58 (1) of the [Rome] Statute."⁴⁵

25. In this respect, the Legal Representative submits that since, in the instant case, as demonstrated above,⁴⁶ the Trial Chamber only ordered a "conditional stay", as defined by the Appeals Chamber, under no circumstances could it base Mr Thomas Lubanga Dyilo's release solely on the stay of the proceedings and was duty-bound to take into account, over and above the criteria of article 58(1) of the Rome Statute, any

⁴³ See Document in support of the appeal, *supra* footnote 7, paras. 26-31.

⁴⁴ *Idem*, paras. 32-39.

⁴⁵ See *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo"*, *supra* footnote 21, para. 37.

⁴⁶ See *supra* paras. 15-17.

other factor which had formed a basis for the previous decisions on the continued detention of the accused issued by both the Trial and Pre-Trial Chambers.

26. The following specific factors, in particular, formed the basis for the decisions on the continued detention of Mr Thomas Lubanga Dyilo: (i) there is a substantial risk that the detained person may abscond from the jurisdiction of the Court on account of the fact that, given his role in the UPC/FPLC, he has been able to establish numerous contacts nationally and internationally which would readily enable him to abscond from the jurisdiction of the Court;⁴⁷ (ii) since the detained person knows the identity of the witnesses, there is a risk that directly, or indirectly with the help of others, he would exert pressure on the said witnesses, thus obstructing or endangering the court proceedings; moreover, in view of the fact that the situation in the Democratic Republic of the Congo still remains volatile, the release of Mr Thomas Lubanga Dyilo could lead to the grave endangerment of the security of victims and witnesses.⁴⁸

⁴⁷ See *Decision on the Application for the interim release of Thomas Lubanga Dyilo* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-586-tEN, 18 October 2006, p. 6. See also *Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo"* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-826, 8 June 2007 (dated 14 February 2007), pp. 4-5; *Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo"* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-924, 14 June 2007 (dated 11 June 2007), p. 6; *Decision reviewing the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo"* (Trial Chamber I), No. ICC-01/04-01/06-976, 9 October 2007, para. 10; *Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)* (Trial Chamber I), No. ICC-01/04-01/06-1151, 26 May 2009 (dated 1 February 2008), para. 10; *Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)* (Trial Chamber I), No. ICC-01/04-01/06-1359, 29 May 2008, para. 14; transcript of the hearing of 18 November 2008, No. ICC-01/04-01/06-T-98-FRA ET WT, p. 41, line 16 to p. 42, line 13.

⁴⁸ See *Decision on the Application for the interim release of Thomas Lubanga Dyilo* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-586-tEN, 18 October 2006, p. 6. See also *Review of the "Decision on the Application for the Interim Release of Thomas Lubanga Dyilo"* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-826, 14 February 2007, p. 5; *Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo"* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-924, 11 June 2007, p. 6; transcript of the hearing of 18 November 2008, No. ICC-01/04-01/06-T-98-FRA ET WT, p. 41, line 16 to p. 42, line 13.

27. The Legal Representative submits that, pursuant to article 60(3) of the Rome Statute, the Trial Chamber can only modify a ruling as to detention, release or conditions of release if it is satisfied that changed circumstances so require. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Appeals Chamber made it clear in particular that: “[t]he requirement of ‘changed circumstances’ [under article 60-3 of the Statute] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its previous ruling is necessary”.⁴⁹

28. However, we are compelled to conclude, as has the Prosecution,⁵⁰ that Trial Chamber I did not consider any of the criteria set out in article 58(1) of the Rome Statute or the specific circumstances of Mr Thomas Lubanga Dyilo’s detention. In ordering Mr Thomas Lubanga Dyilo’s unconditional release, the Trial Chamber totally failed to show, contrary to the requirements of article 60(3) of the Rome Statute, whether and to what extent the specific circumstances which formed the basis for the detention of the said person to date had changed or altered; nor did the Chamber demonstrate the existence of any new facts to warrant modifying previous rulings on the detention of the person concerned. Moreover, to date, and as has been the case since the proceedings started, there is still a major risk that Mr Thomas Lubanga Dyilo could abscond from the jurisdiction of the Court, particularly since he is now apprised of all the evidence against him. Moreover, since Mr Thomas Lubanga Dyilo now knows the identity of all the Prosecution witnesses, and given the fact that the situation in the Democratic Republic of the Congo is still and continues to be volatile, the release of the accused could, even more so than before, lead to the grave endangerment of the security of victims and witnesses involved in the present case.

