

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 20 August 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”**

Separate Opinion of Judge Georgios M. Pikis



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

The Office of the Prosecutor

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REGISTRY

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Separate Opinion of Judge G.M. Pikis

Reasons for Suspension

1. On 13 June 2008, the Trial Chamber stayed criminal proceedings against Mr. Lubanga Dyilo. In coming to this decision, reliance was placed on the decision of the Appeals Chamber of 14 December 2006¹. In its judgment, the Appeals Chamber held that there is no power to stay proceedings unless a fair trial is impossible; put another way, unless the prerequisites for a fair trial are absent.

2. As declared in the decision of the Trial Chamber, stay did not put an end to the proceedings. The decision that proceedings be stayed was accompanied by the following statement: "Although the Chamber is not rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted. In the circumstances, a hearing will take place on Tuesday 24 June 2008 at 14.00 in order to consider the release of the accused"². And so the Trial Chamber addressed the question of release of Mr. Lubanga at a status conference on the appointed date³.

3. On 2 July 2008, the Trial Chamber granted the Prosecutor's application for leave to appeal its decision staying proceedings on the following two issues affecting the correctness of the interpretation accorded by the Trial Chamber to a) the scope and nature of article 54 (3) (e) of the Rome Statute (Hereinafter referred to as "articles" without reference to the Statute) and b) the power conferred upon the court by article 64, read in conjunction with article 67 (2), and its application to the facts of the case. The decision of the Trial Chamber says that both the first and second issues are "arguable".

¹ *Prosecutor v. Lubanga Dyilo* "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006" 14 December 2006 (ICC-01/04-01/06-772), paras. 36 and 39.

² *Prosecutor v. Lubanga Dyilo* "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" 13 June 2008 (ICC-01/04-01/06-1401), para. 94

³ *Prosecutor v. Lubanga Dyilo* "Decision on the release of Thomas Lubanga Dyilo" 2 July 2008 (ICC-01/04-01/06-1418), para. 2; See also transcript of hearing on 28 June 2008, ICC-01/04-01/06-T-91-ENG.



4. By another decision of the Trial Chamber of the same day⁴, sequential to the reaffirmation of stay of proceedings, the Trial Chamber ordered the release of Mr. Lubanga. However, in view of leave being granted to the Prosecutor to appeal the decision ordering stay, regard being had in this connection to the provisions of rule 154 and rule 185 of the Rules of Procedure and Evidence⁵, the Trial Chamber directed the non-enforcement of the order of release pending the expiry of the five-day period⁶ for the lodgement of an appeal. If an appeal were filed within that space of time, accompanied by a request that suspensive effect be given to it, “[...] the accused shall not leave detention until the Appeals Chamber has resolved whether or not the effect of the order granting release is to be suspended”⁷. The Trial Chamber emphasises in its decision that “[...] the order for release is the direct consequence of the Decision for which leave has been granted, it is for the Appeals Chamber and not, as has been submitted, for the Trial Chamber to determine any application for suspensive effect”⁸. It emerges that the decision to release the accused is the offspring of the decision of the Trial Chamber affirming the stay of proceedings.

5. On the self same day, the Prosecutor lodged an appeal against the decision directing the release of Mr. Thomas Lubanga Dyilo, pursuant to the provisions of article 82 (1) (b), which makes appealable as of right “a decision granting or denying release of the person being investigated or prosecuted”.

6. Article 82 (3) confers power upon the Appeals Chamber to give suspensive effect to an appeal. Suspension entails the non-enforcement of the sub judice decision pending the outcome of the appeal. It is designed to sustain the status quo ante, that is, the position obtaining prior to the issuance of the sub judice decision. Suspension is par excellence a discretionary power, to be exercised in the interests of justice, foremost the efficacy of

⁴ *Prosecutor v Lubanga Dyilo* “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’” 2 July 2008 (ICC-01/04-01/06-1417).

⁵ Hereinafter “the Rules”.

⁶ Stipulated by rule 154 of the Rules.

⁷ *Prosecutor v Lubanga Dyilo* “Decision on the release of Thomas Lubanga Dyilo” 2 July 2008 (ICC-01/04-01/06-1418), para. 35.

