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No.: ICC-01/04-01/06 OA12

Date: 18 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

**Prosecution's Consolidated Response to Observations of Participating Victims on
Appeal against "Decision on the release of Thomas Lubanga Dyilo"**

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

The Prosecution is appealing Trial Chamber I's order for the release of Thomas Lubanga Dyilo ("the Accused"), based on its earlier decision to stay the proceedings. The legal representatives filed observations regarding the personal interests of the victims they represent in the issues raised on appeal. The Prosecution concurs with many of the observations made by the victims, and hereby files its response.

Background

1. On 2 July 2008, the Trial Chamber rendered its "Decision on the release of Thomas Lubanga Dyilo" ("Decision on Release"),¹ in which it ordered the release of the Accused.
2. On 2 July 2008, the Prosecution filed a notice of appeal against the Decision on Release and urgently requested that the Appeals Chamber grant suspensive effect to that appeal, pursuant to Article 82(3).² The Appeals Chamber granted suspensive effect to this appeal on 7 July 2008.³
3. On 9 July 2008, the legal representatives of victims a/0001/06 to a/0003/06 and of victim a/0105/06 each filed applications to participate in this appeal.⁴ The Prosecution did not object to the victims' requests to participate in this appeal.⁵
4. On 10 July 2008, the Prosecution filed its Document in Support of its appeal ("Prosecution Appeal"),⁶ in which it submitted that the Trial Chamber made two errors in the Decision on Release:

¹ ICC-01/04-01/06-1418.

² ICC-01/04-01/06-1419 OA12; see also Decision on Release, para. 35.

³ ICC-01/04-01/06-1423 OA12.

⁴ ICC-01/04-01/06-1424 OA12; ICC-01/04-01/06-1425 OA12.

⁵ ICC-01/04-01/06-1442 OA12, 18 July 2008.

⁶ ICC-01/04-01/06-1429 OA12. The Prosecution refers to the more detailed procedural history set out in paras. 1-8 of the Prosecution Appeal.

- (1) The Trial Chamber erred, procedurally, by entertaining the release of the Accused, based solely on the stay of the proceedings, pending a final determination on the stay of those proceedings (“the First Ground”); and
 - (2) The Trial Chamber erred by ordering, at this stage of the proceedings, the immediate and unconditional release of the Accused (“the Second Ground”).
5. On 15 July 2008, the Defence filed its response to the Prosecution Appeal,⁷ and on 16 July 2008 the Defence responded to the applications by victims to participate in the appeal.⁸
 6. On 6 August 2008, the Appeals Chamber granted victims a/0001/06 to a/0003/06 and victim a/0105/06 the “right to participate in the present appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal”.⁹
 7. On 12 August 2008, the legal representatives of victims a/0001/06 to a/0003/06 filed the “*Observations sur l’appel du procureur contre la décision du 2 juillet 2008 ordonnant la libération de l’accusé*” (“First Victims’ Observations”).¹⁰
 8. On 13 August 2008, the Prosecution was notified of the “*Observation de la représentante légale de la victime a/0105/06 au sujet de la liberté de Thomas Lubanga Dyilo*” (“Second Victim’s Observations”).¹¹
 9. Pursuant to the decision by the Appeals Chamber,¹² the Prosecution hereby files a consolidated response to the victims’ observations.

⁷ ICC-01/04-01/06-1437 OA12.

⁸ ICC-01/04-01/06-1438 OA12, 6 August 2008.

⁹ ICC-01/04-01/06-1452 OA12.

¹⁰ ICC-01/04-01/06-1455 OA12.

¹¹ ICC-01/04-01/06-1457 OA13. The Prosecution notes that the Second Victim’s Observations have been registered in the appeal OA13, instead of the appeal OA12, to which the Second Victim’s Observations relate and in which the legal representative of victim a/0105/06 has been granted leave to submit the victim’s views and concerns. For these reasons, the Prosecution will treat the Second Victim’s Observations as having been filed in the appeal OA12. The Prosecution also notes that the Second Victims’ Observations were filed and received by the Registry on 12 August 2008, prior to the expiry of the filing deadline (see official notification form foreseen in Regulation 31).

¹² ICC-01/04-01/06-1452 OA12, p. 3.

