Cour
Pénale
Internationale

International
Criminal
Court

Original: **English** | No.: **ICC-01/04-01/06**
Date: **22 July 2010**

THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song, Presiding Judge**
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko
Judge Sanji Mmasenono Monageng

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

Public Document
With
Public Annex A and Confidential Annex B

Prosecution's Document in Support of Appeal against Trial Chamber I's Oral Decision on the Release 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:

The Office of the Prosecutor	**Counsel for the Defence** Ms Catherine Mabille Mr Jean-Marie Biju-Duval
Legal Representatives of Victims	**Legal Representatives of Applicants**
Unrepresented Victims	**Unrepresented Applicants for Participation/Reparation**
The Office of Public Counsel for Victims	**The Office of Public Counsel for the Defence**
States Representatives	**Amicus Curiae**

REGISTRY

Registrar Ms Silvana Arbia	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

Introduction

1. Trial Chamber I ordered the release of Thomas Lubanga Dyilo ("the Accused"),[1] based on an earlier decision to stay proceedings as an abuse of process.[2] The Prosecution has been granted leave to appeal the underlying decision staying proceedings.[3] The Prosecution filed an application to suspend release pending a decision on appeal and now files its appeal against the decision on release.[4]

2. The case involves an order by the Trial Chamber directing the Prosecution to immediately disclose to the defence – including the Accused and a defence resource person -- the identity of a person for whom the highest level of protective measures had been ordered but not yet implemented. The Prosecution asked that the disclosure order be suspended to permit it to appeal; the Chamber denied the request and reiterated the order of immediate disclosure. The Prosecution sought reconsideration; the Chamber denied that request and ordered disclosure to take place within 50 minutes. Approximately 52 minutes later (a couple of minutes past the deadline), the Prosecution sought a variation of the time limit to consult with the VWU. A couple of hours later, after having consulted with the Unit, it urgently supplemented its request for a variance to permit, before the identity was disclosed, notification to the person that his identity was about to be disclosed and the provision of interim emergency protective measures. In response, the Chamber stayed the proceedings for prosecutorial abuse of process and ordered the unconditional release of the Accused.

3. The Decision on Release is wholly predicated on what the Prosecution submits is the Chamber's erroneous imposition of the stay of the proceedings. If, as the Prosecution will separately argue, the stay order was wrongly entered and should be reversed, then release necessarily is also erroneous and should also be reversed. In addition, the Decision independently reflects other legal, procedural and factual errors. In particular, the Trial Chamber (i) misapplied the relevant jurisprudence of the Appeals Chamber on stay of proceedings, and as a result mischaracterized its own decision on stay and its consequences for the release of the Accused; (ii) failed to apply the criteria enshrined in Article 60 of the Statute when deciding on release; (iii) failed to consider the statutory factors relevant to the detention or release of the accused; and (iv) erred

---

[1] ICC-01/04-01/06-T-314-ENG, pp.17-23 (Hereinafter, "Decision on Release").
[2] ICC-01/04-01/06-2517-Red.
[3] ICC-01/04-01/06-T-314-ENG, p.16.
[4] ICC-01/04-01/06-2522 OA17.

procedurally, in fact and in law when concluding that the Prosecution's request for leave to appeal is a relevant factor supporting the Accused's unconditional release.

Background

4. On 8 July 2010, the Trial Chamber ordered that proceedings in the case be stayed as an abuse of process, based on the Prosecution's alleged (1) refusal to comply with an order to disclose immediately the identity of an intermediary for whom authorized protective measures had not yet been implemented, and (2) intention not to comply with future orders of the Chamber that the Prosecution considers are in conflict with its own obligations of protection under Article 68.[5] It also directed that the VWU cease implementation of the protective measures previously authorized. On 14 July 2010, the Prosecution sought leave to appeal the stay decision.[6]

5. On 14 July 2010, the Trial Chamber ordered the VWU to discontinue implementation of any protective measures for intermediary 143. It found that "[n]ow as the proceedings have been stayed, it would be illogical and inconsistent to take steps to further the trial proceedings".[7]

6. On 15 July 2010 the Trial Chamber convened a hearing to consider the request for leave to appeal and the release of the Accused.[8] The Chamber granted the Prosecution leave to appeal the stay decision.[9] It also ordered that the accused be released ("Decision on Release").[10] It explained that, having imposed "an unconditional stay of proceedings, and bearing in mind the wholesale uncertainty of whether this case will restart at some future time, together with the length of time the accused has been in custody, anything other than unrestricted release" would be unfair.[11]

7. On 16 July 2010, the Prosecution filed its appeal against the Decision on Release, pursuant to Article 82(1) (b), and applied for suspensive effect of that appeal, pursuant to Article 82(3) and Rule 156(5). Pursuant to Regulation 64(5), the Prosecution hereby files its document in support of the appeal against release.

