

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21 October 2008

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

**on the appeal of the Prosecutor against the decision of Trial Chamber I entitled
“Decision on the release of Thomas Lubanga Dyilo”**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
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Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Luc Walley
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REGISTRY

Registrar

Ms Silvana Arbia

Shs

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the release of Thomas Lubanga Dyilo” of Trial Chamber I of 2 July 2008 (ICC-01/04-01/06-1418),

After deliberation,

By majority, Judge Pikis dissenting,

Delivers the following

JUDGMENT

1. The decision of Trial Chamber I of 2 July 2008 entitled “Decision on the release of Thomas Lubanga Dyilo” is reversed.

2. Trial Chamber I is directed to decide anew whether Mr. Lubanga Dyilo should remain in detention or whether he should be released, with or without conditions, in light of paragraphs 37 to 42 of the present judgment.

REASONS

I. KEY FINDING

1. If a Chamber imposes a conditional stay of the proceedings, the unconditional release of the accused person is not the “inevitable” consequence and “the only correct course” to take. 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 Statute.

II. PROCEDURAL HISTORY

2. On 2 July 2008, Trial Chamber I rendered the “Decision on the release of Thomas Lubanga Dyilo” (ICC-01/04-01/06-1418; hereinafter: “Impugned Decision”), ordering the release of Mr. Lubanga Dyilo. The Trial Chamber ordered furthermore that his release should not be implemented until the expiry of the time limit for the filing of an appeal against the Impugned Decision, and, should the appeal be

accompanied by a request for suspensive effect, until the decision of the Appeals Chamber on such request (Impugned Decision, paragraph 35).

3. The Prosecutor filed the “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’ and Urgent Application for Suspensive Effect” dated 2 July 2008 (ICC-01/04-01/06-1419; hereinafter: “Notice of Appeal”). The Notice of Appeal contained a request for suspensive effect of the appeal pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence. The Appeals Chamber granted the request for suspensive effect on 7 July 2008 (ICC-01/04-01/06-1423).¹

4. On 10 July 2008, the Prosecutor filed the “Prosecution’s Document in Support of Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’” (ICC-01/04-01/06-1429; hereinafter: “Document in Support of the Appeal”). Mr. Lubanga Dyilo filed the “Defence Response to the ‘Prosecution’s Document in Support of Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’” on 15 July 2008 (ICC-01/04-01/06-1437-tENG; hereinafter: “Response to the Document in Support of the Appeal”).

5. Following a decision allowing their participation in the present appeal (ICC-01/04-01/06-1452), the legal representatives of victims a/0001/06, a/0002/06 and a/0003/06 filed on 12 August 2008 the “Observations on the Prosecutor’s appeal against the Decision of 2 July 2008 ordering the release of the accused” (ICC-01/04-01/06-1455-tENG; hereinafter: “Observations of Victims a/0001/06, a/0002/06 and a/0003/06”). On the same day, the legal representative of victim a/0105/06 filed the “Observations of the Legal Representative of Victim a/0105/06 Regarding the Release of Thomas Lubanga Dyilo” (ICC-01/04-01/06-1457-tENG; hereinafter: “Observations of Victim a/0105/06”). The Prosecutor filed the “Prosecution’s Consolidated Response to Observations of Participating Victims on Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’” (ICC-01/04-01/06-1458; hereinafter: “Response of the Prosecutor”) on 18 August 2008. On the same day, Mr. Lubanga Dyilo filed the “Defence Response to the Victims’ Observations on the Prosecutor’s Appeal Against

¹ The reasons for that decision were filed on 22 July 2008 (ICC-01/04-01/06-1444).

the Decision of 2 July 2008 Ordering the Release of the Accused” (ICC-01/04-01/06-1460-tENG; hereinafter: “Response of Mr. Lubanga Dyilo”).

6. On 13 October 2008, the Appeals Chamber rendered the “Decision on the ‘Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused’” (ICC-01/04-01/06-1476), rejecting an application by the Prosecutor of 15 September 2008 (ICC-01/04-01/06-1470) to be granted leave to provide additional information and clarification pursuant to regulation 28 of the Regulations of the Court.

III. MERITS

7. The Prosecutor raises two grounds of appeal against the Impugned Decision. For the reasons summarised below, the Appeals Chamber sees merit only in the second ground.

A. First ground of appeal – decision to release Mr. Lubanga Dyilo pending final decision on the stay of the proceedings

8. As his first ground of appeal, the Prosecutor submits that the Trial Chamber made a procedural error when deciding on the release of Mr. Lubanga Dyilo pending a final decision by the Appeals Chamber on the stay of the proceedings.

1. Relevant part of the Impugned Decision and procedural context

9. The Trial Chamber ordered the release of Mr. Lubanga Dyilo after it had rendered, on 13 June 2008, the “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008” (ICC-01/04-01/06-1401; hereinafter: “Decision to Stay the Proceedings”), staying the proceedings before that Chamber in respect of Mr. Lubanga Dyilo and halting the trial process in all respects (Decision to Stay the Proceedings, paragraph 94). The stay of the proceedings was imposed because the Prosecutor was unable to disclose to the defence more than 200 documents containing potentially exculpatory information or information that is potentially material for the preparation of the defence of Mr. Lubanga Dyilo because the Prosecutor had obtained

the documents on the condition of confidentiality from certain information providers, including from the United Nations Organization (hereinafter: “United Nations” or “UN”). The information providers had not consented to the disclosure of most of the documents even to the Trial Chamber.

