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No. ICC-01/01-01/06

Date: 23 August 2010

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki KourulaTitle
Judge Anita UšackaTitle
Judge Daniel David Ntanda NserekoTitle
Judge Sanji Mmasenono MonagengTitle

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

Public Document

Observations on behalf of Victims a/0001/06, a/0002/06, a/0003/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09 and a/0398/09 on the Appeal Against the Decision of Trial Chamber I of 15 July Ordering the Release of the Accused

Source: Group of Victims V01

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

The Office of the Prosecutor

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**The Office of Public Counsel for
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Amicus Curiae

REGISTRY

Registrar

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Noting the oral decision of Trial Chamber I of 15 July 2010, by which it decided to release Thomas Lubanga Dyilo;¹

Noting the document in support of the appeal filed by the Prosecutor on 23 July 2010;²

Noting the Defence response of 22 July 2010.³

Noting the Appeals Chamber's decision of 117 August 2010 granting the victims leave to participate in the appeal proceedings.⁴

The views and concerns of the victims in respect of the possible release of the accused.

1. For the victims, the decision under appeal is incomprehensible, as is the decision of the previous week to stay the proceedings. In 2006, the International Criminal Court asked the DRC to surrender Thomas Lubanga Dyilo, who was being detained and prosecuted there for war crimes and crimes against humanity, which is still the case for some of his alleged accomplices. After four and a half years of proceedings, the Trial Chamber has decided to release him unconditionally, after terminating the prosecution on account of a procedural problem. It is not stated in the decision that the accused should be surrendered to the Congolese authorities, or that he should remain at the Court's disposal. Accordingly, it cannot be ruled out that he might also escape any prosecution in the DRC by finding refuge in another country, or that he might secretly return to Ituri to continue his fight there. The objective result of the Court's intervention would then be impunity without trial for a person prosecuted by his national authorities for serious war crimes. That is not what the victims of those crimes were hoping for when

¹ ICC-01/04-01/06-T-314.

² ICC-01/04-01/06-2522, hereinafter "the Prosecutor's Document".

³ ICC-01/04-01/06-2542, hereinafter "the Defence Response".

⁴ ICC-01/04-01/06-2555.

their country acceded to the Rome Statute and certainly not when they learned of the accused's surrender to the ICC.

2. The victims who have had the courage to participate in the proceedings, or even to come to The Hague to give evidence at the Prosecutor's request, have taken significant risks. Some⁵ have been threatened and physically attacked as a result of their participation in the proceedings and have been included in a protection programme. Others have agreed to have their identity disclosed to the Defence, but do not receive any protection.⁶ In light of the possible imminent release without trial of the accused, who also knows their identities and even their addresses, they fear the prospect—by no means imaginary—of acts of revenge.

The relationship between the appeals

3. In the decision of 8 July the Chamber raised *motu proprio* the issue of the accused's release, without the Defence's having submitted an application for release under article 60. It should be noted that the determining factor in the decision to release the accused was not the length of detention, but the unconditional and permanent stay of the proceedings, which the Chamber itself had ordered. The two appellate proceedings currently pending are thus undeniably interlinked.
4. However, that is not to say that the Appeals Chamber must necessarily rule on both appeals in a single judgment. Nevertheless, it would be contrary to all logic and certainly not in the interest of the proper administration of justice if the Appeals Chamber were to rule on the accused's release without considering the merits, or lack thereof, of the decision to stay the proceedings, as the Defence suggests in its Response.

⁵ Victims a/0002/06 and a/0007/08, inter alia.

⁶ This is the case for Victims a/0002/06, a/00049/06, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 and a/0149/07.

Merits of the Prosecutor's appeal

5. If the Appeals Chamber sets aside the decision to stay the proceedings and orders their resumption, the decision on release must also be set aside, given that the Trial Chamber did not consider the issue of possible release by reference to the circumstances provided for in articles 58 and 60 of the Statute.⁷ It would be impossible for the Appeals Chamber to substitute itself for the Trial Chamber by conducting this exercise itself without depriving the Prosecution of its right under article 82(b) to appeal any decision granting conditional release, and without depriving the victims of the possibility of submitting their views and concerns in relation to the conditions proposed. Moreover, the Defence is not even asking for this, since it restricts itself to requesting quite simply that the impugned Decision be upheld.

Conclusion

6. Accordingly, the victims are of the view that the accused's possible release must be contingent upon the decision to be taken on the unconditional and permanent stay of the proceedings, and that the decision to release the accused must be set aside, as must the decision to stay the proceedings.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER

To find that the appeal is admissible and has merit;

To set aside the decision of 15 July 2010;

To rule that the accused shall remain in detention, subject to a new determination by the Trial Chamber.

⁷ See the Prosecutor's second and third grounds of appeal, and Judgment 1487 of the Appeals Chamber dated 21 October 2008.

[signed]

Luc Walley, Counsel,
for the V01 team of victims

Dated this 23 August 2010

At Brussels, Belgium