---

[5] ICC-01/04-01/06-2517-Red, see in particular para.31.
[6] ICC-01/04-01/06-2520-Red.
[7] ICC01/04-01/06-2519-Conf.
[8] ICC-01/04-01/06-T-314-ENG.
[9] ICC-01/04-01/06-T-314-ENG, pp.15-18.
[10] ICC-01/04-01/06-T-314-ENG, p.18-24.
[11] ICC-01/04-01/06-T-314-ENG, p.21, lns.19-23. The Trial Chamber further ordered that the release of the Accused shall not be enforced until the 5 day time limit to lodge an appeal against the Decision on Release had expired, and that if an appeal was filed within that time limit and the Appellant sought suspensive effect, then the accused also shall not leave detention until the Appeals Chamber has resolved whether to grant such suspensive effect (ICC-01/04-01/06-T-314-ENG, p.24).

Request for joint consideration of appeals

8. As with the previous appeals against stay and release, the Appeals Chamber in this instance is confronted with two interlinked decisions: the decision to stay the proceedings was the sole reason that the Trial Chamber decided to order the release of the accused. As a result, the ultimate determination of whether the Accused should have been released will depend, at least in part, on the outcome of the Prosecution's separate appeal against the stay decision, for if the decision to stay proceedings is overturned then the decision to release the accused must also fall.

9. The Prosecution therefore respectfully submits that in the interests of a proper and full determination of the all matters before it, the Appeals Chamber should defer any determination on this appeal against release pending a decision on the appeal against stay; and that the Appeals Chamber could consider issuing judgments on the two appeals jointly, as it did in the previous appeals against stay and release.[12]

The errors committed by the Trial Chamber

10. The Appeals Chamber has previously determined that appraisal of the evidence relevant to continued detention of an accused lies, in the first place, with the first instance Chamber. The Appeals Chamber may justifiably interfere "if the findings of the [first instance] Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues."[13]

11. In the decision to release the Accused, the Trial Chamber committed errors of law, procedural errors, and errors of fact.

12. The first error committed by the Trial Chamber was to characterise its own decision as an unconditional stay. As a result, it failed to properly apply the Appeals Chamber's prior judgment on the question of release in the context of a stay of proceedings. The decision to stay proceedings may not have been "conditional" in the sense that it required no further condition for it to be enforced, and may have not been <u>automatically</u> lifted upon the fulfilment of a particular condition. However, it certainly was a "conditional stay" within the meaning of the Appeals Chamber's prior judgment, given that the proceedings were not terminated thus barring permanently

[12] See ICC-01/04-01/06-1487 OA12, paras.14 and 19. In the previous stay of Proceedings the Appeals Chamber issued the two judgments simultaneously, ICC-01/04-01/06-1487 OA12 and ICC-01/04-01/06-1486OA13.
[13] ICC-01/04-01/07-572 OA06, para.25. *See also* ICC-01/05-01/08-323 OA, para.52; ICC-01/05-01/08-631-Red OA02, paras.61-63.

the Court from exercising its jurisdiction.[14] As a result, the Trial Chamber misinterpreted and wrongly applied the principles set out in the Appeals Chamber's judgment and erred in its determination on unconditional release.[15]

13. The second error committed by the Trial Chamber is related to the first: as a result of the misapplication of the Appeals Chamber's jurisprudence, the Trial Chamber did not "base its decision on release or detention on the criteria in articles 60 and 58(1) of the Statute."[16] Rather, it simply stated that:

> "[t]he trial has been halted because it is no longer fair, and the accused cannot be held in preventative custody on a speculative basis; namely, that at some stage in the future the proceedings may be resurrected.
> […]
> Given, as just set out, the Chamber has imposed an unconditional stay of proceedings, and bearing in mind the wholesale uncertainty of whether this case will restart at some future time, together with the length of time the accused has already been in custody, anything other than unrestricted release will be unfair."[17]

14. There is no reference to the conditions set out in Articles 60 or 58(1) in these findings. Indeed, it is even unclear under which limb of Article 60 the Chamber ordered the release of the accused. This failure to consider release according to the governing provisions, or even to specify the provision under which release is ordered, constitutes a further error of law or process.[18]

15. Because of the approach taken by the Chamber, it committed a third error where it failed to consider relevant factors which are essential to a proper determination of release. The Decision made no mention of the fact that, as previously determined by the Trial Chamber, the Court is likely to be unable to ensure the Accused's presence at trial if he is released;[19] the fact that there are substantial grounds to believe that the Accused committed serious crimes, a finding that remains in force,[20] is also ignored; similarly, the remaining criteria in Articles 58 and 60, are also absent from the Chamber's reasoning. Rather, on the plain terms of the Decision, the Chamber only

