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THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Erkki Kourula

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

Public Document

**Prosecution's Document in Support of Appeal against
"Decision on the release of Thomas Lubanga Dyilo"**

Source: Office of the Prosecutor

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Introduction

The Prosecution is appealing Trial Chamber I's order for the release of Thomas Lubanga Dyilo ("the Accused"), based on an earlier decision to stay proceedings. The Prosecution has also sought, and has been granted, leave to appeal the related decision staying proceedings.

The Prosecution submits that the Trial Chamber erred by prematurely imposing the most drastic remedy at its disposal. There was never a suggestion by the Prosecution that the Accused should be detained indefinitely. However the Trial Chamber ordered the *immediate* and *unconditional* release of the Accused (1) while the sole basis for the determination on release, the stay of the proceedings, was itself under appeal; and (2) without fully considering the circumstances of the case and the range of available options, which would have provided a more constructive course of action, better balancing the various interests involved, and could have facilitated the resolution of the difficulties encountered in this case and the administration of justice, while still respecting the rights of the Accused.

Background

1. On 29 May 2008, the Trial Chamber issued a decision reviewing the detention of the Accused, in accordance with Rule 118(2).¹ The Trial Chamber held that "the requirement of Article 58(1)(a) that there are 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court' is met in this instance", and also that "the defendant faces grave charges and if released is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to ensure his attendance at trial."²

¹ ICC-01/04-01/06-1359.

² *Ibid*, paras. 13-14.

2. On 2 June 2008, the Defence filed a “Requête de la Défense aux fins de cessation des poursuites”.³
3. On 13 June 2008, the Trial Chamber ordered that proceedings in the case be stayed, and scheduled a hearing for 24 June 2008 in order to consider the release of the Accused.⁴
4. On 23 June 2008, the Prosecution sought leave to appeal the decision staying the proceedings.⁵
5. At the hearing of 24 June 2008, the Trial Chamber noted that the issue of leave to appeal the stay of the proceedings and the issue of the Accused’s detention are linked.⁶ 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.
6. On 27 June 2008, the Prosecution filed submissions in which it argued that if the Trial Chamber granted leave to appeal the decision staying the proceedings, then it should defer consideration of the release of the Accused pending the resolution of that appeal.⁷ The Prosecution submitted that the basis for any consideration of release would be those aspects of the Decision to Stay Proceedings which would be the object of such an appeal. Thus, if the Prosecution’s appeal against the stay decision succeeded, then any determination on release would have been made on incorrect bases; and as a result the proceedings and the Court’s exercise of jurisdiction could be jeopardised⁸.

³ ICC-01/04-01/06-1366.

⁴ ICC-01/04-01/06-1401 (“Decision to Stay Proceedings”), para. 94.

⁵ ICC-01/04-01/06-1407.

⁶ ICC-01/04-01/06-T-91-ENG, p. 1, line 23. The Trial Chamber further observed that, prior to deciding whether to grant leave to appeal the decision staying the proceedings, it would be premature to further discuss the release of the Accused - ICC-01/04-01/06-T-91-ENG, p. 2, lines 11-13.

⁷ ICC-01/04-01/06-1414.

⁸ *Ibid*, paras. 5-7.

7. On 2 July 2008, the Trial Chamber granted the Prosecution leave to appeal the Decision to Stay Proceedings.⁹ However, the Trial Chamber also issued a separate decision in which it ordered the release of the Accused (“Decision on Release”).¹⁰ Although the Trial Chamber confirmed that the stay ordered “does not undermine the validity of the [arrest] warrant”, it nevertheless ruled that as a result of the stay of the proceedings *sine die*, the continued detention of the accused could not be justified.¹¹ The Trial Chamber did not consider deferring this decision, and determined that only the Appeals Chamber could suspend its implementation.¹²
8. The Prosecution filed a notice of appeal against the Decision on Release, pursuant to Article 82(1)(b) and Rule 154(1), on 2 July 2008 and urgently requested that the Appeals Chamber grant suspensive effect to that appeal, pursuant to Article 82(3) and Rule 156(5), as foreseen in the Decision on Release.¹³ The Appeals Chamber granted suspensive effect to this appeal on 7 July 2008.¹⁴
9. The Prosecution hereby files its Document in Support of its appeal, pursuant to Regulation 64(5).

