

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 October 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  
THE PROSECUTOR v. THOMAS LUBANGA DYILO**

**Public document**

**Judgment  
on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15  
July 2010 to release Thomas Lubanga Dyilo**

*Shs*

**Decision/Order/Judgment 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

**Legal Representatives of Victims**  
Mr Luc Walley  
Ms Carine Bapita Buyangandu  
Mr Paul Kabongo Tshibangu

**The Office of Public Counsel for Victims**  
Ms Paolina Massidda

**REGISTRY**

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**Registrar**  
Ms Silvana Arbia

*shs*

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),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

The oral decision of Trial Chamber I of 15 July 2010 ordering the release of Mr Thomas Lubanga Dyilo is reversed.

### REASONS

#### I. KEY FINDING

1. As the decision to stay proceedings, on which the decision to release Mr Lubanga Dyilo was predicated, is reversed by the Appeals Chamber today, the decision to release Mr Lubanga Dyilo must necessarily also be reversed.

#### II. PROCEDURAL HISTORY

##### A. Proceedings before the Trial Chamber

2. On 8 July 2010, the Trial Chamber I (hereinafter: "Trial Chamber") 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"<sup>1</sup>, staying the proceedings against Mr Lubanga Dyilo (hereinafter: "Decision to Stay Proceedings").

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<sup>1</sup> ICC-01/04-01/06-2517-Conf. A public redacted version was filed on the same day as ICC-01/04-01/06-2517-Red. *shs*

3. On 15 July 2010, the Trial Chamber rendered an oral decision in which it ordered that Mr Lubanga Dyilo be released without conditions<sup>2</sup> (hereinafter: “Impugned Decision”). However, the Chamber suspended the implementation of the order until the five-day time-limit for filing an appeal would expire. It also stated that, if an appeal would be filed and a request would be made to suspend the effect of the decision, Mr Lubanga Dyilo would not be released until the Appeals Chamber decided on the request for suspensive effect.<sup>3</sup>

## **B. Proceedings before the Appeals Chamber**

4. On 16 July 2010, the Prosecutor filed a notice of appeal against the Impugned Decision which contained a request that the appeal be given suspensive effect pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence.<sup>4</sup> The Appeals Chamber granted the request on 23 July 2010.<sup>5</sup>

5. On 22 July 2010, on behalf of a victim they represented, Mr Paul Tshibangu and Ms Carine Bapita Buyangandu filed an application to participate in the appeal against the Decision to Stay Proceedings and the present appeal.<sup>6</sup> On 23 July 2010, victims represented by the Office of the Public Counsel for Victims (hereinafter: “OPCV”) filed an application to participate in this appeal,<sup>7</sup> and, on 26 July 2010, victims represented by Mr Luc Walleyne filed an application for the same purpose.<sup>8</sup>

6. On 23 July 2010, the Prosecutor filed the “Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the Release of Thomas Lubanga Dyilo”<sup>9</sup> (hereinafter: “Document in Support of the Appeal”).

<sup>2</sup> ICC-01/04-01/06-T-314-ENG, p. 17, line 8 to p. 22, line 8.

<sup>3</sup> Impugned Decision, pp. 21-22.

<sup>4</sup> “Prosecution’s Appeal against Trial Chamber I’s oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect”, ICC-01/04-01/06-2522.

<sup>5</sup> “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”, ICC-01/04-01/06-2536.

<sup>6</sup> “Request for Participation in the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 (ICC-01/04-01/06-2517-Conf) and against the Decision to Release the Accused of 15 July 2010 (ICC-01/04-01/06-T-314)”, ICC-01/04-01/06-2533-Conf-tENG. A redacted version in French, dated 22 July 2010, was registered on 24 July 2010 as ICC-01/04-01/06-2533-Red.

<sup>7</sup> “Application by the OPCV in its Capacity as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to Participate in the Interlocutory Appeal Lodged by the Prosecution Challenging the Oral Decision of Trial Chamber I of 15 July 2010”, ICC-01/04-01/06-2535-tENG.

<sup>8</sup> “Application to Participate in the Appeal Proceedings against the Decision of 15 July 2010 to Release the Accused”, ICC-01/04-01/06-2537-tENG.

<sup>9</sup> ICC-01/04-01/06-2534. This document is dated 22 July 2010 and was registered on 23 July 2010.