[14] ICC-01/04-01/06-1487 OA12, paras.36-37.
[15] See Prosecution's first ground of Appeal, below.
[16] ICC-01/04-01/06-1487 OA12, para.37.
[17] ICC-01/04-01/06-T-314-ENG, p.21, lns.7-10 and lns.19-23.
[18] See prosecution's Second Ground of Appeal.
[19] ICC-01/04-01/06-1359, para.18.
[20] As noted by the Appeals Chamber in its prior judgement on the release of the Accused, see ICC-01/04-01/06-1487 OA12, para.38.

considered one factor, namely the stay of the proceedings that it had previously ordered.[21]

16. The decision to release the accused was finally built upon additional errors. The Chamber took the fact that the Prosecution had not at this stage applied to lift the stay, and had sought leave to appeal the decision as a demonstration that "the Prosecution […] <u>is not intending</u> to seek to persuade us to lift [the stay]". It is not, and has never been, the Prosecution's position that it would not apply to lift the stay if circumstances allow the present difficulty to be resolved. The Trial Chamber created a false dichotomy between applying to lift the stay, and appealing the original decision which it considered evidenced an intention never to apply to lift that stay. This constitutes (a) a procedural error in the form of giving weight to irrelevant considerations; (b) a factual error; and (c) a legal error, in the sense that the Decision would effectively penalize a party's exercise of its appellate rights with the foregoing of its ability to seek a lifting of the stay once the underlying circumstances had changed.[22]

The Prosecution's First Ground of Appeal: the Trial Chamber erred in ruling that the stay of proceedings was unconditional, in light of the Appeals Chamber's prior jurisprudence, and in determining that unconditional release was therefore required

17. The Trial Chamber erroneously characterised its own decision staying the proceedings as an unconditional stay, and as a result it misinterpreted and misapplied the existing jurisprudence of the Appeals Chamber on consideration of release once proceedings have been stayed.[23]

18. During the hearing on 15 July 2010, the nature of the stay was repeatedly raised, and all participants (including the Chamber) recognised that it was an important factor in considering whether the accused must be released, and if so whether conditions should be imposed. The Defence argued that the present stay was "a definitive halt of the proceedings", and that as a result the applicable provision from the Appeals Chamber was the one that provided that "in principle, if it is ordered that a permanent stay of proceedings be implemented, an irrevocable one, the accused will be released."[24] The

[21] See Prosecution's Third Ground of Appeal.
[22] See Prosecution's Fourth Ground of Appeal.
[23] As one national jurisdiction (U.S.) explains, "the label a [trial] court places on its disposition is not binding on an appellate court." *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989); *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973)), *cert. denied*, 434 U.S. 1086 (1978).
[24] ICC-01/04-01/06-T-314-ENG, p.7, lns.9-19; quoting ICC-01/04-01/06-1487 OA12, para.36.

Defence however acknowledged that even "if this is a provisional stay", then the Trial Chamber would have to apply paragraph 37 of the Appeals Judgment (which dealt with a situation where "the proceedings have only been stayed *conditionally*")[25] and apply Articles 58(1) and 60 of the Statute.[26]

19. The Legal Representative of victims, on the other hand, argued that this was "a conditional or temporary stay of proceedings".[27] The Prosecution similarly argued that the stay was a conditional one, within the terms of the Appeals Chamber's jurisprudence.[28] The Trial Chamber, however, stated that "[t]his is not a conditional stay […] the stay didn't attach any conditions to it. This is an unconditional stay."[29]

20. Regardless of the terminology used, the stay ordered by the Trial Chamber was imposed due to specific circumstances – namely "the material non-compliance with the Chamber's orders of 7 July 2010"and "the Prosecutor's clearly evinced intention not to implement the Chamber's orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution's other obligations" - and it was imposed "[w]hilst these circumstances endure".[30] It is equally clear that the Chamber contemplated that the stay could and would be lifted if those circumstances changed: the possibility of an application to lift the stay was repeatedly referred to during the hearing on release[31] and it was also contemplated, albeit in relation to one of the obstacles identified by the Chamber, in the ensuing Decision.[32] Before then, the Trial Chamber had notified the parties that it would examine any applications "directly relevant to the stay".[33] Thus, the stay imposed was one that *could be and would be lifted* by the Trial Chamber, if the circumstances underpinning it changed; it was *not* a termination of the proceedings, but a situation that could and may well be resolved.