The Prosecution’s Grounds of Appeal

10. The Prosecution submits that the Trial Chamber made two errors in the Decision on Release:
 - (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

⁹ ICC-01/04-01/06-1417.

¹⁰ ICC-01/04-01/06-1418.

¹¹ Decision on Release, paras. 28, 30.

¹² Decision on Release, paras. 31-32.

¹³ ICC-01/04-01/06-1419 OA12; see also Decision, para. 35.

¹⁴ ICC-01/04-01/06-1423 OA12.

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

11. The Prosecution submits that the First Ground of Appeal constitutes a procedural error on the part of the Trial Chamber. The Decision on Release was based exclusively on the Decision to Stay Proceedings, which was under appeal by the Prosecution. The Prosecution submits that decisions with such profound effects on proceedings should not be taken on uncertain or provisional bases; and that consequently the Trial Chamber should have deferred any decision on release.¹⁵
12. Even if the Trial Chamber correctly entertained the release of the Accused on the basis of the stay of proceedings, the Prosecution submits as its Second Ground of Appeal that the Trial Chamber erred in its assessment of the basis for the release of the Accused and the conclusions which it drew.¹⁶ The Prosecution submits that the immediate and unconditional release of the Accused was excessive and premature in these circumstances and that in making this order the Trial Chamber erred as it failed to consider a series of relevant factors and thereby issued a decision which was unreasonable in the circumstances.¹⁷

The First Ground of Appeal – the Trial Chamber erred in entertaining the release the Accused prior to the finalisation of the decision staying proceedings

The relationship between the Decision to Stay Proceedings and the Decision on Release

13. Throughout the relevant proceedings, the Trial Chamber has acknowledged (1) the link between its decision to stay proceedings and the possibility of release, which was first raised in the Decision to Stay Proceedings, and (2) the possible impact of the appeal against that stay of proceedings on any determination on

¹⁵ In light of the intrinsically interlinked nature of the two decisions, the Prosecution submits that the Appeals Chamber can only properly rule on the Decision on Release after having considered the Decision to Stay Proceedings; and that if the stay of proceedings is overturned then the Decision on Release must also be reversed. See paras. 13-23, below.

¹⁶ See *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25.

¹⁷ See further *Prosecutor v Katanga*, ICC-01/04-01/07-215-Anx OA, 20 February 2008, para. 30 and authorities cited therein.

release.¹⁸ However, the Trial Chamber failed to take any steps to prevent prejudice arising from the impugned Decision to Stay Proceedings. In particular, while the Trial Chamber recognised the ability of the Appeals Chamber to grant suspensive effect to the appeal against the Decision to Stay Proceedings, it simultaneously frustrated the ability of the Appeals Chamber to grant suspensive effect to that appeal by entertaining the release of the Accused based solely on the impugned findings.

14. The impact of making a determination of the release of the Accused while the appeal against the underlying stay of the proceedings is pending is not academic: as the Prosecution submitted before the Trial Chamber,

“The Trial Chamber, as recently as 29 May 2008, 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”. 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.”¹⁹

15. The Prosecution further notes that the Decision to release the Accused was not entered pursuant to Articles 60(2) and (3),²⁰ nor was it based on the criteria prescribed in Article 60(4).²¹ The Trial Chamber made no new findings regarding the requirements for detention under Article 58(1), and the Decision on Release makes it clear that 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.”²² Rather, the Decision on Release is based solely on the Decision to Stay Proceedings, which the Trial Chamber considered in and of itself vitiated the

¹⁸ See e.g. ICC-01/04-01/06-T-91-ENG, 24 June 2008, pp. 1-2.

¹⁹ ICC-01/04-01/06-1414, para. 7 (citations omitted), referring to ICC-01/04-01/06-1359, 29 May 2008, in particular para. 18.