10. The Trial Chamber explained that the Impugned Decision and the Decision to Stay the Proceedings were linked: although the conditions for the issuance of a warrant of arrest continued to exist and the warrant of arrest therefore was not void (Impugned Decision, paragraph 28), Mr. Lubanga Dyilo could not be held in custody any longer, given the stay of the proceedings and “in the absence of the prospect of a trial” (Impugned Decision, paragraph 30). The Trial Chamber noted that it had granted leave to appeal the Decision to Stay the Proceedings, but explained that notwithstanding the granting of leave to appeal, any decision on suspensive effect of the appeal would have to be taken by the Appeals Chamber, and not by the Trial Chamber (Impugned Decision, paragraph 32).

11. At paragraph 34 of the Impugned Decision, the Trial Chamber found that:

[T]he logical – indeed the inevitable – consequence of the [Decision to Stay the Proceedings] is that the only correct course is to order the release of the accused, because, consistent with the [Decision to Stay the Proceedings] and on the basis of available information, a fair trial of the accused is impossible, and the entire justification for his detention has been removed.

2. Arguments of the Prosecutor

12. As his first ground of appeal, the Prosecutor submits that the Trial Chamber erred procedurally by ordering the release of Mr. Lubanga Dyilo on the basis of the Decision to Stay the Proceedings at a time when the Appeals Chamber had not made a final determination as to whether the stay of the proceedings was justified.

13. The Prosecutor submits that the Impugned Decision was based solely on the Decision to Stay the Proceedings and recalls that he had sought leave to appeal that latter decision. In his submission, his appeal against the Decision to Stay the Proceedings could be frustrated by the Impugned Decision because of the “possibly irreversible consequences” of that decision (Document in Support of the Appeal, paragraph 16). Furthermore, if the Decision to Stay the Proceedings were overturned by the Appeals Chamber, the basis for the Impugned Decision would fall away

(Document in Support of the Appeal, paragraph 17). In the view of the Prosecutor, the decision to release Mr. Lubanga Dyilo therefore was premature, in particular because decisions of such kind “should not be made without the most solid foundation” (Document in Support of the Appeal, paragraph 18). The Prosecutor is of the opinion that the Trial Chamber confused the suspension of a decision with a deferral of a decision and argues that the Trial Chamber should have waited to render a decision on release until the decision of the Appeals Chamber on the appeal of the Decision to Stay the Proceedings (Document in Support of the Appeal, paragraph 19). The Prosecutor avers that the Trial Chamber created an “anomalous situation” because the Trial Chamber potentially frustrated the exercise of appellate jurisdiction, even though the Trial Chamber had recognised the ability of the Appeals Chamber to grant suspensive effect also in respect of the Decision to Stay the Proceedings (Document in Support of the Appeal, paragraph 20).

14. In the view of the Prosecutor, as a result of the procedural error made by the Trial Chamber, the Appeals Chamber is now facing two appeals which are inextricably linked (Document in Support of the Appeal, paragraph 21). He submits that the Appeals Chamber should treat the two appeals jointly, or defer any determination of the appeal against the Impugned Decision until after the determination of the appeal against the Decision to Stay the Proceedings (Document in Support of the Appeal, paragraph 22). He submits furthermore that if the appeal of the Prosecutor against the Decision to Stay the Proceedings is successful, the Impugned Decision must be overturned; the Appeals Chamber should also order the continued detention of Mr. Lubanga Dyilo (Document in Support of the Appeal, paragraph 23).

3 Arguments of Mr. Lubanga Dyilo

15. Mr. Lubanga Dyilo disputes the arguments of the Prosecutor. He recalls that the Trial Chamber found in the Impugned Decision that the release of Mr. Lubanga Dyilo was the “logical – indeed the inevitable – consequence” (Impugned Decision, paragraph 34) of the Decision to Stay the Proceedings because, a fair trial being impossible, his continued detention could not be justified (Response to the Document in Support of the Appeal, paragraphs 7 and 8). He emphasises that the Appeals Chamber has not granted suspensive effect in relation to the appeal of the Prosecutor

against the Decision to Stay the Proceedings (Response to the Document in Support of the Appeal, paragraph 9). In the submission of Mr. Lubanga Dyilo, the Trial Chamber had to apply its Decision to Stay the Proceedings in all its consequences, as only the Appeals Chamber has the power to suspend proceedings (Response to the Document in Support of the Appeal, paragraph 11). Thus, in his view, the Impugned Decision was not erroneous (Response to the Document in Support of the Appeal, paragraph 12).

4 Observations of the victims

16. Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 do not make any submissions that are directly related to the arguments raised under the first ground of appeal.

5. Determination by the Appeals Chamber

17. For the reasons summarised below, the Appeals Chamber is not persuaded by the arguments of the Prosecutor that the Trial Chamber made a procedural error by rendering the Impugned Decision before the Appeals Chamber could decide on the appeal of the Prosecutor against the Decision to Stay the Proceedings.

