



Original: **English**

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

Date: **16 July 2010**

THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Document

**Prosecution's Appeal against Trial Chamber I's oral decision to release 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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Introduction

1. Trial Chamber I ordered the unconditional release of Thomas Lubanga Dyilo (“the Accused”), based on an earlier decision to stay proceedings.
2. The Prosecution is appealing the decision staying proceedings. It also 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.¹

Background

3. On 8 July 2010, the Trial Chamber ordered that proceedings in the case be stayed as an abuse of process, based on the Prosecution’s alleged refusal to comply with a specific order of the Chamber and its conclusion that the Prosecution intends to refuse to implement future orders of the Chambers if it considers that the orders conflict with the Prosecution’s other obligations of protection.² On 14 July, the Prosecution sought leave to appeal that decision.³ At a hearing on 15 July, the Chamber granted the request.⁴ It also ordered that the accused be released without conditions (“Decision on Release”).⁵
4. The Chamber stayed release, however, to permit the Prosecution to file an appeal against the Decision on Release. In the event that the Prosecution were also to seek an order from the Appeals Chamber suspending release, the Chamber further provided that its order would be stayed until the Appeals Chamber ruled on that request.⁶

¹ See e.g. ICC-01/04-01/06-1423 OA12, 7 July 2008; ICC-01/04-01/06-1347 OA9 OA10, 22 May 2008.

² ICC-01/04-01/06-2517-Red, see in particular para. 31.

³ ICC-01/04-01/06-2520-Red.

⁴ ICC-01/04-01/06-T-314-ENG, pages 14-17.

⁵ ICC-01/04-01/06-T-314-ENG, pages 17-23.

⁶ ICC-01/04-01/06-T-314-ENG, page 23.

5. 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).

Appeal pursuant to Article 82(1) (b)

6. The Prosecution is appealing Trial Chamber I's decision to order the release of Thomas Lubanga Dyilo, delivered orally on 15 July 2010 (transcript ICC-01/04-01/06-T-314-ENG, pages 17-23) in the case of *The Prosecutor v Thomas Lubanga Dyilo*, pursuant to Article 82(1)(b), Rule 154(1) and Regulation 64(1).⁷
7. The Prosecution will request that the Appeals Chamber overturn the decision to release the Accused, and order his continued detention.

Request for Suspensive Effect

8. The Appeals Chamber has previously recognised in similar circumstances that releasing an Accused pending appeal against the release decision could defeat the purpose of the appeal, as well as the appeals against other related decisions (in this case, the decision to stay proceedings).⁸ Where 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.⁹

⁷ “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.”

⁸ ICC-01/04-01/06-1444 OA12, see in particular para. 9.

⁹ 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.” (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

9. Additionally, releasing the Accused in the present circumstances, pending the outcome of this appeal, would have “far reaching”,¹⁰ “adverse and possibly dire consequences”¹¹ on the trial proceedings themselves. The consequences – particularly, his flight and the effect that his release might also have on witnesses and the elicitation of evidence – “would be very difficult to correct and may be irreversible”¹² and “could potentially defeat the purpose of the appeal”¹³ from the decision to stay the trial.
10. Throughout these proceedings, the accused has been detained on the basis of repeated findings that his detention is necessary to ensure his appearance at trial, and 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”¹⁴ – a finding referred to by this Chamber in an earlier appeal on release.¹⁵ In its Decision on Release, the Chamber did not purport to conclude that the risk of flight has abated or indeed address risk of flight at all. Thus, the previous findings regarding the possibility of flight are undisputed and undiminished.
11. The Court was able to obtain custody of the Accused in this case because he was already in detention in the DRC, a circumstance not likely to replicate itself again. The other suspect in relation to these charges, Bosco Ntaganda, remains at large over four years after the issuance of the arrest warrant against him.
12. There is thus 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. In this regard, the Prosecution recalls

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.” (ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 9).

¹⁰ ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras.22-23.

¹¹ ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 12.

¹² ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, para 23; see also ICC-01/05-01/08-817 OA3, 9 July 2010, para. 11.

¹³ ICC-01/04-01/06-1444 OA12, 22 July 2008, para 10; see also ICC-01/05-01/08-817 OA3, 9 July 2010, para. 11.

¹⁴ See e.g. ICC-01/04-01/06-1359, para 18.

¹⁵ ICC-01/04-01/06-1487 OA12, para. 38.

that the Appeals Chamber has previously recognised that in similar circumstances suspensive effect is warranted in the context of an appeal against a decision on release.¹⁶ The Prosecution submits that for the reasons set out above, suspension of the implementation of the decision is necessary, a conclusion which is furthermore consistent with the practice of the *ad-hoc* Tribunals.¹⁷

13. In addition, the release of the accused is founded on a prior contested decision of the Trial Chamber to stay the proceedings against the Accused. The Prosecution will challenge that decision and its legal and factual findings in a separate appeal. If the Accused is released and the Appeals Chamber ultimately overturns the Trial Chamber's decision staying proceedings, then the very foundations of the release would have disappeared. 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.

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.

¹⁶ ICC-01/04-01/06-1444 OA12, 22 July 2008, para 10. In that instance, the Trial Chamber had already granted leave to appeal against the underlying decision on stay of proceedings. However, the Prosecution submits that this is not a material difference which would require a different conclusion on suspensive effect in the present circumstances, especially as it has sought leave to appeal the decision on stay; and the Trial Chamber has previously recognized that issues of a stay of proceedings and the basis for that stay have met the requirements for granting leave to appeal under Article 82(1) (d).

¹⁷ See ICC-01/04-01/06-1419 OA12, para. 12 and authorities cited therein.



Luis Moreno-Ocampo,
Prosecutor

Dated this 16th day of July 2010
At The Hague, The Netherlands