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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Redacted Version

**Urgent Prosecution's Application for Leave to Appeal the Trial Chamber I's
decision of 8 July 2010 staying the proceedings for abuse of process**

Source: Office of the Prosecutor

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Trial Chamber II

Introduction

1. On 8 July 2010 Trial Chamber I ordered a stay of the proceedings because of the Prosecution's "non-compliance" with the Chamber's orders of 7 July 2010 and its "clearly evinced intention not to implement the Chamber's orders". The Chamber held that the fair trial of the accused is no longer possible in these circumstances.¹
2. The case presents a conflict between the level of risk acceptable for the Chamber and for the Prosecution. It presents the question whether the Prosecution dismissed the authority of the Chamber by using legal remedies to insist on the implementation of authorized protective measures before disclosing the identity of Prosecution Intermediary 143 and, after, to properly evaluate the risk of a limited disclosure. It also presents the question whether the Trial Chamber correctly determined that the Prosecution's conduct rendered it impossible for the Accused to receive a fair trial.
3. The Chamber, to assist the Accused's affirmative abuse of process Defence, ordered the disclosure of the identity of 143. The intermediary is not a witness, and no allegations of his wrongdoing have ever been made. Because of the recognized risk to the intermediary and his family, the Chamber determined that the intermediary's identity would not be disclosed to the Defence before the substantial protective measures recommended by the VWU were implemented. The Trial Chamber denied the Prosecution's request to appeal that decision reiterating the protective measures will be established before disclosure.
4. However, through no fault of the Prosecution or the VWU, implementation of the protective measures was delayed. In order to avoid that an estimated two-week delay in the implementation of the protection measures would affect the Defence's cross-examination of a witness, on 6 and 7 July the Chamber varied its decision and ordered to immediately disclose the person's identity "under strict embargo" to the Defence, its resource person and to the Accused. The Chamber determined that this limited dissemination posed no increase of risk.
5. The Chamber disregarded the Prosecution's objection that limited disclosure continued to pose a risk to 143's security, and specifically its reservations concerning past activities of the Defence resource person. The Chamber determined that by seeking reconsideration and then a variation of the time limit the Prosecution refused to respect its orders. Finding the Prosecution's objections to be factually unjustified and its reluctance to disclose the identity of the intermediary to constitute non-compliance with the Chamber's order, it ordered the trial to be stayed "[w]hilst these circumstances endure".²

¹ ICC-01/04-01/06-2517-Red (hereinafter, the "Decision").

² Decision, para. 31.

6. The Prosecution hereby seeks leave to appeal three closely intertwined issues that arise out of the Decision: (a) whether the Prosecution refused to implement the orders of the Trial Chamber to disclose the identity of 143 (“First Issue”); (b) whether a stay of proceedings, on the ground that it is now “impossible to piece together the consistent elements of a fair trial”, was warranted (“Second Issue”); and (c) the proper distribution of protective functions within the Rome Statute, in particular the existence and scope of the protective duties given to the Prosecution under Article 68 (“Third Issue”). All issues meet the statutory criteria set out in Article 82(1)(d) for interlocutory appeal – they significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution may materially advance the proceedings.
7. In respect of the First issue, the Prosecution did not refuse to comply with any order from the Chamber; rather, the Prosecution exercised its right to make applications contemplated by the Court’s legal texts or entertained by the Chamber. The Prosecution resorted to available legal avenues in order to prevent harm to a person at risk due to his interaction with the Court, while respecting at all times the Chamber’s authority.
8. As to the Second issue, the Prosecution submits that an indefinite stay of proceedings is an unwarranted and disproportionate response in the circumstances of this case. Implementing protective measures prior to disclosure would have entailed an estimated delay of two weeks. VWU had been in conversations with Intermediary 143 and a final decision was expected by Friday, 9 July 2010. In case of acceptance, the necessary protective measures would have been implemented on 16 July. The Chamber found that this was a “substantial” delay in putting in place necessary protective measures, and that this delay would interrupt the questioning by the Defence of a particular witness. Moreover, the harm perceived by the Chamber could have been redressed by measures that would not impact unfairly and disproportionately on the interests of the affected victims and their communities.
9. Finally, on the Third Issue, the Prosecution submits that the Trial Chamber erred in its interpretation of the distribution of functions and duties of protection within the Court, in particular in its interpretation of the Prosecution’s duties of protection under the Statute. The Prosecution recognizes at all times that the Chamber has its own duty of protection and full authority to guarantee a fair trial, and that VWU is the unit that advises all organs of the Court on protection and thereafter implements certain protective measures. But Article 68(1) expressly states that the Prosecution “shall” take protective measures “particularly during the investigation and prosecution of such crimes”. In accordance with this duty, when there are discrepancies between the Prosecution’s standards of protection and those used by the Chamber, the Prosecution should seek all possible avenues to

present its views and comply with judicial orders, as it did in this case. Ultimately the Prosecution's duty can force it to decide not to provide the information in possession of the Prosecution and to accept appropriate consequences, such as inferences as to the existence of a fact, instead.³

