

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 June 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 Document

**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**

Source: [Office of the Prosecutor]

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

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Introduction

The Prosecution submits that the Trial Chamber should refrain from entering any decision on release pending determination on the application for leave to appeal filed by the Prosecution and/or any subsequent appeal.

If leave to appeal is granted, the Prosecution submits that the Trial Chamber should not render a determination on the release of the Accused, pending the decision of the Appeals Chamber.

The Trial Chamber, as recently as 29 May 2008,¹ decided that there exists “the real possibility that the Court is likely to be unable to ensure the Accused’s presence at trial if he is released”.² Therefore if the Accused is released, but the Appeals Chamber overturns the basis for that release, the Trial Chamber’s own findings show that such a situation may have irreversibly frustrated the exercise of the Court’s jurisdiction.³

If leave is denied and release is decided, the current detention has to be maintained to allow the Prosecution to meaningfully appeal the release of the Accused pursuant to Article 82(1)(b) of the Rome Statute.

¹ ICC-01-04-01-06-1359.

² *ibid.*, para 18.

³ Such a result would certainly, within the jurisprudence of the Appeals Chamber, qualify as “far reaching”, “adverse and possibly dire consequences” (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras.22-23. *Prosecutor v. Lubanga*, ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 12).

Background

1. In its decision of 13 June 2008 ordering the stay of proceedings ("the impugned decision"), the Trial Chamber scheduled a hearing for 24 June 2008 in order to consider the release of Thomas Lubanga Dyilo ("the Accused").⁴
2. At the hearing of 24 June 2008, the Trial Chamber noted that the issue of leave to appeal the impugned decision and the issue of the Accused's detention are linked.⁵ The Trial Chamber, furthermore, observed that, prior to deciding whether to grant leave to appeal the impugned decision, it would be premature to further discuss the release of the Accused.⁶
3. Accordingly, the Trial Chamber ordered that the Parties and the Legal Representatives of the Victims file written submissions on the effect of the Prosecution's application for leave to appeal the impugned decision on the detention of the Accused.
4. In particular, the Trial Chamber invited the Parties and the Legal Representatives of the Victims to address the issue of the continued detention of the Accused in two possible scenarios: in the event that the Trial Chamber was to grant leave to appeal the impugned decision and, in the event that the Trial Chamber was to deny leave to appeal the impugned decision.⁷

If Leave to Appeal the Impugned Decision is Granted

5. If leave to appeal is granted, the Prosecution submits that the Trial Chamber should not render a determination on the release of the Accused, pending the

⁴ ICC-01/04-01/06-1401, para. 94.

⁵ ICC-01/04-01/06-T-91-ENG, p. 1, line 23.

⁶ ICC-01/04-01/06-T-91-ENG, p. 2, lines 11-13.

⁷ ICC-01/04-01/06-T-91-ENG, p. 2, lines 19-20.

decision of the Appeals Chamber. Any determination on release is linked to the ruling on the stay of the proceedings.⁸ The Prosecution submits that the Trial Chamber's inherent authority to control the proceedings before it include the power to defer a determination until disputes over the fundamental grounds of such a determination have been resolved.⁹

6. The Prosecution further submits that resolution of the substantive issues on appeal is of "crucial importance"¹⁰ for the subsequent determination of the application for release. Releasing the Accused, therefore, pending a decision of the Appeals Chamber will potentially result in a situation whereby a subsequent appeal could remove the basis for the release of the Accused. "The rendering of decision ... premised on incorrect assumptions" is precisely the risk which is to be averted by temporarily staying such a determination pending appeal.¹¹

⁸ ICC-01/04-01/06-1407, 23 June 2008, para. 34; Transcript of status conference of 23 June 2008, ICC-01/04-01/06-T-91-ENG, p. 3, lines 14-19. See also statement of the Trial Chamber, Transcript of status conference of 23 June 2008, ICC-01/04-01/06-T-91-ENG, p. 1, line 22 – p. 2, line 13.

