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

Date: **29 July 2010**

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

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

Source: Mr Thomas Lubanga Dyilo’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 8 July 2010, Trial Chamber I (hereafter “the Chamber”) ordered a stay in the proceedings against Mr Thomas Lubanga.¹
2. On 15 July 2010, the Chamber ordered the release of Mr Thomas Lubanga.²
3. On 16 July 2010, the Prosecutor announced his intention of appealing the decision ordering the release of Mr Thomas Lubanga and requested the Appeals Chamber to order that its effect be suspended.³
4. On 23 July 2010, the Appeals Chamber granted the Prosecutor’s request for suspension of the effect of the decision ordering the release of Mr Thomas Lubanga.⁴
5. On 23 July 2010, the Prosecutor filed his “Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo”.⁵
6. The Defence wishes to submit the following observations in response to the Prosecutor’s grounds of appeal.

OBSERVATIONS

I. Preliminary remarks

7. The Defence notes that certain statements by the Prosecutor in his account of the facts are incomplete, and thus misrepresent the facts which led the Chamber to stay the proceedings.

¹ ICC-01/04-01/06-2517-Conf.

² ICC-01/04-01/06-T-314.

³ ICC-01/04-01/06-2522.

⁴ ICC-01/04-01/06-2536.

⁵ ICC-01/04-01/06-2534.

8. For example, in paragraph 2 of his account of the facts, the Prosecutor omitted to mention that:

- on 15 March 2010, the Chamber informed the Prosecutor that it intended to order the disclosure of the identity of intermediary 143 to the Defence. It thus ordered the Prosecutor, in liaison with the Victims and Witnesses Unit (VWU), to evaluate the protective measures to be implemented prior to such disclosure;⁶
- on 4 May 2010, the VWU submitted to the Chamber details of the protective measures to be implemented to ensure the safety of intermediary 143 prior to the disclosure of his identity to the Defence.⁷ On 12 May 2010, the Chamber ordered that the identity of intermediary 143 be disclosed to the Defence once the protective measures had been implemented;⁸
- the protective measures afforded to intermediary 143 were to have been implemented by mid-June 2010;⁹
- at the hearing of 14 June 2010, the identity of intermediary 143 was partly revealed by the Defence during its cross-examination of Witness DRC-OTP-WWWW-0581.¹⁰ One of the names mentioned by the Defence had already been revealed by Witness D01-0002 during testimony on 1 February 2010;¹¹
- on 6 July 2010, the Chamber and the Parties were informed that intermediary 143 was no longer satisfied with the protective measures

⁶ ICC-01/04-01/06-T-261-CONF-ENG ET, p. 6, line 18 *et seq.* See ICC-01/04-01/06-2434-Conf-Red, para. 41.

⁷ ICC-01/04-01/06-2434-Conf-Red, footnote 124.

⁸ *Idem*, paras. 143 and 150(i).

⁹ The Chamber ordered the disclosure of the identity of intermediary 143 on 12 May 2010 (ICC-01/04-01/06-2434-CONF-Red, paras. 143 and 150(i)). On 3 June 2010 the Prosecutor stated that the protective measures afforded to intermediary 143 would be implemented within the next 10 days (ICC-01/04-01/06-T-298-ENG-ET, p. 20, lines 14-15).

¹⁰ The Prosecutor stated that the name mentioned by Ms Mabilie during the examination of witness 0581 was "something quite similar", "not the exact name", ICC-01/04-01/06-T-310-CONF-ENG, p. 62, line 6 *et seq.*

¹¹ ICC-01/04-01/06-T-238-CONF-ENG CT, p. 10, line 20 *et seq.*

offered to him by VWU and that he wished the level of protection to be stepped up.¹²

