

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 July 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

**Reasons for the decision on the request of the Prosecutor for suspensive effect of his
appeal against the “Decision on the release of Thomas Lubanga Dyilo”**

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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

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the release of Thomas Lubanga Dyilo” of Trial Chamber I of 2 July 2008 (ICC-01/04-01/06-1418),

In the matter of the “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’ and Urgent Application for Suspensive Effect” dated 2 July 2008 (ICC-01/04-01/06-1419), in which a request for suspensive effect pursuant to article 82 (3) of the Statute was made,

Provides the following reasons for its decision entitled “Decision on the request of the Prosecutor for suspensive effect of his appeal against the ‘Decision on the release of Thomas Lubanga Dyilo’” of 7 July 2008 (ICC-01/04-01/06-1423):

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 2 July 2008, Trial Chamber I rendered the “Decision on the release of Thomas Lubanga Dyilo” (ICC-01/04-01/06-1418; hereinafter: “Impugned Decision”), ordering the release of Mr. Lubanga Thomas Dyilo. The Trial Chamber recalled that it had decided, on 13 June 2008, to stay the proceedings against Mr. Lubanga Dyilo *sine die* (see ICC-01/04-01/06-1401; hereinafter: “Decision to Stay the Proceedings”) and that therefore, his continued detention could not be justified (Impugned Decision, paragraphs 29 and 30).

2. The Trial Chamber decided furthermore that the order on release should not be enforced until the expiry of the time limit pursuant to rule 154 of the Rules of Procedure and Evidence for the filing of an appeal against the Impugned Decision; in case that an appeal was filed within this time limit and that the appellant requested that the appeal should have suspensive effect, the order on release should not be enforced until the decision of the Appeals Chamber on such a request (Impugned Decision, paragraph 35).

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3. The Prosecutor filed the “Prosecution’s Appeal against ‘Decision on the release of Thomas Lubanga Dyilo’ and Urgent Application for Suspensive Effect” dated 2 July 2008 (ICC-01/04-01/06-1419; hereinafter: “Notice of Appeal”). He requested the Appeals Chamber to grant suspensive effect of his appeal pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence. The Prosecutor submitted that in the circumstances of the present case, suspensive effect was required because if Mr. Lubanga Dyilo were released, this could pre-empt the outcome of the appeal and could render the appeal moot (Notice of Appeal, paragraph 10). The Prosecutor emphasised that the Trial Chamber had determined on 29 May 2008 that there existed “the real possibility that the Court is likely to be unable to ensure the Accused’s presence at trial if he is released” (quote in Notice of Appeal, paragraph 11).

4. The Prosecutor submitted that in such circumstances, the suspension of the implementation of the Impugned Decision was necessary and referred the Appeals Chamber to decisions of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda, in which Chambers of these tribunals had accepted arguments similar to the arguments raised by the Prosecutor in the present case (Notice of Appeal, paragraph 12). The Prosecutor noted furthermore that the Impugned Decision was based on the Decision to Stay the Proceedings and that this decision would also be appealed. If the appeal against the Decision to Stay the Proceedings were to be successful, but Mr. Lubanga Dyilo would be released now, the Appeals Chamber’s remedy would come too late (Notice of Appeal, paragraph 13).

5. On 4 July 2008, Mr. Lubanga Dyilo filed the “Réponse de la Défense à la demande du Procureur, datée du 3 juillet 2008, aux fins de suspension des effets de la Décision ordonnant la libération de Monsieur Thomas Lubanga” (ICC-01/04-01/06-1422; hereinafter: “Response to Request for Suspensive Effect”). Mr. Lubanga Dyilo was opposed to the request for suspensive effect. He recalled that article 82 of the Statute established that decisions on release were, in principle, immediately enforceable, notwithstanding any appeals against such decisions (Response to Request for Suspensive Effect, paragraph 7). The immediate enforcement of a decision granting release was even more necessary because detention pending trial should be an exception (Response to