Statement of Facts

Intermediary 143

10. In order to conduct investigations during ongoing conflict in a confidential manner the Prosecution relied on intermediaries to facilitate contact with some of its trial witnesses. Absent indications of wrongdoing or other compelling circumstances, there is no reason to disclose their identities.
11. Intermediary 143, one such Prosecution intermediary, [REDACTED]. He is a professional person who assisted the Prosecution by liaising with some of the witnesses and with other persons who did not testify for the Prosecution, but whose evidence was nonetheless disclosed to the Defence.
12. On 27 January 2010, during the opening of its case, the Defence for the first time gave notice that it would pursue the affirmative Defence of prosecutorial abuse of process, based on its claim that Prosecution witnesses lied at trial and that intermediaries assisted in the fabrication of their false testimony.⁴ [REDACTED].⁵ There were no allegations that he committed misconduct; instead his identity was ordered to be disclosed because some Defence witnesses contradicted aspects of testimony of prosecution witnesses whose cooperation he had facilitated.
13. Because of concerns for his safety, and noting that if it cannot protect the confidentiality of its sources it will be unable to conduct investigations at all, the Prosecution proposed alternatives to the disclosure of this intermediary's identity. The Chamber rejected the proposals and on 12 May 2010 ordered the Prosecution to disclose his identity so that the Defence could investigate his activities.⁶ Because both the Prosecution and the VWU had agreed that disclosure of Intermediary 143's identity would pose substantial risks for him and his family, the Chamber required that disclosure would not occur before the protective measures deemed essential by the VWU were implemented.⁷

³ [REDACTED].

⁴ ICC-01/04-01/06-T-236-CONF-ENG ET, p. 20 ln. 19 – p. 24 ln.5.

⁵ ICC-01/04-01/06-T-261-Conf-ENG, p.34 ln.16 – p.35 ln.13.

⁶ ICC-01/04-01/06-2434-Conf-Exp. A confidential redacted version and a public redacted version was filed subsequently: ICC-01/04-01/06-2434-Conf-red; ICC-01/04-01/06-2434-Red2.

⁷ ICC-01/04-01/06-2434-Red2, paras. 143 and 150(i).

14. The Prosecution sought leave to appeal the disclosure decision. On 2 June 2010 the Chamber denied the Prosecution's application for leave to appeal,⁸ expressly reiterating that disclosure would be undertaken only after appropriate protective measures were in place.⁹

The Events and Order of 6 July 2010

15. The protective measures were due to be implemented in "early July".¹⁰ On 6 July 2010, after receiving information from the VWU, the Prosecution informed the Court that the protective measures for 143 were not yet in place.¹¹ The Chamber proposed that the cross-examination of witness 321, another intermediary currently testifying, be exhausted on matters unrelated to Intermediary 143 and that cross-examination regarding the latter points be deferred until the protective measures were in place.
16. The Defence wanted immediate disclosure so that W-321 could be asked on cross-examination specifically about 143. As a consequence, the Defence proposed that the Chamber direct the Prosecution to disclose the intermediary's identity only to Defence lawyers, the accused, and the Defence Resource Person, with the understanding that no investigations would be undertaken with this information.
17. The Prosecution objected that disclosure should not take in the absence of full protective measures. Overruling that objection, the Chamber determined that the "substantial" delays in implementing protection for Intermediary 143 and his family – attributed to concerns by the intermediary himself about the modalities of protection -- affected the Defence ability to conduct its cross-examination, and particularly noted the considerable delays that have already been experienced in relation to this trial.¹² The Chamber then ordered the Prosecution to immediately disclose the identity to members of the Defence team, including its resource person, for the purpose of questioning the current witness. It stressed that there is "an absolute embargo on any dissemination of this information to anyone else, and no investigative steps should be taken that are based on this information in any way".¹³

⁸ ICC-01/04-01/06-2463.