- as the change of position by intermediary 143 would result in considerable delay in the proceedings, the Chamber deemed it necessary to order the disclosure of his identity whilst at the same time offering sufficient guarantees of protection.¹³
9. Furthermore, the Prosecutor misrepresents the Chamber's decision by failing to state that, in ordering the disclosure of the identity of intermediary 143 to the Defence, it set extremely strict limits for said disclosure:¹⁴ 1) Disclosure to be limited to those members of the team present in court, to the assistants to Lead Counsel and to the resource person working in the DRC; 2) Under no circumstances was the information to be disclosed to anyone else; and 3) No investigative steps to be taken that were based on this information.¹⁵
10. In addition, in paragraph 2 of his Introduction, the Prosecutor fails to indicate that, prior to the Chamber ordering the stay of proceedings, VWU had informed it¹⁶ of its view that disclosure to the Defence, under the conditions ordered by the Chamber, did not pose a risk to intermediary 143.¹⁷

¹² ICC-01/04-01/06-T-238-CONF-ENG CT, p. 49, line 8 *et seq.* See also p. 63, line 5 *et seq.*

¹³ *Idem.*, p. 64, lines 2 to 12.

¹⁴ "Highly restricted circumstances, determined by the Chamber", ICC-01/04-01/06-2517-Conf., para. 20.

¹⁵ ICC-01/04-01/06-2517-Conf, para. 20 and ICC-01/04-01/06-T-310-CONF-ENG ET, p. 63, line 5, to p. 65, line 5.

¹⁶ In his observations of 7 July 2010, the Prosecutor intimates incorrectly that VWU objected to the identity of intermediary 143 being disclosed to the Defence, even under highly restricted circumstances. See ICC-01/04-01/06-2516-Conf.

¹⁷ E-mail from the VWU Legal Adviser dated 8 July 2010 at 13:51, entitled: "FW: ICC-01/04-01/06-2516-Conf – Prosecution's Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay". This e-mail is appended to document ICC-01/04-01/06-2538-Conf-AnxB, p. 4/5.

2. The request for joint consideration of appeals

11. The Prosecutor is calling for joint consideration of the appeal against the decision to stay proceedings of 8 July 2010 and that against the decision for release with which we are currently concerned, on the ground that the stay of proceedings is the sole reason for the Chamber's decision to order the release of the accused.
12. That request calls for the following observations:
13. Firstly, in its decision of 21 October 2008, the Appeals Chamber emphasised the separate nature of the two issues,¹⁸ which, although linked in some respects, could be examined separately in the context of separate decisions.
14. Secondly, although it is true that, if proceedings are stayed unconditionally, the necessary consequence is the unconditional release of the accused, release may, however, be ordered under articles 58(1) and 60 of the Statute even where there has been no stay of proceedings. As the release of the accused is not necessarily dependent on an unconditional stay of proceedings, the Appeals Chamber may therefore rule on detention in a separate decision prior to ruling on the appeal against the decision to stay the proceedings.
15. Thirdly, contrary to what the Prosecutor argues,¹⁹ in addition to the situation where there is an unconditional stay of proceedings, which in itself is sufficient to justify release, the Chamber has also accepted that the length of time spent in detention by the accused to date constitutes an additional ground for release.²⁰ An unconditional stay of proceedings is thus not the only ground relied on for ordering the release of the accused.

¹⁸ ICC-01/04-01/06-1487, paras. 17 to 19.

¹⁹ ICC-01/04-01/06-2534, para. 8.

²⁰ ICC-01/04-01/06-T-314-ENG ET, p. 21, line 21.

16. Fourthly, joint consideration of the appeals might delay the release of the accused and thus aggravate the harm suffered by him as a result of unjustified detention.
17. It follows that the joint consideration requested by the Prosecutor is neither necessary nor appropriate.

