

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 2 July 2008

**TRIAL CHAMBER I**

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

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

**Public**

**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**

Ms Fatou Bensouda  
Mr Ekkehard Withopf

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

**Legal Representatives of the Victims**

Mr Luc Walleyne  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu

**Legal Representatives of the Applicants**

[1 name per team maximum]

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

[2 names maximum]

**The Office of Public Counsel for the  
Defence**

[2 names maximum]

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber 1 (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following decision on the release of the accused:

## I. Procedural history

1. On 13 June 2008 the Chamber rendered its “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” (“Decision”).<sup>1</sup> In the Decision, the Chamber indefinitely stayed the proceedings against Mr Thomas Lubanga Dyilo following the failure of the Office of the Prosecutor (“prosecution”) to disclose potentially exculpatory materials which the Chamber was told are covered by confidentiality agreements, and it scheduled a Status Conference for 24 June 2008 to consider the release of the accused.<sup>2</sup>
  
2. During the Status Conference of 24 June 2008<sup>3</sup> the Bench ordered that, as the issues of leave to appeal the 13 June Decision and the release or continued detention of Mr Lubanga were inextricably linked, written submissions should be filed addressing both of these issues. Accordingly, the parties and the participants were ordered to file written submissions by 4pm on Friday 27 June.<sup>4</sup> However, they were also given the opportunity to make oral submissions.<sup>5</sup>

<sup>1</sup> 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

<sup>2</sup> *Ibid.*, paragraph 94.

<sup>3</sup> Transcript of hearing on 28 June 2008, ICC-01/04/01/06-T-91-ENG.

<sup>4</sup> *Ibid.*, page 2, lines 4-5 and page 2, lines 15-20

<sup>5</sup> *Ibid.*, page 2, lines 23-25

3. It is to be noted that both the prosecution<sup>6</sup> and the defence<sup>7</sup> agreed that in addition to any oral submissions advanced on 24 June 2008, there should be an opportunity to file written submissions on the linked issues of leave to appeal and detention.

## II. Submissions of the parties and the participants

4. The prosecution submitted that it was premature to consider the release of the accused while an application for leave to appeal the Decision was pending, and after a recent letter had been received from the United Nations setting out a framework for the judges to view some of the non-disclosed materials, thereby, it was contended, 'remov[ing] any basis for the stay.'<sup>8</sup> The suggested solution contained in the letter was the subject of a detailed exchange between the Presiding Judge and prosecuting counsel,<sup>9</sup> following which the Bench set out its preliminary views on the proposal.<sup>10</sup>
5. In its written submissions<sup>11</sup>, the prosecution contended that the Trial Chamber should not decide on release pending a determination of the application for leave to appeal and the outcome of any subsequent appeal, should leave be granted.<sup>12</sup>
6. It was argued that if the Appeals Chamber in due course rejects the substantive appeal, releasing the accused at this stage may irreversibly frustrate the exercise of the Court's jurisdiction.<sup>13</sup> The prosecution submitted that part of the Chamber's inherent authority to control the proceedings was

<sup>6</sup> *Ibid*, page 3, lines 14-20.

<sup>7</sup> *Ibid.*, page 3, lines 22-25 and page 4, lines 10-12.

<sup>8</sup> *Ibid.*, page 19, lines 21-25 and page 20, lines 5-6.

<sup>9</sup> *Ibid*, page 26, line 9 – page 30, line 13

<sup>10</sup> *Ibid.*, page 30, line 21 – page 33, line 4.