⁹ "The jurisdiction to stay lies with the trial court and not with the appeal court." - *Prosecutor v. Lubanga*, ICC-01/04-01/06-844 OA8, 9 March 2007, Separate Opinion of Judge Pikis, para. 5. Such a power has been exercised by Pre-Trial Chambers where continuing on the basis of the decision against which a party had sought leave to appeal "prior to a decision on the Prosecution's Request for Leave to Appeal shall effectively pre-empt the subject of the Prosecution request" (*Prosecutor v. Katanga*, ICC-01/04-01/07-94, 11 December 2007); and where leave to appeal was granted, the staying of the implementation of the terms of the impugned decision extended both to the same issues in other decisions, and until the determination of the underlying appeal (see e.g. *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07- 361, 3 April 2008, paras. 32 and 56, see also pp. 4-5, 27; ICC-01/04-01/07-427, 21 April 2008, paras. 50 and 67, see also pp. 7-8, 32).

While stay by the Trial Chamber is a separate remedy to suspensive effect by the Appeals Chamber, in particular as it may extend beyond the terms of the impugned Decision, the Prosecution submits that the same underlying rationale and principles apply: namely that the "guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court." (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 9). Such decisions are left to the discretion of the Chamber, which should "consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances." - *Prosecutor v. Lubanga*, ICC-01/04-01/06-1290 OA11, 22 April 2008, para. 7.

¹⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1347 OA9 and 10, 22 May 2008, para. 19-20.

¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras. 19-20. As the Appeals Chamber went on to note in that decision, failing to suspend the decision in question could in turn force the parties to appeal the subsequent determinations.

7. The Trial Chamber, as recently as 29 May 2008,¹² established that there exists “the real possibility that the Court is likely to be unable to ensure the Accused’s presence at trial if he is released”.¹³ Therefore if the Accused is released, but the Appeals Chamber overturns the basis for that release, the exercise of the Court’s jurisdiction could be irreversibly frustrated.¹⁴

8. Should leave to appeal be granted the Prosecution would submit an immediate application to the Appeals Chamber for suspensive effect of the stay of proceedings pursuant to Article 82(3) of the Rome Statute. If granted by the Appeals Chamber, this would suspend the determination on release. In this event, the Prosecution submits that to render a decision on the release of the Accused pending determination of such an application for suspensive effect, would prevent the proper exercise of jurisdiction by the Appeals Chamber.

9. The present stay of proceedings flowed from the Defence’s filing entitled “Requête de la Défense aux fins de cessation des poursuites”.¹⁵ This Defence document was filed less than a week after the Trial Chamber delivered its reasoned decision of 29 May 2008 on the review of the detention of the Accused. The 29 May decision highlighted that the Prosecution had not caused an “inexcusable” delay and also that factors without the Prosecution’s control had “significantly contributed” to impeding the start of the trial.¹⁶ The decision of 29 May was, furthermore, delivered after the matter of the materials subject to Article 54(3)(e) of the Rome Statute had been extensively

¹² ICC-01-04-01-06-1359.

¹³ *Ibid.*, para 18.

¹⁴ Such a result would certainly, within the jurisprudence of the Appeals Chamber, qualify as “far reaching”, “adverse and possibly dire consequences” (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras.22-23. *Prosecutor v. Lubanga*, ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 12).

¹⁵ ICC-01-04-01-06-1366.

¹⁶ In the words of the Trial Chamber “the pending appeals of both parties currently before the Appeals Chamber”. These factors would still play a role even if the issue pertaining to the disclosure of Article 54(3)(e) materials were, presently, to be resolved.

ventilated in the hearings of 6 May 2008¹⁷ and 28 May 2008.¹⁸ The Prosecution submits that the underlying rationale for the continued detention of the Accused had not materially changed by 13 June 2008 when the Trial Chamber ordered the stay of proceedings. As a result, in the event that the Trial Chamber grants leave to appeal the impugned decision, the Prosecution submits that it should not make any determination on release based on that same decision while it remains under appellate scrutiny.