21. The Appeals Chamber has identified two different types of stays in its prior judgment: one is a "permanent and irreversible stay of the proceedings", which terminated a

[25] ICC-01/04-01/06-1487 OA12, para.37, emphasis in original.
[26] ICC-01/04-01/06-T-314-ENG, p.7, ln.20 to p.8, ln.4.
[27] ICC-01/04-01/06-T-314-ENG, p.5, lns.7-10.
[28] ICC-01/04-01/06-T-314-ENG, p.9, lns.20-24; p. 10, lns.14-21.
[29] ICC-01/04-01/06-T-314-ENG, p.10, lns.1-9. See also p.20, lns.22-24 ("this cannot be described as necessarily constituting a temporary stay, nor has it been imposed conditionally.")
[30] Decision Staying Proceedings, para.31.
[31] See e.g. ICC-01/04-01/06-T-314-ENG, p.10, lns.4-6 ("It is a stay which could have led to an application by the Prosecution to lift it if the Prosecution was prepared to follow the Chamber's orders.").
[32] ICC-01/04-01/06-T-314-ENG, p.20, lns.13-17; p.20, ln.25 and p.21, ln.1.
[33] E-mail from the Trial Chamber's Legal Advisor to the parties on 9 July 2010 at 13:02, entitled "Lubanga – Matters which may be raised whilst the stay is in place", informing them pursuant to an instruction from the Presiding Judge that in addition to the issues of applications for leave to appeal, release of the Accused and the possible application of Article 71, "the parties, participants and VWU may make filings which are directly relevant to the stay". Attached as "Confidential - Annex B".

case; the second one is a "conditional stay [which] is neither an acquittal nor a final termination of the proceedings, but may be lifted in appropriate circumstances". These two options were those discussed by both the Prosecution[34] and the Defence[35] during the hearing.

22. Thus, while the stay may not be "conditional" *as the Trial Chamber meant it* – in the sense that lifting it did not depend on the fulfilment of any future condition[36] – it is also not "permanent" within the meaning of the Appeals Chamber's previous decision. In the terms which the Appeals Chamber had set down, this is a "conditional stay" because it did not terminate proceedings but rather expressly allowed for the possibility of their resumption upon a properly-founded application to lift the stay once the circumstances were resolved. By failing to recognise that this was a conditional stay within the meaning of the Appeals Chamber's jurisprudence, and proceeding on the basis that it was a permanent one, the Trial Chamber committed an error of law.

23. This error in the characterisation of the stay was not an abstract or harmless one. It had a very real impact on the decision to release the accused without conditions. The Trial Chamber first recognised that:

> "the Appeals Chamber addressed the issue of the circumstances in which an accused should be released, and particularly whether his release ought to be the subject of restrictions, in its judgment of 21 October 2008 (document 1487) in which it observed that the Trial Chamber must take into account inter alia the conditional nature of the stay, if that is the situation, when considering unconditional release and, moreover, it should consider all the available options at its disposal."[37]

24. The Trial Chamber, however, did not follow this path because it went on to hold that:

> "Given, as just set out, the Chamber has imposed an unconditional stay of proceedings, and bearing in mind the wholesale uncertainty of whether this case will restart at some future time, together with the length of time the

[34] ICC-01/04-01/06-T-314-ENG, p.11, lns.8-11: "Then turning from the conditional stay issue to whether release should be ordered as if this case is over – that that seems to be the import of the Court's suggestions – either it's a conditional stay or its permanent". p.12, ln.25 to p.13, ln.4: "I will accept for this point that the stay that has been imposed is intended to be a stay without sort of conditions, it's just a stay, but as a practical matter, this stay we do not believe is going to be a permanent one such that the trial itself is suspended and the charges are dismissed."

[35] ICC-01/04-01/06-T-314-ENG, p.7, ln.9 to p.8, ln.4; see para.18, above.

[36] See ICC-01/04-01/06-T-314-ENG, p.19, lns.17-19: "In argument before us this afternoon, counsel for the Prosecution has suggested that our decision imposing a stay was a conditional order". This is not what the Prosecution had meant by a "conditional stay"; it had meant that the stay was "conditional", as opposed to "permanent", within the meaning of the Appeal Judgment.