⁹ ICC-01/04-01/06-2463, para. 30, "Accordingly, the suggested risk that the Decision will deter intermediaries from assisting in other cases is not a factor properly to be taken into account; similarly, whilst a court will strive not to treat individuals who are affected by the work of the Court unfairly (*as demonstrated by the Chamber's insistence that the necessary protective measures are implemented prior to disclosure of intermediary 143's identity*) [...]" (emphasis added).

¹⁰ Decision, para 5.

¹¹ T.310, page 56 to 58,

¹² T.310, page 64, lines 5-8.

¹³ T.310, page 64, lines 15-25 to page 65, lines 1-5.

18. The Prosecution stated that it would seek leave to appeal the decision and applied to suspend the order of disclosure so as not to render moot the appeal application.¹⁴ The Chamber agreed to suspend the order overnight.

The Events and Order of 7 July 2010

19. On 7 July, the Chamber stated that it “saw some force” in the application to suspend the order until the leave to appeal can be resolved.¹⁵ It proposed that the Defence continue with the witness and examine him on issues unrelated to Intermediary 143; once leave to appeal was resolved or the security measures were implemented, the Defence would recall the witness to The Hague or continue questioning him via video-link. The Prosecution agreed. The Defence objected, claiming that if W-321 were to return to the DRC before completing his testimony he could adjust his evidence in the interim.¹⁶
20. In the face of the Defence’s objections, the Chamber abandoned its compromise proposal and on 7 July 2010 it ordered disclosure to the Defence within half an hour. The Chamber determined that such disclosure did not create “any potential increased risk to 143.”¹⁷
21. The Prosecution did not disclose within the 30 minute deadline. Approximately two hours later, the Prosecution sought leave to make an oral application for reconsideration.
22. In a hearing that afternoon, the Chamber agreed to entertain the application for reconsideration.¹⁸ The Prosecution underscored its objection to the disclosure unless full protective measures were in place; even a limited disclosure, it urged, created a risk. It explained that Article 68 conferred on the Prosecution as well as the Court the obligation to take measures to protect persons during the investigation and prosecution. It attempted to express its reservations concerning disclosure particularly to the Defence Resource Person, against whom unspecified allegations had previously been made.¹⁹ With respect to the particular situation at hand, it also urged that the benefit of immediate disclosure was insubstantial (and thus did not outweigh the risk) because it would not expedite the trial or diminish the probability that the current witness would have to be recalled once the embargo on investigations was lifted.²⁰ The Prosecution also underscored that, to respect its duty to not disclose unless sufficient protective measures were in place, it would be

¹⁴ T.310, page 89.

¹⁵ T.311, page 2.

¹⁶ T.311, pages 3 to 9.

¹⁷ T. 311, page 13, lines 17-18.

¹⁸ T.312, page 3, line 23.

¹⁹ T-312- p 9, line 22 – p. 12 line 17.

²⁰ T 312, page 12, lines 11-17.

willing to withdraw cases if necessary rather than jeopardize the security of persons who cooperated with the Prosecution.²¹

23. After brief deliberation, the Trial Chamber reiterated its conclusion that “the limited disclosure” of 143’s identity effected “no deterioration in the security position of that individual”²² and directed the Prosecution to disclose his identity and other materials related to the intermediary to the Defence within the next 50 minutes (by 16:30).²³
24. Before expiration of the deadline, the Prosecution informed the Chamber of its intent to seek a variation of the time-limit. At 16:41 it filed an “Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, seeking additional time to enable consultations with VWU regarding whether, and what, interim measures would be required prior to disclosure.²⁴ The Prosecution then learnt that the Chamber had not informed VWU of the immediate disclosure order; accordingly, VWU had not notified Intermediary 143, assessed whether disclosure without protective measures in place posed a risk and, if so, what protective measures could be implemented on an urgent basis.²⁵
25. Based on this, early in the evening of 7 July the Prosecution filed supplementary information to its request for variation of the time-limit or stay.²⁶ It informed the Chamber that it had been advised by the VWU that, according to its assessment, the limitation on disclosure of the identity of Intermediary 143 did not change its previous assessment regarding the security situation of the intermediary and further, that it in its view interim protective measures had to be implemented before disclosure took place. The Prosecution also reiterated that it had an independent statutory obligation to protect persons put at risk on account of their interaction with the Prosecution. It explained that it was attempting to resolve its dilemma of being ordered to provide information that, if it complied, would entail a violation of its separate statutory obligation by subjecting the person to a foreseeable risk. It informed the Chamber that it would accept adverse consequences in its litigation rather than leave unprotected a person exposed to risk on account of his interaction with the Prosecution. The Prosecution made explicit that this was not a challenge to the authority of the Chamber, but was instead a reflection of the Prosecution’s own legal duty under the Statute.