²⁰ Article 60 is not referred to in the Decision on Release, and in particular in the recitation of the relevant provisions, paras. 22-24; see also para. 35 of the Decision on Release, referring to Rule 185.

²¹ In relation to the criteria prescribed in Article 60(4), on 29 May 2008 the Trial Chamber made the following findings:

“the Chamber does not conclude that the delays to the commencement of trial are attributable solely to the prosecution; nor is it persuaded that those delays that are attributable to the prosecution are, at this time, inexcusable. Therefore, balancing all the factors set out above, including the real possibility that the Court is likely to be unable to ensure the accused's presence at trial if he is released and the imminent start date, the Chamber concludes it is inappropriate, on this review, to order the interim release of the accused.” (ICC-01/04-01/06-1359, para. 18).

²² Decision on Release, para. 28.

continued applicability of the findings under Article 58(1)(b)(i) and (ii) in the present circumstances “because the trial (which was the result of the investigation) has been stayed”.²³

16. The Prosecution submits that the issuance of a decision to immediately and unconditionally release the Accused in such circumstances constitutes a procedural error on the part of the Trial Chamber. The release of the Accused, a step with profound and possibly irreversible consequences,²⁴ can only take place upon solid and certain bases. In this case, the sole basis for release is the impugned Decision to Stay Proceedings,²⁵ the core findings of which have been challenged by the Prosecution and are presently also under appellate scrutiny.²⁶

17. If the Decision to Stay Proceedings is overturned by the Appeals Chamber, then the entire basis for the Decision on Release of the Accused would be removed. In that event, the prior and valid findings of the Trial Chamber that there are reasonable grounds to believe that the Accused is criminally responsible for the crimes set out in the warrant of arrest, and that his detention is necessary to ensure his appearance at trial,²⁷ would require the continued detention of the Accused.

The Trial Chamber erred by prematurely deciding upon the release of the Accused

18. The Prosecution submits that for the reasons set out above, the Trial Chamber committed a procedural error by proceeding to make its determination on release on such a contested basis. Decisions as significant as the release of a person accused of the most serious crimes of concern to the international community as a

²³ Decision on Release, paras. 29-30.

²⁴ Given that the Trial Chamber had previously held that the detention of the Accused appeared necessary to ensure his presence at trial (see para. 13, above), if the stay is lifted and the trial may proceed, but the Accused has been released, then on the Trial Chamber’s own findings the Court may be unable to secure his presence at that trial.

²⁵ “the order for release is the direct consequence of the Decision for which leave has been granted [i.e. the Decision to Stay Proceedings]” – Decision on Release, para. 32.

²⁶ As another Judge of this Court has noted, those findings are not yet final, as the matter “is still *sub judice*” - *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-621, 20 June 2008, para. 57.

²⁷ ICC-01/04-01/06-1359, paras. 13-15 – these findings have not been challenged in the present proceedings relating to the release of the Accused; and the Decision on Release confirms the continued validity of the arrest warrant (para. 28).

whole – especially immediate release without conditions – should not be made without the most solid foundation.

19. This procedural error appears to have been caused, at least in part, by the Trial Chamber confusing the suspension of the implementation of a decision, ordered by a higher court (suspensive effect), and the deferral of a decision itself. The Trial Chamber presented the options in terms of ordering the immediate release of the Accused, on one hand, or suspending the effect of its decision that he should be released, on the other. The Trial Chamber did not appear to have considered the simpler option of deferring the determination of whether or not to release the accused, which the Prosecution has submitted was the appropriate course in these circumstances.²⁸

20. The Prosecution submits that the Trial Chamber's error has created an anomalous result. The Trial Chamber has recognised its ability to defer the release of the Accused pending any application for suspensive effect of an appeal against that decision;²⁹ yet it did not defer the determination of release itself, in order to allow the Prosecution to seek suspensive effect of the Decision to Stay Proceedings which formed the basis for the release.³⁰ The Prosecution had expressly stated that it would seek suspensive effect if leave to appeal was granted,³¹ and the Trial Chamber only needed to defer the determination on release for a few days to allow such an application, as it did for the implementation of the release. Thus, while the Trial Chamber recognised the ability of the Appeals Chamber to grant suspensive effect to appeal against the Decision to Stay Proceedings;³² it simultaneously frustrated the effective exercise of that power by the Appeals