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Request for Suspensive Effect, paragraph 8). Mr. Lubanga Dyilo submitted furthermore that in such circumstances, suspensive effect could only be granted in exceptional circumstances, but that such exceptional circumstances had not been established. He disputed the argument of the Prosecutor that the Impugned Decision was founded on the Decision to Stay the Proceedings. Rather, the Impugned Decision was based on the Trial Chamber's assessment that he could not receive a fair trial and therefore must be released, notwithstanding the fact that the Prosecutor intended to appeal the Decision to Stay the Proceedings (Response to Request for Suspensive Effect, paragraphs 9 and 10). For that reason, Mr. Lubanga Dyilo submitted, the arguments of the Prosecutor relating to the appeal against the Decision to Stay the Proceedings were misplaced (Response to Request for Suspensive Effect, paragraph 12). In Mr. Lubanga Dyilo's view, none of the arguments of the Prosecutor indicated that his eventual appeal against the Decision to Stay the Proceedings might be successful. In such circumstances, the continued detention of Mr. Lubanga Dyilo was disproportionate and unjustified (Response to Request for Suspensive Effect, paragraphs 14 to 16). Mr. Lubanga Dyilo submitted that it was entirely uncertain whether the trial would take place and that therefore, the findings of the Trial Chamber of 29 May 2008 could not be taken into account (Response to Request for Suspensive Effect, paragraphs 17 to 19).

6. Mr. Lubanga Dyilo finally recalled that he was subject to a travel ban imposed by the Security Council of the United Nations, which means that he could not leave the Netherlands. He stated that he would make himself available for an eventual resumption of the proceedings and for the appellate proceedings and would remain in the Netherlands for that purpose (Response to Request for Suspensive Effect, paragraphs 20 and 21).

II. DETERMINATION BY THE APPEALS CHAMBER

7. For the following reasons, the Appeals Chamber decided to grant the request of the Prosecutor for suspensive effect of his appeal.

8. At paragraph 7 of the "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" of 22 April 2008 (ICC-01/04-01/06-1290), the Appeals Chamber explained that

decisions of the Appeals Chamber in respect of applications under article 82 (3) of the Statute read with rule 156 (5) of the Rules of Procedure and Evidence are discretionary and that “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.” This approach was confirmed in the “Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008” of 22 May 2008 (ICC-01/04-01/06-1347). Accordingly, the submission of Mr. Lubanga Dyilo in the present case that suspension may only be granted in exceptional circumstances was misguided. The fact that the suspension of the Impugned Decision would lead to his continued detention was, however, one of the factors that the Appeals Chamber has taken into account in the exercise of its discretion.

9. In the present case, the Appeals Chamber came to the conclusion that the granting of suspensive effect was appropriate. The Appeals Chamber noted the various decisions of Pre-Trial Chamber I and of Trial Chamber I, finding that the detention of Mr. Lubanga Dyilo was necessary to ensure his presence at trial (article 58 (1) (b) (i) of the Statute).¹ This finding was confirmed most recently by Trial Chamber I at paragraph 14 of the “Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)” of 29 May 2008 (ICC-01/04-01/06-1359), where the Trial Chamber stated “that the defendant faces grave charges and if released is likely to return to the Democratic Republic of the Congo, with the probable consequence that the Court would no longer be able to ensure his attendance at trial.”

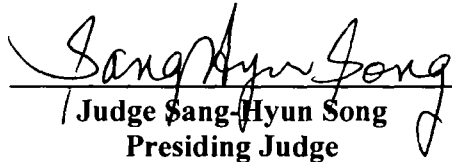
10. Given the fact that the decision on release was under appeal and that leave to appeal the stay of proceedings had been granted and in light of previous findings of the Pre-Trial and Trial Chambers that his detention is necessary to secure his presence at trial, the

¹ See Pre-Trial Chamber I, “Decision on the Application for the interim release of Thomas Lubanga Dyilo”, 18 October 2006 (ICC-01/04-01/06-586-tEN), at pp. 5 et seq.; “Review of the ‘Decision on the Application for the Interim Release of Thomas Lubanga Dyilo’”, 14 February 2007 (ICC-01/04-01/06-826), at pp. 5 et seq.; “Second Review of the ‘Decision on the Application for Interim Release of Thomas Lubanga Dyilo’”, 11 June 2007 (ICC-01/04-01/06-924), at pp. 4 et seq.; Trial Chamber I, “Decision reviewing the ‘Decision on the Application for the Interim Release of Thomas Lubanga Dyilo’”, 9 October 2007 (ICC-01/04-01/04-976), at paragraph 10; “Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)”, 1 February 2008 (ICC-01/04-01/06-1151), at paragraph 10.

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.² 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.

Judge Georghios M. Pikis will file a separate opinion to the present reasons.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 22nd day of July 2008

At The Hague, The Netherlands

² In the meantime, the Prosecutor's document in support of the appeal in respect of the Decision to Stay the Proceedings has been filed, see ICC-01/04-01/06-1434.