²¹ T 312, page 8.

²² T. 312, page 20, lines 11-18.

²³ T. 312, pages 21-22.

²⁴ ICC-01/04-01/06-2515.

²⁵ In its decision entered the next day, the Chamber explained its conclusion “that it was unnecessary to seek a further report from the VWU” because it ordered disclosure to just the Defence team and its resource person and it determined that “there are no enhanced security risks” caused by that limited disclosure. Decision, para. 19.

²⁶ ICC-01/04-01/06-2516.

The Impugned Decision

26. On 8 July 2010, the Chamber issued its “Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”.²⁷
27. The Chamber interpreted the Prosecution’s actions as an “unequivocal refusal to implement the repeated orders of this Chamber to disclose the identity of 143 (in highly restricted circumstances, determined by the Chamber)”.²⁸ According to the Chamber, the Prosecutor claims “autonomy to comply with, or disregard, the orders of the Chamber”; he “does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of the trial proceedings, namely the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the prosecution”.²⁹ It concluded:
- [T]he Prosecutor has elected to act unilaterally in the present circumstances, and he declines to be “checked” by the Chamber. In these overall circumstances, it is necessary to stay these proceedings as an abuse of the process of the Court because of the material non-compliance with the Chamber’s orders of 7 July 2010, and more generally, because of the Prosecutor’s clearly evinced intention not to implement the Chamber’s orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution’s other obligations. Whilst these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done, not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework.³⁰
28. Accordingly, it directed that the proceedings be stayed indefinitely, relying on the Appeals Chamber’s determination that a Trial Chamber is obliged to stay proceedings because “it is impossible to piece together the constituent elements of a fair trial.”³¹

The issues for which leave to appeal is sought

29. Pursuant to Article 82(1)(d), the Prosecution hereby seeks leave to appeal three issues arising out of the Decision:

²⁷ Decision, see note 1, above. .

²⁸ Decision, para. 20.

²⁹ Decision, para. 21; see also para. 24.

³⁰ Decision, para. 31.

³¹ Decision, para. 30.

- (a) Whether the Prosecution refused to implement the orders of the Trial Chamber to disclose the identity of 143 (“First Issue”).
- (b) Whether a stay of proceedings, on the ground that it is now “impossible to piece together the constituent elements of a fair trial” was warranted (“Second Issue”).
- (c) The proper distribution of protective functions within the Rome Statute, in particular the existence and scope of the protective duties given to the Prosecution under Article 68 (“Third Issue”).

30. The First and Third Issues, and the conclusions which the Chamber drew therefrom, were identified by the Chamber as “two concurrent but essentially different problems”³² which formed the basis for the Chamber’s order to stay the proceedings (the Second Issue).³³ That a stay of proceedings was warranted was the ultimate determination in the Decision. Each of these questions is therefore plainly matters which were “essential for the determination of the matters arising in the judicial cause under examination”,³⁴ and thus form issues for the purposes of leave to appeal under the Appeals Chamber’s approach.
31. Each issue arises from the plain terms of the Decision: with respect to the First Issue, the Trial Chamber ruled that “the Prosecution’s unequivocal refusal to implement the repeated orders of this Chamber to disclose the identity of 143” was “the immediate cause of the present hiatus”.³⁵ If and when leave to appeal is granted, the Prosecution will demonstrate that it did not refuse to implement the Chamber’s orders, but instead took legitimate procedural steps to seek a stay of the order pending an application for leave to appeal, first, requesting a reconsideration by the same Chamber, and finally, ensuring that necessary protective measures were in place before disclosure was effected.
32. With respect to the Second Issue, the Trial Chamber held that “[i]n these overall circumstances, it is necessary to stay these proceedings as an abuse of the process of the Court”.³⁶ Whether the order was necessary thus also directly arises from the Decision. If leave is granted then the Prosecution will argue that a stay of proceedings for abuse of process was entirely disproportionate in the present circumstances. Implementing protective measures prior to disclosure would have entailed an estimated delay of less than two weeks. VWU had been in conversations with Intermediary 143 and a final decision was expected by Friday, 9 July 2010. In case of acceptance, the necessary protective measures would have been implemented on 16 July.