18. The submission of the Prosecutor that the Trial Chamber should have waited to decide upon the release of Mr. Lubanga Dyilo until the Appeals Chamber rendered its judgment on the appeal against the Decision to Stay the Proceedings is misguided. In the Decision to Stay the Proceedings the Trial Chamber had determined that in its view, no fair trial could be held in respect of Mr. Lubanga Dyilo. It was indeed logical to determine immediately what the consequences of the Decision to Stay the Proceedings would be for the detention of Mr. Lubanga Dyilo. There was no reason for the Trial Chamber to wait until the Appeals Chamber would decide on the eventual appeal against the Decision to Stay the Proceedings. Decisions of the Trial Chamber even on fundamental questions are not merely provisional decisions that require the approval of the Appeals Chamber before they can be enforced.

19. The purported risk that the appeal of the Prosecutor against the Decision to Stay the Proceedings could be frustrated by the Impugned Decision did not exist: the Prosecutor could appeal the Impugned Decision as a matter of right (see article 82 (1)

(b) of the Statute) and he could request suspensive effect of his appeal against the Impugned Decision, which in fact he did. This request for suspensive effect was granted by the Appeals Chamber. The Appeals Chamber furthermore does not consider that the fact that two inter-related appeals are pending before the Appeals Chamber at the same time has created in the present case an “anomaly” that could not be addressed or rectified within the available procedural framework. The Appeals Chamber notes that the Prosecutor himself has identified measures, summarised at paragraph 14 above, as to how the purported “anomaly” can be easily overcome.

B. Second ground of appeal – disproportionate and premature nature of the release of Mr. Lubanga Dyilo

20. As his second ground of appeal, the Prosecutor submits that the release of Mr. Lubanga Dyilo was disproportionate and premature.

1. Relevant part of the Impugned Decision

21. The part of the Impugned Decision relevant to the second ground of appeal is summarised above at paragraphs 9 *et seq.*

2. Arguments of the Prosecutor

22. The Prosecutor submits his second ground of appeal in the alternative. He argues that even if the Appeals Chamber finds that the Trial Chamber did not make a procedural error when deciding on the release of Mr. Lubanga Dyilo at a time when the Appeals Chamber had not yet decided on the stay of the proceedings, the decision of the Trial Chamber to release Mr. Lubanga Dyilo immediately and unconditionally was incorrect (Document in Support of the Appeal, paragraph 24).

23. The Prosecutor recalls that Mr. Lubanga Dyilo continues to be an accused person; neither have the charges been withdrawn, nor has he been acquitted (Document in Support of the Appeal, paragraph 25). Given that the Court was still considering matters relating to his release – namely the decision to stay the proceedings – the Trial Chamber should not have released Mr. Lubanga Dyilo, but maintained his detention for a limited period, or as a minimum imposed conditions on his release, in order to ensure that the Court could exercise its jurisdiction at a later stage (Document in Support of the Appeal, paragraph 26).

24. The Prosecutor avers that the stay of the proceedings as a result of the non-disclosure of potentially exculpatory information cannot be compared to a stay of the proceedings as a result of the “systematic, gross or irredeemable violation of the rights of the Accused” (Document in Support of the Appeal, paragraph 27) and notes that the reason for the stay was the inability of the Trial Chamber in the specific circumstances to ensure the fairness of the proceedings, and that the Prosecutor continued to seek a solution for these challenges (Document in Support of the Appeal, paragraph 28). He submits furthermore that “regardless of the situation as at 13 June 2008 [the date of the Decision to Stay the Proceedings], by 2 July 2008 it could no longer be said that the fair trial of the Accused was an ‘impossibility’, as the Prosecution had provided substantial indicia of the progress towards resolving the situation” (Document in Support of the Appeal, paragraph 29, footnotes omitted); factors which, in the opinion of the Prosecutor, the Trial Chamber failed to take into account.

25. In the submission of the Prosecutor, the Trial Chamber also failed to take into consideration alternatives to the unconditional release, such as the continued detention of Mr. Lubanga Dyilo for a limited period of time, or the imposition of conditions for his release (Document in Support of the Appeal, paragraphs 29 and 31). The Prosecutor argues that the Trial Chamber created a “false dichotomy” of either the immediate and unconditional release or the “undefined continuation of the detention of the Accused” (Document in Support of the Appeal, paragraph 30). In his opinion the Trial Chamber failed to take into account the interests and concerns of the victims, and the impact of the release of Mr. Lubanga Dyilo on the ability of the Court to secure his presence at the trial, should the proceedings recommence (Document in Support of the Appeal, paragraph 31). In such a situation, the Prosecutor argues, the Trial Chamber erred by imposing the “most drastic remedy at its disposal” even though the stay of the proceedings might be revisited in a reasonable amount of time (Document in Support of the Appeal, paragraph 32).

3. Arguments of Mr. Lubanga Dyilo

26. Mr. Lubanga Dyilo does not raise any specific arguments to counter the submissions of the Prosecutor under the second ground of appeal. Instead, he refers the Appeals Chamber to article 60 (2) and (4) of the Statute and requests that “[i]n the

unlikely event of the Appeals Chamber dismissing the arguments [of the defence], the Defence seeks the release of the accused under article 60(2)” (Response to the Document in Support of the Appeal, paragraph 15). He also submits that the conditions for his release under article 60 (4) of the Statute are met, as the delay in the disclosure process is attributable to the Prosecutor and is inexcusable (Response to the Document in Support of the Appeal, paragraphs 19 to 22). He recalls furthermore that he is the object of a travel ban imposed by the Security Council of the United Nations and is not in the possession of any travel documents and that he is therefore not in a position to leave the Netherlands (Response to the Document in Support of the Appeal, paragraph 17).

