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

Date: **2 July 2008**

**THE APPEALS CHAMBER**

**Before:**

**Judge Philippe Kirsch  
Judge Georghios M. Pikis  
Judge Navi Pillay  
Judge Sang-Hyun Song  
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 Appeal against "Decision on the release of Thomas Lubanga Dyilo"  
and Urgent Application for Suspensive Effect**

**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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**Detention Section**

**Victims Participation and Reparations  
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## Introduction

Trial Chamber I has ordered the release of Thomas Lubanga Dyilo (“the Accused”), based on an earlier decision to stay proceedings. The Prosecution has sought, and been granted, leave to appeal that decision staying proceedings.

The Prosecution hereby files an appeal against the Decision on Release. The Prosecution also requests that the Appeals Chamber suspend the release of the Accused, pending the resolution of this appeal and in order not to render the subject of the appeal moot, and that it rules on this request on an expedited basis and prior to any consideration of the substantive appeal.<sup>1</sup>

## Background

1. 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.<sup>2</sup>
2. On 23 June 2008, the Prosecution sought leave to appeal against the decision staying the proceedings.<sup>3</sup>
3. 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.<sup>4</sup> The Trial Chamber, furthermore, 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.<sup>5</sup> Accordingly, the Trial Chamber ordered that the Parties and the Legal Representatives of the Victims file written submissions on the effect of the

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<sup>1</sup> See e.g. ICC-01/04-01/06-1347 OA9 OA10, 22 May 2008.

<sup>2</sup> ICC-01/04-01/06-1401, para. 94.

<sup>3</sup> ICC-01/04-01/06-1407.

<sup>4</sup> ICC-01/04-01/06-T-91-ENG, p. 1, line 23.

<sup>5</sup> ICC-01/04-01/06-T-91-ENG, p. 2, lines 11-13.

Prosecution's application for leave to appeal the impugned decision on the detention of the Accused.

4. 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.<sup>6</sup> The Prosecution submitted that the elements from the decision on stay which would be the object of such an appeal would also form the basis for any consideration of release. Thus, if the Prosecution's appeal against that decision succeeded, then any determination on release would have been made on incorrect bases and that proceedings and the Court's exercise of jurisdiction could be jeopardized.
5. On 2 July 2008, the Trial Chamber granted the Prosecution leave to appeal the decision staying the proceedings,<sup>7</sup> and separately issued a decision in which it ordered the release of the Accused ("Decision on Release").<sup>8</sup> 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.
6. The Prosecution hereby:
  - files its appeal against the Decision on Release, pursuant to Article 82(1)(b), Rule 154(1) and Regulation 64(1); and
  - applies for suspensive effect of that appeal, pursuant to Article 82(3) and Rule 156(5).

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<sup>6</sup> ICC-01/04-01/06-1414.

<sup>7</sup> ICC-01/04-01/06-1417.

<sup>8</sup> ICC-01/04-01/06-1418.

### **Appeal pursuant to Article 82(1)(b)**

7. The Prosecution is appealing the “Decision on the release of Thomas Lubanga Dyilo” (ICC-01/04-01/06-1418), delivered on 2 July 2008 in the case of *The Prosecutor v Thomas Lubanga Dyilo*, pursuant to Article 82(1)(b), Rule 154(1) and Regulation 64(1).<sup>9</sup>
8. The Prosecution will request that the Appeals Chamber overturn the decision to release the Accused, and order his continued detention.

### **Request for Suspensive Effect**

9. The Prosecution had submitted before the Trial Chamber that in the event that leave to appeal the decision staying the proceedings was granted, which it was,<sup>10</sup> any determination of the release of the Accused should be deferred pending the resolution of that appeal by the Appeals Chamber, as it constituted the trigger and the fundamental bases for consideration of the release of the Accused.<sup>11</sup> The Trial Chamber declined to defer its consideration of the release, holding that only the Appeals Chamber has the power to order suspensive effect.<sup>12</sup> However in the Decision on Release, the Trial Chamber contemplated the possibility of the Appeals Chamber ordering suspensive effect, and took steps to ensure that should such a decision be entered by the Appeals Chamber then it could be given effect and the status quo maintained.<sup>13</sup>
10. The Prosecution submits that in the present circumstances, where the unconditional release of the accused has been ordered, suspensive effect is required in order to avoid pre-empting the subject of the appeal – i.e. the

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<sup>9</sup> “An appeal filed under rule 154 shall state: (a) The name and number of the case or situation; (b) The title and date of the decision being appealed; (c) The specific provision of the Statute pursuant to which the appeal is filed; (d) The relief sought.”