7. On 29 July 2010, Mr Lubanga Dyilo filed the “Defence Response to the ‘Prosecution’s Document in Support of Appeal against Trial Chamber I’s Oral Decision on the release of Thomas Lubanga Dyilo’, dated 22 July 2010”<sup>10</sup> (hereinafter: “Response to the Document in Support of the Appeal”).

8. On 17 August 2010, the Appeals Chamber rendered the “Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo”<sup>11</sup> (hereinafter: “Decision on Victims’ Participation”). The Appeals Chamber allowed victims a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0051/06, a/0052/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09, and a/0398/09 to participate in the present appeal and set a time-limit of 16h00 on 23 August for the filing of observations by victims.

9. On 23 August 2010, the victims represented by the OPCV and victims represented by Mr Walleyne filed their observations<sup>12</sup> (hereinafter: “Observations of Victims Represented by the OPCV” and “Observations of Victims Represented by Mr Walleyne”, respectively). On 24 August 2010, victim a/0051/06, represented by Mr Tshibangu and Ms Buyangandu, filed a document containing observations relating to both the appeal against the Decision to Stay Proceedings and the Impugned Decision.<sup>13</sup> (hereinafter: “Observations of Victim a/0051/06”). On 27 August 2010, Mr Lubanga Dyilo responded to the victims’ observations<sup>14</sup> (hereinafter: “Mr Lubanga Dyilo’s Response to Victims’ Observations”). The Prosecutor did not file a response to the victims’ observations.

<sup>10</sup> ICC-01/04-01/06-2542-tENG.

<sup>11</sup> ICC-01/04-01/06-2555.

<sup>12</sup> “Observations of the OPCV as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 on the Issues Raised in the Interlocutory Appeal Lodged by the Prosecution against the Oral Decision of Trial Chamber I of 15 July 2010”, ICC-01/04-01/06-2557-tENG; “Observations on behalf of Victims a/0001/06, a/0002/06, a/0003/06, a/00049/06 (sic), a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09 and a/0398/09 on the Appeal Against the Decision of Trial Chamber I of 15 July Ordering the Release of the Accused”, ICC-01/04-01/06-2558-tENG.

<sup>13</sup> “Observations of the Legal Representatives of Victim a/0051/06 on the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 and the Appeal against the Decision to Release the Accused of 15 July 2010”, ICC-01/04-01/06-2560-tENG.

<sup>14</sup> “Defence Response to the Observations of the Legal Representatives of the Victims on the Appeal against the Decision Ordering the Release of Mr Thomas Lubanga”, ICC-01/04-01/06-2561-tENG.

### III. PRELIMINARY ISSUES

#### A. Admissibility of Observations of Victim a/0051/06

10. Mr Lubanga Dyilo requests the Appeals Chamber to declare the Observations of Victim a/0051/06 inadmissible in relation to the present appeal for having being filed after the time-limit.<sup>15</sup> In his/her observations, Victim a/0051/006 states correctly that the Appeals Chamber, in the Decision on Victims' Participation, authorised him or her to participate in this appeal.<sup>16</sup> This decision set a time-limit of 23 August 2010 for submission of the observations of victims.<sup>17</sup> Victim a/0051/06 states that, on 18 August 2010, the Appeals Chamber extended this time-limit for the submission of observations in both this appeal and the appeal against the Decision to Stay Proceedings to 24 August 2010.<sup>18</sup>

11. The Appeals Chamber observes that the decision of 18 August 2010 solely concerned the appeal against the Decision to Stay Proceedings, setting a time limit for victims' observations in that appeal.<sup>19</sup> It did not concern the appeal against the Impugned Decision. In respect of the present appeal, the time limit set in the Decision on Victims' Participation (23 August 2010) remained in force, and the Observations of Victim a/0051/06, which were filed on 24 August 2004, were filed late. The Appeals Chamber therefore finds the Observations of Victim a/0051/06 to be inadmissible for the purpose of the present appeal.

### IV. MERITS

#### A. Summary of Impugned Decision

12. In the Impugned Decision, the Trial Chamber ordered the unconditional release of Mr Lubanga Dyilo.<sup>20</sup> The Chamber observed that "[t]he trial has been halted

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<sup>15</sup> Mr Lubanga Dyilo's Response to Victims' Observations (OA 17), paras 38-40.

<sup>16</sup> Observations of Victim a/0051/06 (OA 17 and 18), preambular para. j.

<sup>17</sup> Decision on Victims' Participation.