4. Observations of the victims and responses thereto

27. Victims a/0001/06, a/0002/06 and a/0003/06 emphasise that the Trial Chamber should not have ordered the unconditional release of Mr. Lubanga Dyilo, noting that the stay of the proceedings could be lifted at any moment and that the Statute does not provide for a trial *in absentia* (Observations of Victims a/0001/06, a/0002/06 and a/0003/06, paragraphs 3 to 6). Only a conditional release would enable the Court to exercise control over the actions of Mr. Lubanga Dyilo, in particular in respect of the security of the victims and witnesses (Observations of Victims a/0001/06, a/0002/06 and a/0003/06, paragraph 7). It is furthermore submitted that Mr. Lubanga Dyilo should not be released without the consent of the Democratic Republic of the Congo because already before his surrender to the Court, he was detained for his alleged involvement in war crimes and crimes against humanity (Observations of Victims a/0001/06, a/0002/06 and a/0003/06, paragraph 19). Victims a/0001/06, a/0002/06 and a/0003/06 furthermore list the conditions which, in their view, should be imposed, should Mr. Lubanga Dyilo be released (Observations of Victims a/0001/06, a/0002/06 and a/0003/06, paragraph 20).

28. Victim a/0105/06 emphasises that the circumstances have changed since the Trial Chamber rendered the Impugned Decision, noting that the Prosecutor has now been given the authorisation to disclose to the defence several of the documents in question; thus, there is hope that the proceedings can continue (Observations of Victim a/0105/06, paragraphs 14 and 15). It is furthermore submitted that the victim could be discouraged by the release of Mr. Lubanga Dyilo without a proper

examination of the substance of the allegations against him, and that this could create the impression that the conscription, enlistment or use of child soldiers is not a serious offence (Observations of Victim a/0105/06, paragraphs 17 and 18).

29. The Prosecutor expresses his agreement with most of the arguments submitted by the victims (Response of the Prosecutor, paragraph 10). In particular, he underlines that since the date of the Impugned Decision, the situation has changed materially because he has applied for the lifting of the stay of the proceedings and many documents have now been disclosed to the defence (Response of the Prosecutor, paragraph 11).

30. Mr. Lubanga Dyilo refutes the arguments raised by the victims and submits that none of their arguments have been substantiated by facts (Response of Mr. Lubanga Dyilo, paragraphs 10 to 12). Regarding the submissions of victim a/0105/06 that the changed circumstances indicate that Mr. Lubanga Dyilo should remain in custody, Mr. Lubanga Dyilo states that the Appeals Chamber should not take into account facts that have arisen after the Impugned Decision was rendered; thus, the argument of the victim should be disregarded (Response of Mr. Lubanga Dyilo, paragraph 14).

5. Determination by the Appeals Chamber

31. In relation to the second ground of appeal, the Appeals Chamber determines, for the reasons summarised below, that the Impugned Decision was erroneous because 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. This led the Trial Chamber to fail to consider all the options that were at its disposal and to assume erroneously that the unconditional release of Mr. Lubanga Dyilo was “inevitable”.

32. As the Appeals Chamber finds at paragraphs 37 *et seq.* of today’s “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’” (hereinafter: “Judgment on the Stay of the Proceedings”), the Trial Chamber was not wrong in concluding, in the Decision to Stay the Proceedings, that at the time it

rendered that decision, there was no prospect that a fair trial could be held. The Decision to Stay the Proceedings took into account the developments as of 13 June 2008, a point in time when such a prediction was fully justified, in particular in light of the several and largely unsuccessful attempts of the Prosecutor to secure the consent of the information providers to grant access to the documents in question at least to the Trial Chamber.

33. In today's Judgment on the Stay of the Proceedings, the Appeals Chamber also explains that the Trial Chamber did not impose an absolute or irreversible stay, but a stay that was conditional (Judgment on the Stay of the Proceedings, paragraph 75). As the Appeals Chamber explains at paragraph 80 of the Judgment on the Stay of the Proceedings:

Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay may decide to lift it in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67 (1) (c) of the Statute). If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes – deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute).

34. Pre-conviction detention at the Court is governed by articles 60 and 58 (1) of the Statute. Article 60 provides as follows:

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

35. Article 58 (1) of the Statute provides:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

36. It is evident that detention under articles 60 and 58 (1) of the Statute must be related to the exercise of criminal jurisdiction over persons suspected of having committed crimes under the jurisdiction of the Court. Therefore, in the ordinary course of events, if a *permanent* and *irreversible* stay of the proceedings is imposed 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.²

37. The matter is different, however, when the proceedings have only been stayed *conditionally*, as in the present case. A conditional stay is neither an acquittal nor a final termination of the proceedings, but may be lifted in appropriate circumstances (see above at paragraph 33). Therefore, the Court is not necessarily permanently barred from exercising jurisdiction in respect of the person concerned. The Trial Chamber expressly recognised this in stating that the stay it imposed was capable of

² See also European Court of Human Rights, *Guzzardi v Italy*, judgment, 6 November 1980, Application no. 7367/76, paragraph 102.