[37] ICC-01/04-01/06-T-314-ENG, p.2, lns.11-18.

accused has already been in custody, anything other than unrestricted release will be unfair."[38]

25. As a result, the Trial Chamber did not consider that it needed to analyze all relevant factors, including the likelihood of "the stay being lifted in the not-too-distant future"[39] or to explore the full range of options. Rather, it proceeded directly to the conclusion that because of the nature of the stay, unconditional release was the only option - "*anything* other than unrestricted release would be unfair" - without any indication that available options such as a brief extension of detention or the imposition of conditions had been considered. Consequently the error in its characterisation of the stay of proceedings, within the terms of the Appeals Chamber's prior judgment of the very issue before it, constituted an error of law on the part of the Trial Chamber which materially affected the decision to order the unconditional release of the accused.[40]

The Prosecution's Second Ground of Appeal: the Trial Chamber erred in failing to properly apply Articles 58 and 60 when deciding on release

26. The error in characterising the stay of proceedings as not conditional led the Trial Chamber to commit a second error. In any circumstances other than a final, permanent and irreversible termination of the proceedings, or a final and firm acquittal, the release of the accused must necessarily be based on one of the provisions of Article 60 (read in conjunction with Article 58(1)).

27. The Appeals Chamber has previously ruled that:

> "[O]nce 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."[41]

[38] ICC-01/04-01/06-T-314-ENG, p.21, lns.19-23.
[39] One of the critical factors identified by the Appeals Chamber in its earlier Judgment (ICC-01/04-01/06-1487, para.37).
[40] The Appeals Chamber has found previously that the Trial Chamber erred when ordering the unconditional release of Mr. Lubanga, as it "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'" (ICC01/04-01/06-1487 OA12, para.31).
[41] ICC-01/04-01/06-1487 OA12, para.37.

28. The Trial Chamber, however, did not conduct its assessment of detention or release by applying Article 60 and 58(1). Rather, it simply ruled that:

> "The trial has been halted because it is no longer fair, and the accused cannot be held in preventive custody on a speculative basis
>
> […]
>
> Given, as just set out, the Chamber has imposed an unconditional stay of proceedings, and bearing in mind the wholesale uncertainty of whether this case will restart at some future time, together with the length of time the accused has already been in custody, anything other than unrestricted release will be unfair.
>
> The accused, therefore, shall be released unconditionally"[42]

29. Therefore, the Trial Chamber failed to apply the principles set out by the Appeals Chamber to address this very scenario. It did not consider the relevant circumstances and base its decision on the statutory criteria. Nor did the Chamber make any of the findings which are necessary for a decision on release under Article 60. The Chamber did not even specify under which limb of Article 60 release was justified: Article 60(2) and (3), in conjunction with Article 58(1), because detention is no longer necessary to ensure appearance at trial; or Article 60(4), because of unreasonable length of detention resulting from inexcusable Prosecutorial delay. Decisions on a matter as fundamental as the release of the Accused cannot be arrived at in such a cursory fashion. This is all the more so when it concerns the release, more than half-way through trial of an accused who has previously be held to pose a risk of flight and when the basis for the release (the stay of proceedings) is being appealed..

30. Instead of applying the provisions of the Statute and making the necessary findings, as mandated by the Appeals Chamber, the Trial Chamber issued a conclusory decision that the Accused could not be held in "preventive custody",[43] and that the uncertainty as to when the case might resume, "together with the length of time the accused has already been in custody" rendered it unfair to do anything other than order his unconditional release.[44] In this regard, the Decision on Release reflects the same sort of conclusory reasoning which the Trial Chamber applied in its earlier decision on release and which the Appeals Chamber overturned in its prior judgment. If anything, the present decision provides fewer details, less reasoning, and fewer findings

[42] ICC-01/04-01/06-T-314-ENG, p.21, lns.19-23.
[43] ICC-01/04-01/06-T-314-ENG, p.21, ln.9.
[44] ICC-01/04-01/06-T-314-ENG, p.21, ln.23.

supporting the decision to release the accused: in the previous decision, the Trial Chamber identified the legal basis as Article 58(1) (b) and made findings in relation to each limb. Neither of those elements is to be found in the ruling currently under appeal.

31. The Trial Chamber thus "misdirected itself on a question of law", by failing to identify the legal basis for release or make the findings necessary for release under any of the applicable provisions of the Statute. This alone suffices to invalidate the Decision.

The Prosecution's Third Ground of Appeal: the Trial Chamber erred in failing to consider factors relevant to detention or release

32. The error in the Decision is not confined to the lack of an identifiable legal foundation for release: the *process* followed by the Trial Chamber was also defective, in particular due to the Chamber's complete failure to consider all relevant factors prior to determining release. As previously noted, however denominated, the stay that was ordered in fact was a conditional stay. The Appeals Chamber has previously ruled that once a Chamber has ordered a conditional stay of the proceedings, it must, prior to ordering release

> […] 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.[45]

33. The language of that the Appeals Chamber ruling is clear: "*all* relevant circumstances" must be considered. The Trial Chamber considered none. In perhaps the clearest example of the Chamber's faulty process, the Trial Chamber failed to comply with one of the fundamental steps required by the Appeals Chamber's jurisprudence:

> [t]he 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).[46]

[45] ICC-01/04-01/06-1487 OA12, para.37.
[46] ICC-01/04-01/06-1487 OA12, para.37.

