

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 OA 17

Date: 23 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

**Decision on the Prosecutor's request to give suspensive effect to the appeal
against Trial Chamber I's oral decision to release Mr Thomas Lubanga Dyilo**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Mr Thomas Lubanga Dyilo (ICC-01/04-01/06-T-314-ENG),

Having before it the “Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect” of 16 July 2010 (ICC-01/04-01/06-2522),

Renders unanimously

DECISION

The request of the Prosecutor for suspensive effect is granted with respect to the order of Trial Chamber I to release Mr Lubanga Dyilo.

REASONS

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 8 July 2010, Trial Chamber I rendered the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”¹ wherein the Trial Chamber found it “necessary to stay [...] proceedings as an abuse of process of the Court”² (hereinafter: “Decision to Stay Proceedings”).

2. On 15 July 2010, Trial Chamber I issued an oral decision, ordering the unconditional release of Mr Lubanga Dyilo (hereinafter: “Impugned Decision”).³ With respect to the enforcement of this order, the Trial Chamber stipulated, in relevant part:

This order shall not be enforced until the five day time limit for an appeal has expired. If an appeal is filed within the five day time limit against this order granting release, and if a request is made to suspend its effect, the accused shall

¹ ICC-01/04-01/06-2517-Conf. A redacted version of the decision was filed on the same day as ICC-01/04-01/06-2517-Red. All references herein are to the redacted version.

² ICC-01/04-01/06-2517-Red, para. 31.

³ ICC-01/04-01/06-T-314 ENG, p. 17, line 8 to p. 22, line 8.



not leave detention until the Appeals Chamber has resolved whether this order granting release is to be suspended.⁴

3. On 16 July 2010, the Prosecutor submitted the “Prosecution’s Appeal Against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect”⁵ (hereinafter: “Request”). The Prosecutor appeals against the Impugned Decision and requests that the Appeals Chamber suspend the release of Mr Lubanga Dyilo, pending the resolution of this appeal.⁶ The Prosecutor argues that “[w]here the 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 Decision whether to release the Accused – and rendering its outcome moot”.⁷ The Prosecutor recounts prior proceedings before the Trial and Appeals Chambers and concludes that “there is a clear and present danger that if the Accused is released, but the Appeals Chamber subsequently overturns the Decision, the Court will not be able to regain custody of the Accused”.⁸ Furthermore, the Prosecutor notes that the Impugned Decision was based on the Decision to Stay Proceedings, which is presently under appeal, and argues that suspensive effect is necessary for the Appeals Chamber to address “all impugned aspects of the decisions under appeal and their relevant consequences”.⁹ The Prosecutor requests that the Appeals Chamber grant suspensive effect on an expedited basis.¹⁰

4. On 22 July 2010, Mr Lubanga Dyilo filed the “Réponse de la Défense à la « Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect », déposée le 16 juillet 2010”¹¹ (hereinafter: “Response”). He submits that the developments in the case do not justify his continued detention and are, for the following reasons, distinguishable from the circumstances in 2008, when the first stay of proceedings was imposed: the unconditional nature of the stay of the proceedings; the excessive length of his detention caused by the unjustifiable delay of the Prosecutor; his inability to interfere with witnesses or the investigation of the case, given that the Prosecutor has already

⁴ Impugned Decision, p. 21, line 25 to p. 22, line 5.

⁵ ICC-01/04-01/06-2522.

⁶ Request, para. 2.

⁷ Request, para. 8.

⁸ Request, para. 12.

⁹ Request, para. 13.

¹⁰ Request, para. 14.

¹¹ ICC-01/04-01/06-2531.

closed his case; and the hypothetical nature of the risk of his flight, should he be released.¹²

5. Mr Lubanga Dyilo refutes the Prosecutor's argument that granting of suspensive effect is a corollary to the right to appeal a decision granting release.¹³ He notes that the Trial Chamber ordered his release because he has been in detention for more than four years and because of the recent developments in the case.¹⁴ He emphasises that the Prosecutor's non-compliance with the Trial Chamber's orders renders the resumption of the proceedings uncertain.¹⁵ In Mr Lubanga Dyilo's view, keeping him in detention would be disproportionate and unjustifiable in view of the interests that the granting of suspensive effect could protect.¹⁶