<sup>11</sup> Prosecution's Submission on the Effect of the Application for Leave to Appeal the Decision of the Trial Chamber to Stay the Proceedings on the Detention of Thomas Lubanga Dyilo, 27 June 2008, ICC-01/04-01/06-1414

<sup>12</sup> *Ibid.*, introduction

<sup>13</sup> *Ibid.*, introduction and paragraph 7.

the power to defer determining an issue until its merits were resolved.<sup>14</sup> It added that a resolution of the substantive issues on the appeal was of “crucial importance” for the determination of the application for release, and this provided grounds for granting suspensive effect.<sup>15</sup> Therefore, the prosecution submitted, a decision on the release of the accused prior to a decision of the Appeals Chamber on suspensive effect would prevent the Appeals Chamber from properly exercising its jurisdiction.<sup>16</sup>

7. The prosecution also referred to the Chamber’s decision reviewing the detention of the accused of 29 May 2008<sup>17</sup> in which it had highlighted that the prosecution had not caused an “inexcusable” delay and that factors without the prosecution’s control had “significantly contributed” to the delay to the start of the trial. It submitted that the rationale for the continued detention of the accused reflected in that decision had not materially changed as a result of the Trial Chamber’s subsequent stay of the proceedings.<sup>18</sup>
8. If the application for leave to appeal is refused and if the Chamber orders the accused’s release, the Prosecutor submitted that his detention should be maintained in order to enable the prosecution to appeal the latter decision.<sup>19</sup> It took issue with the argument of the defence that the arrest warrant is void.<sup>20</sup>
9. Finally, the prosecution submitted that, in the event that the Chamber orders the release of the accused, the arguments for his continued detention during an appeal of the substantive Decision apply equally, if not with greater force, pending the prosecution’s appeal of a decision to release the accused.<sup>21</sup> It

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<sup>14</sup> *Ibid*, paragraph 5

<sup>15</sup> *Ibid*, paragraph 6

<sup>16</sup> *Ibid.*, paragraph 8

<sup>17</sup> Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, ICC-01/04-01/06-1359.

<sup>18</sup> ICC-01/04-01/06-1414, 27 June 2008, paragraph 9.

<sup>19</sup> *Ibid.*, introduction.

<sup>20</sup> *Ibid*, paragraph 10.

<sup>21</sup> *Ibid*, paragraph 12

therefore repeated the argument that the Trial Chamber has the power to defer the implementation of a decision, particularly pending an appeal against the decision or at least pending the determination of an application on suspensive effect.<sup>22</sup> In support of this contention, the prosecution noted that the 5-day time limit for filing an appeal from a decision releasing the accused pursuant to Rule 154(1) of the Rules of Procedure and Evidence (“Rules”) was in itself an institutional safeguard against an undue infringement of the rights of the accused.<sup>23</sup>

10. In its oral submissions the defence submitted that it was ‘obvious’ that the stay in proceedings should lead to the release of the accused, on the basis that the arrest warrant is now void.<sup>24</sup> It contended that the conditions of Article 60 of the Rome Statute (“Statute”) and Rule 118<sup>25</sup> of the Rules are no longer relevant<sup>26</sup> and that, since there has been (at the relevant time) no grant of leave to appeal the Decision by the Trial Chamber and no order for suspensive effect from the Appeals Chamber, there is no ‘legal decision’ legitimising further detention.<sup>27</sup>

11. The defence noted that not only has there been no further disclosure of potentially exculpatory materials since the Decision was issued but additional materials have very recently been ‘unearthed’ by the prosecution in their offices.<sup>28</sup> Furthermore, it observed that no solution has been proposed in relation to evidence provided to the prosecution by two sources other than the United Nations who are refusing to allow the Chamber to view the

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<sup>22</sup> *Ibid.*, paragraph 14

<sup>23</sup> *Ibid.*, paragraph 15

<sup>24</sup> Transcript of hearing on 28 June 2008, ICC-01/04/01/06-T-91-ENG, page 4, lines 17-19.

<sup>25</sup> This was wrongly described as Rule 78

<sup>26</sup> Transcript of hearing on 28 June 2008, ICC-01/04/01/06-T-91-ENG, page 4, lines 20-22

<sup>27</sup> *Ibid.*, page 5, lines 10-19.

