



Original: **French**

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

Date: **12 August 2008**

**THE APPEALS CHAMBER**

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

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

**Public Document**

**Observations on the Prosecutor's appeal against the Decision of 2 July 2008  
ordering the release of the accused.**

**Source:** Legal Representatives for Victims a/0001/06 to a/0003/06

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**REGISTRY**

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**Registrar**

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Noting the Decision of 2 July 2008 ordering the release of the accused;<sup>1</sup>

Noting the Prosecutor's appeal;

Noting the Appeals Chamber's Decision dated 6 August granting the victims leave to participate in appeals proceedings;<sup>2</sup>

1. If the Appeals Chamber determines that the Prosecutor's Appeal against the Decision of 13 June 2008 is founded, the arguments used by the Trial Chamber to order the release of the accused will no longer be valid and the order for release will consequently also have to be set aside.

2. However, if the Decision of 13 June 2008 is confirmed at appeal, this does still not mean that release would be required. Indeed, the Trial Chamber has not put an end to proceedings but has expressly stated that it or the Appeals Chamber could lift the stay on proceedings at any time. Moreover, the Office of the Prosecutor has submitted an application to that end to the Trial Chamber.

3. It should be noted that when faced with problems relating to the Prosecution's disclosure of its materials to the Defence or problems which might undermine the principle of a fair trial, the ad hoc tribunals nonetheless never deemed it appropriate to stay the proceedings. The Appeals Chamber of the International Criminal Tribunal for Rwanda, for instance, has held that "[t]he remedy of a continuance is not the only remedy for a violation of the Prosecution's disclosure obligations".<sup>3</sup> It even went so far as to state that "[d]uring the trial process, the Defence is free to seek an

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<sup>1</sup> ICC-01/04-01/06-1418.

<sup>2</sup> ICC-01/04-01/06-1452.

<sup>3</sup> See ICTR, *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-PT, *Decision on the defence motion for continuance of trial*, para. 7.

appropriate remedy for any alleged disclosure violation, and such requests will be decided by the Trial Chamber on a case-by-case basis".<sup>4</sup>

4. In any event, only provisional release could be ordered. Indeed, the Appeals Chamber ruled that "[i]n accordance with the provisions of the Statute, an arrested person remains in custody during the pendency of the proceedings unless his/her interim release is sanctioned by the Court under the provisions of article 60 of the Statute".<sup>5</sup>

5. When the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that "the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted 'in exceptional circumstances'",<sup>6</sup> emphasising that "[i]t is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions would amount to exceptional circumstances under this rule",<sup>7</sup> this also referred to provisional, rather than definitive, release.

6. This distinction is crucial here. Since proceedings can be resumed at any time, the accused should remain available to the Court within the shortest time possible pursuant to article 63 of the Rome Statute, which provides that an accused cannot be judged *in absentia*. Definitive release would certainly preclude the holding of a trial if the conditions justifying the stay of proceedings ceased to exist and would consequently prevent the Chamber from resuming the proceedings.

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<sup>4</sup> *Ibid.*

<sup>5</sup> See *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*, ICC-01/04-01/06-772, para. 2.

<sup>6</sup> See ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, *Judgment*, 15 July 1999, para. 55.

<sup>7</sup> *Ibid.*

7. Furthermore, only provisional release under certain conditions would enable the Chamber to control the actions of the accused, particularly with respect to the safety of the witnesses and victims.

Considering the unstable situation in Ituri and the armed groups' current policy of again recruiting former child soldiers, any release of the accused could disturb the peace in Ituri by encouraging impunity in a region where peace remains elusive and by creating the risk of repeat offences and endangering the lives of the witnesses and victims.

19. Furthermore, it should not be forgotten that the accused was not deprived of his freedom as a result of the ICC warrant of arrest; rather, he was already in detention in the DRC charged with war crimes and crimes against humanity. Any release therefore would also require the agreement of the Congolese judicial authorities.

20. If by some remote chance provisional release were ordered, it should include very strict conditions such as a prohibition against:

- going to the DRC, except to be detained there at the request of the Congolese judicial authorities;
- contacting victims and witnesses with a view to putting pressure on them, even through intermediaries;
- establishing contacts with persons suspected of participation in the crimes with which he is charged, particularly the officials and members of the UPC and its armed forces.

The intention here is to avoid any risk of a repeat offence or reprisals against victims or witnesses.

**FOR THESE REASONS,**

**MAY IT PLEASE THE APPEALS CHAMBER TO:**

Declare the Prosecutor's appeal admissible and founded;

Set aside the decision of 2 July;

Determine that there are no grounds for releasing the accused.

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[signed]

Luc Walley, on behalf of the team of legal representatives for Victims a/0001/06 to  
a/0003/06.

Dated this 12 August 2008, at Brussels.