<sup>10</sup> ICC-01/04-01/06-1417.

<sup>11</sup> ICC-01/04-01/06-1414, see in particular paras. 5-9.

<sup>12</sup> Decision on Release, para. 32.

<sup>13</sup> Decision on Release, para. 35.

Decision whether to release the Accused – and rendering its outcome moot.<sup>14</sup> Releasing the Accused in the present circumstances, pending the outcome of this appeal, would have “far reaching”,<sup>15</sup> “adverse and possibly dire consequences”<sup>16</sup> on the proceedings.

11. The Trial Chamber, as recently as 29 May 2008,<sup>17</sup> 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”.<sup>18</sup> Therefore if the Accused is released, but the Appeals Chamber subsequently overturns the Decision, the exercise of the Court’s jurisdiction could be irreversibly frustrated.

12. The Prosecution submits that for the reasons set out above, suspension of the implementation of the decision is necessary. The Prosecution further notes that in the *ad-hoc* Tribunals, Chambers recognised that the stay or suspension of the implementation of the release was necessary “to preserve the status quo of the Appeal”,<sup>19</sup> to “preserve the object of the Prosecution’s appeal against the provisional release”,<sup>20</sup> or finding that “failure to grant the requested stay would effectively exclude the Prosecution’s ability to challenge the Trial Chamber’s ... Order”.<sup>21</sup>

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<sup>14</sup> Decisions on suspensive effect 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). In determining whether to exercise such discretion, it has been stated 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 Pikić, para. 9).

<sup>15</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras.22-23.

<sup>16</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikić, para. 12.

<sup>17</sup> ICC-01-04-01-06-1359.

<sup>18</sup> ICC-01-04-01-06-1359, para 18. These factual findings were not overturned in the Decision on Release; rather, the Trial Chamber considered that they could no longer be applied to the case at hand, based on the findings in the decision staying proceedings (Decision on Release, para. 30-31). Those findings are also presently under appeal (ICC-01/04-01/06-1417).

<sup>19</sup> *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.

<sup>20</sup>; *Prosecutor v. Prlić et al.*, IT-04-74-AR65.1, IT-04-74-AR65.2, and IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 15 (referring to *Prosecutor v. Prlić et al.*, IT-04-74-AR65.1, Order on the Prosecution’s Motion for a Stay, 10 August 2004).

<sup>21</sup> *Prosecutor v. Simić et al.*, IT-95-9-PT, Decision on Prosecutor’s Motion for Stay, 4 April 2000. In this case, the Prosecution’s motion for stay concerned an order on defence requests for judicial assistance for the

13. In addition, the Prosecution notes that in the specific circumstances of this case, the Decision on Release of the accused is exclusively founded on a prior contested decision of the Trial Chamber to stay all proceedings against the Accused, which will also be the subject of appellate review. If the Accused is released at this juncture, and the Appeals Chamber subsequently overturns the Trial Chamber's decision staying proceedings, then the very foundations of the release would have disappeared, yet the remedy afforded by the Appeals Chamber would arrive too late. Suspensive effect is thus needed both to prevent irreparable prejudice in this appeal, and also to ensure that the Appeals Chamber is in a position to exercise its corrective authority in a comprehensive manner, addressing all impugned aspects of the decisions under appeal and their relevant consequences.

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production of information. See also *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, 3 November 1999, para. 106), yet release was still stayed pending determination of the Prosecution's application for revision of the decision.

### Relief Sought

14. Accordingly, the Prosecution requests that the Appeals Chamber:

- (1) Accept this appeal against the “Decision on the release of Thomas Lubanga Dyilo” pursuant to Article 82(1)(b), and Rule 154(1) and Regulation 64(1);  
and
- (2) Grant suspensive effect to such an appeal, pursuant to Article 82(3) and Rule 156(5), on an expedited basis.



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**Luis Moreno-Ocampo,  
Prosecutor**

Dated this 2<sup>nd</sup> day of July 2008  
At The Hague, The Netherlands