

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06 OA 11

Date: 22 April 2008

**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**THE PROSECUTOR v. THOMAS LUBANGA DYILO**

**Public document**

**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**

*shs*

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Thomas Lubanga Dyilo pursuant to the decision of Trial Chamber I of 6 March 2008, entitled “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” (ICC-01/04-01/06-1210),

Having before it the “Defence Appeal against the Decision on Redactions and Disclosure Issued Orally on 18 January 2008” (ICC-01/04-01/06-1227-tENG) of 17 March 2008, in which a request for suspensive effect is made,

*Renders* the following

## DECISION

The request for suspensive effect is rejected.

## REASONS

### I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 18 January 2008, Trial Chamber I rendered an oral decision (see ICC-01/04-01/06-T-71; hereinafter: “Impugned Decision”) in which it disposed of six filings of the Prosecutor relating to the disclosure to the defence of evidence and other material prior to the commencement of the trial of Mr. Thomas Lubanga Dyilo (hereinafter: “appellant”).

2. The appellant sought leave to appeal the Impugned Decision (ICC-01/04-01/06-1134). On 6 March 2008 the Trial Chamber granted leave to appeal (ICC-01/04-01/06-1210<sup>1</sup>; hereinafter: “Decision Granting Leave to Appeal”) in relation to three issues, which the Chamber formulated as follows: “whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure” (Decision Granting Leave to Appeal, paragraph 14); whether “the Chamber was wrong in giving preference to the protection of witnesses for the defence over the defence right to

<sup>1</sup> A corrigendum to this decision was filed on 14 March 2008 (ICC-01/04-01/06-1224).

know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”<sup>2</sup> (Decision Granting Leave to Appeal, page 6); and whether the conclusion of the Trial Chamber “that the prosecution is not under an obligation to ‘serve material that relates [to] the general use of child soldiers’ because it does not constitute exculpatory material contravenes Rule 77 of the Rules [of Procedure and Evidence]” (Decision Granting Leave to Appeal, paragraph 21).

3. On 17 March 2008 the appellant filed the “Defence Appeal against the Decision on Redactions and Disclosure Issued Orally on 18 January 2008” (ICC-01/04-01/06-1227-tENG; hereinafter: “Document in Support of the Appeal”). On page 13 of the Document in Support of the Appeal, the appellant requests the Appeals Chamber to order “an immediate stay of the proceedings for the duration of the appeal” (hereinafter: “Request for Suspensive Effect”). To support his request, the appellant submits that the issues on appeal are of importance and will have great impact on the further proceedings before the Trial Chamber (Document in Support of the Appeal, paragraph 44). He submits that if the proceedings before the Trial Chamber were to continue on the basis of unfair rules, this situation might be impossible to correct at a later stage, even if the appellant were to win the present appeal.

4. On 28 March 2008 the Prosecutor submitted the “Prosecution’s Response to Defence Document in Support of Appeal against Oral Decision of Trial Chamber I rendered on 18 January 2008” (ICC-01/04-01/06-1243; hereinafter: “Response to the Document in Support of the Appeal”). The Prosecutor opposes the Request for Suspensive Effect and notes that, in his view, the appellant is not seeking a suspension only of the Impugned Decision, but a stay of all proceedings (Response to the Document in Support of the Appeal, paragraph 34). The Prosecutor submits that the appellant would not suffer any prejudice from the implementation of the Impugned Decision, in particular as the first two issues on appeal “relate to events which may, or may not, take place at a much later stage of the proceedings” (Response to the Document in Support of the

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<sup>2</sup> In the corrigendum to the Decision Granting Leave to Appeal, the relevant passage reads as follows: “Whether the Chamber was wrong in giving preference to the protection of witnesses for the prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”.

Appeal, paragraph 35), and because the Prosecutor continues to disclose to the Defence the information that is the subject of the third issue on appeal, pending the outcome of the present appeal (Response to the Document in Support of the Appeal, paragraph 36). The Prosecutor submits furthermore that if any aspect of the appeal were successful, the Appeals Chamber or Trial Chamber could then make any orders necessary to address any prejudice that might have been caused to the appellant, and that the suspension of the proceedings as a whole would be disruptive to the preparation of the trial (Response to the Document in Support of the Appeal, paragraphs 37 and 38).

## II. DETERMINATION BY THE APPEALS CHAMBER

5. The Appeals Chamber determines, for the reason set out below, that in the circumstances of the present case it would be inappropriate to order that the appeal have suspensive effect. The Request for Suspensive Effect is therefore rejected.

6. 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”. Rule 156 (5) of the Rules of Procedure and Evidence provides that “[w]hen filing an appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.”

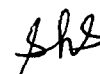
7. As neither article 82 (3) of the Statute nor rule 156 (5) of the Rules of Procedure and Evidence stipulate in which circumstances suspensive effect should be ordered, this decision is left to the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances.

8. In light of the submissions of the appellant, the Appeals Chamber has considered in the present case whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant. The Appeals Chamber is not persuaded that it would be appropriate to order that the appeal shall have suspensive effect because it does

not consider that the implementation of the Impugned Decision would create such an irreversible situation and because there are no other apparent reasons for granting the request. The Impugned Decision and the issues raised on appeal relate to disclosure obligations of the Prosecutor in preparation for the trial. As the Trial Chamber confirmed at paragraph 12 of the Decision Granting Leave to Appeal, the Impugned Decision did not impose a “duty of disclosure on the accused in the sense suggested”. Therefore, in the context of the present appeal, there is no need to protect the appellant from a potentially irreversible situation that could be caused by the disclosure of his lines of defence because the Impugned Decision did not oblige him to do so. Similarly, if the present appeal were successful and if this would lead to additional disclosure obligations of the Prosecutor prior to the commencement of the trial in respect of the identities of witnesses or the general use of child soldiers in the Democratic Republic of the Congo, the Trial Chamber could make any necessary adjustments at that time, in order to ensure the fairness of the proceedings.

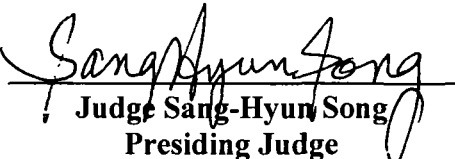
9. As the Appeals Chamber concludes that suspensive effect should not be ordered in the present case, it does not consider it necessary to address the question of whether the specific relief sought by the appellant, namely the suspension of all proceedings before the Trial Chamber pending the decision on appeal, would be appropriate.

10. The Appeals Chamber emphasises that the present decision is only concerned with the request for suspensive effect; whether the issues raised for consideration derive from the Impugned Decision of the Trial Chamber is a matter the Chamber shall address in its final decision on the present appeal.



The position of Judge Pikis on the issues raised, their resolution and the outcome of the application for suspensive effect will be set out in an opinion to be filed shortly.

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

  
Judge Sang-Hyun Song  
Presiding Judge

Dated this 22nd day of April 2008

At The Hague, The Netherlands