being lifted in the future (see, for example, paragraphs 94 and 97 of the Decision to Stay the Proceedings). For that reason, 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 Statute. In particular, the necessity of the continued detention (see article 58 (1) (b) of the Statute) will have to be assessed carefully. With specific reference to article 58 (1) (b) (i) of the Statute, the Chamber should take into account that the trial has been conditionally stayed, not permanently terminated. If the conditions for continued detention are not met, the Chamber will have to determine whether, in the particular circumstances of the case, release should be with or without conditions (see article 60 (2), third sentence, of the Statute). When deciding on detention or release (with or without conditions), the Chamber will have to consider, for example, 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. At the same time, 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 1966³, article 5 (3) of the *[European] Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950⁴, and article 7 (5) of the *American Convention on Human Rights* of 22 November 1969⁵; see also article 7 (1) (d) of the African Charter on Human and Peoples' Rights of 27 June 1981⁶, which generally provides for the right to a trial within a reasonable time). If a Chamber concludes that the continued detention, or the release only with conditions, is justified, it will have to review such a decision at short intervals.

38. As to the present case, the Appeals Chamber notes that on 29 January 2007, Pre-Trial Chamber I determined that there are substantial grounds to believe that Mr. Lubanga Dyilo has committed the crimes with which he has been charged (see ICC-01/04-01/06-803). This finding has not been invalidated since. The Appeals Chamber recalls furthermore the "Decision reviewing the Trial Chamber's ruling on the

³ 999 United Nations Treaty Series 14668.

⁴ 213 United Nations Treaty Series 2889

⁵ 1144 United Nations Treaty Series 17955.

⁶ 1520 United Nations Treaty Series 26363

detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)” of 29 May 2008 (ICC-01/04-01/06-1359), where the Trial Chamber had determined at paragraph 14 that Mr. Lubanga Dyilo, if released, was “likely to return to the DRC, with the probable consequence that the Court would no longer be able to secure his attendance at trial”.

39. The Appeals Chamber notes furthermore the developments that had taken place between the stay of the proceedings being imposed on 13 June 2008 and the Impugned Decision being rendered on 2 July 2008. Within that period, the Prosecutor had made several relevant submissions to the Trial Chamber.

40. On 20 June 2008, the Prosecutor had filed the “Prosecution’s additional further updated information on documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)” (ICC-01/04-01/06-1405; hereinafter: “Submission of 20 June 2008”), informing the Trial Chamber at paragraph 7 that the negotiations with the United Nations regarding disclosure to Mr. Lubanga Dyilo of the documents in question were continuing and that:

[I]n the case where no consent to lifting the restrictions can be given, a verbal agreement has been reached with the UN for all UN documents, which will shortly be confirmed in writing, that they will agree to the Judges viewing the material under appropriate conditions of confidentiality, in particular to assess the adequacy of summaries through viewing the underlying material.

41. On 23 June 2008, the Prosecutor filed the “Prosecution’s provision of the letter of the United Nations dated 20 June 2008 concerning documents that were obtained by the Office of the Prosecutor from the United Nations pursuant to Article 54(3)(e) on the condition of confidentiality and solely for the purpose of generating new evidence and that potentially contain evidence that falls under Article 67(2)” (ICC-01/04-01/06-1409; hereinafter: “Submission of 23 June 2008”). Annexed to the Submission of 23 June 2008 was a letter by the United Nations to the Prosecutor, indicating that the United Nations agreed, in principle, that certain documents covered by confidentiality agreements could be disclosed to the Judges of the Trial Chamber. The United Nations outlined the procedure for such disclosure, namely that the documents would be disclosed to the Judges in a room on the premises of the Peace

Palace and in the presence of a representative of the United Nations, that the Judges would not be allowed to take notes in the room, but that notes could be made outside the room. Should the Judges consider that any of the documents would have to be made available to the defence, the United Nations indicated that it would be willing to explore whether summaries of the documents could be disclosed to the defence, the adequacy of which could be verified by the Judges of the Trial Chamber by comparing the summaries with the original documents. The Prosecutor indicated at paragraph 8 of the Submission of 23 June 2008 that while the letter of the United Nations did not cover all documents that had been provided by the UN on the condition of confidentiality, the United Nations had indicated their willingness to follow a similar procedure in respect of all other documents. At a status conference on 24 June 2008, the Trial Chamber indicated its preliminary opinion regarding the conditions stipulated by the United Nations and advised the Prosecutor which conditions should be met before the Prosecutor should make an application to lift the stay of the proceedings (see ICC-01/04-01/06-T-91-ENG, pages 31 to 33). Thus, the Trial Chamber contemplated that the Prosecutor might make an application to lift the stay of the proceedings.

42. The aforementioned developments, which were aimed at correcting the situation that had led to the imposition of the conditional stay of the proceedings, should have been taken into account fully when deciding on the release of Mr. Lubanga Dyilo. In the view of the Appeals Chamber, the Trial Chamber failed to follow the approach outlined at paragraph 37 above. Instead of carefully assessing all interests at stake and giving proper weight to all factors, in particular those summarised at paragraphs 38 to 41 above, the Trial Chamber focussed on the fact that the proceedings had been stayed and incorrectly assumed that following such a conditional stay, the unconditional release of the accused person was the “inevitable” consequence and “the only correct course” to take (see above, paragraph 11).