6. Mr Lubanga Dyilo further contends that his release will not jeopardise the resumption of the proceedings since he has no travel documents and is under a United Nations Security Council international travel ban and, as such, is not in a position to leave The Netherlands without a resolution of the Security Council.¹⁷ He maintains that the Prosecutor's submissions as to the risk of flight are speculative and should not be taken into consideration.¹⁸ Moreover, Mr Lubanga Dyilo undertakes to remain at the disposal of the Court for the duration of the appeal.¹⁹

II. MERITS

7. The Appeals Chamber has stated previously:

Article 82 (3) of the Statute provides that an appeal shall not have suspensive effect "unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence." [...] The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.²⁰

¹² Response, para. 6.

¹³ Response, para. 8.

¹⁴ Response, para. 9.

¹⁵ Response, para. 10.

¹⁶ Response, para. 11.

¹⁷ Response, para. 13.

¹⁸ Response, para. 14.

¹⁹ Response, para. 15.

²⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", 9



8. Thus, the mere fact that a decision orders release does not automatically require that a request for suspensive effect of an appeal against that decision be granted.²¹ Rather, the Appeals Chamber must consider the specific circumstances of the case and all relevant factors.

9. The Appeals Chamber previously had occasion to consider, and granted, a request for suspensive effect of a decision ordering release following a stay of proceedings in this very case.²² The Appeals Chamber explained:

Given the fact that the decision on release was under appeal and that leave to appeal the stay of proceedings had been granted and in light of previous findings of the Pre-Trial and Trial Chambers that his detention is necessary to secure his presence at trial, the Appeals Chamber found that the release of Mr. Lubanga Dyilo at this point in time could potentially defeat the purpose of the present appeal as well as of the appeal that, in all likelihood, would be mounted against the Decision to Stay the Proceedings. In such circumstances, the interest of Mr. Lubanga Dyilo to be released immediately did not outweigh the reasons in favour of granting the request for suspensive effect.²³

10. Despite Mr Lubanga's submissions, the Appeals Chamber is of the view that the same factors that led the Appeals Chamber to grant suspensive effect of the appeal against the previous decision to release Mr Lubanga Dyilo remain equally valid in the present case.

11. The Appeals Chamber reaches this conclusion despite the fact that this is the second stay of proceedings in the present case, that this stay has been characterised as unconditional by the Trial Chamber,²⁴ that Mr Lubanga Dyilo has been in detention at the Court for more than four years, and that the Prosecutor has closed his case. The Appeals Chamber is further aware that Mr Lubanga Dyilo undertakes to remain at the

July 2010, ICC-01/05-01/08-817 (OA 3), para. 6 (quoting *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of the Prosecutor for Suspensive Effect", 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11 (references omitted), which confirmed an approach developed in *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008", 22 April 2008, ICC-01/04-01/06-1290 (OA 11), para. 7).

²¹ See *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the decision on the request of the Prosecutor for suspensive effect of the appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", 22 July 2008, ICC-01/04-01/06-1444 (OA 12) (hereinafter: "Prior Reasons"), para. 8.

²² See *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", 7 July 2008, ICC-01/04-01/06-1423 (OA 12).

²³ Prior Reasons, para. 10.

²⁴ Impugned Decision, p. 21, lines 19-20.

disposal of the Court for the duration of the appeal and that Mr Lubanga Dyilo is subject to a travel ban and does not have travel documents. The Appeals Chamber notes that these are all factors to be taken into account, but concludes that they do not outweigh the potential impact on the proceedings, should the Appeals Chamber decline to grant suspensive effect. In the view of the Appeals Chamber, an immediate implementation of the order to release him could render the resumption of the trial uncertain, should the Appeals Chamber later find in favour of the Prosecutor's appeals against the Decision to Stay Proceedings and the Impugned Decision. In these circumstances, his release could potentially defeat the purpose of the present appeal and that of the appeal against the Decision to Stay Proceedings, and the granting of suspensive effect is therefore appropriate.

12. The Appeals Chamber therefore grants the Prosecutor's request and suspends the implementation of the release of Mr Lubanga Dyilo pending the determination of this appeal.

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



Judge Anita Ušacka
For the Presiding Judge

Dated this 23 day of July 2010

At The Hague, The Netherlands