³² Decision, para. 20.

³³ Decision, para. 31.

³⁴ ICC-01/04-168 OA3, para. 9.

³⁵ Decision, para. 20. The Chamber also referred to the “material non-compliance with the Chamber’s orders of 7 July 2010” - Decision, para. 31.

³⁶ Decision, paras. 30 and 31.

33. In addition, the Prosecution notes that it was endeavouring through procedural avenues provided in the Court's basic documents and the practice of the Court to avoid a situation in which it could breach its statutory obligations of protection and put a person at risk. But assuming that the Chamber considered the Prosecution's conduct to be defiant and not excusable, a remedy as exceptional as a stay of proceedings can only be warranted as a measure of last resort and when a fair trial is impossible.
34. In this context, the fact that the Second Issue arises and impacts on the proceedings is in no way altered by the fact that the Prosecution had requested, in the alternative to the extension of time, a confined stay of proceedings on a different basis and for a different purpose, namely to facilitate "consultations and implementation of the necessary protective measures, in the interests of the overall safety and well-being of intermediary 143."³⁷
35. As to the Third Issue, the Trial Chamber made a series of rulings regarding the scope of the Prosecution's independent duties of protection and their relationship with the Chamber's authority, which it considered to be "a more profound and enduring concern"³⁸ -- that the Prosecution appropriated for itself a right to protect persons, which according to the Chamber infringed its judicial power to determine protection as part of its authority to ensure that the Accused has a fair trial.
36. If leave is granted, the Prosecution will demonstrate that under the Statute there is an adequate distribution of responsibilities between organs of the Court, which includes the Prosecution's independent duty of protection. The Prosecution recognizes at all times that the Chamber has its own duty of protection and full authority to guarantee a fair trial, and that VWU is the unit that advises all organs of the Court on protection and thereafter implements certain protective measures. But Article 68(1) expressly states that the Prosecution "shall" take protective measures "particularly during the investigation and prosecution of such crimes".

The Issues fulfil the criteria for leave to appeal

37. Each of these issues meet the criteria for leave to appeal under Article 82(1)(d): they affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and their immediate resolution by the Appeals Chamber will materially advance the proceedings.

³⁷ ICC-01/04-01/06-2515, para. 2.

³⁸ Decision, para. 21; see generally paras. 21-24, 27-29.

38. In addition to the impact that the First and Third Issues have independently on the proceedings, the cumulative impact of the three issues together warrants granting leave to appeal. The Chamber held that

“it is necessary to stay these proceedings as an abuse of the process of the Court because of the material non-compliance with the Chamber's orders of 7 July 2010 [i.e. the first issue], and more generally, because of the Prosecutor's clearly evinced intention not to implement the Chamber's orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution's other obligations [i.e. the third issue].”³⁹

39. Given that the First and Third Issues formed the basis for ordering the stay of proceedings (the Second Issue), the three issues are thus in the language of the Appeals Chamber “inextricably linked”.⁴⁰ Their cumulative result has been the imposition of a stay of all proceedings in this case as a consequence of abuse of process; and the impact which the issues have together on the fair and expeditious conduct of the proceedings and on the outcome of the trial, and the necessity for their immediate resolution by the Appeals Chamber if the proceedings are to advance, should thus be beyond dispute. Indeed, this Trial Chamber has already recognized that a stay of proceedings for abuse of process, and the “interrelated” reasons which purportedly justified that stay, satisfy the requirements for leave to appeal.⁴¹

40. In addition to the cumulative impact of these issues leading to the stay, the other issues also individually impact on the conduct of the proceedings. The impact of these issues will be felt even if the stay is subsequently lifted, in particular the Third Issue due to its systemic nature.⁴²

The Issues affect the fair conduct of the proceedings

41. This Trial Chamber has already recognized that “interrelated” issues leading to the conclusion that it is necessary to impose a stay of proceedings to ensure a fair trial (the conclusion that it arrived at in this case)⁴³ impacts on the fair conduct of the proceedings.⁴⁴ Indeed, the entire rationale for its determination that a stay is necessary

³⁹ Decision, para. 31.

⁴⁰ ICC-01/04-01/06-1486 OA13, para. 17.

⁴¹ ICC-01/04-01/06-1417.

⁴² This can also apply to the First Issue, to the extent that it may form the basis for actions by the Chamber under Article 71.

