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

Date: **24 August 2010**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula, Judge
Judge Anita Ušacka, Judge
Judge Daniel David Ntanda Nsereko, Judge
Judge Sanji Mmasenono Monageng, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Thomas Lubanga Dyilo***

Public Document

**Observations of the Legal Representatives of Victim a/0051/06 on the Appeal
against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 and
the Appeal against the Decision to Release the Accused of 15 July 2010**

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

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Detention Section

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Other

Observations of the Legal Representatives of Victim a/0051/06 on the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 (ICC-01/04-01/06-2517-Conf) and the Appeal against the Decision to Release the Accused of 15 July 2010 (ICC-01/04-01/06-T-314)

- a. Considering that, on 31 May 2010, the Trial Chamber rendered a decision on intermediaries and the measures to be taken in relation to Intermediary 143;¹
- b. Considering that, on 3 June 2010, a discussion took place between a representative of the Office of the Prosecutor and the Victims and Witnesses Unit on the protective measures for Witness T 143;
- c. Considering that, on 13 June 2010, the Victims and Witnesses Unit promised to implement those protective measures without any reservations being expressed at that time by Intermediary 143;
- d. Considering that, on 21 June 2010, Intermediary 143 declared that he was satisfied with the measures taken for his protection by the Victims and Witnesses Unit;
- e. Considering that, on 6 July 2010, the Chamber was informed that Intermediary 143 was calling into question the measures taken for his security and was now seeking full protection for himself and his family;²
- f. Considering that, on 7 July 2010,³ an exchange took place between the Office of the Prosecutor and the Defence on ways of resolving that difficulty, and on the Prosecutor's announcement of his intention to appeal the order to publicise in part information relating to Intermediary 143;
- g. Considering that, on 8 July 2010, the Trial Chamber found the entire proceedings by the Office of the Prosecutor to be an abuse of the Court's process, ordered the stay of the proceedings and consequently, on 15 July 2010, granted the unconditional release of the accused, Mr Thomas Lubanga Dyilo;
- h. Considering that, on 16 July 2010, the Prosecutor appealed that decision of the Chamber and requested suspensive effect of said appeal against the release of the accused;
- i. Considering that, on 22 July 2010, the Legal Representatives of Victims a/0051/06 requested leave to participate in the proceedings before the Appeals Chamber;⁴
- j. Considering that, on 17 August 2010, the Chamber granted them leave to participate in the appellate proceedings;⁵

¹ ICC-01/04-01/06-2434.

² Transcript of hearing ICC-0104-0106-T-310-CONF-ENG ET, p. 49, lines 8 to 11.

³ Transcript of hearing ICC-0104-0106-T-311-CONF-ENG ET and ICC-0104-0106-T-312-CONF-ENG ET.

⁴ ICC-01/04-01/06-2533-Conf-tENG.

⁵ ICC-01/04-01/06-2555.

- k. Considering that, on 18 August 2010, the Appeals Chamber extended to 4.00 p.m. on Tuesday 24 August 2010 the time limit for the Legal Representatives of Victims to submit in writing their views and concerns relating to the two ongoing appeals;⁶
- l. The Legal Representatives hereby most respectfully submit to the Appeals Chamber the following observations:

I - THE STAY OF THE PROCEEDINGS FOR ABUSE OF PROCESS BEFORE THE COURT

1. The Legal Representatives of Victims note that the situation characterised as an abuse of process before the Court arose from a conflict between the Prosecutor and the Trial Chamber regarding their respective obligations as to the protection of witnesses and the requirements of ensuring a fair trial:
1. The Trial Chamber issued two orders requesting the Prosecutor to disclose the identity of Intermediary 143 to the Defence, or at the very least, to the Defence team present in the courtroom and its resource person in the DRC.
2. The Office of the Prosecutor considers that that disclosure concerns an individual who is cooperating with it, and who ought to enjoy an enhanced level of protection; and that the Prosecutor therefore needs time in order to put measures in place enabling full responsibility to be assumed for Intermediary 143 and his entire family.
3. The Prosecutor, like the Chamber, has a statutory obligation to protect the witnesses appearing before the Court (article 68(5) of the Rome Statute).
4. The Legal Representatives of Victims are not in a position to assess fully the security issues surrounding the appearance of this witness. However, the Victims and Witnesses Unit, which pursuant to article 68(4) of the Statute is the competent section of the Court to evaluate the potential risks to a witness appearing before the Court and to advise the Chamber, was in talks with the Office of the Prosecutor with a view to formulating a new proposal which would satisfy the witness.
5. The Chamber did not give the Unit enough time to put forward proposals, making it impossible at the present time to determine whether or not the delay due to the precautionary measures, which at first sight seem justified, is excessive.
6. A further matter of concern would be to know whether, in ordering the partial disclosure of information relating to the identity of the witness, the Chamber has been able to satisfy itself in regard to the security situation in the field, in light of certain observations made by some of the witnesses who came to testify to the Court and have been threatened on returning to their country, the DRC.
7. The Legal Representatives of Victims note that the obligation of protection incumbent on both the Office of the Prosecutor and the Chamber poses serious problems of assessment, depending on whether the situation is viewed from the stance of the Prosecution dealing with an individual who is cooperating with it, or whether the main concern is to act to ensure a fair trial for the accused.