²⁸ ICC-01/04-01/06-1414, 27 June 2008. See e.g. *Prosecutor v Hadzihasanovic et al*, IT-01-47-PT, Decision on the Form of the Indictment, 17 September 2003, para. 6: referring its previous "Decision on Motion for Leave to Amend the Amended Indictment" (18 June 2003), in which the Chamber decided "to postpone the final decision on the Motion until the Appeals Chamber has issued its decision on the joint Interlocutory Appeal and will, depending on the outcome of the decision by the Appeals Chamber, decide on all then remaining issues relating to the form of the indictment".

²⁹ Decision on Release, para. 35.

³⁰ Decision on Release, paras. 31-32.

³¹ ICC-01/04-01/06-1414, 27 June 2008, para. 8.

³² Decision on Release, para. 32.

Chamber by prematurely entering the Decision on Release based on the impugned findings.

The situation presently confronting the Appeals Chamber

21. As demonstrated above, the Decision on Release was based solely on the Decision to Stay Proceedings, which the Prosecution is also appealing. As a result of the Trial Chamber's erroneous and premature determination to release the Accused, the Appeals Chamber is faced with two appeals in which the issues are inextricably linked. In this regard, the Prosecution submits that it was an error for the Trial Chamber to draw further consequences from the impugned Decision to Stay Proceedings prior to its consideration by the Appeals Chamber. In contrast, the Prosecution submits that the proper course would have been to defer consideration of the release of the Accused, pending a determination by the Appeals Chamber of the propriety of the stay of the proceedings which would form the basis for any release. A decision on release could then have been taken, and if necessary appealed and reviewed, on a firm and certain basis.
22. For the purposes of a proper and full determination of all matters before it, the Prosecution respectfully submits that the Appeals Chamber may either decide to (a) treat both appeals jointly and release a single, comprehensive judgment, addressing both the issues of stay and of release; or (b) defer any determination on the appeal against the Decision on Release, pending a decision on the appeal against the Decision to Stay Proceedings.
23. If the Appeals Chamber upholds the Prosecution's appeal against the stay of the proceedings then, on the face of the Decision on Release, the sole basis for such release is removed. In that event, the Prosecution submits that the Appeals Chamber must overturn the Decision on Release as it would have been rendered without foundation. The Prosecution further submits that the Appeals Chamber should order the continued detention of the Accused, as it has all of the necessary findings before it for that purpose: the Trial Chamber confirmed that the Article

58 findings remain valid,³³ and it was only the *application* of the criteria in Article 58(1)(b) which pursuant to the stay was ruptured by the lack of the prospect of a trial.³⁴

The Second Ground of Appeal – the immediate and unconditional release of the Accused was disproportionate and premature in the circumstances

24. The Prosecution submits this Second Ground of Appeal in the alternative; it need only be considered by the Appeals Chamber if it dismisses the First Ground of Appeal set out above. The Prosecution submits that even if, *arguendo*, the stay of the proceedings was proper, and the Appeals Chamber finds that the Pre-Trial Chamber was in a position to make a determination on the release of the Accused whilst the appeal against that stay was pending, then the *immediate* and *unconditional* release of the Accused was still a disproportionate and premature remedy in the specific circumstances of this case. The Prosecution thus submits that the Trial Chamber made several errors in making this order at this stage of the instant case.³⁵

25. First, the Prosecution emphasises that the stay of the proceedings in this case, at this stage, is not a termination of the proceedings or withdrawal of the charges; much less an acquittal of the Accused, as the Trial Chamber itself stressed in the Decision on Release.³⁶ Thomas Lubanga Dyilo is still an accused person facing serious charges before the Court.

³³ Decision on Release, para. 28.

³⁴ Decision on Release, para. 29-31.