⁴³ Decision, paras. 30-31: “The Appeals Chamber has endorsed the Trial Chamber's right – indeed obligation – to stay the proceedings if they constitute an abuse of the process, because ‘it is impossible to piece together the constituent elements of a fair trial’ [...] whilst these circumstances endure, the fair trial of the accused is no longer possible”.

⁴⁴ See ICC-01/04-01/06-1417, para. 31..

was that the Prosecution's purported refusal to implement a judicial order and its purported appropriation of power to itself means that a fair trial is no longer possible. Those issues thus necessarily impact on the fair conduct of the proceedings.

42. The Second Issue, regarding the appropriateness of ordering a stay of the proceedings, impacts on the Prosecution's ability to present its case at trial,⁴⁵ fulfilling its core statutory duty, and thus impacts on the fairness of the proceedings to the Prosecution.⁴⁶ In this regard, the Prosecution submits that the stay of the proceedings also impacts on the interests of other actors, such as the affected victims and their communities, and thus on the fairness of proceedings towards them.⁴⁷
43. The First Issue, in addition to the impact of the stay which was based in part upon it, also affects the Prosecution's right to make applications contemplated by the Regulations of the Court or ask that the Chamber exercise its inherent powers. An issue which affects the ability of a party to make applications, and characterizes them as a refusal to comply with court orders, affects the fairness of the proceedings to that party. In this particular instance, the unfairness towards the Prosecution is even more acute, given that as a result of its actions the Prosecution is facing a warning under Article 71 for disobeying a Chamber's order. In addition, the Chamber itself acknowledges that the First Issue affects the fairness of the proceedings against the accused, as only after this alleged refusal had been remedied could the witness "be questioned by the defence on a fair basis".⁴⁸
44. Fairness also requires that all parties, including the Prosecution, be able to exercise its powers and fulfill its duties, including those under Articles 54⁴⁹ and 68(1).⁵⁰ The Third Issue thus also has an independent impact on the fairness of the proceedings as it forces

⁴⁵ Fairness has also been linked to the ability of a party to present its case - see *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

⁴⁶ The fair conduct of the proceedings requires that the procedural and substantive rights and obligations of all participants be respected, including "that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54" (ICC-01/04-135-tEN, para. 39). This is additionally supported by the jurisprudence of the *ad hoc* international criminal tribunals, which have granted leave to appeal issues of stay of proceedings, see *Prosecutor v Kvočka et al*, IT-98-30/1, "Decision on the Defense 'Motion Regarding Concurrent Procedures Before ICTY and ICJ on the Same Questions'", 5 December 2000; *Prosecutor v Kvočka et al*, IT-98-30/1, "Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I dated 5 December 2000", 25 May 2001, paras. 19-21. The tribunals also have recognised that the stay of a trial affects both the rights of the accused to a fair and expeditious trial, *Prosecutor v Kvočka et al*, IT-98-30/1, "Decision on Application by the Accused Zoran Zigic for Leave to Appeal the Decision of Trial Chamber I dated 5 December 2000", 16 February 2001, and the Prosecution, who "acts on behalf of and in the interests of the international community." *Prosecutor v Kvočka et al*, IT-98-30/1, "Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I dated 5 December 2000", 25 May 2001, para. 21.

⁴⁷ The Trial Chamber recognised such an impact in its prior decision imposing a stay of proceedings: see ICC-01/04-01/06-1401, para. 95.

⁴⁸ Decision, para. 20.

⁴⁹ ICC-01/04-135-tEN, para.39.

⁵⁰ See ICC-01/04-01/07-776 OA7, para. 80.

the Prosecution to choose between, on one hand, violating its statutory obligation of protection and placing at risk an individual who has substantially assisted it (and the Court) in its investigations, and on the other hand risking sanctions from the Court for failing to comply with the order of disclosure.

The Issues affect the expeditious conduct of the proceedings

45. The cumulative impact of the three issues on the expeditious conduct of the proceedings⁵¹ is equally clear: the Chamber has “stay[ed] these proceedings in their entirety”,⁵² a course which necessarily interferes with the expeditious conduct of this case. A stay of proceedings (the Second Issue), along with the grounds on which the Chamber based that stay (the First and Third Issues), thus affects the expeditious conduct of the proceedings, as this Chamber has previously recognized.⁵³
46. The First Issue also directly and independently impacts the expeditious conduct of the proceedings: the Chamber identified this issue as “the immediate cause of the present hiatus”;⁵⁴ and this issue has formed the basis for the apparent initiation of the first steps under Article 71, which risks further impacting on the expeditious conduct of the proceedings as they might lead to further litigation and delays.
47. In addition, the Third Issue impacts on the expeditious conduct of the proceedings because it was forcing the Prosecution to disclose the identity of a person recognized to be at risk without the implementation of protective measures that has resulted in the present delays.⁵⁵ The impact of this issue, and its appealability, are consistent with prior decisions in which issues relating to the protection of those at risk on account of their cooperation with the Court (which includes intermediaries),⁵⁶ such as the present one, have been recognised as affecting, amongst other things, the expeditious conduct of the proceedings.⁵⁷