<sup>28</sup> *Ibid.*, page 6, line 14 to page 7, line 1; referring to Prosecution's request to reclassify its previous information regarding the discovery and examination of additional material in the possession of the Prosecutor, ICC-01/04/01/06-1408-Anx1.

material. It submitted that the solution proposed by the United Nations<sup>29</sup> creates difficulties for the functioning of international justice not only because it impairs the independence of the judges and creates certain practical difficulties, but also because summaries of evidence are unacceptable substitutes for the disclosure of the evidence itself. In these circumstances the defence submitted there can be no effective challenge to the Decision, and accordingly the prosecution should not be entitled to use that possibility as a credible reason for arguing for the continued detention of Mr Thomas Lubanga Dyilo.<sup>30</sup>

12. In its written submissions<sup>31</sup> the defence contended that the Decision ought to be executed in full (i.e. both the stay of the proceedings and the release of the accused).<sup>32</sup> In the alternative, the defence suggested that the accused should be released pursuant to Article 60(2) and (4) of the Statute.<sup>33</sup> It submitted, in the event of a resumption of the trial, the accused would be available to the Court because he will remain in the Netherlands, given the travel ban against him imposed by the United Nations and his lack of travel documents.<sup>34</sup>

13. The defence contended that Article 60(4) of the Statute justified the release of the accused in the current circumstances, namely a *sine die* postponement of an already unreasonably delayed trial brought about by the inexcusable behaviour of the Prosecutor.<sup>35</sup>

<sup>29</sup> 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), 23 June 2008, ICC-01/04-01/06-1409-Anx1.

<sup>30</sup> Transcript of hearing on 28 June 2008, ICC-01/04/01/06-T-91-ENG, page 10, lines 20-23.

<sup>31</sup> Observations de la Défense sur la mise en liberté de M. Thomas Lubanga, 27 June 2008, ICC-01/04-01/06-1415

<sup>32</sup> *Ibid.*, paragraphs 11-16

<sup>33</sup> *Ibid.*, paragraphs 17-24.

<sup>34</sup> *Ibid.*, paragraphs 19-20

<sup>35</sup> *Ibid.*, paragraphs 22-25.

14. In its oral response the prosecution argued that there is no proper legal basis for releasing the accused.<sup>36</sup> In particular, the prosecution relied on the Chamber's decision of 29 May 2008 reviewing Mr Lubanga Dyilo's detention,<sup>37</sup> which it argued is still valid. Moreover, the prosecution averred that there has been no delay in the proceedings that is attributable to the prosecution.<sup>38</sup> It submitted that the recently discovered documents which fell within the prosecution's disclosure obligations were limited to 35, and only some of them are subject to confidentiality restrictions.<sup>39</sup>
15. The legal representative of victims a/0001/06 to a/0003/06 drew the Chamber's attention to the perception of the Court within the Democratic Republic of the Congo, and to the wider implications of the Chamber's decisions.<sup>40</sup> The legal representative noted the possibility that future defendants could rely on confidentiality agreements,<sup>41</sup> along with other more general consequences of a decision to release the accused.<sup>42</sup>
16. The legal representative for victim a/0105/06 accepted that the accused should be given interim release but cautioned the Bench to consider the consequences of such a release.<sup>43</sup> The legal representative in her submissions relied on policy grounds – the 'realities of the field'<sup>44</sup> – including igniting further tensions in Ituri, sparking revenge attacks<sup>45</sup> and increasing risks to intermediaries and victims.<sup>46</sup> She also cautioned that release of the accused could undermine the Court<sup>47</sup> and give legitimacy to Mr Lubanga's

<sup>36</sup> Transcript of hearing on 28 June 2008, ICC-01/04/01/06-T-91-ENG, page 21, lines 10-15.

<sup>37</sup> Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, ICC-01/04-01/06-1359.

<sup>38</sup> Transcript of hearing on 28 June 2008, ICC-01/04/01/06-T-91-ENG, page 21, lines 16-17.

<sup>39</sup> *Ibid.*, page 22, lines 6-24

<sup>40</sup> *Ibid.*, page 13

<sup>41</sup> *Ibid.*, page 13, lines 21-22

<sup>42</sup> *Ibid.*, page 15, lines 1-5

<sup>43</sup> *Ibid.*, page 15, lines 20-24.