Submissions

10. The Prosecution concurs with many of the observations made by the victims.¹³

The Prosecution agrees that the immediate and unconditional release of the Accused was disproportionate and premature in the circumstances.¹⁴ The Prosecution also agrees that if the pending appeal against the decision to stay proceedings¹⁵ succeeds, then the Decision on Release must be annulled;¹⁶ and further that even if the decision to stay the proceedings is upheld by the Appeals Chamber, this does not necessarily entail the immediate and unconditional release of the Accused, especially as the Trial Chamber, at all times, contemplated the potential for lifting the stay.¹⁷

11. The victims also note that the situation that led to the stay of the proceedings and to the release of the Accused has changed materially since the issuance by the Trial Chamber of the Decision on Release.¹⁸ The Prosecution has made a formal application to lift the stay of proceedings, and the victims observe that for these reasons there is presently hope for resumption of the proceedings.¹⁹ The Prosecution recalls that shortly after the filing of the Prosecution Appeal, and as foreshadowed in that document,²⁰ the Prosecution informed the Trial Chamber that it was in a position to provide to the Chamber for its review all of the documents, from the United Nations²¹ and from the other information providers.²² This filing also set out the procedure and alternatives contemplated by the other various information providers, which also demonstrates a significant change of the situation with respect to the documents received by the Prosecution pursuant to Article 54(3)(e) from information providers other than the United

¹³ The Prosecution in this response does not intend to address each and every submission made by the legal representatives of the victims, and does not concede or necessarily support those arguments to which it does not respond.

¹⁴ See First Victims' Observations, paras. 3, 6-7, and 20. See also Prosecution Appeal, paras. 24-32.

¹⁵ ICC-01/04-01/06-1434 OA13.

¹⁶ First Victims' Observations, para. 1.

¹⁷ First Victims' Observations, para. 2. Second Victim's Observations, paras. 14-15.

¹⁸ Second Victim's Observations, para. 14.

¹⁹ Second Victim's Observations, para. 15.

²⁰ Prosecution Appeal, footnote 44.

²¹ ICC-01/04-01/06-1431, 11 July 2008, para. 23-25.

²² ICC-01/04-01/06-1431, 11 July 2008, paras. 28, 31, 33, 36, 39, 42.

Nations.²³ On 8 August 2008, the Prosecution further informed the Trial Chamber that “out of 152 documents received from the United Nations and subject to Article 54(3)(e) confidentiality restrictions as of the filing of the application to lift the stay of proceedings on 10 July 2008, 52 can now be disclosed [to the Defence] with no redactions, 65 can be disclosed in a redacted form and 35 are still under consideration”.²⁴

12. Finally, the Prosecution notes that the decision to release the Accused was not entered pursuant to Article 60, as suggested by the victims.²⁵ In fact, Article 60 is not referred to in the Decision on Release.²⁶

Conclusion

13. The Prosecution respectfully requests that the Appeals Chamber consider the above submissions in its resolution of this appeal.



Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of August 2008
At The Hague, The Netherlands

²³ See ICC-01/04-01/06-1431, 11 July 2008, paras. 26-44.

²⁴ ICC-01/04-01/06-1454, 8 August 2008, para. 8, plus annexes. See also ICC-01/04-01/06-1451, plus annexes, 30 July 2008. With respect to one of the documents that may be disclosed with redactions, the United Nations require that the disclosure of this document to the Defence is further subject to a Defence undertaking not to divulge the content thereof, in addition to other appropriate protective measures (ICC-01/04-01/06-1454, 8 August 2008, para. 6 and annex 3, p. 2).

²⁵ See First Victims’ Observations, para. 4; Second Victim’s Observations, para. 9. See also Prosecution Appeal, para. 15, observing that “the Decision to release the Accused was not entered pursuant to Articles 60(2) and (3), 20 nor was it based on the criteria prescribed in Article 60(4).”

²⁶ In particular, the Decision on Release does not refer to Article 60 when reciting the relevant provisions (see Decision on Release, paras. 22-24). See also para. 35, referring to Rule 185. In relation to the criteria prescribed in Article 60(4), less than one month prior to the Decision on Release, the Trial Chamber held that “the Chamber does not conclude that the delays to the commencement of trial are attributable solely to the prosecution; nor is it persuaded that those delays that are attributable to the prosecution are, at this time, inexcusable. Therefore, balancing all the factors set out above, including the real possibility that the Court is likely to be unable to ensure the accused’s presence at trial if he is released and the imminent start date, the Chamber concludes it is inappropriate, on this review, to order the interim release of the accused.” (ICC-01/04-01/06-1359, 29 May 2008, para. 18).