If Leave to Appeal the Impugned Decision is Denied

10. Even if leave to appeal the impugned decision be denied, the Prosecution argues that the legal process, albeit halted, remains subject to the jurisdiction of the Trial Chamber¹⁹ pending lifting of the stay of proceedings for which specific criteria have been set out.²⁰ The Prosecution emphasises, therefore, that the Trial Chamber has not ordered the termination of proceedings. In light of this, the argument proffered by the Defence at the hearing of 24 June 2008, that the arrest warrant against the Accused should be viewed as void²¹ is, in the Prosecution's submission, incorrect. Moreover, the question is not, contrary to the Defence submission, one of suspensive effect.²²

11. Firstly, even if the Trial Chamber was to deny leave to appeal the impugned Decision, the Prosecution submits that the underlying facts for the Trial Chamber's findings of 29 May, including that the Accused has not been

¹⁷ ICC-01/04-01/06-T-86.

¹⁸ ICC-01/04-01/06-T-88.

¹⁹ ICC-01/04-01/06/1401, para. 94.

²⁰ ICC-01/04-01/06-T-91-ENG, p. 30, line 21 – p. 33, line 4.

²¹ ICC-01/04-01/06-T-91-ENG, p. 4, lines 17-22.

²² ICC-01/04-01/06-T-91-ENG, p. 5, line 5 onwards, line 11. Suspensive effect can only be applied for before the Appeals Chamber, once leave to appeal has been granted. If the Trial Chamber denies leave to appeal, the Appeals Chamber would not be in a position to consider or grant any application for suspensive effect, as there is no appeal at that point which could have such an effect.

detained for an unreasonable period;²³ that any delays in the commencement of the trial are not attributable solely to the Prosecution;²⁴ and that those delays attributable to the Prosecution are not inexcusable,²⁵ remain unaltered. The Trial Chamber's findings of 29 May 2008 also continue to meet the criteria of Article 58(1)(a) and (b).²⁶ In addition the Prosecution submits that it was diligently working to harmonize its disclosure duties and its obligation to protect the security of the witnesses and respect the confidentiality of the information provided under 54 (3) (e).

12. Further, the Prosecution recalls that pursuant to Article 82(1)(b) of the Rome Statute, the Prosecution is entitled, by right, to appeal any release of the Accused resulting from a decision of the Trial Chamber to deny leave to appeal. To this end, all the submissions made above in support of detention pending an appeal on the impugned decision are equally relevant, if not more so, pending appeal of a discrete decision to release the Accused.

13. Despite the fact that the power to grant suspensive effect is, statutorily, within the province of the Appeals Chamber, the Prosecution, nevertheless, requests that if the Trial Chamber after denying leave to appeal the impugned decision decides to release the Accused, then the Chamber exercise its inherent power

²³ For the criteria to be considered for the purposes of determining reasonableness, see *Neuminster Case*, 8 ECHR (ser. A), 1968, paras. 23-24. *Vidoje Blagojevic et al*, Case No. IT-02-60-PT, Decision on Vidoje Blagojevic's Application for Provisional Release, 22 July 2002, referring to the "conduct of authorities" as an additional criteria to be considered. See further *Karim A.A. Khan*, Investigation and prosecution, Initial proceedings before the Court, in *Triffterer, O.* (Editor), "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 780.

²⁴ ICC-01/04-01/06-1359, Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, para. 18.

²⁵ ICC-01/04-01/06-1359, Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, para. 18. For the purposes of assessing the possible release of the Accused, the above criteria are conjunctive in nature (see ICC-01/04-01/06-824 OA7, 13 February 2007, para. 124; see also *Karim A.A. Khan*, Investigation and prosecution, Initial proceedings before the Court, in *Triffterer, O.* (Editor), "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 779.

²⁶ ICC-01/04-01/06-1359, Decision reviewing the Trial Chamber's ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, paras. 13 and 14.

to stay on the implementation of such release pending an immediate Prosecution appeal and petition to the Appeals Chamber for suspensive effect.