IV. APPROPRIATE RELIEF

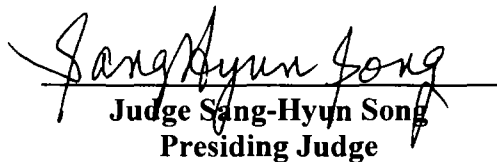
43. In an appeal brought under article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). The Prosecutor requests the Appeals Chamber to “overturn” the Impugned Decision and, in case the Appeals Chamber upholds his

second ground of appeal, to “remand the matter to the Trial Chamber for a fresh determination on the release of the Accused in accordance with its judgment on this appeal, including relevant consideration of the timing of any release and the imposition of appropriate conditions” (Document in Support of the Appeal, paragraph 35).

44. As stated in the preceding section of this judgment, the Appeals Chamber has determined that the Impugned Decision was erroneous because 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. This led the Trial Chamber to fail to consider all the options that were at its disposal. This materially affected the decision of the Trial Chamber to order the unconditional release of Mr. Lubanga Dyilo. It is therefore appropriate to reverse the Impugned Decision.

45. The matter is remanded 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 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.

Judge Georgios M. Pikis appends a dissenting opinion to this judgment.


Judge Sang-Hyun Song
Presiding Judge

Dated this 21st day of October 2008

At The Hague, The Netherlands

Dissenting Opinion of Judge Georghios M. Pikis

I. PROCEDURAL HISTORY

1. On 13 June 2008, Trial Chamber I (hereinafter “Trial Chamber”) stayed proceedings against the accused, Mr. Lubanga Dyilo, because of impossibility to hold a fair trial.¹ Sequentially, the case was adjourned to 24 June 2008 to determine whether the accused should be released.²

A. The impugned decision

2. The Trial Chamber determined by the impugned decision³ of 2 July 2008 that, “[i]n the absence of the prospect of a trial, the accused cannot be held in custody or subjected to provisional release as purely preventative measures to deter him from committing further crimes.”⁴ It transpires from this statement that the prospect of a fair trial had eclipsed with the finding of the Trial Chamber that a fair trial was impossible. Indeed, at the time of staying the proceedings there was no prospect of a fair trial taking place.⁵ For that reason the Trial Chamber ordered the release of the accused subject to an appeal and any suspensive effect being given to the appeal pending its outcome.

3. Before referring to the rival arguments of the parties and the views of victims participating in the appeal, it is worth analysing the decision by reference to its background.

4. The accused was facing a number of charges before the Trial Chamber. On 13 June 2008, the Trial Chamber held that it was impossible to hold a fair trial owing to the inability of the Prosecutor to disclose to the accused exculpatory evidence in his possession. As a result, the proceedings were brought to a halt, to use the phraseology

¹ See *Prosecutor v. Lubanga Dyilo* “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008” 13 June 2008 (ICC-01/04-01/06-1401).

² See *ibid.*, para. 94; see also transcript of the status conference of 24 June 2008 (ICC-01/04-01/06-T-91-ENG).

³ *Prosecutor v. Lubanga Dyilo* “Decision on the release of Thomas Lubanga Dyilo” 2 July 2008 (ICC-01/04-01/06-1418) (hereinafter the “Impugned Decision”).

⁴ *Ibid.*, para. 30.

⁵ See *Prosecutor v. Lubanga Dyilo* “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008” 13 June 2008 (ICC-01/04-01/06-1401), confirmed on appeal.

of the Trial Chamber,⁶ i.e to an end. This is repeated in the *sub judice* decision.⁷ This being the case, the release of the accused from captivity was the inevitable outcome of the order to stay,⁸ an order founded on impossibility to hold a fair trial. Few would disagree about the meaning of the word “impossible”, meaning unattainable. The opposite of impossible is “possible”, the contrast between the two being unattainableness in the former case and attainability in the latter.

5. As the Trial Chamber stressed, the object of detention of the accused was to ensure his attendance at his trial. When the prospect of a trial disappeared from the horizon, detention could find no justification. And as the Trial Chamber underlined in the definitive part of its decision, cited earlier, there was no prospect of a fair trial being held.

B. Arguments of the Prosecutor

6. The Prosecutor appealed the decision.⁹ He raised two grounds in support of his appeal, the following:

(1) The Trial Chamber erred, procedurally, by entertaining the release of the Accused, based solely on the stay of the proceedings, pending a final determination on the stay of those proceedings (“the First Ground”); and

(2) The Trial Chamber erred by ordering, at this stage of the proceedings, the immediate and unconditional release of the Accused (“the Second Ground”).¹⁰

7. In his submission, the release of the accused is a premature measure. Firstly, because no decision should be taken on the release of the accused before the outcome of the Prosecutor’s appeal against the decision staying proceedings.¹¹ Secondly, because the prospect of securing a fair trial by the disclosure of exculpatory evidence in his possession at a future stage could not be ruled out.¹² That being the case, stay might be lifted, a possibility to which the Trial Chamber alluded in its decision

⁶ See *Prosecutor v Lubanga Dyilo* “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008” 13 June 2008 (ICC-01/04-01/06-1401), para. 94.

⁷ See Impugned Decision, para. 30.

⁸ See Impugned Decision, para. 30.

⁹ *Prosecutor v Lubanga Dyilo* “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’ and Urgent Application for Suspensive Effect” 2 July 2008 (ICC-01/04-01/06-1419).

¹⁰ See *Prosecutor v Lubanga Dyilo* “Prosecution’s Document in Support of Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’” 10 July 2008 (ICC-01/04-01/06-1429), para. 10.

