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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 Kourula Title
Judge Anita Ušacka Title
Judge Daniel David Ntanda Nsereko Title
Judge Sanji Mmasenono Monageng Title

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Redacted Version

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 Trial Chamber I's decision of 8 July to stay the proceedings.

Source: Group V01 victims

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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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 Trial Chamber I's decision of 8 July 2010, by which it decided to stay the proceedings against Thomas Lubanga Dyilo;¹

Noting the Chamber's authorisation to the Prosecutor to appeal that decision;²

Noting the document in support of the Prosecutor's appeal dated 30 July 2010;³

Noting the Defence response of 9 August 2010.⁴

Noting the Appeal Chamber's decision of 18 August 2010 authorising the victims to participate in the appeal proceedings.⁵

The views and concerns of the victims in relation to the impugned decision

1. In the victims' view, the impugned decision is incomprehensible. In 2006, the International Criminal Court asked the DRC to surrender Thomas Lubanga Dyilo, who was detained there and being prosecuted for war crimes and crimes against humanity. The Prosecutor gave as grounds for his application for a warrant of arrest the risk of Thomas Lubanga being released by the Congolese judicial authorities, which would have meant that the international crimes of which he was accused would remain unpunished.⁶ After three years of pre-trial proceedings and one and a half years before the Trial Chamber, the latter has decided to end the trial and release the accused,⁷ for reasons that the victims find difficult to accept.
2. In effect, the Chamber found that a fair trial was no longer possible because the Prosecutor had failed to comply – within half an hour – with the order to disclose to the Defence the identity of an intermediary used by him, although the Prosecutor accepted the disclosure in principle but considered - rightly or

¹ ICC-01/04-01/06-2517-Conf and –Red, hereafter “the Decision”.

² ICC-01/04-01/06-2536, 23 July 2010, hereafter “the Prosecutor's Document”.

³ ICC-01/04-01/06-2544Red.

⁴ ICC-01/04-01/06-2550-Conf, hereafter “the Defence Response”.

⁵ ICC-01/04-01/06-2556.

⁶ ICC-01/04-01/06-06-8-Corr.

⁷ ICC-01/04-01/06-2515-Red, 8 July 2010.

wrongly - that immediate implementation thereof jeopardised that person's security.

3. The victims cannot appreciate the whys and wherefores of this debate as they do not have all the facts at their disposal. It is undeniable, however, that one of the reasons why the Chamber deemed that the identity of that intermediary could be disclosed without risk was ... the fact that the Defence already knew his name.⁸ The uninitiated cannot help but wonder, therefore, what could possibly have led the Office of the Prosecutor to refuse to make this disclosure ordered by the Chamber.⁹
4. Whatever the reason, it follows from the decision of 8 July that the most important ground for the stay of the proceedings was not the failure to disclose the intermediary's name,¹⁰ but the Chamber's impression that the Prosecutor reserved the right to ignore the Chamber's orders if he considered them to be inconsistent with his obligations under the Statute¹¹—a proposition which the Prosecutor disputes.¹² In other words, the entire problem could be summed up as a misunderstanding between two organs of the Court.
5. What concerns the victims is not the debate about the need for such disclosure within a given time-limit, but the conclusions drawn by the Chamber from the Prosecutor's refusal to disclose.
6. Proceedings before the International Criminal Court do not concern only the Prosecutor and the accused. The crimes prosecuted before this Court do not violate merely an abstract notion of "international public order". While these crimes engage the responsibility of the international community as a whole,

⁸ See Defence Response, p.10 *et seq.* [REDACTED] The Office of the Prosecutor did not deny that this was indeed the individual concerned.

⁹ Even though the victims are aware that any disclosure to the Defence can involve major risks to the security of the persons concerned. [REDACTED]

¹⁰ Decision, para. 20.

¹¹ Decision, para. 28.

¹² Prosecutor's Document, introduction.

they specifically affect the lives of thousands of individuals and the functioning of entire communities, sometimes for generations. The crimes committed in Ituri at the beginning of the decade caused the death, wounding and displacement of tens of thousands of people and uprooted the youth of an area larger than many European countries.

7. The Rome Statute fundamentally changed international justice not only by providing for the participation of victims in the proceedings, but also by giving them the possibility of obtaining reparation. Victims who have thus put their trust in the Court by asking to participate in the proceedings, in some cases by agreeing to testify or to give information to the Office of the Prosecutor, have taken significant risks. For over four years, these victims have been living in a situation of uncertainty and insecurity. Some of them¹³ have been threatened and physically assaulted because of their participation in the proceedings.
8. If the Decision of 8 July were confirmed, all this effort and suffering would have been in vain. The crimes committed would not only be left unpunished, they would not even be tried. After four years' participation in the proceedings, the victims would never have the opportunity to expose the harm they have suffered, and their applications for reparation would become moot. Furthermore, even the accused would lose the opportunity to convince the Court, public opinion and the victims of his innocence, since a substantive debate on the charges would never take place. To the victims, this is hardly consistent with the founding objectives of the ICC.
9. This stay in proceedings, like that of 2008, was widely celebrated as a victory by the accused's sympathisers, and wrongly interpreted as proof of the accused's innocence. For the victims, this meant further psychological suffering and victimisation.

