

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **27 August 2010**

THE APPEALS CHAMBER

Before

**Judge Sang-Hyun 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 Observations of the Legal Representatives of the
Victims on the Appeal against the Decision Ordering the Release of Mr Thomas
Lubanga**

Source: Mr Thomas Lubanga's Defence Team

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

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BACKGROUND

1. On 8 July 2010, the Trial Chamber ordered a stay of the proceedings against Mr Thomas Lubanga.¹
2. On 15 July 2010, the Trial Chamber ordered the release of Mr Thomas Lubanga.²
3. On 16 July 2010, the Prosecutor announced his intention to lodge an appeal against the decision ordering the release of Mr Thomas Lubanga.³
4. On 22, 23 and 26 July 2010, the Defence received three requests⁴ from the Legal Representatives of the Victims for participation in the appeal proceedings against the decision ordering the release of Mr Thomas Lubanga.
5. On 30 July 2010, the Prosecutor filed his appeal document.⁵
6. On 17 August 2010, the Appeals Chamber authorised a certain number of victims to present their views and concerns with respect to the appeal against the release of Mr Thomas Lubanga, and ordered said victims to file their observations by 4.00 pm on 23 August 2010.⁶

¹ ICC-01/04-01/06-2517-Conf.

² ICC-01/04-01/06-T-314-ENG ET WT, p. 21, lines 24-25 ff.

³ ICC-01/04-01/06-2522.

⁴ ICC-01/04-01/06-2533-Conf-tENG, ICC-01/04-01/06-2535-tENG and ICC-01/04-01/06-2537-tENG.

⁵ ICC-01/04-01/06-2544-Conf.

⁶ ICC-01/04-01/06-2555.

7. On 17 August 2010, the Appeals Chamber authorised a certain number of victims to present their views and concerns in respect of the stay of proceedings ordered by the Trial Chamber on 8 July 2010, and ordered said victims to file their observations in this regard by 4.00 pm on 24 August 2010.⁷
8. On 23 August 2010, the Office of Public Counsel for Victims (“OPCV”), and Mr Luc Walley on behalf of the Group of Victims VO1, filed their observations in respect of the Prosecutor’s appeal against the decision ordering the release of Mr Thomas Lubanga.⁸
9. On 24 August 2010, Ms Carine Bapita Buyangangu and Mr Paul Kabongo Tshibangu filed their “Observations of the Legal Representatives of Victim a/0051/06 on the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 and the Appeal against the Decision to Release the Accused of 15 July 2010” (“the Observations of Victim a/0051/06”).⁹

OBSERVATIONS

1. The Observations of the OPCV

a) As to the first ground raised in support of the appeal

10. The Defence points out that the OPCV did not seek leave to file its observations in respect of the appeal against the decision ordering the stay

⁷ ICC-01/04-01/06-2556.

⁸ ICC-01/04-01/06-2557-tENG and ICC-01/04-01/06-2558-tENG.

⁹ ICC-01/04-01/06-2560-tENG.

of proceedings, but merely sought, and obtained, leave to file its observations in respect of the appeal against the decision ordering the release of Mr Thomas Lubanga.

11. However, in its observations on the first ground of appeal, the OPCV questions whether the decision to suspend the proceedings is final, and disputes the validity of such a decision.
12. The OPCV states that, in its opinion, *“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 its jurisdiction over Mr Thomas Lubanga Dyilo”*,¹⁰ thus challenging the actual substance of the decision ordering the stay of the proceedings.
13. The Trial Chamber clearly stated, at the hearing of 15 July 2010, that the stay of proceedings was permanent and not subject to any conditions.¹¹ The OPCV’s contention in its observations that there was “no doubt” that this stay was a “conditional stay”¹² directly contradicts the clear language used by the Trial Chamber to describe the nature of its decision.
14. Not only is the position expressed by the OPCV on the first ground of appeal unfounded, for the reasons already stated by the Defence in its response to the Prosecutor’s appeal document,¹³ but it goes beyond the subject-matter authorised by the Appeals Chamber.

¹⁰ ICC-01/04-01/06-2557-tENG, para. 17.

¹¹ ICC-01/04-01/06-T-314-ENG ET WT, p. 10, lines 8-9, and p. 11, lines 5-6. The OPCV itself stresses this fact in paragraph 17 of its observations.

¹² ICC-01/04-01/06-2557-tENG, para. 16.