34. But perhaps more strikingly, the Chamber erroneously ordered an "unconditional release" of the Accused[47] without first assessing whether the conditions set forth in Article 58(1) were met. As the proceedings have not been terminated, only if the conditions therein were *not* met could the Chamber have ordered a release subject to no conditions.[48] Thus, the Chamber should have first considered, *inter alia*, whether the Accused's release posed a risk; and if it did – as the Appeals Chamber previously confirmed -- it should have then considered whether (and which) conditions could be fashioned and enforced to effectively mitigate the risk.

35. In addition, and largely as a result of its second error, the Trial Chamber also failed to consider a series of other factors that are critical to a determination on release. These include (a) as already advanced, the necessity of the continued detention under Article 58 (1) (b), and in particular the Trial Chamber's prior and unchanged assessment that there are substantial grounds to believe that the Accused committed the charged crimes and that if released, he is "likely to return to the DRC, with the probable consequence that the Court would no longer be able to secure his attendance at trial";[49] (b) the gravity of the crimes charged;[50] (c) whether the period of detention, considering all circumstances of the case, continues to be reasonable;[51] (d) the likelihood of "the stay being lifted in the not-too-distant future";[52] (e) the advanced stage of this case, where the case for the Prosecution is completed and the Defence has offered its evidence in support of its abuse of process motion;[53] (f) the Accused's knowledge of the identities of protected Prosecution witnesses, gained during the trial, and the risk of retaliatory harm to them that the Accused could pose, if released; and

[47] ICC-01/04-01/06-T-314-ENG, p.21, ln.24.
[48] ICC-01/05-01/08-631-Conf OA02, para.105.
[49] ICC-01/04-01/06-1359. The Appeals Chamber expressly refers to this finding in its earlier judgment on release in this case, see ICC-01/04-01/06-1487 OA12, para.38.
[50] See, inter alia, ICC-01/04-01/07-572 OA06, paras.21, 24. See also *Prosecutor v. Cermak and Marcak*, Decision on Interlocutory appeal against Trial Chamber's decision denying provisional release, IT-03-73-AR65.1, 2 December 2004, para.25; *Prosecutor v. Tolimir et al*., Decision on interlocutory appeal against trial chamber decision granting provisional release, IT-04-80-AR65.1, 19 October 2005, para.25; *Prosecutor v. Sainovic and Ojdanic*, Decision on provisional release, IT-99-37-AR65, 30 October 02, para.6.
[51] ICC-01/04-01/06-1487 OA12, para.37.
[52] One of the critical factors identified by the Appeals Chamber in its earlier Judgment (ICC-01/04-01/06-1487 OA12, para.37).
[53] From the disclosure effected to the Prosecution, it transpires that should the Defence's application for termination of proceedings due to an alleged abuse of process fail, then only ten witnesses will be called by the Defence to address the substance of the charges against the Accused. Chambers at the ICTY have considered that factors such as the proximity of a prospective judgment date may weigh against a decision to release. See *Prosecutor v. Miodrag Jokic*, Order on Miodrag Jokic's Motion for Provisional Release, IC-01-42-T, 20 February 2002, para.21.

(g) the fact that the Appeals Chamber could deliver an authoritative determination on the underlying stay decision within a confined period of time.[54]

36. The Chamber did not consider the range of relevant factors, as it should have done, but instead, noted simply "the wholesale uncertainty of whether this case will restart at some future time", together with the "length of the time the accused has already been in custody".[55] The Prosecution submits that this dismissive approach to the factors mandated by the Appeals Chamber's jurisprudence[56] was erroneous, and that had the Chamber appropriately and carefully considered those factors it could not reasonably have ordered the unconditional release of the Accused.

37. In particular, the Prosecution emphasizes that the critical factor -- the likelihood of the stay being lifted "within the not-too-distant future" -- especially establishes the error in the Chamber's conclusion. Removal of the obstacle to the continuation of trial is certain and was (and remains) likely to occur quickly. The Trial Chamber itself recognized that "the immediate cause of the present hiatus […], the Prosecutor's unequivocal refusal to implement the repeated order of this Chamber to disclose the identity of 143 […] may well be […] time limited, in the sense that a delay of a few days or weeks may result in the prosecution's objections evaporating once protective measures, acceptable to 143, have been implemented".[57] The Trial Chamber is also aware that if this occurs, it will be asked to resume the proceedings.[58] Though the Trial Chamber directed the VWU to discontinue the implementation of the protective measures with respect to these proceedings, Trial Chamber II subsequently ordered VWU to continue with the implementation of protective measures for the purposes of the *Katanga and Ngudjolo* case.[59]