⁴⁹ See *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”* (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 60.

⁵⁰ See Document in support of the appeal, *supra* note 7, paras. 29, 30 and 34-36.

29. In this respect, the Legal Representative points out that, in its Judgment of 21 October 2008, the Appeals Chamber criticised Trial Chamber I for having ordered the unconditional release of the accused without taking due account of the conditional character of the stay it had ordered and without considering all of the relevant circumstances in light of the criteria set out in articles 58(1) and 60 of the Rome Statute, and it accordingly reversed the said decision.⁵¹ Moreover, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Appeals Chamber also criticised Pre-Trial Chamber II for having erroneously found that the circumstances and conditions justifying the continued detention of the accused had materially changed,⁵² whilst specifically emphasising that, after the confirmation of charges phase, the risk of the accused absconding from the jurisdiction of the Court is much higher than it was prior to that phase.⁵³ These principles established by the Appeals Chamber must continue to apply to the present case.

30. Furthermore, inasmuch as the Trial Chamber based Mr Thomas Lubanga Dyilo's release on, inter alia, what it considered to be the "excessive" length of time that he had already spent in custody,⁵⁴ the Legal Representative submits that, even if that period were to exceed the requisite reasonableness, this proposition *per se* does not suffice for the immediate and unconditional release of the accused, given the numerous risks and considerable and real dangers that such release could entail.

31. In this respect, under international human rights jurisprudence, as enunciated by the European Court of Human Rights ("the ECHR"), the following grounds may

⁵¹ See *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo"*, *supra* footnote 21, paras. 37, 42-45.

⁵² See *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*, *supra* footnote 49, paras. 57-88.

⁵³ *Idem*, para. 87.

⁵⁴ See the Decision, *supra* footnote 3, p. 21, lines 22-23.

be considered “relevant” and “sufficient” to justify the continued detention of the person concerned:⁵⁵ (i) the existence and persistence of serious indications of guilt;⁵⁶ (ii) the existence of a risk of causing public disquiet by releasing the detained person;⁵⁷ (iii) the existence of a risk of pressure being brought to bear on the witnesses and of collusion between the co-accused;⁵⁸ (iv) danger of the applicant’s absconding;⁵⁹ (v) the existence of a risk of reoffending;⁶⁰ and (vi) the requirements of the investigation.⁶¹

32. The Legal Representative submits that in the instant case the Chamber ordered Mr Thomas Lubanga Dyilo’s unconditional release without taking into consideration or even evaluating the risks and dangers that the release of the accused could entail, in particular the risk that the accused may abscond from the jurisdiction of the Court, the risk that the accused may obstruct or endanger the Court proceedings and the risk that the security of the witnesses and victims may be endangered.⁶² Such risks and dangers have existed throughout the proceedings and the reality thereof has been acknowledged and affirmed on numerous occasions by Pre-Trial Chamber I and Trial Chamber I. Lastly, to date, these risks and dangers have never been denied or dismissed by any Chamber of the Court with competence

⁵⁵ See ECHR, *Prencipe v. Monaco*, Application No. 43376/06, 16 July 2009, para. 74; *Tum v. Turkey*, Application No. 11855/04, 17 June 2008, para. 41; *Lelievre v. Belgium*, Application No. 11287/03, 8 November 2007, para. 92.

⁵⁶ See ECHR, *Tum v. Turkey*, Application No. 11855/04, 17 June 2008, para. 41; *Mansur v. Turkey*, Application No. 16026/90, 8 June 1995, para. 56; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 89.

⁵⁷ See ECHR, *Prencipe v. Monaco*, Application No. 43376/06, 16 July 2009, para. 79; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 91; *Kemmache v. France*, Applications No. 12325/86 and No. 14992/89, 27 November 1991, para. 52.

⁵⁸ See ECHR, *Contrada v. Italy*, Application No. 27143/95, 24 August 1998, para. 61; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, paras. 92-95.

⁵⁹ See ECHR, *Cetin Agdas v. Turkey*, Application No. 77331/01, 19 September 2006, paras. 27-28; *Mansur v. Turkey*, Application No. 16026/90, 8 June 1995, para. 55; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 98; *Letellier v. France*, Application No. 12369/86, 26 June 1991, para. 43.

⁶⁰ See ECHR, *Paradysz v. France*, Application No. 17020/05, 29 October 2009, para. 70; *Muller v. France*, Application No. 21802/93, 17 March 1997, para. 44; *Clooth v. Belgium*, Application No. 12718/87, 12 December 1991, para. 40.