¹³ ICC-01/04-01/06-2542-tENG.

b) As to the second and third grounds raised in support of the appeal

15. The arguments advanced by the OPCV to support the second and third grounds of appeal are unfounded, as they are based on the proposition that the decision to stay the proceedings was of a temporary or conditional nature.
16. However, for the reasons already explained by the Defence,¹⁴ the Trial Chamber ordered a permanent and irreversible stay of the proceedings. The Appeals Chamber has already made it clear that in such circumstances the accused person must be released, because his continued detention would not be consistent with the exercise of criminal jurisdiction by the Court.¹⁵ An examination of the criteria of Articles 58(1) and 60 of the Statute would therefore appear to be devoid of purpose in the instant case.¹⁶
17. The OPCV further contends that, even if the period of detention could be deemed excessive, the following criteria are relevant and sufficient to justify continued detention: a) the existence and persistence of serious indications of guilt, b) the existence of a threat to public order following the release of the detainee, c) the existence of a risk of pressure on witnesses and of collusion between the co-accused, d) the risk of absconding, e) the existence of a risk that a further offence may be committed, and f) the requirements of the investigation.¹⁷

¹⁴ *Idem*, paras. 18 to 28,

¹⁵ ICC-01/04-01/06-1487, para. 36.

¹⁶ See in this regard the arguments advanced by the Defence in its filing ICC-01/04-01/06-2542-tENG, paras. 29 to 36.

¹⁷ ICC-01/04-01/06-2557-tENG, para. 31.

18. For the reasons set out above, it is unnecessary to consider whether these criteria apply. The Defence submits, however, that the arguments advanced by the OPCV are not supported by the decisions of the European Court of Human Rights (ECHR) cited, for the following reasons:

- *As to the existence and persistence of serious indications of guilt*

19. In the cases of *Prencipe v. Monaco* and *Tum v. Turkey*, the Court held that the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of continued detention, but after a certain lapse of time it no longer suffices. The ECHR adds that, if other grounds continue to justify the deprivation of liberty, it must be ascertained whether the competent national authorities displayed special diligence in the conduct of the proceedings.¹⁸

- *As to the risk of public disorder*

20. The ECHR considers that the definite and actual nature of the threat to public order must be sufficiently demonstrated by the party alleging it and that it is not sufficient to “[TRANSLATION] *refer in an abstract manner to the gravity of the alleged offences and the risk of public disorder*”.¹⁹
21. In the instant case, the OPCV claims that there is an “additional risk” that the release of Mr Thomas Lubanga could pose a threat to public order, in

¹⁸ *Prencipe v. Monaco*, Application No. 43376/06, 16 July 2009, paras. 74 and 79; *Tum v. Turkey*, Application No. 11855/05, 17 June 2008, para. 41.

¹⁹ *Prencipe v. Monaco*, Application No. 43376/06, 16 July 2009, para. 81. This principle is included in the other two judgments of the ECHR cited by the OPCV to support this criterion, namely *Tomasi v. France*, Application No. 12325/86 and No. 14992/89, 27 November 1991, para. 54 and *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 91.

particular in the Ituri region,²⁰ but cites no specific factual evidence to back this up.

22. In any event, there is no evidence in the case file to support this assertion.
23. It must be pointed out, furthermore, that the threat to public order is not one of the criteria listed in articles 58(1) and 60 to be taken into account by the Chamber.

- As to the existence of a risk of pressure on the witnesses

24. In the case of *Contrada v. Italy*, the Court stated that the risk of pressure on witnesses is a factor that the Court has to take into account, but which may cease to exist at a certain point in the proceedings, notably depending on the progress of the trial.²¹

- As to the risk of absconding

25. Although the risk of absconding can constitute a relevant factor in continued detention, the ECHR establishes that such a danger cannot be gauged solely on the basis of the severity of the sentence risked, and that that risk necessarily decreases with time.²²

²⁰ ICC-01/04-01/06-2557-tENG, para. 32.

²¹ *Contrada v. Italy*, Application No. 27143/95, 24 August 1998, para. 30. In that case, the accused had been released before the end of the trial, after a little under 3 years in pre-trial detention.

²² *Letellier v. France*, Application No. 12369/86, 26 June 1991, para. 43; *Cetin Agdas v. Turkey*, Application No. 77331/01, 19 September 2006, para. 28; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 98.

26. In the case of *Masur v. Turkey*, the ECHR warns the courts against the temptation to automatically confirm the continued detention of the accused. It also criticises the repetitive nature of the orders confirming detention, which often use an identical, not to say stereotyped, form of words.²³

- As to the existence of a risk that further offences will be committed

27. It is apparent from the decisions of the ECHR that the risk that further offences will be committed must be “plausible” and must be analysed in the light of the circumstances of the case and the past history and the personality of the person concerned.²⁴ Such a risk must therefore be assessed on the basis of specific factual evidence and not mere supposition.

- As to the requirements of the investigation

28. In the cases cited by the OPCV, the “requirements of the investigation” were taken into account at the time when the accused was initially detained, but not when assessing whether the continued detention was justified.²⁵

c) As to the fourth ground raised in support of the appeal

²³ *Mansur v. Turkey*, Application No. 16026/90, 8 June 1995, para. 55.