38. While the Prosecution recognizes that the Trial Chamber imposed the stay based on two circumstances, implementation of protective measures would allow the identity to be disclosed, thus removing the "immediate" cause of the stay;[60] and would have allowed the parties to make submissions before the Appeals Chamber on whether a

[54] As argued by the Prosecution before the Trial Chamber, see ICC-01/04-01/06-T-314-ENG, p.12, lns.1-7.
[55] ICC-01/04-01/06-T-314 ENG, p.21, lns.19-23.
[56] See, inter alia, the Appeals Chamber's ruling on release in *Prosecutor v. Bemba*, ICC-01/05-01/08-323OA, para.55.
[57] ICC-01/04-01/06-2517, para.20.
[58] Ibid.
[59] ICC-01/04-01/07-2287-Conf. The Prosecution noted in its oral submissions before the Chamber that the current situation was significantly different to that in the previous stay, where "the Prosecution and the Defence and the Court were awaiting something from an external force, in this instance the ultimate problem here was a need for a few extra days to implement" (ICC-01/04-01/06-T-314-ENG, p. 9, lns.21-24). This constitutes a new development in the sense of ICC-01/04-01/06-1487 OA12, para.39.
[60] Decision, para.20.

stay could and should be justified on a difference of interpretation of the scope of role of particular duties (in abstracto), or whether other avenues would address the Chamber's concerns while allowing the trial to continue.[61] In this sense, the Chamber's unsupported reliance on the "wholesale uncertainty" of whether the case would restart at some future time for the purposes of deciding in favor of release is clearly erroneous.

39. By failing to consider any of these critical factors, in contravention of the legal requirements stemming from the applicable law and the Appeals Chamber's jurisprudence, the Trial Chamber followed a wrong process and reached a wrong conclusion. These errors warrant intervention by the Appeals Chamber.

The Prosecution's Fourth Ground of Appeal: the Trial Chamber erred in considering that the Prosecution had decided not to seek lifting of the stay

40. Finally, Trial Chamber erred when it considered that the Prosecution intended to exercise its legal right to seek to appeal instead of agreeing to the Court's requirement of immediate limited disclosure without protection, a predicate for lifting the stay. This constituted a procedural error in the form of taking into account an irrelevant consideration in the Chamber's decision-making process, an error of fact and a legal error, to the extent that the Chamber considered that by applying for leave to appeal the Prosecution decided to forego its right to apply for a lifting of the stay.

41. The Trial Chamber's reasoning, while not entirely clear, appears to be that the Prosecution could not both appeal and seek to lift the stay, and that its determination to appeal precluded it from also taking steps that would allow the case to proceed. Thus, it seems to conclude that the Prosecution by its actions rendered the stay a "permanent" one. As the Chamber stated:

> "[t]he Prosecution, as we understand it, is not intending to seek to persuade us to lift it. It is instead intending to exercise its appellate rights[62]

42. This reasoning was repeated at different times during the hearing where the release of the Accused was decided,[63] and in the Decision itself.[64] The Prosecution, however,

---

[61] The Prosecution notes that it is challenging the Trial Chamber's characterization of the Prosecution's conduct and submissions before the Chamber in its parallel appeal against the Chamber's ruling on stay of proceedings.
[62] ICC-01/04-01/06-T-314-ENG, p.11, lns.21-23.
[63] ICC-01/04-01/06-T-314-ENG, p.10, lns.1-9; p.11, lns.19-24.
[64] ICC-01/04-01/06-T-314-ENG, p.20, lns.13-17 and 25; p.21, ln.1.

never took the position that it would not seek to lift the stay. The fact that the Prosecution had not immediately sought a lifting of the stay in no way precluded it from asking the Trial Chamber to lift it in due course, if circumstances changed sufficiently to resolve the underlying concerns which had motivated the stay. The Prosecution repeatedly indicated that it hoped and intended that the trial would be able to resume after a brief period.[65]

43. The fact that the Prosecution preserved its appellate rights by filing an application within the statutory five-day period was an irrelevant and inappropriate factor for the Trial Chamber to consider as supporting release.[66] Appealing the foundations of a decision staying proceedings, which the Trial Chamber itself enunciated would have consequences for the release of the Accused,[67] cannot in and of itself constitute a relevant factor for the purposes of determining whether release should be granted. Nor is it justification to ignore the requisite factors in Articles 58(1) and 60 (2) of the Statute. As the Appeals Chamber has stated, taking into account "facts extraneous to the *sub judice* issues"[68] constitutes an appellable error warranting intervention by the Appeals Chamber.