<sup>18</sup> Observations of Victim a/0051/06 (OA 17 and 18), preambular para. k.

<sup>19</sup> "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings", ICC-01/04-01/06-2556 (OA 18), para. 1.

<sup>20</sup> Impugned Decision, p. 21, lines 24-25.

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because it is no longer fair, and the accused cannot be held in preventative custody on a speculative basis”.<sup>21</sup>

13. Indicating that the Prosecutor had made clear his determination to “rather face adverse consequences in its litigation” and had not applied to lift the stay,<sup>22</sup> the Trial Chamber opined that “it is by no means certain that compliance with court orders will in [these] circumstances be assured”.<sup>23</sup> The Trial Chamber concluded that “[g]iven, 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”.<sup>24</sup>

## **B. Arguments of the Parties and Participants**

### *1. Arguments of the Prosecutor*

14. The Prosecutor puts forward two principal arguments. First, he submits that the Impugned Decision was based on the wrongful imposition of a stay of proceedings by the Trial Chamber. In his view, if the Decision to Stay Proceedings is found to have been made in error, then the decision to release Mr Lubanga Dyilo is equally erroneous and must, therefore, be reversed.<sup>25</sup>

15. Second, the Prosecutor argues that, even if the Decision to Stay Proceedings were upheld, the Impugned Decision was nevertheless made in error. The Prosecutor alleges four legal, factual or procedural errors committed by the Trial Chamber, namely that: (1) the Trial Chamber committed an error of law in ruling that the stay of proceedings was unconditional and in determining that the unconditional release of Mr Lubanga Dyilo was therefore required;<sup>26</sup> (2) as a consequence of the first error, the Trial Chamber committed a subsequent error in failing to properly apply articles 58 and 60 of the Statute when deciding on release;<sup>27</sup> (3) the Trial Chamber erred by

<sup>21</sup> Impugned Decision, p. 21, lines 7-9.

<sup>22</sup> Impugned Decision, p. 20, lines 13-17, citing “Prosecution’s Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay”, 7 July 2010, ICC-01/04-01/06-2516, para. 6.

<sup>23</sup> Impugned Decision, p. 20, lines 20-22.

<sup>24</sup> Impugned Decision, p. 21, lines 19-23.

<sup>25</sup> Document in Support of the Appeal, para. 3.

<sup>26</sup> Document in Support of the Appeal, paras 17-25.

<sup>27</sup> Document in Support of the Appeal, paras 26-31.

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failing to consider factors relevant to the detention or release of Mr Lubanga Dyilo;<sup>28</sup> and (4) the Trial Chamber committed errors of fact and law in taking into consideration that the Prosecutor had decided not to seek lifting of the stay.<sup>29</sup>

## *2. Arguments of Mr Lubanga Dyilo*

16. Mr Lubanga Dyilo argues that, contrary to the Prosecutor's assertion, the Trial Chamber clearly defined the stay of proceedings as a permanent and, therefore, not a conditional stay.<sup>30</sup>

17. Mr Lubanga Dyilo alleges further that (1) the stay ordered by the Trial Chamber, being of an unconditional nature, necessarily entails his release, and there is therefore no need to evaluate whether the conditions set forth in articles 58(1) and 60 of the Statute have been met;<sup>31</sup> (2) even if the stay was a conditional stay, no development has occurred since the imposition of the stay which would suggest the stay might some day be lifted;<sup>32</sup> and (3) the Appeals Chamber should take into consideration that this was the second time that the Chamber ordered a stay of proceedings in this case due to inexcusable delay on the part of the Prosecutor.<sup>33</sup>

18. Mr Lubanga Dyilo submits that the argument of the Prosecutor that the Trial Chamber committed errors of fact and law in considering that the Prosecutor had decided not to seek lifting of the stay is without merit.<sup>34</sup>

## *3. Observations of the victims and responses thereto*

19. The victims represented by the OPCV agree with the arguments of the Prosecutor. They add that, even if the Trial Chamber considered the length of time the accused has already been in custody as excessive, this factor is not in itself sufficient to release Mr Lubanga Dyilo immediately and unconditionally, and that the Trial

<sup>28</sup> Document in Support of the Appeal, paras 32-39.

<sup>29</sup> Document in Support of the Appeal, paras 40-45.

<sup>30</sup> Response to Document in Support of Appeal, paras 23-27.

<sup>31</sup> Response to Document in Support of the Appeal, para. 30.