⁵¹ The Prosecution has previously submitted that expeditiousness requires that decisions at all stages not unduly or unnecessarily delay the overall determination of responsibility - see further ICC-01/04-103, para. 29 and authorities cited therein.

⁵² T-313, p. 2, lines 6-7, 14-15.

⁵³ See ICC-01/04-01/06-1417, para. 31. The Appeals Chamber has indicated that expeditious conduct involves the conduct of proceedings without undue impediment or delay, referring to “the unimpeded and expeditious conduct” of the relevant proceedings: ICC-01/04-01/06-1335 OA9 OA10, para. 14.

⁵⁴ Decision, para. 20.

⁵⁵ ICC-01/04-01/06-2515.

⁵⁶ Trial Chamber I has stated that “[t]he Chamber had a clear duty to protect those at risk on account of the activities of the Court (Article 68(1))”. See oral ruling of 13 March 2009, ICC-01/04-01/06-T-146-CONF-EXP-ENG ET, page 6, line 19 to page 7, line 13, quoted in Decision, para. 16.

⁵⁷ See e.g. ICC-01/04-01/07-365, p. 7; ICC-01/04-01/07-108, p. 6; ICC-01/04-01/07-116, p. 6; ICC-01/04-01/06-165-Conf-Exp, (referred to in ICC-01/04-01/06-489); ICC-01/04-01/06-489, p. 12.

The Issues affect the outcome of the trial

48. Once again, the combined impact of the issues arising out of this Decision is the stay of the proceedings, and these three issues thus may impact on the outcome of the trial. As the Chamber noted, the present conditional stay of proceedings cannot be maintained indefinitely.⁵⁸ In the event that the issues underlying the stay cannot be resolved, this stay may mean that there is no determination of guilt or innocence: more than merely affecting the outcome of the trial, it may constitute the outcome.
49. In addition to the impact of the stay of the proceedings (the Second Issue) on the outcome of the trial, each of the predicate issues also has an independent impact. The Decision itself recognizes that the First Issue may affect the outcome of the trial, as it will impact on its overall assessment of the evidence in the case and “is likely to be relevant to the defence abuse application”.⁵⁹ The Third Issue may also impact on the outcome of the trial, as the Prosecution has the right to decide to suffer adverse consequences in its litigation in order to ensure the protection of persons and compliance with its statutory obligations and the Decision effectively deprives the Prosecution of this possibility.

Immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings

50. Immediate resolution of these Issues is required to materially advance the proceedings⁶⁰ -- as the Trial Chamber previously recognised in relation to the issue of stay of proceedings, and the matters which were “interrelated” with and served as the basis for the stay.⁶¹ As a result of the Decision, and the Issues contained in it, the proceedings are currently halted and will remain halted, according to the Trial Chamber, “[w]hilst these circumstances endure”.⁶² The resolution of the issues by the Appeals Chamber – its “authoritative determination” on the Trial Chamber’s characterization of the Prosecution’s actions, the Prosecution’s independent duties of protection, and the propriety and proportionality of staying the proceedings for alleged abuse of process – will allow the proceedings to advance.

⁵⁸ Decision, para. 30.

⁵⁹ Decision, para. 20.

⁶⁰ As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will ensure that “the proceedings follow the right course.” - ICC-01/04-168, paras. 14-15, 18.

⁶¹ See ICC-01/04-01/06-1417, para. 31.

⁶² Decision, para. 31.