³⁵ The Prosecution recalls that the Appeals Chamber has stated that it may review the appraisal of the basis for continued detention of an accused based on, *inter alia*, “a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues” (*Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25). In addition, the Prosecution submits that the Trial Chamber had a discretion whether to impose conditions on release, pursuant to Rule 119 (“may set one of more conditions”), and that as a result the Appeals Chamber may review such a determination if the Chamber has failed to consider all relevant factors, or has arrived at a decision which is unreasonable (see further *Prosecutor v Katanga*, ICC-01/04-01/07-215-Anx OA, 20 February 2008, para. 30 and authorities cited therein).

³⁶ Decision on Release, para. 28.

26. The Trial Chamber has remained at all times seized with the case, and the Court continues to be vested with the jurisdiction to deal with it.³⁷ In this context, the Prosecution submits that the Trial Chamber erred by ordering the immediate and unconditional release of the Accused, while the Court was still actively considering matters relating to the case and critical to the release. Rather, it should have maintained the detention of the Accused for a confined period. At a minimum, the Chamber should have refrained from ordering release on an unconditional basis, and should have instead considered and imposed conditions to ensure that the continued jurisdiction of the Court could be exercised in due course, if required. The Prosecution submits that the Trial Chamber's conclusion that *any* continued detention or *provisional* release would be, in effect, without purpose was unwarranted in light of the ongoing efforts to resolve the difficulties which lead to the initial stay.³⁸

27. Second, the stay of the proceedings was not based on a systematic, gross or irredeemable violation of the rights of the Accused, but rather on a confined and surmountable procedural difficulty. The Prosecution recognises that the right to disclosure of potentially exculpatory material is an important component of the rights of the Accused, and the Trial Chamber's role in ensuring the fairness of the proceedings.³⁹ However the Prosecution submits that the nature of any violation of such rights in this case is not comparable to where proceedings have stayed

³⁷ Decision on Stay of Proceedings, ICC-01/04-01/06-1401, para. 94. In this regard, the present situation can be contrasted with the *Barayagwiza* case, in which the Appeal Chamber initially dismissed the indictment with prejudice to the prosecution on the basis that "the fundamental rights of the Appellant were repeatedly violated" (see *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 3 November 1999, para. 106). As an example, the Prosecution notes that on the same day that the Trial Chamber issued the Decision to Stay Proceedings, it also issued a substantive decision on the admissibility of four documents (ICC-01/04-01/06-1399).

³⁸ See paras. 28-29, below.

³⁹ As the Prosecution has previously submitted, "The Prosecution is fully aware of the Trial Chamber's critical role as the custodian of the fairness of the trial, and consequently of the importance of the Chamber having before it all the material needed to make an informed decision as to whether the rights of the accused and the fairness of trial are adversely affected. The Prosecution has worked, and continues to work, to find satisfactory avenues for the Chamber to be in a position to discharge its duties adequately and guarantee that the accused's right to obtain disclosure of exonerating material is respected." - ICC-01/04-01/06-1407, 23 June 2008, para. 16.

because past abuses rendered any continued exercise of jurisdiction, and therefore continued detention, inconsistent with the integrity of the Court.⁴⁰

28. In contrast, the challenges in the present case have been confined to the Trial Chamber's ability to ensure the fairness of the proceedings,⁴¹ and there has at all times been the prospect of a resolution.⁴² The Prosecution continues to work with the relevant information providers in order to resolve the impasse, as it has been prior to the Decision on Release. The Prosecution has further endeavoured to keep the Trial Chamber informed of such steps,⁴³ which make clear that both the Prosecution and information providers considered this an ongoing process with the prospect of resolution.⁴⁴

29. The Prosecution submits that regardless of the situation as at 13 June 2008,⁴⁵ by 2 July 2008 it could no longer be said that the fair trial of the Accused was an "impossibility",⁴⁶ as the Prosecution had provided substantial indicia of progress towards resolving the situation.⁴⁷ At a minimum, the efforts of key actors to

⁴⁰ i.e. where it is "otiose, repugnant to the rule of law" or where "the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course", leading to a permanent stay of proceeding - ICC-01/04-01/06-772, 14 December 2006, paras. 30-31. Such situations usually involve intentional violations of the law or misuse of power in the process of bringing the accused to justice (see e.g. ICC-01/04-01/06-772, 14 December 2006, para. 29) or torture or serious mistreatment (para. 43), which is not the situation in the present instance.