3 –The First Ground of Appeal

18. The Prosecutor contends that the Chamber erroneously characterised its own decision staying the proceedings as an “unconditional stay”.²¹ He submits in this regard that the stay was only imposed due to “specific circumstances”²² and that the Chamber itself contemplated the possibility of proceedings resuming if the circumstances underpinning the stay were to change.²³
19. This analysis misrepresents the basis and scope of the decisions rendered by the Chamber.
20. Firstly, the Chamber drew a clear distinction in its decision between the two obstacles which were blocking the continuation of the trial:
21. The first is the Prosecutor’s refusal to implement the two orders of the Chamber regarding an essential disclosure which affects the fairness of the proceedings; this obstacle could be regarded as capable of removal, provided the order was implemented in a timely fashion.²⁴
22. The second obstacle, however, concerns the position of principle adopted by the Prosecutor, independently of any “specific circumstances”, whereby he does not consider that he is bound to comply with the orders of the Chamber

²¹ ICC-01/04-01/06-2534, para. 17.

²² *Idem*, para. 20.

²³ *Idem*.

²⁴ ICC-01/04-01/06-2517-Conf, para. 20.

- relating to the protection of those persons who have been affected by their collaboration with the Court.²⁵
23. This position of principle is neither temporary nor dependent upon circumstances, but on the contrary is of a general and permanent nature. However, as emphasised by the Chamber, “[n]o criminal court can operate on the basis that whenever it takes an order in particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations”.²⁶ Thus, by its very nature, this constitutes a permanent obstacle to the continuation of the trial. Moreover, it confirms the Prosecutor’s determination not to carry out an order issued by the Chamber whose implementation is fundamental to the fairness of the proceedings, and hence to the continuation of the trial.
24. Secondly, contrary to what the Prosecutor asserts, the Chamber has never presented the stay in proceedings as liable to be lifted following a change in “circumstances”. The references submitted by the Prosecutor in support of this assertion are clearly only relevant to the first obstacle noted by the Chamber. They are not in any way relevant to the second one, whose existence is not dependent on any external circumstances but which has arisen as a result of the Prosecutor’s own decision not to consider himself bound to comply with the decisions of the judges.
25. Thus, in identifying two major obstacles to the continuation of the trial, one of which is of a general and permanent nature, the Chamber has very clearly defined a situation where there is a permanent stay of the proceedings.
26. However, the principles which apply to the release of an accused person following a decision to stay proceedings were clearly set out by the Appeals Chamber on 21 October 2008 in its *Judgment on the appeal of the Prosecutor*

²⁵ *Idem*, para. 21 *et seq.*

²⁶ *Idem*, para. 27.

against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”:²⁷ if there is a permanent and irreversible stay of proceedings, the accused person will have to be released “because continued detention would not be in connection with the exercise of criminal jurisdiction by the Court”.²⁸

27. In the present case, the Chamber has rightly emphasised in its decision ordering the release of Mr Thomas Lubanga that it had imposed an unconditional stay of proceedings.²⁹
28. It follows, as stated by the Chamber, that anything other than the unrestricted release of Mr Thomas Lubanga would be unfair.³⁰

4 – The Second and Third Grounds of Appeal

29. The Prosecutor contends that the Chamber erred in failing to examine the issue of the detention of the accused in light of the provisions of articles 58(1) and 60 of the Statute, and in ordering the release of the accused without taking into consideration “all relevant circumstances”.
30. Firstly, in accordance with the principles laid down by the Appeals Chamber in its decision of 21 October 2009, the unconditional and permanent nature of the stay ordered requires the accused to be released, without any need to assess whether this is justified in light of articles 58(1) and 60 of the Statute. The arguments invoked by the Prosecutor on the basis of these provisions are therefore irrelevant in the present case.
31. Secondly, even in the case of a “conditional stay”, the Appeals Chamber has emphasised that it would be necessary to consider whether further

²⁷ ICC-01/04-01/06-1487.

²⁸ *Idem*, para. 36.