14. The Trial Chamber's inherent authority to control the proceedings before it, as set out above, must similarly extend to the power to defer the implementation of a decision, especially pending an appeal against that decision or at least determination of an application for suspensive effect.²⁷

15. The Prosecution, further, notes that Rule 154(1) of the Rules of Procedure and Evidence sets out a time-limit of 5 days from notification for the filing of an appeal on the release of an accused.²⁸ This provision, by forcing the Prosecution to act in a prompt manner, is thus, of itself, an institutional safeguard against an undue infringement of the rights of the Accused.

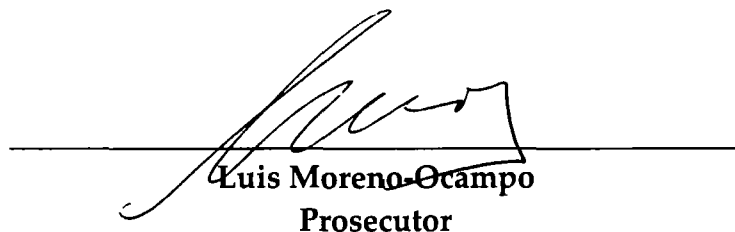
²⁷ As noted, "The jurisdiction to stay lies with the trial court and not with the appeal court." - *Prosecutor v. Lubanga*, ICC-01/04-01/06-844 OA8, 9 March 2007, Separate Opinion of Judge Pikis, para. 5. Such a power has also been exercised by Pre-Trial Chambers where an appeal was underway, staying the implementation of the terms of the impugned decision until the determination of the underlying appeal (see e.g. *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07- 361, 3 April 2008, paras. 32 and 56, see also pp. 4-5, 27; ICC-01/04-01/07-427, 21 April 2008, paras. 50 and 67, see also pp. 7-8, 32). See footnote 9, above, regarding the underlying rationale and principles (namely "the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court."). Where release of an Accused has been ordered at the *ad-hoc* International Criminal Tribunals, or example, implementation of such a specific decision has often been stayed by the Trial Chamber pending appeal against that decision. See for instance, *Prosecutor v. Haradinaj*, IT-04-84-AR65.1, Stay of "Decision on Defence Motion of Ramush Haradinaj to Request Reassessment of conditions of Provisional Release Granted 6 June 2005", 16 December 2005; *Prosecutor v. Kordic et al.*, IT-04-74-AR65.1, Order on the Prosecution's Motion for a Stay, 10 August 2004; *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Order, 25 November 1999; and *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Order, 8 December 1999. In the Barayagwiza case, the Appeal Chamber had previously dismissed the indictment with prejudice to the prosecution and ordered the release of the Appellant, finding that "the fundamental rights of the Appellant were repeatedly violated" and that the Prosecutor's failure to prosecute was "tantamount to negligence" (see *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 2 November 1999, para. 69), yet release was still stayed pending determination of the Prosecution's application for revision of the decision. – In so doing, the respective Chambers have acted in order to "preserve the status quo of the Appeal" and to "preserve the object of the Prosecution's appeal against the provisional release", *Prosecutor v. Haradinaj*, IT-04-84-AR65.1, Stay of "Decision on Defence Motion of Ramush Haradinaj to Request Reassessment of conditions of Provisional Release Granted 6 June 2005", 16 December 2005; *Prosecutor v. Haradinaj*, IT-04-84-AR65.1, Stay of "Decision on Defence Motion of Ramush Haradinaj to Request Reassessment of conditions of Provisional Release Granted 6 June 2005", 16 December 2005.

²⁸ Regulation 64(5) also prescribes further abridged deadlines for the filing of documents in appeals against decision on release.

Relief Sought

16. Accordingly, the Prosecution requests the Trial Chamber

- (1) to refrain from entering any decision on release pending determination on the application for leave to appeal filed by the Prosecution and/or any subsequent appeal;
- (2) if leave is denied, to maintain the current detention pending any discussion on release; and
- (3) if release is decided, not to implement the decision pending any direct appeal filed by the Prosecution against it.



Luis Moreno-Ocampo
Prosecutor

Dated this 27th day of June 2008

At The Hague, The Netherlands