⁴¹ The Decision to Stay Proceedings in this case was not based on a direct violation of the rights of the Accused, but because the Trial Chamber was not able to verify the impact of the non-disclosure in question (or the alternative measures proposed) on the Accused's right to a fair trial – see ICC-01/04-01/06-1401 13 June 2008, para. 92(iii), see further paras. 83-88.

⁴² See ICC-01/04-01/06-1407, 23 June 2008, paras. 16, 23-26.

⁴³ See e.g. ICC-01/04-01/06-1391, 11 June 2008; ICC-01/04-01/06-1405, 20 June 2008; ICC-01/04-01/06-1409 and annex, 23 June 2008.

⁴⁴ In this sense, the Prosecution notes that it will be filing soon a further document before the Trial Chamber in compliance with the conditions prescribed by the Trial Chamber and which it submits contains all of the elements required for a satisfactory solution to the problem, thus removing the basis for both the stay of proceedings and the release of the Accused.

⁴⁵ The Prosecution strongly disputes that the indefinite stay of the proceedings was warranted in the first place (see ICC-01/04-01/06-1407, 23 June 2008, pp. 6-7 and paras. 16-30), and will set out its position regarding the propriety of the stay in more detail in its separate Appeal against the Decision to Stay Proceedings.

⁴⁶ Decision on Release, para. 30. As described above, the Decision on Release is based solely and directly on the stay of the proceedings (Decision on Release, paras. 30, 32); and the stay of proceedings, and its vitiation of the applicability of Article 58(1)(b)(i) and (ii), was in turn based on the findings by the Trial Chamber that "there is no sufficient indication that [the Trial Chamber's inability to discharge their duties] will be resolved during the trial process", that there was "no prospect, on the information before the Chamber, that the present deficiencies will be corrected." - Decision to Stay Proceedings, para. 91 (emphasis added).

⁴⁷ Prior to the Decision on Release, the Prosecution had provided the Trial Chamber with further information that it had secured the in-principle agreement of the United Nations for the Chamber to view the relevant undisclosed material under appropriate conditions of confidentiality (ICC-01/04-01/06-1405, 20 June 2008; ICC-01/04-01/06-1409 and annex, 23 June 2008); and the Chamber had provided further guidance regarding the conditions

resolve the difficulties which lead to the stay of proceedings were relevant considerations to any decision whether to release the Accused, when such release should be effected, and whether to impose conditions upon release.

30. The Prosecution submits that any decision to release an accused (including the timing of release and the imposition of conditions) must necessarily weigh all relevant factors, including the real impact on the rights of the Accused in light of the nature of the detention, the impact of release *vis-à-vis* the safety and well-being of victims and witnesses, and the impact on the ability of the Court to continue to exercise its jurisdiction.⁴⁸ In this regard, the Trial Chamber appears to have created a false dichotomy for itself: considering only the immediate and unconditional release of the Accused, on the one hand; and an undefined continuation of the detention of the Accused, on the other. The undefined, and by implication indefinite, manner in which the Chamber perceived any further detention lead the Trial Chamber to erroneously inflate the impact on the rights of the Accused, to the point where it eclipsed the impact of release on the interests of victims and the broader community. The Trial Chamber also failed to consider the relevant possibility of confining the extension of the detention of the Accused, thereby minimising any infringement on his rights while also reducing the risk of substantial or irreparable consequences for the counter-veiling interests of victims, witnesses, and the administration of justice.

which it considered would be required for it to fulfil its duties to ensure the fairness of the proceedings (ICC-01/04-01/06-T-91-ENG, 24 June 2008, p. 30, line 14 – p. 32, line 25).