¹³ In particular victims a/0002/06 and a/0007/08.

The requirements of a fair trial and proportionality

10. The victims, like the Defence and the Prosecutor, are also entitled to a fair trial.¹⁴ Hence, in order to assess the fairness of a trial, the interests of all the participants must be taken into account.¹⁵ The European Court of Human Rights has often pointed out that the fairness of a trial cannot be judged merely on the basis of a violation of the rights of the Defence, but can only be assessed by taking into consideration the proceedings as a whole, including appeal proceedings.¹⁶ The Chamber of course has the right and the duty to take appropriate action on any violation of a party's rights by another party, but it must consider whether the measures envisaged are proportionate. A final and unconditional stay of the proceedings is an extreme measure, which risks creating violations of the fundamental rights of other persons, in particular the victims' right of access to justice.

11. The notion of abuse of process is one that implies an extremely serious violation of the rights of the Defence by the Prosecution. Not all wrongful conduct by the Prosecution constitutes an abuse of process, and not all abuses of process necessarily entail the termination of the proceedings against the accused.

12. The Appeals Chamber considered that it was justified in ordering a conditional and temporary stay of the proceedings where "a large number of potentially exculpatory information or information material to the preparation of the defence had neither been disclosed to the accused person nor to the Chamber".¹⁷ On 8 July, the situation was very different, in that it was a matter of the *temporary* non-disclosure of the identity of just one of the Office of the

¹⁴ ECHR (Grand Chamber) no. 47287/99, 12 February 2004 (*Perez v. France*) and no. 54789/00, 10 November 2005 (*Bocos-Cuesta v. The Netherlands*). <http://www.echr.coe.int>.

¹⁵ Ibidem, *Bocos-Cuesta v. The Netherlands*, para. 69. ... "principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims..".

¹⁶ Ibidem, *Bocos-Cuesata v. The Netherlands*, para. 67; see also *Barbera et al. v. Spain*, 6 December 1988.

¹⁷ ICC-01/04-01/06-1486, para. 75.

Prosecutor's seven intermediaries, whose identity was moreover already known (at least for the most part) to the Chamber and even to the Defence. However, the Chamber did not order a conditional, temporary stay pending disclosure as in 2008, but an unconditional, final stay.¹⁸

13. The Decision itself acknowledges that the non-disclosure of the intermediary's identity did not in itself justify the stay of proceedings, and that the Chamber could have taken it into account as part of the general debate on the Defence allegation that the Prosecutor had committed an abuse of process by knowingly using false testimony.¹⁹ The Legal Representatives of Victims respectfully submit that the Chamber could even have taken it into account in its overall assessment of the evidence, if appropriate by discarding certain testimony influenced by an intermediary who remained anonymous. Moreover, if the Appeals Chamber sets aside the decision of 8 July, the debate on the alleged abuses of process may well be reopened.

14. Lastly, the main motivation for staying the proceedings,²⁰ namely the impossibility of continuing a trial with a Prosecution that purportedly wishes to refuse to implement any order of the Chamber that, in its view, conflicts with what it interprets as its other obligations,²¹ would imply - if we took the Chamber's and the Defence's reasoning to its logical conclusion²² - that not only this trial, but all trials before this Court, would become impossible, so long as this difference between Prosecution and judges on the interpretation of the Rome Statute remained unresolved.²³ Conversely, it also means that, when

¹⁸ Furthermore, the incident occurred a few days before the judicial recess, and during that recess the situation might have changed.

¹⁹ Decision, para. 20.

²⁰ Decision, para. 21; "The second problem, however, reveals a more profound and enduring concern. The Prosecutor, by his refusal to implement the orders of the Chamber and in the filings set out above, has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings...."

²¹ Decision, para.31 "more generally, because of the Prosecutor's clearly evinced intention not to implement the Chambers orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecutions' other obligations".

²² Defence response, paras. 69 to 71.

²³ Decision para. 27 "No criminal court can operate on the basis that whenever it makes an order in a particular case, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his

this difference between the Chamber and the Prosecutor is decided in the forthcoming judgment, the alleged need to stay the proceedings, as argued by the Trial Chamber, would cease to exist.

Conclusion

15. The victims accordingly consider that an unconditional and final stay of the entire proceedings as ruled by the Trial Chamber was disproportionate, premature and unjustified.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER

To declare the appeal well-founded,

To set aside the decision of 8 July 2010,

To order the proceedings to be continued.

[signed]

Luc Walley, Counsel,
For the team for the V01 victims

Dated this 23 August 2010

At Brussels, Belgium.

obligations". The Defence uses the following wording in its Response to the Prosecutor's appeal against the release of the accused (ICC-01/04-01/06-2542-tENG "23. This position of principle is neither temporary nor dependent upon circumstances, but on the contrary is of a general and permanent nature [....] Thus, by its very nature, this constitutes a permanent obstacle to the continuation of the trial".