⁸ *Prosecutor v. Lubanga Dyilo* “Decision on the release of Thomas Lubanga Dyilo” 2 July 2008 (ICC-01/04-01/06-1418), para. 32.



the judicial process. The Statute casts the Appeals Chamber as the final arbiter of what the law warrants on an appealable subject. The interpretation and range of application of article 82 (3) was considered by the Appeals Chamber in “*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*”⁹ (majority decision; dissenting opinion by Judge Georgios M. Pikis). According to the majority in that case, the crucial question in adjudging whether to grant suspension is “[...] 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”¹⁰. And as the Appeals Chamber (majority) did “[...] not consider that the implementation of the Impugned Decision would create such an irreversible situation”¹¹, suspension was refused. A contrary view was taken in the dissenting opinion. It is stressed therein that “such issues are assessed, at this phase of the appellate process, on their face value”¹², underlining thereafter that “[...] the Appeals Chamber will not pronounce on the merits of the appeal including the acceptability of the issues raised as proper subjects of an appeal under article 82 (1) (d)”¹³. The guiding principles bearing on suspension are identified in the following passage: “The object of suspension is to avert adverse consequences on the proceedings that may follow from acting upon the decision given by the first instance court. The guiding principle in the exercise of the discretion of the Court lies in the 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”¹⁴.

⁹ *Prosecutor v. 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); See also Dissenting Opinion of Judge Georgios M. Pikis 13 May 2008 (ICC-01/04-01/06-1290-Anx).

¹⁰ *Ibid.*, majority decision, para. 8.

¹¹ *Ibid.*, majority decision, para. 8.

¹² *Ibid.*, dissenting opinion, para. 10.

¹³ *Ibid.*, dissenting opinion, para. 10.

¹⁴ *Ibid.*, dissenting opinion, para. 9.



7. Suspension was revisited by the Appeals Chamber in its decision of 22 May 2008.¹⁵ In that case too, the appeal to which suspensive effect was sought to be given was taken under article 82 (1) (d). The Appeals Chamber granted the order sought, explaining that “in its consideration of the requests of the Prosecutor and the Defence for suspensive effect the Appeals Chamber will focus on the issues certified for appeal and whether the decisions giving rise to them require suspension pending the resolution of the proceedings on appeal”¹⁶, adding that “at this stage the Appeals Chamber will not make any determinations on the merits of the appeal”¹⁷.

8. In appeals under article 82 (1) (d), the criteria for certifying the appealable issues in themselves suggest that the sub judice issues merit resolution by the Appeals Chamber as they are apt to affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Moreover, their immediate resolution by the Appeals Chamber may materially advance the proceedings. The criteria for certifying an appealable issue in themselves impact on any decision to grant suspension of the proceedings.¹⁸

9. Unlike appeals under article 82 (1) (d), appeals under article 82 (1) (b) do not require the prior certification by the Trial or Pre-Trial Chamber as proper subjects of appeal for any reason. Another difference is that appealable decisions under article 82 (1) (d) are of an interlocutory character, whereas appeals under article 82 (1) (b) involve decisions dispositive of the issues they address. In both cases, suspension must be justified by the exigencies of the case. And it serves the same purpose, that is, the forestalment of the enforcement of the sub judice decision, in the interests of the sound administration of justice. The aim is to guard against errors that may lead the judicial process off course to the detriment of justice. Suspension is a pre-emptive measure, a safeguard against mistakes apt to divert the judicial process from its ordained course.

¹⁵ *Prosecutor v Lubanga Dyilo* “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” 22 May 2008 (ICC-01/04-01/06-1347).

¹⁶ *Prosecutor v Lubanga Dyilo* “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” 22 May 2008 (ICC-01/04-01/06-1347), para. 14.

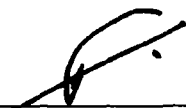
¹⁷ *Ibid.*

¹⁸ Such criteria were identified by the Appeals Chamber in *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168).



10. In this case, the foundation of the order for the release of the accused, as the Trial Chamber acknowledges in the sub judice decision, is the decision staying proceedings. Leave to appeal was granted in relation to two subjects, involving, as the Trial Chamber says, “arguable” issues, which I interpret to mean decisions in respect of which the opposite cannot incontrovertibly be ruled out. If the foundation for release is shaken on appeal by the reversal of the decision, the premise upon which release was ordered will also collapse. In that eventuality, the release of the accused may have irremediable consequences for the proceedings in view of a) the need for the presence of the accused at the trial (article 63 (1)) and b) the earlier decision of the Trial Chamber “[...] 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”¹⁹. For these reasons suspension is warranted. At this stage, as emphasised on previous occasions, no evaluation is made of the merits of the appeal or any aspect of the decision giving rise to it. The fact that suspension entails deprivation of liberty makes it all the more necessary that the appeal be resolved the soonest possible.

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



Judge Georgios M. Pikis

Dated this 20th day of August 2008

At The Hague, The Netherlands

¹⁹ *Prosecutor v. Lubanga Dyilo* “Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2)” 29 May 2008 (ICC-01/04-01/06-1359), para. 14.