⁴⁸ In relation to the recognised need to balance factors involved in release, including the integrity of the judicial process and rights of the accused, and also the interests of the community in the effective prosecution of those accused of serious crimes, see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 39; ICC-01/04-01/06-924, 11 June 2007, p. 7; *Prosecutor v Brdanin & Talic*, IT-99-36, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002 (“The Trial Chamber has carefully balanced two main factors, namely the public interest, including the interests of victims and witnesses who have agreed to cooperate with the Prosecution, and the right of all detainees to be treated in a humane manner according to the fundamental principles of respect for the inherent dignity and of the presumption of innocence.”). On the need to consider all relevant factors and balance the interests in decisions on release, see further *Prosecutor v Haradinaj*, IT-04-84, Decision on Motion on Behalf of Haradinaj for Provisional Release, 20 July 2007, para 9; *Prosecutor v. Stanisic*, IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release, 17 October 2005, para. 8; *Prosecutor v. Popovic et al*, IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release, 1 March 2007, paras. 7, 20.

31. Further, while the Decision states that the Trial Chamber had considered the competing submissions and given full weight to the fears of victims and the consequences for them of release,⁴⁹ there does not appear to be any indication that the Trial Chamber considered the imposition of conditions upon the release of the Accused to minimise any consequences for victims and witnesses;⁵⁰ a further factor which the Prosecution submits was relevant. Nor does the Trial Chamber appear to have properly weighed the impact of the immediate and unconditional release of the Accused, in light of its findings of 29 May 2008,⁵¹ on the possibility of the Court securing the presence of the Accused if and when proceedings recommence; as against the impact on the Accused of extending his detention for a finite period or imposing conditions upon his release, even if only temporarily, in order to facilitate his presence before the Court should the stay be lifted within a reasonable time.

32. The Prosecution is not suggesting that the Accused should be detained indefinitely. Were the detention of the Accused to be extended for a finite period or conditions imposed on his release, these matters could be revisited by the Chamber if the underlying problems were not resolved and the stay lifted within a reasonable period of time. The Prosecution thus submits that the Trial Chamber again erred, as it did by the original imposition of an indefinite stay of proceedings, by prematurely imposing the most drastic remedy at its disposal, without alternative options, which could have facilitated the resolution of the

⁴⁹ Decision on Release, para. 33.

⁵⁰ The Decision on Release merely states 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” (para. 30, emphasis added); “In light of that conclusion - that the accused should be released unconditionally...” (para. 31); and “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 Chambers order, therefore, is that the accused is to be released without restrictions” (para. 34).

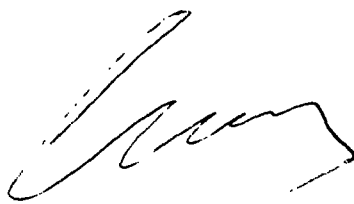
The Decision on Release does not set out the basis or reasoning upon which the Trial Chamber determined that the imposition of conditions upon the release of the Accused would be unlawful, which the Prosecution submits would have been all the more relevant in light of the Chamber’s recognised retention of jurisdiction over the case (Decision on Stay of Proceedings, ICC-01/04-01/06-1401, para. 94).

⁵¹ ICC-01/04-01/06-1359, 29 May 2008, paras. 13-15; see para.14, above.

difficulties encountered in this case and the administration of justice, while still respecting the rights of the Accused.

Relief Sought

33. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber allow the appeal and overturn the "Decision on the release of Thomas Lubanga Dyilo".
34. If the Appeals Chamber upholds the Prosecution's First Ground of Appeal, and/or holds that the Trial Chamber erred in ordering the stay of proceedings at this stage, then the Prosecution further requests that the Appeals Chamber order the continued detention of the Accused.
35. In the alternative, if the Appeals Chamber dismisses the Prosecution's First Ground of Appeal and upholds the Second Ground of Appeal, then the Prosecution requests that the Appeals Chamber remand the matter to the Trial Chamber for a fresh determination on the release of the Accused in accordance with its judgement on this appeal, including relevant consideration of the timing of any release and the imposition of appropriate conditions.



Luis Moreno-Ocampo
Prosecutor

Dated this 10th day of July 2008
At The Hague, The Netherlands