²⁴ *Clooth v. Belgium*, Application No. 12718/87, 12 December 1991, para. 40; *Paradysz v. France*, Application No. 17020/05, 29 October 2009, para. 70.

²⁵ *Lelièvre v. France*, Application No. 11287/03, 8 November 2007; *Bouchet v. France*, Application No. 33591/96, 20 March 2001.

29. Contrary to the OPCV's contentions, the Trial Chamber did not interpret the Prosecutor's appeal as a refusal to seek to have the imposed stay lifted.²⁶
30. The Trial Chamber merely noted that the Prosecutor, in his application seeking leave to appeal,²⁷ maintained his position to the effect that it was open to him not to comply with certain orders of the Chamber. However, the Prosecutor could not maintain such a position, while at the same time contending that the reasons having given rise to the stay of proceedings had ceased to exist.
31. Furthermore, the Prosecutor was not deprived of his right of appeal,²⁸ and the reference by the OPCV to the right to equality of arms is irrelevant in this respect.

2. As to the Observations of Group of Victims V01

32. The Group of Victims V01 maintains, in paragraph 2 of its observations, that certain victims (a/0002/06 and a/0007/08) had been threatened and physically attacked as a result of their participation in the proceedings.
33. However, there is no evidence in the case file to support such a claim. Moreover, no further details are provided in relation to the alleged attacks.

²⁶ ICC-01/04-01/06-2557-tENG, paras. 33 and 34.

²⁷ ICC-01/04-01/06-2520-Conf.

²⁸ See ICC-01/04-01/06-2550-Conf-tENG, para. 42.

34. Victim a/0002/06 was called to testify before the Court and was questioned by the Legal Representative. In testimony, no reference was made to any threat or attack as a result of the victim's participation in the proceedings, and no questions were asked of the victim in this regard by the Legal Representative.²⁹
35. The Defence points out that, to date, it is still unaware of the identity of Victim a/0007/08. In these circumstances, it is hard to imagine that the victim might have been threatened or attacked for participating in the proceedings. Furthermore, there is no proof, or any specific factual evidence, in this regard.
36. The Defence submits that the Group of Victims V01 cannot simply claim that certain victims fear "*the prospect—by no means imaginary—of acts of revenge*",³⁰ without indicating the objective evidence on which these alleged fears are based.
37. It is, moreover, incorrect to claim that Victims a/0002/06, a/0049/06, a/0149/07, a/0155/07, a/0156/07, a/404/08, a/405/08, a/0406/08, a/0407/08 and a/0409/08 have no protection;³¹

- a. Victims a/0002/06³² and a/0049/06³³ have been placed in a protection programme;

²⁹ ICC-01/04-01/06-T-110-Conf-ENG CT, ICC-01/04-01/06-T-123-Conf-ENG CT and ICC-01/04-01/06-T-124-Conf-ENG CT.

³⁰ ICC-01/04-01/06-2558-tENG, para. 2.

³¹ *Idem*.

³² As indicated in paragraph 2 of the observations of the Group of Victims V01.

³³ ICC-01/04-01/06-978, para. 3. Victim a/0049/06 is one of the six witnesses referred to in the *Decision on the confirmation of charges*, ICC-01/04-01/06-796-Conf-tENG.

- b. No information relating to Victims a/0149/07, a/0155/07, a/0156/07, a/404/08, a/405/08, a/0406/08, a/0407/08 and a/0409/08 making it possible to identify their address, their activities or the members of their families has, as at the date of this document, yet been disclosed to the Defence, which has been informed only of their names and dates of birth;³⁴
- c. The Defence points out that Victim a/0404/08, as referred to in footnote 6 to the Observations of Group of Victims V01, is not one of the victims given leave to submit their views and concerns in this appeal.

3. The Observations of Victim a/0051/06

- 38. The observations of Victim a/0051/06 on the stay of proceedings and on the release of Mr Thomas Lubanga were submitted in one and the same filing, on 24 August 2010.³⁵
- 39. The Appeals Chamber had, however, ordered the observations of Victim a/0051/06 on the issue of the release of Mr Thomas Lubanga to be filed by 23 August 2010.³⁶ The Observations of Victim a/0051/06 were thus filed out of time.
- 40. Since the victim neither sought nor obtained from the Appeals Chamber any extension of the deadline for filing his or her observations on the issue of the release of Mr Thomas Lubanga, the Defence submits that the

³⁴ ICC-01/04-01/06-1893-Conf-exp.

³⁵ ICC-01/04-01/06-2560-tENG.

³⁶ ICC-01/04-01/06-2555.

observations contained in paragraphs 13 to 23 of the Observations of Victim a/0051/06 should be declared inadmissible.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO TAKE NOTE of the observations contained herein;

TO DISMISS the Prosecutor's appeal and the observations of the Legal Representatives;

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

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 27 August 2010
At The Hague, The Netherlands