<sup>44</sup> *Ibid.*, page 19, line 10

<sup>45</sup> *Ibid.*, page 16, lines 8-9 and page 17, lines 4-5.

<sup>46</sup> *Ibid.*, page 17, line 10

<sup>47</sup> *Ibid.*, page 17, lines 22-25.

supporters.<sup>48</sup> Victims' rights generally, the legal representative submitted, should be considered in any decision on the release of the accused.<sup>49</sup>

17. In response to the oral submissions made by the legal representatives of victims, the defence argued that, whilst such concerns regarding peace and security were valid, ultimately the Chamber had to apply the law,<sup>50</sup> independently of pressures coming from the Democratic Republic of the Congo.<sup>51</sup> Any other course, in the argument of the defence, would be contrary to the underlying principles of the Court.<sup>52</sup> The Court's legal instruments, it was submitted, indicated that the stay on proceedings should lead to the release of the accused, and justice similarly dictated that outcome.<sup>53</sup>

18. The legal representatives of victims a/0001/06 to a/0003/06 and a/0105/06 jointly filed written submissions<sup>54</sup> to the effect that the accused should not be released.<sup>55</sup> They distinguished two scenarios, namely whether or not the Chamber grants leave to appeal.<sup>56</sup>

19. The legal representatives contended that if the Chamber grants leave to appeal, the Chamber's decision on the review of the accused's detention of 29 May 2008 remains effective pending the appeal until the end of August, pursuant to Rule 118(2) of the Rules.<sup>57</sup> They submitted that the issue currently before the Chamber should not be equated with a request for review of detention pursuant to Rule 118(2) of the Rules, since the defence had argued

<sup>48</sup> *Ibid*, page 18, line 18.

<sup>49</sup> *Ibid*, page 18, lines 23-24

<sup>50</sup> *Ibid*, page 24, lines 19-24.

<sup>51</sup> *Ibid*, page 25, lines 22-25 and page 26, lines 1-5

<sup>52</sup> *Ibid*., page 24, lines 21-22

<sup>53</sup> *Ibid*, page 25, lines 3-9

<sup>54</sup> Observations communes des représentants légaux des victimes sur la demande de mise en liberté de l'Accusé, 27 June 2008, ICC-01/04-01/06-1413.

<sup>55</sup> *Ibid*, page 8

<sup>56</sup> *Ibid*, paragraph 1

<sup>57</sup> *Ibid*, paragraph 3.

only that the accused should be released following the stay of proceedings.<sup>58</sup> Citing the decision on the confirmation of charges and the decision on the review of the accused's detention, the legal representatives added that the requirements of Article 58(1) of the Statute still applied.<sup>59</sup> The legal representatives therefore submitted that releasing the accused because of the stay of proceedings while the matter was before the Appeals Chamber would prejudice and undermine the outcome of the appeal' process.<sup>60</sup>

20. In the event that the Chamber declines to grant leave to appeal, the legal representatives argued that the stay of proceedings should not necessarily result in release of the accused.<sup>61</sup> A suspension of the proceedings could not be equated with an end of the proceedings, which the Chamber itself has accepted by envisaging the possibility of lifting the stay.<sup>62</sup> They submitted that the trial may yet occur because the prosecution is searching for solutions with the information providers.<sup>63</sup> They recalled that when confronted with problems of disclosure or fairness of the proceedings, the *ad hoc* tribunals had resorted to remedies other than a stay of proceedings.<sup>64</sup> They referred generally to jurisprudence from the *ad hoc* tribunals which they submitted was to the effect that the detention of an accused continues during the entire proceedings unless the Chamber decides otherwise. In accordance with this approach, the legal representatives argued that the decision to stay the proceedings was not a sufficient reason to justify his release.<sup>65</sup> Moreover, the legal representatives argued that the ICTY had followed the practice that in 'exceptional circumstances' provisional, and not unrestricted, release was appropriate.<sup>66</sup>

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<sup>58</sup> *Ibid*, paragraph 4

<sup>59</sup> *Ibid.*, paragraph 5

<sup>60</sup> *Ibid*, paragraph 7.

