



Original: **French**

No.: **ICC-01/04-01/06/OA13**

Date: **12 August 2008**

THE APPEALS CHAMBER

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

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

Public Document

**Observations of the Legal Representative of Victim a/0105/06 Regarding the
Release of Thomas Lubanga Dyilo**

Source: Ms Carine Bapita Buyangandu

Document 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

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Ms Catherine Mabilie
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Legal Representatives of Victims

Ms Carine Bapita Buyangandu
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

SUBMISSION OF THE LEGAL REPRESENTATIVE OF VICTIM a/0105/06**BACKGROUND**

1. On 2 June 2008, the Defence filed its "*Requête de la Défense aux fins de cessation des poursuites*" and requested the release of the accused before Trial Chamber I ("the Chamber") (ICC/01/04-01/06-1366).
2. On 13 June 2008, the Chamber ordered a stay in the proceedings and postponed consideration of the release of the accused until 24 June 2008 (ICC-01/04-01/06-1401).
3. On 2 July 2008, the Chamber ordered the release of Mr Thomas Lubanga Dyilo (ICC-01/04-01/06-1418).
4. On 2 July 2008, the Chamber granted the Prosecutor leave to appeal against its decision of 13 June 2008 ordering the stay of the proceedings (ICC-01/04-01/06-1417).
5. On 3 July 2008, the Prosecutor announced his intention to appeal the decision ordering the release of the accused and requested that the Appeals Chamber grant suspensive effect to that decision (ICC-01/04-01/06-1419 OQ12+Anx).
6. On 9 July 2008, the Legal Representative of Victim a/0105/06 requested leave of the Appeals Chamber to participate in the appeal against the decision on the unconditional release of Thomas Lubanga (ICC-01/04-01/06-1425).
7. On 6 August 2008, Victim a/0105/06 was granted leave to participate in the appeal against the unconditional release of Thomas Lubanga (ICC-01/04-01/06 OA13).

The Legal Representative of Victim a/0105/06 hereby most respectfully submits her views and observations to the Appeals Chamber.

8. The Trial Chamber ordered the unconditional release of the accused on the ground that the Chamber's decision resulted in a *sine die* stay of the proceedings because a fair trial of the accused is now impossible.

Accordingly, continued detention of the accused cannot be justified in order to secure his appearance or to protect the investigation. Without the prospect of a trial, the accused cannot be kept in detention or granted interim release. The accused must be released unconditionally.

9. Article 60 of the *Rome Statute* provides that the Chamber may modify its ruling on the detention of a detainee (Thomas Lubanga) by releasing him unconditionally as a result of the impasse caused by the application of article 54(3)(e).

10. A joint reading of articles 54(3)(e) and 67(2) of the *Rome Statute* leads us to conclude that the impasse resulting from the non-disclosure of exculpatory material in the Prosecutor's possession has no significance since the agreements between the Prosecutor and his sources on the basis of article 54(3)(e) should be used only to obtain information allowing the generation of new evidence.

11. These documents in the Prosecutor's possession under article 54(3)(e) may be considered exculpatory evidence by the Defence **only if the sources grant leave to the Prosecutor to disclose them after confidentiality has been lifted.** In this case, the source at issue is the United Nations.

12. **Only then is the Prosecutor under the obligation to disclose them as soon as practicable to the Defence as provided in article 67(2) of the *Rome Statute*.**

13. However, it so happens that the sources which provided the exculpatory material to the Prosecutor did so on the basis of agreements such as the one mentioned in article 54(3)(e) of the *Rome Statute*, and that when the Trial Chamber decided to release Thomas Lubanga unconditionally, the Prosecution had not yet

received authorisation from the United Nations to lift the confidentiality and to disclose the exculpatory material to the Defence.

14. As matters now stand, the situation that led to the unconditional release of Thomas Lubanga has significantly changed.

Regarding the exculpatory documents under article 54(3)(e), **the Prosecutor received authorisation to lift the seal of confidentiality and disclose a number of these documents to the Defence. There has therefore been a development in the situation.** These documents must be disclosed to the Defence as soon as practicable to satisfy the requirements set forth in article 67(2) of the Statute.

15. Consequently, there is **hope that the proceedings will be resumed and that a trial will be resumed**, and there is no reason for an unconditional release in the current circumstances.

16. It should also be added that the accused's Defence should not only expect exculpatory material from the Prosecutor; it should also seek to gather its own exculpatory material to secure its client's release from detention, because it has been proved that Thomas Lubanga's Defence has received sufficient financial resources to properly conduct investigations for the purpose of obtaining exculpatory materials for its client and effectively contribute to the establishment of the truth through a fair trial, to which it is also expected to contribute.

17. **The personal interest of Victim a/0105/06** in seeing the Trial Chamber's decision on the release of Thomas Lubanga set aside derives from the fact that his release would **discourage** the victim, who might well think that although the substantive issues were not analysed, the accused has easily obtained release on procedural grounds, which would mean that **the serious character of the offence might be diluted**, and the crime of enlistment and conscription of children and their

active participation in an armed group might be **considered minor offences**, whereas this is not at all the case.

18. Should the accused appear as a free man, **the impact of serious punishment for this crime might not act as a deterrent on other warlords who continue to use child soldiers**. This situation will necessarily discourage a/0105/06 and might lead the victim to fail to understand or consider enlistment as constituting a serious offence. A/0105/06 might **feel remorse or regret**, whereas in approaching the Court, the victim considered such a move to be a noble act designed to discourage militia members from continuing to enlist child soldiers.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER

- **To set aside the decision by the Trial Chamber to grant unconditional release to Thomas Lubanga; and**
- **To keep him in detention especially as the situation that led to his unconditional release by the Trial Chamber has since changed.**

And justice shall be done.

[signed]

Ms Carine Bapita Buyangandu

Legal Representative of Victim a/0105/06

Dated this 12 August 2008

At Kinshasa