¹¹ See *ibid*, paras. 13 to 17

¹² See *ibid*, paras. 28 to 31.

ordering stay and at the status conference of 24 June 2008.¹³ Consequently, stay was both a disproportionate and a premature measure. Therefore, the release of the accused should not be countenanced or at the least not without conditions.¹⁴

C. Arguments of the defence

8. The defence for its part supported the *sub judice* decision.¹⁵ The accused argued that even if there was residual power to lift stay, immediate release of the accused was the inevitable consequence of the absence of any firm indication that the trial could be held at any certain future time.

D. Submissions of the victims and responses thereto

9. The victims¹⁶ submitted that if the accused were released and returned to the Democratic Republic of the Congo, the sense of the people of the country that the perpetrators of grave crimes, more so the ones who were recruiting child soldiers, for which the accused was charged, are not immune from punishment, will be undermined or destroyed; sequentially it will cultivate a sense of impunity on the part of the perpetrators of grave crimes.¹⁷ If accused is to be released, this should be subject to stringent conditions, including his non-return to the Democratic Republic of the Congo.¹⁸ One of the victims stated that if accused is released, the victim will experience remorse or regret for coming to the Court, a step reduced to inconsequentiality.¹⁹

¹³ See also status conference of 24 June 2008 (ICC-01/04-01/06-T-91-ENG).

¹⁴ See *Prosecutor v. Lubanga Dyilo* "Prosecution's Document in Support of Appeal against 'Decision on the release of Thomas Lubanga Dyilo'" 10 July 2008 (ICC-01/04-01/06-1429), para. 18.

¹⁵ See *Prosecutor v. Lubanga Dyilo* "Defence Response to the 'Prosecution's Document in Support of Appeal against 'Decision on the release of Thomas Lubanga Dyilo'" 15 July 2008 (ICC-01/04-01/06-1437-t-ENG), paras. 7 to 8.

¹⁶ Victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 were granted leave to participate in the appeal by the decision of the Appeals Chamber "Decision on the participation of victims in the appeal" of 6 August 2008 (ICC-01/04-01/06-1452).

¹⁷ See *Prosecutor v. Lubanga Dyilo* "Observations on the Prosecutor's appeal against the Decision of 2 July 2008 ordering the release of the accused" 12 August 2008 (ICC-01/04-01/06-1455-tENG), para. 7; "Observations of the Legal Representative of Victim a/0105/06 Regarding the Release of Thomas Lubanga Dyilo" 12 August 2008 (ICC-01/04-01/06-1457-tENG), para. 17.

¹⁸ See *Prosecutor v. Lubanga Dyilo* "Observations on the Prosecutor's appeal against the Decision of 2 July 2008 ordering the release of the accused" 12 August 2008 (ICC-01/04-01/06-1455-tENG), paras. 4 to 6, 20.

¹⁹ See *Prosecutor v. Lubanga Dyilo* "Observations of the Legal Representative of Victim a/0105/06 Regarding the Release of Thomas Lubanga Dyilo" 12 August 2008 (ICC-01/04-01/06-1457), para. 18.

II. DETERMINATION

10. Stay of proceedings for impossibility to hold a fair trial brings the proceedings to an end. My reasons for so holding are set out in my separate opinion in the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”²⁰ (hereinafter “Judgment in the parallel appeal OA13”). I need not repeat them. Can there be any justification for not releasing the accused thereafter? This is the question to be answered.

11. Stay of proceedings entails that the accused is no longer answerable to the charges. His release follows as a matter of course. Indeed this is visualised by rule 185 of the Rules of Procedure and Evidence that contemplates release as the inevitable outcome of the end of the proceedings. Article 58 (1) (b) of the Statute envisages that detention may be ordered in face of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court for three reasons:

- (i) To ensure the person’s appearance at trial;
- (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
- (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

12. To my mind, reasons two and three cannot be divorced or be isolated from the judicial proceedings. Article 58 (1) must like every article of the Statute be construed and applied in accordance with internationally recognised human rights (article 21 (3) of the Statute).²¹ It is an axiom of human rights that aside from sentence by a court of

²⁰ *Prosecutor v Lubanga Dyilo* 21 October 2008 (handed down simultaneously with this judgment on the appeal against the impugned decision).

²¹ See *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168), para. 38; separate opinion of Judge Pikis in *Prosecutor v Lubanga Dyilo* “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-

law upon conviction, the liberty of man cannot be restricted except by a court of law and only when circumstances warrant the detention of the person for the purpose of standing his/her trial.²² There is no authority to order the detention of a person as a preventive or as a precautionary measure.²³ Ensuring that the person stands trial is the only cause that may legitimise pre-trial detention. Detention for any other purpose is incompatible with the presumption of innocence, the emblem of liberty.

13. Even if I were to assume, contrary to the position I espouse, that stay of proceedings on grounds of impossibility of holding a fair trial could be lifted at an indefinite future time, the release of the accused would again be inevitable. The Statute confers no power, directly or indirectly, to detain a person for any purpose other than standing his/her trial. Authority for the detention of the accused vests in a court for the purpose of ensuring his/her presence at the trial. In this case, there was no trial in sight. At best there existed a possibility of trial at an indefinite future time. To order the detention of the accused in such circumstances would be tantamount to restricting his liberty for reasons that one could not predict that they would materialise, and if so, when. The mere possibility of holding a trial in the future, remote as it may be, would provide ground for the detention of the accused.