<sup>61</sup> *Ibid.*, paragraph 12

<sup>62</sup> *Ibid*, paragraph 9.

<sup>63</sup> *Ibid.*, paragraph 10.

<sup>64</sup> *Ibid.*, paragraph 11.

<sup>65</sup> *Ibid*, paragraph 13.

<sup>66</sup> *Ibid.*, paragraph 14

21. The legal representatives submitted that if the accused is released at this stage, it should only be on a temporary or conditional basis.<sup>67</sup> The legal representatives argued that unrestricted release may prevent a trial (if the stay is later lifted).<sup>68</sup> Moreover, conditional release would enable the Chamber to exercise control over the accused's actions, in particular with respect to the security of victims and witnesses.<sup>69</sup> However, the legal representatives argued that, at this stage of the proceedings, even provisional or conditional release should not be contemplated, given the nature of the charges and the possible consequences on public order if the accused is released.<sup>70</sup> The legal representatives supported this argument by the suggestion that the European Court of Human Rights has allowed derogations to the right to liberty in order to maintain public order.<sup>71</sup>

### III. Relevant Provisions

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

**Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear**

1. 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

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<sup>67</sup> *Ibid.*, paragraph 15

<sup>68</sup> *Ibid.*, paragraph 15

<sup>69</sup> *Ibid.*, paragraph 16

<sup>70</sup> *Ibid.*, paragraphs 17-18

<sup>71</sup> *Ibid.*, paragraph 17.

(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

23. Article 82 of the Statute provides:

**Appeal against other decisions**

1 Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence.

[ . ]

(b) A decision granting or denying release of the person being investigated or prosecuted;

[ . ]

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

24. Rule 154(1) of the Rules provides:

**Appeals that do not require the leave of the Court**

1. An appeal may be filed under article 81, paragraph 3 (c) (ii), or article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.

25. Rule 185(1) of the Rules provides:

**Release of a person from the custody of the Court other than upon completion of sentence**

1. Subject to sub-rule 2, where a person surrendered to the Court is released from the custody of the Court because the Court does not have jurisdiction, the case is inadmissible under article 17, paragraph 1 (b), (c) or (d), the charges have not been confirmed under article 61, the person has been acquitted at trial or on appeal, or for any other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State. In this case, the host State shall facilitate the transfer in accordance with the agreement referred to in article 3, paragraph 2, and the related arrangements.

#### IV. Analysis and Conclusions

26. As set out above, the defence submitted that following the Decision to stay the proceedings, the warrant of arrest is void, and that since the detention of the accused was based on the warrant of arrest, his continued detention is

without legal justification. Additionally, it was contended that the current situation is not one where the provisions relating to interim release (as provided in Article 60 of the Statute and Rule 118 of the Rules) apply. The defence argued that continued detention could only be lawful if the Appeals Chamber grants suspensive effect to the Decision but in the absence of such an order, the continued detention of the accused is impermissible.

27. These arguments do not survive careful scrutiny.

28. The arrest warrant was issued pursuant to Article 58(1) of the Statute. The factual and legal elements which affect the validity of the warrant are unaffected by the Chamber's Decision to impose a stay on the proceedings. The issuance of the warrant was lawful because there were reasonable grounds to believe that the accused had committed various crimes, as listed in the warrant of arrest,<sup>72</sup> and the validity of that document is unaltered by the stay in proceedings. The Court is under an obligation<sup>73</sup> to review periodically (at least every 120 days) its decision on the release or detention of the accused.<sup>74</sup> At all times, there have remained reasonable grounds to believe that Mr Thomas Lubanga Dyilo is criminally responsible under Article 25(3)(a) of the Statute for the crimes set out in the arrest warrant, as amended by the Decision Confirming the Charges.<sup>75</sup> It is to be emphasised, therefore, that the stay imposed on the proceedings does not undermine the validity of the warrant since it is no more than the direct result of the present impossibility of trying the accused fairly. Accordingly, the principle argument as advanced by the defence fails.