<sup>32</sup> Response to Document in Support of the Appeal, paras 31-32.

<sup>33</sup> Response to Document in Support of the Appeal, paras 33-35.

<sup>34</sup> Response to Document in Support of the Appeal, paras 37-40.

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Chamber should have taken into consideration the “the numerous risks and considerable and real dangers” which would be caused by such release.<sup>35</sup>

20. The victims represented by Mr Walleyne claim that victims have been threatened and physically attacked as a result of their participation in proceedings and express fear for their security should Mr Lubanga Dyilo be released.<sup>36</sup> They argue that the decision of the Trial Chamber to stay the proceedings, and not the length of Mr Lubanga Dyilo’s detention, was the decisive element of its decision to release Mr Lubanga Dyilo, and that, if the former is reversed, the latter must also be reversed.<sup>37</sup> They submit that, in such a case, the Appeals Chamber cannot substitute its judgment for that of the Trial Chamber.<sup>38</sup>

21. Mr Lubanga Dyilo responds that the victims represented by the OPCV mischaracterise the unconditional nature of the stay on which release was predicated and that the jurisprudence relied on in their observations is not supportive of their claims.<sup>39</sup> As to the contention made in the Observations of Victims Represented by Mr Walleyne that certain victims have been threatened or physically attacked, Mr Lubanga Dyilo argues that these contentions are not founded on evidence and that one of the victims referred to in these observations has not been granted the right to participate in the present appeal.<sup>40</sup>

### **C. Determination of the Appeals Chamber**

22. The Appeals Chamber recalls that the Trial Chamber ordered the release of Mr Lubanga Dyilo on the grounds of (1) the unconditional stay of proceedings, (2) the uncertainty of the trial resuming at a future date and (3) the length of Mr Lubanga Dyilo’s detention.

23. In today’s “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘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’”

<sup>35</sup> Observations of Victims Represented by the OPCV, para. 30.

<sup>36</sup> Observations of Victims Represented by Mr Walleyne, para. 2.

<sup>37</sup> Observations of Victims Represented by Mr Walleyne, paras 3-5.

<sup>38</sup> Observations of Victims Represented by Mr Walleyne, para. 5.

<sup>39</sup> Mr Lubanga Dyilo’s Response to Victims’ Observations, paras 10-31.

<sup>40</sup> Mr Lubanga Dyilo’s Response to Victims’ Observations, paras 32-37.

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(hereinafter: “Judgment on the Stay of Proceedings”), the Appeals Chamber has determined that the Trial Chamber erred when it imposed a stay of proceedings for the Prosecutor’s refusal to comply with the Chamber’s orders, without first imposing sanctions under article 71 of the Statute.<sup>41</sup> Accordingly, the Appeals Chamber has reversed the Decision to Stay Proceedings.

24. The Appeals Chamber agrees with the Prosecutor that the stay of proceedings was the essential element underpinning the decision to release Mr Lubanga Dyilo. If not for the stay of proceedings, the Trial Chamber would not have ordered the release of Mr Lubanga Dyilo. The reversal of the Decision to Stay Proceedings by the Appeals Chamber vitiates the very basis of the Impugned Decision and, therefore, requires that the Impugned Decision be reversed.

25. The Appeals Chamber has not overlooked the significance attached by the Trial Chamber to the length of Mr Lubanga Dyilo’s detention. However, the Appeals Chamber observes that the Trial Chamber made no finding either that the continued detention of Mr Lubanga Dyilo was no longer necessary for trial under articles 58 and 60 (2) and (3) of the Statute or that Mr Lubanga Dyilo was detained for an unreasonable period due to the inexcusable delay of the Prosecutor under article 60 (4) of the Statute. It would be inappropriate for the Appeals Chamber to enter findings for the Trial Chamber on these points.

26. In light of the above, the Appeals Chamber considers it unnecessary to address the additional grounds of appeal put forward by the Prosecutor.

## V. APPROPRIATE RELIEF

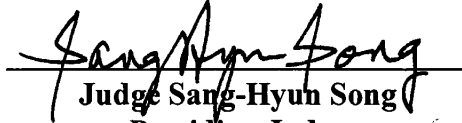
27. On an appeal pursuant to article 82 (1) (b) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to reverse the Impugned Decision.

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<sup>41</sup> “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘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’”.

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

  
Judge Sang-Hyun Song  
Presiding Judge

Dated this 8<sup>th</sup> of October 2010

At The Hague, The Netherlands