⁶¹ See ECHR, *Lelievre v. Belgium*, Application No. 11287/03, 8 November 2007, para. 92; *Bouchet v. France*, Application No. 33591/96, 20 March 2001, para. 41.

⁶² See *supra* paras. 25-27.

in the matter. Moreover, to the said risks could be added the additional risk that Mr Thomas Lubanga Dyilo's release may prejudice public order, particularly in the Ituri region of the Democratic Republic of the Congo, as well as compromising the Office of the Prosecutor's further or ongoing investigations. The said risks and dangers, considered together, undoubtedly justify maintaining Mr Thomas Lubanga Dyilo in detention, especially in view of the temporary nature of the stay of proceedings imposed.

V. Fourth Ground raised in support of the appeal

33. Lastly, the Prosecution maintains that the Chamber erred in interpreting the appeal as demonstrating its refusal not to seek a lifting of the imposed stay.⁶³

34. The Legal Representative concurs with the Prosecution arguments as regards the Fourth Ground raised in support of the appeal and wishes to provide the following supplementary submissions.

35. The Legal Representative submits that each party and participant in the trial is absolutely free and autonomous in terms of developing its strategy and choosing those procedural means which best meet its interests and needs. No party or participant can be compelled to prioritise some procedural means over others – even if, in the view of the Chamber, other means would better suit the requirements of effective proceedings – unless such restrictions are expressly provided for by the relevant legal texts. However, the statutory and regulatory texts of the Court do not provide for any restriction of the kind. Such restrictions would, in any event, be

⁶³ See Document in support of the appeal, *supra* footnote 7, paras. 40-46.

inconsistent with equality of arms, one of the fundamental principles of a fair and equitable trial.⁶⁴

36. Under international human rights jurisprudence, equality of arms implies that each party to the proceedings is afforded the same procedural opportunities.⁶⁵ Equality of arms requires the existence of the same opportunities with respect to, *inter alia*, the preparation of the case, access to material and presentation of the case.⁶⁶ Moreover, even the requirements of the right to an effective trial within a reasonable time must in no way run counter to the general needs of the proper administration of justice.⁶⁷ It follows that it is for a party to select a procedural remedy from among those available under the relevant texts.

37. Accordingly, the Legal Representative submits, as has the Prosecution,⁶⁸ that it is entirely misconceived to conclude that the Prosecution failed to seek the lifting of the stay of proceedings solely from the fact that the latter has preferred, at this stage, to appeal the Decision rather than to apply for a lifting of the Decision staying the proceedings, and, in addition, to use such a conclusion in an attempt to establish that the stay of proceedings is of a permanent character, despite the fact that it is rather in the nature of a “conditional stay” as defined by the Appeals Chamber.

⁶⁴ See ECHR, *Kennedy v. United Kingdom*, Application No. 26839/05, 18 May 2010, para. 184; *Rasmussen v. Poland*, Application No. 38886/05, 28 April 2009, para. 42; *Bulut v. Austria*, Application No. 17358/90, 22 February 1996, para. 47.

⁶⁵ See ECHR, *Kennedy v. United Kingdom*, Application No. 26839/05, 18 May 2010, para. 184; *Rasmussen v. Poland*, Application No. 38886/05, 28 April 2009, para. 42; *Gorraiz Lizarraga v. Spain*, Application No. 62543/00, 27 April 2004, para. 56.

⁶⁶ See ECHR, *Salov v. Ukraine*, Application No. 65518/01, 6 September 2005, para. 87; *Mantovanelli v. France*, Application No. 21497/93, 18 March 1997, para. 33.

⁶⁷ See ECHR, *Förderkreis E.V. et al v. Germany*, Application No. 58911/00, 6 November 2008, para. 63; *Kirsten v. Germany*, Application No. 19124/02, 15 February 2007, para. 45; *Wimmer v. Germany*, Application No. 60534/00, 24 February 2005, para. 30.

⁶⁸ See Document in support of the appeal, *supra* footnote 7, para. 46.

For the above reasons,

The Legal Representative respectfully requests the Appeals Chamber:

- to reverse the oral Decision of 15 July 2010 ordering Mr Thomas Lubanga Dyilo's release;⁶⁹ and
- to order the continued detention of the accused.

[signed]

**Ms Paolina Massidda
Principal Counsel**

Dated this 23 August 2010

At The Hague, The Netherlands

⁶⁹ See the Decision, *supra* footnote 3.