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<sup>72</sup> ICC-01/04-01/06-2-tEN.

<sup>73</sup> Article 60(3) of the Statute.

<sup>74</sup> Rule 118(1) of the Rules

<sup>75</sup> Decision on the confirmation of the charges, 29 January 2007, ICC-01/04-01/06-803-tEN.

29. However, there are other important factors that require consideration. Pursuant to Article 58(1)(b) of the Statute, the accused's detention, prior to the commencement of the trial, is only justified if it is necessary:

- to ensure his appearance at trial, or
- to ensure he does not obstruct or endanger the investigation or the court proceedings, or
- where it is necessary to prevent the person from continuing with the commission of crimes within the jurisdiction of the court, arising out of the same circumstances.<sup>76</sup>

30. As just set out, the Chamber's Decision stayed the proceedings *sine die* because of the present impossibility of trying the accused fairly.<sup>77</sup> It follows that the detention of the accused cannot be justified in order to ensure his appearance at trial or to safeguard the investigation, because the trial (which was the result of the investigation) has been stayed. Furthermore, in 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.

31. In light of that conclusion – that the accused should be released unconditionally – the Chamber has considered whether to order his immediate release or to suspend its effect until the decision of the Appeals Chamber on the appeal (for which the Chamber has granted leave)<sup>78</sup>.

<sup>76</sup> Article 58 (1) (b) and Article 60 (2) of the Statute.

<sup>77</sup> ICC-01/04-01/06-1401, 13 June 2008, paragraph 91.

<sup>78</sup> Decision on the Prosecution's Application for Leave to Appeal 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', 2 July 2008

32. Notwithstanding the grant of leave to appeal the Decision, the inevitable result is that the Chamber must order the immediate release of the accused. Although the prosecution has indicated that it intends to apply to the Chamber to lift the stay, the outcome of any application of that kind is wholly uncertain and the Chamber will address any submissions that may be advanced in the future, on their own facts. As regards the effect of the grant of leave to appeal, given the order for release is the direct consequence of the Decision for which leave has been granted, it is for the Appeals Chamber and not, as has been submitted, for the Trial Chamber to determine any application for suspensive effect.<sup>79</sup>

33. In reaching a conclusion on this issue the Bench has weighed with great care all of the competing submissions. Given the potentially vulnerable position of the victims, the Chamber particularly stresses that it has given full weight to the fears of, and the possible consequences to, the victims as a result of a decision to release the accused. The victims are entitled to have their views and concerns taken into account on issues of this kind, and the Chamber has given full effect to that important right.

34. However, for the reasons set out above and after careful reflection, the Chamber has concluded that the logical – indeed the inevitable – consequence of the Decision is that the only correct course is to order the release of the accused, because, consistent with the Decision and on the basis of the available information, a fair trial of the accused is impossible, and the entire justification for his detention has been removed. It would be unlawful for the Chamber to order him to remain in what, in reality, would be preventative detention or to impose conditional release. **The Chamber's order, therefore, is that the accused is to be released without restrictions, but subject to the matters set out below.**

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<sup>79</sup> Article 82(3)

## V. Conclusions

35. Trial Chamber I orders the release of the accused, but since by Rule 154 of the Rules an appeal may be filed no later than 5 days from the date upon which the party filing the appeal is notified of the decision, this order shall not be enforced until the expiry of the 5 day time limit, and, furthermore, if an appeal is filed within the 5 day time-limit against the order granting release and if a request is made in the appeal for suspensive effect, the accused shall not leave detention until the Appeals Chamber has resolved whether or not the effect of the order granting release is to be suspended.

36. It is to be noted, finally, that by Rule 185 of the Rules, an order releasing the accused shall only be put into effect after arrangements have been made for his transfer to a State that is obliged to receive him. It follows that these arrangements should not be implemented until the 5 day time-limit, set out above, has expired.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 2 July 2008

At The Hague, The Netherlands