⁶ ICC-01/04-01/06-2556.

8. The Defence has made it clear that it is anxious to obtain the information relating to the identity of Intermediary 143 in order to enable it to conduct a full examination of Witness 0321, and has put forward several proposals to this effect. The Defence finally suggested postponing its examination of Witness 0321 until such time as it had obtained the information it had been seeking on Intermediary 143.
9. In any event, there was bound to be an adjournment of a few days to allow the Prosecution and the Victims and Witnesses Unit to take measures to meet Intermediary 143's concerns and ensure that the Defence had the opportunity to examine Witness 0321 without being interrupted once it had received the documents relating to Intermediary 143.
10. To the question: "Can consideration of these important concerns of the Prosecution be regarded as an abuse of process?" the Legal Representatives of Victims believe themselves justified in responding in the negative.
11. According to the Representatives' analysis of the facts, there were, however, real difficulties of assessment as between two organs who are both empowered by the Statute to provide protection for witnesses, and concerned to determine the extent to which such protection should be put in place in light of the witness's concerns in relation to the environment in which he lives.
12. The approach to justice advocated and practised by the Court should not suffer from this *de facto* antagonism, which is not necessarily intentional or deliberate. In effect, to continue with the approach taken by the Trial Chamber would lead to a denial of justice, from which the accused himself would not emerge with honour, since he would not have been acquitted, and would leave the victims with no recourse to expose the harm they have suffered and seek reparation for it. The very reasons for which the Court was created would be called into question and the right granted to the victims to participate in the trial would lose all meaning, causing them still further harm, on top of all the suffering they have already endured as a result of the events which led to Mr Thomas Lubanga Dyilo being charged.

II - THE UNCONDITIONAL RELEASE OF MR THOMAS LUBANGA DYILO

13. In its decision of 8 July 2010,⁷ the Trial Chamber found the entire proceedings initiated by the Office of the Prosecutor in relation to the position of Witness 143 to be an abuse of the process of this Court and granted the unconditional release of Mr Thomas Lubanga.
14. The Chamber's justification for the unconditional release of the accused is the fact that it is unable to envisage when the trial might resume and that the accused has already spent a long period of time in pre-trial detention.
15. The legal basis for release, with or without conditions, is article 60 of the Statute, which must be read in conjunction with article 58(1).

⁷ ICC-01/04-01/06-2517-Conf.

16. Unfortunately, it appears that the decision taken by the Chamber does not comply with the requirements of article 60 of the Rome Statute, and still less with those of article 58.
17. Thus, in its decision of 8 July 2010, the Chamber did not address the grounds set out in articles 60 and 58(1) of the Statute for granting release, whether with or without conditions.
18. The only ground advanced by the Trial Chamber for granting the unconditional release of Mr Lubanga was simply that the proceedings had been stayed. This is not a sufficient reason to grant the release of an accused person.
19. Thus the Chamber must also consider what the consequences of releasing the accused would be if the trial were to resume; would the Chamber take some other measure to return the accused to custody, or, at the very least, to secure his presence?
20. The crimes with which the accused is charged are very serious, and the situation has not changed; in its decision to release the accused unconditionally, the Trial Chamber provides no guarantee that he will appear in future, having at no time specified where the accused would stay following his release, or giving any indication of a country agreeing to receive him.
21. Furthermore, the fact that the Trial Chamber envisaged that the hearings would probably resume should have led it to include a time limit in its decision to release the accused.
22. The standard applied by the Appeals Chamber in its decision of 21 October 2008⁸ on the provisional release of TLD is not the same as that applied in the decision to release him rendered by the Trial Chamber on 8 July 2010, and now under appeal.

Having regard to all of the foregoing, the Legal Representatives respectfully request the Appeals Chamber:

FOR THESE REASONS

- To admit the present observations on the Prosecutor's appeal against the Decision to stay proceedings for abuse of process of 8 July 2010 and against the Decision to release the accused of 15 July 2010 (ICC-01/04-01/06-T-314);
- To find them well-founded;
- To rule that the Trial Chamber's decision to stay the trial of Mr Lubanga for abuse of process is wrong in law, and accordingly to reverse the decision and order the resumption/continuation of the trial proceedings;
- To rule that the Trial Chamber's decision to release Mr Thomas Lubanga unconditionally is likewise without merit, and accordingly to reverse the decision and order that the accused remain in custody not merely as the result of the suspensive effect of the appeals currently before the present Chamber, which will come to an end as soon as the Chamber has ruled on these matters.

⁸ ICC-01/04-01/06-1487.

Without prejudice.

AND JUSTICE SHALL BE DONE.

[signed]
Carine Bapita Buyangandu

[signed]
Paul Kabongo Tshibangu

Legal Representatives of Victims

Dated this 24 August 2010
At Kinshasa, DRC