51. Separately, the resolution of the First Issue by the Appeals Chamber will also materially advance the proceedings. The Appeals Chamber needs to resolve whether the Prosecution's actions in the instant case constituted an "unequivocal refusal" to comply with an order from the Chamber or the legitimate exercise of the rights and obligations afforded to parties and participants by the Court's basic documents.
52. Resolution of the First Issue by the Appeals Chamber will also materially advance the proceedings because a new course of action, namely a warning and potential subsequent sanctions against the Deputy Prosecutor and Prosecutor under Article 71 for disobeying an order of the Court, has been based by the Trial Chamber on the relevant findings. The resolution of this issue is therefore essential to ensure that any such actions are taken on a proper and meritorious foundation, and that procedures are not pursued and potentially sanctions imposed on an erroneous basis.
53. In addition, resolution of the Third Issue by the Appeals Chamber will also advance the proceedings. As stated by the Trial Chamber, issues of the protection of person at risk on account of their interaction with the Prosecution occupied a considerable part of the Chamber's judicial work during the present case.⁶³ Therefore immediate resolution by the Appeals Chamber of this Issue will also settle an important question related to the manner in which the Chamber and the Prosecution must exercise their respective duties of protection.
54. The question of whether the Prosecution has to disclose the identity of a person who is at risk and who has not yet received the protective measures which have been assessed as necessary by the Prosecution goes to the fundamental question of its protection duties under the Statute. As a result, the resolution of this issue by the Appeals Chamber is necessary in order to resolve the current impasse, and to "map a course of action along the right lines"⁶⁴ for all actors to follow in resolving this fundamental question.

Request to Stay any further proceedings based on the Decision

55. If the Prosecution is granted leave to appeal the Decision, it will apply for suspensive effect thereof, in particular directed at preventing any further action being taken on the basis of the impugned findings in the Decision to stay the proceedings.
56. The Prosecution therefore requests that the Trial Chamber not take any further action based upon the Decision and findings made therein – including any proceedings related to the release of the accused, and any actions relating to Article 71 sanctions based on the

⁶³ Decision, para. 22.

⁶⁴ ICC-01/04-168 OA3, para. 15.

Prosecution's alleged refusal to comply with orders of the Chamber⁶⁵ – until it has decided on this application for leave to appeal and, if leave is granted, the Appeals Chamber has decided upon an application for suspensive effect. It does so to avoid prejudice being caused unnecessarily; to avoid the Court's resources being wasted on proceedings which may be rendered moot if leave and suspensive effect are granted; and to prevent subsequent and unnecessary litigation in response to any such proceedings and decisions.

57. In particular in the context of the proposed hearing on release of the accused, the Prosecution notes that this is not a situation analogous to the prior stay of proceedings, where the Trial Chamber held that there was no prospect of the trial continuing and therefore no further purpose for continued detention – a basis for release which was overturned by the Appeals Chamber even in that scenario.⁶⁶ Here, the Trial Chamber contemplates that the stay is a temporary one when in paragraph 31 of the impugned decision it stipulates that it will entertain applications related to leave to appeal on this issue or any related issue “whilst the stay is in place...”.

58. On the other hand, any other basis for considering release – including, without prejudice to submissions on the applicability of Article 60(4), the question whether any detention is now “due to inexcusable delay by the Prosecutor” – will necessarily be predicated on factual and legal findings by the Chamber which will be at the heart of any appeal by the Prosecution, if leave is granted. Therefore, any discussion of and decision on release should be deferred until after a determination on leave to appeal and, if leave is granted, a determination of suspensive effect by the Appeals Chamber.

Relief sought

59. For the reasons set out above, the Prosecution requests that the Trial Chamber:

- (a) grant leave to appeal pursuant to Article 82(1)(d); and
- (b) Not conduct any further proceedings based on the Decision to stay the proceedings, or the findings made in that Decision which are the subject of this

⁶⁵ The Chamber indicated that during the stay it would entertain submissions on the possible application of Article 71 (which it did on 8 July 2010); and scheduled a hearing for submissions on the accused's detention for 15 July 2010 – Decision, para. 32.

⁶⁶ The Trial Chamber in that instance while acknowledging that the issue of leave to appeal the decision staying the proceedings and the accused's detention were intrinsically linked it ordered the release of the accused on the basis that there was no prospect of trial (ICC-01/05-01/06-1438, para. 30). The Appeals Chamber overruled this reasoning as the stay was conditional and the proceedings had not been terminated (ICC-01/04-01/06-1487 OA12, para. 37). The present stay of proceedings is also a conditional one, as the trial (which is in its advanced stages) has only been halted “whilst these circumstances endure” (Decision, para. 31).

application for leave to appeal, until it has decided upon this application and, if leave is granted, the Appeals Chamber has decided upon an application for suspensive effect.



Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of July 2010

At The Hague, The Netherlands