²⁹ See for example ICC-01/04-01/06-T-314-ENG ET, p. 21, lines 19 *et seq.*

³⁰ *Idem*.

developments since the imposition of the conditional stay made it likely that the stay might be lifted.³¹

32. Yet, since the stay in proceedings, there have been no developments to indicate that this situation might be resolved, since the Prosecutor has maintained his position, both in his application of 14 July 2010³² and in his oral observations of 15 July 2010³³ and his submissions of 26 July 2010.³⁴
33. Thirdly, as the Appeals Chamber pointed out: “the Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights (see article 9 (3) of the International Covenant on Civil and Political Rights of 16 December 1966, article 5 (3) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and article 7 (5) of the American Convention on Human Rights of 22 November 1969; see also article 7 (1) (d) of the African Charter on Human and Peoples’ Rights of 27 June 1981, which generally provides for the right to trial within a reasonable time).”³⁵
34. Yet this is the second time the Chamber has ordered a stay in proceedings as a result of abuse of process on the part of the Prosecutor.³⁶ As noted by the Chamber in its decision of 29 May 2008, further delays attributable to the Prosecutor will be taken into account when reviewing detention under article 60(4).³⁷

³¹ ICC-01/04-01/06-1487, para. 37.

³² ICC-01/04-01/06-2520.

³³ ICC-01/04-01/06-T-314-ENG ET.

³⁴ ICC-01/04-01/06-2538-Conf.

³⁵ ICC-01/04-01/06-1487, para. 37.

³⁶ The first stay in proceedings in the case involving Mr Thomas Lubanga was ordered by Trial Chamber I on 13 June 2008, see ICC-01/04-01/06-1401, and his release was ordered on 12 July 2008, see ICC-01/04-01/06-1418.

³⁷ ICC-01/04-01/06-1359, para. 17.

35. Mr Thomas Lubanga has been in custody under the authority of the Court since March 2006, and his pre-trial detention must not be extended any longer as a result of inexcusable delays attributable to the Prosecution.
36. The Chamber therefore correctly took into consideration the period already spent in pre-trial detention by the accused as an additional ground for release.³⁸

5 – The Fourth Ground of Appeal

37. The Prosecutor contends that the Chamber erred when it interpreted his appeal against the decision to stay proceedings as a demonstration of his refusal to seek to secure a lifting of the stay.
38. This ground of appeal is without merit.
39. Firstly, this argument is irrelevant in assessing whether the decision to release the accused following the stay in proceedings is well-founded. It goes without saying that the current and actual situation, where two major obstacles are preventing the trial from continuing, prevails over the actual or assumed intentions of the Office of the Prosecutor as regards its hypothetical future actions.
40. Secondly, there is no denying that the Prosecutor has repeatedly reiterated its intention not to implement the orders of the Chamber.³⁹ At no time has the

³⁸ ICC-01/04-01/06-T-314-ENG ET, p. 21, line 17 *et seq.*

³⁹ ICC-01/04-01/06-T-312-ENG ET, p. 8, line 10 *et seq.*; *Idem*, p. 13, line 25 *et seq.*; ICC-01/04-01/06-2516-Conf, para. 6: “The Prosecution is sensitive to its obligation to comply with the Chamber’s instructions. However, it also has an independent statutory obligation to protect persons put at risk on account of the Prosecution’s actions. It should not comply, or be asked to comply, with an Order that may require it to violate its separate statutory obligation by subjecting the person to a foreseeable risk. The Prosecutor accordingly has made a determination that the Prosecution would rather face adverse consequences in its litigation than expose a person to risk on account of prior interaction with this Office. This is not a challenge to the authority of the Chamber, it is instead a reflection of the Prosecution’s own legal duty under the Statute.” (Emphasis added)

Prosecutor demonstrated any intention of complying with the orders of the Chamber in order to secure the lifting of the stay. The Chamber has simply taken note of this situation. It cannot be criticised for taking note of the Prosecutor's decisions and drawing the necessary conclusions therefrom.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO DISMISS the Prosecutor's appeal.

TO CONFIRM the Decision of Trial Chamber I ordering the release of Mr Thomas Lubanga.

TO ORDER the Registrar to make the necessary arrangements to implement that decision.

Ms Catherine Mabile, Lead Counsel

[signed]

Dated this 29 July 2010

At The Hague, The Netherlands