44. But insofar as the Trial Chamber considered that seeking leave to appeal the stay was contemplated by the Prosecution as an alternative to seeking its lifting, and that the Prosecution therefore would not seek to lift the stay even if changes of circumstances allowed for such an application to be properly made,[69] then this also constituted an error of fact, since the proposition has no support whatsoever on the record before the Trial Chamber. On the contrary, the exchanges with the Trial Chamber, summarized above, demonstrate that it was always the Prosecution's intention to solve the problems underlying the stay of proceedings before the same Trial Chamber. The Prosecution's Urgent Request for Variance of the order directing immediate disclosure made clear that it wanted to consult with the VWU to implement "urgent interim measures" to permit disclosure before the full VWU protective scheme was implemented. Nor could the Prosecution's Application for Leave to Appeal be reasonably construed as confirming a prosecutorial right to refuse to comply with the Trial Chamber's orders with impunity: while that document referred to the

[65] See in particular ICC-01/04-01/06-T-314-ENG, p.9, lns.21-24 and 12, lns.16-19.
[66] ICC-01/04-01/06-T-314-ENG, p. 20, ln.13; see also p.20, ln.25 to p.21, ln.1See also p.10 to p.11.
[67] See ICC-01/04-01/06-2517, para.32.
[68] ICC-01/04-01/07-572 OA06, para.25.
[69] ICC-01/04-01/06-T-314-ENG, p.20, ln.25 to p.21, ln.1.

Prosecution's duties of protection, it also clarified that the Prosecution recognized the Chamber's authority.[70]

45. Finally, to the extent that the Decision considered that as a matter of law the Prosecution, by choosing to exercise its appellate rights, decided to forego the possibility of seeking in parallel a lifting of the stay, and in this manner contributed to the consolidation of the "permanent" nature of the stay,[71] then this would constitute a legal error, causing prejudice to the Prosecution. As a matter of law, no provision from the Statute, the Rules or the Regulations of the Court, nor decision from the Court's emerging jurisprudence, embraces the position that, when faced with a decision staying proceedings, a party must choose between seeking a lifting of the stay or exercising its appellate rights. Conversely, there is a 5 day-time limit enshrined in the Rules of Procedure and Evidence in order to exercise a party's right to seek leave to appeal that under the existing jurisprudence of this Court, cannot be extended since it is prescribed in the Rules.[72]

46. In the instant case, the Prosecution considers that the decision on stay was vitiated by fundamental errors, including the manner in which the Prosecution's conduct was characterized by the Trial Chamber. These errors have far-reaching implications, which include the proper discharge of the Prosecution's duties of protection, the proper consequences that a party may endure when seeking to have a temporary amendment of the terms of a Chamber's order for reasons that the party considers to be compelling, the conditions and scope of the use of the extraordinary remedy of stay of proceedings and, last but not least, the possible consequences under Article 71 that the decision on stay could entail for the Prosecutor and Deputy Prosecutor of the Court.[73] It would be legally unsupported and wholly unfair to the Prosecution to penalize the exercise of its appellate rights in these circumstances by drawing adverse consequences to it, and in particular to decide that the stay is now cast out of stone for that reason. If this was the tenor of the Trial Chamber's ruling, it is a troubling precedent and should be overturned by the Appeals Chamber.

---

[70] See ICC-01/04-01/06-2520-Red, paras. 9, 25 and 36.
[71] As could be interpreted from the words of the Presiding Judge: "This is not a conditional stay. It is a stay which could have led to an application by the Prosecution to lift it if the Prosecution was prepared to follow the Chamber's orders. The Prosecution has not taken that route. Instead, you have filed a notice of appeal solely against the decision imposing the stay" (ICC-01/04-01/06-T-314-ENG, p.10, ln.1-9).
[72] See Rule 155 (1). ICC-01/04-01/07-466, p.4; ICC-02/04-01/05-18, p.6-7; ICC-02/04-01/05-60, para.22.
[73] See ICC-01/04-01/06-T-314-ENG, p. 22, lns. 9-25 and p. 23, lns. 1-3.

Relief Sought

47. Accordingly, the Prosecution requests that the Appeals Chamber defer any determination on this appeal against release pending a decision on the appeal against stay; and issue judgments on the two appeals jointly.

48. Opportunely, overturn the decision to release the Accused, and, under the procedure previously followed by the Chamber[74]

    (a) Remand the matter for a new determination by the Trial Chamber of whether the Accused should be released with or without conditions, applying the correct legal principles and considering all relevant factors; and

    (b) Order that pending this new determination the Accused remain in the custody of the Court.

Luis Moreno-Ocampo,
Prosecutor

Dated this 22nd day of July 2010
At The Hague, The Netherlands

[74] ICC-01/04-01/06-1487 OA12, para.45.