14. Authority to lift stay would leave the accused answerable to charges for an indefinite period of time, theoretically in perpetuity, in breach of his right to be tried

Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo' 13 February 2007 (ICC-01/04-01/06-824).

²² See Article 9 of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966), entered into force 23 March 1976, 999 United Nations Treaty Series 171, provides: "2. Anyone who is arrested shall be promptly informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. [...] 3. Anyone arrested or detained on a criminal charge [...] shall be entitled to trial within a reasonable time or to release."; Article 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889, provides "1. [...] No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (c) the lawful arrest and detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence [...] 3 Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) [...] shall be entitled to trial within a reasonable time or to release pending trial."; Article 7 of the *American Convention on Human Rights*, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, provides "4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained [...] shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings."

²³ See European Court of Human Rights e.g. *Case of Lawless v. Ireland*, Judgment of 1 July 1961, application no. 332/57, para. 14; *Case of De Jong, Baljet and Van Den Brink v The Netherlands*, Judgment of 22 May 1984, application no. 8805/79, 8806/79, 9242/81, para. 44.



without undue delay;²⁴ a right associated with certainty respecting his status and rights as a human being. In face of accusation the rights of a person should ideally be determined immediately, if possible. Reality makes this unachievable. This is one of the principal reasons that human rights prescribe that the accused should be tried without delay or within a reasonable time.²⁵ The right of the accused to trial without undue delay is assured as his/her fundamental right by article 67 (1) (c) of the Statute, in *pari passu* with the other rights safeguarded to the accused by the same article. The time factor is in itself an element in the configuration of a fair trial, as explained in my separate opinion in the parallel appeal OA13. Undue delay is evidenced by the very fact of stay of the proceedings.²⁶ As explained in my separate opinion in the parallel appeal OA13, amenity to hold a fair trial is determined from the viewpoint of the time perspective at which the trial should be held.²⁷

15. Not only is trial without undue delay assured as a right of the accused, but the Statute goes a step further. Article 64 (2) of the Statute binds the Court to hold, not only a fair, but an expeditious trial too. Expeditiousness denotes the speedy doing or transaction of something.²⁸ The standard introduced by article 64 (2) of the Statute is more stringent than the one imported by the requirement of trial being held without undue delay, which is incorporated in the notion of a fair trial; a standard that the Court is duty bound to uphold. The likelihood of holding an expeditious trial after the

²⁴ See European Court of Human Rights *Case of Wemhoff v Germany*, Judgment of 27 June 1968, application no. 2122/64, para. 18.

²⁵ See Article 14 (3) of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966), entered into force 23 March 1976, 999 United Nations Treaty Series 171, provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] 3. To be tried without undue delay"; Article 6 (1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889, provides "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."; Article 7 of the *African Charter on Human and Peoples' Rights*, signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363, provides: "Every individual shall have the right to have his cause heard. This comprises [...] d) the right to be tried within a reasonable time by an impartial court or tribunal."; Article 8 (1) of the *American Convention on Human Rights, "Pact of San José, Costa Rica"*, signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, provides. "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

²⁶ See separate opinion of Judge Pikis in the Judgment in the parallel appeal OA13.

²⁷ See Judgment in the parallel appeal OA13, para. 49 of the separate opinion of Judge Pikis.

²⁸ See Shorter Oxford English Dictionary on historical principles (Fifth edition, Oxford 2002), Volume 1, A-M, page 893.



stay of proceedings on grounds of impossibility of holding a fair trial cannot be envisioned. It is a contradiction in terms. It is hardly humane treatment to expect the accused to live under the burden of accusation for an indefinite or uncertain period of time, while prevented from asserting his innocence before a court of law.

16. Under any circumstances, for the accused to be confined to prison because he may face trial at a future uncertain time cannot be countenanced in law. So to order would in this case have the effect of prolonging the detention of the accused for no fault of his own, but on account of the fault of his adversary.

17. I do not overlook that the accused is facing extremely serious crimes or the necessitous situation prevailing in the Democratic Republic of the Congo. Nor do I overlook the mission of the International Criminal Court or the need that its writ in this ultrasensitive area of human affairs should run unimpeded. Human rights, on the other hand, aim to sustain the core of humanity and the right to a fair trial is amongst the most consequential ones. Laxity in their protection beholds, as history teaches, great dangers for humanity, such that no court of law should countenance. In this connection it is worth reminding of the passage cited below from the judgment²⁹ of the Appeals Chamber of 14 December 2006:

Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.³⁰

18. Necessitous circumstances, grave as they may be, do not overshadow human rights including, no doubt, the right to liberty. Liberty cannot be subordinated to anything other than the need of assuring the attendance of the accused at his/her trial ordained to be fair and to run its course according to law.

19. Stay of proceedings for impossibility to hold a fair trial brings the proceedings to an end. The accused is no longer answerable to the charges. He is discharged therefrom. His release is the inevitable consequence.

²⁹ *Prosecutor v Lubanga Dyilo* "Judgment on the Appeal of Mr. 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" 14 December 2006 (ICC-01/04-01/06-772).

³⁰ *Ibid*, para. 39.



20. For my part, I would confirm the decision of the Trial Chamber to release the accused.

Done in both English and French, the English version being authoritative.



Judge Georghios M. Pikis

Dated this 21st day of October 2008

At The Hague, The Netherlands