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Original: **English** No.**: ICC-01/04-01/06**
Date: **30 July 2010**

THE APPEALS CHAMBER

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

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

Public Redacted Version
With
Public Annexes A and F and
Confidential Annexes B to E

Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process

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

1. On 8 July 2010 Trial Chamber I considered the Prosecution's actions as an "unequivocal refusal to implement the repeated orders of this Chamber to disclose the identity of 143".[1] Moreover, based on what the Prosecution "appears to argue", it found that the Prosecutor "claims a separate authority which can defeat the orders of the Court, and which thereby involves a profound, unacceptable and unjustified intrusion into the role of the judiciary".[2] The Chamber held that the fair trial of the accused is no longer possible, stayed the proceedings and ordered the release of the accused.[3]

2. The Decision is based on a deep misunderstanding of the legal positions of the Prosecution, its protection duties under the Statute and its right to a reasonable opportunity and time to present its legitimate concerns to the Chamber. Intermediary 143 is not a witness and has not been accused of misconduct; he helped the Prosecution to ensure confidentiality of witnesses' interactions with the Office and to enhance their protection. The Prosecution sought to ensure his protection and to comply with the Chamber's disclosure order—not defy it.

3. The Prosecution did and does acknowledge and respect the Chamber's final authority in all matters affecting the conduct of the trial process including questions of appropriate protective measures and what is necessary to secure a fair trial. What the Prosecution asserted was not to set itself above the Chamber with respect to protection decisions, but rather to implement its statutory duty of protection. The Prosecution respectfully submits that it was never allowed fairly to present its concerns about the increased risks for Intermediary 143 and

[1] ICC-01/04-01/06-2517-Red (hereinafter, the "Decision"), para.20.
[2] Decision, para.27.
[3] This appeal is re-filed pursuant to the Appeals Chamber's decision ICC-01/04-01/06-2543OA18. The Prosecution files this document confidentially due to references to information that is contained in confidential portions of the record of this case. In particular, it refers to submissions by the parties and the VWU, and internal e-mail exchanges, regarding protective measures for intermediary 143 that are not in the public domain. A public redacted version is being filed separately.

his family should Thomas Lubanga and the Defence's resource person be informed of his identity. Thomas Lubanga is allegedly responsible for serious crimes. Even though he is presumed innocent, that presumption cannot prevent the Court from concluding that he (or persons acting on his orders) might pose a risk to the security and well being of Intermediary 143 once his identity is revealed. The resource person was allegedly one of the top members of Lubanga's militia. He is in DRC and some defence witnesses made allegations that he attempted to taint evidence.

4. The Prosecution will seek to show that it did not receive a reasonable opportunity to present its views *before* variation of Intermediary 143's protective measures was adopted and that its insistence to present its views *afterwards* was wrongly considered to be defiance of the Court's authority. The use of proper legal avenues at its disposal was consistent at all times with a recognition, not a rejection, of the Chamber's authority. The Prosecution's attempt to provide urgent pre-disclosure protection reflected its intent and effort to comply with the order. It attempted obedience, not refusal.

5. The Prosecution submits that a Chamber may disagree with the manner in which a party exercises its litigation rights in relation to an order it has issued, but it should not penalize the legitimate exercise of those rights by treating it as non-compliance. The Prosecution is profoundly concerned that the Chamber did not acknowledge that the Prosecution has the right to attempt to persuade it to its point of view or considered that the exercise of such a right by the Prosecution was not done in good faith. It thus penalized the Prosecution and, worse, speculated that its conduct indicated an inevitable pattern of future disobedience. The Chamber decided that the applications were in material non-compliance and erroneously concluded that "the Prosecutor has elected to act unilaterally in the present circumstances, and he declines to be "checked" by the Chamber."

6. At the heart of the Chamber's error lies the question whether the Prosecution has a particular duty of protection during the trial and what proper process must be followed to decide on protective measures. It also raises the question of whether, in the circumstances of this case, where disclosure of the identity of the intermediary could have been safely implemented within a short period of time (less than two weeks), a remedy as exceptional as a stay of the proceeding was a necessary and proportionate one.

7. The Prosecution thus contends that the Trial Chamber erred when it concluded that it was necessary to stay the proceedings because of: (i) the Prosecution's material non-compliance with the Chamber's orders of 7 July 2010; and (ii) the Prosecution's alleged clearly evinced intention not to implement the Chamber's orders, if it considers they conflict with the Prosecution's interpretation of its other obligations.

8. The Prosecution will seek to demonstrate that it never refused to comply with an order from the Chamber. It will also show that it never suggested that its duties of protection under the Statute allowed defiance of the Chamber's authority and that it acted at all times within the proper boundaries of its statutory duties of protection. Finally, it will show that the decision to stay proceedings in this case was excessive and disproportionate. The Chamber had at its disposal a range of alternative adequate remedies short of discontinuation of trial proceedings, a measure that not only impacts on the rights of the Prosecution but also on those of victims and of the communities where the crimes have taken place.

The process of interaction between the Chamber and the Prosecution on protection matters.

9. In order to properly assess the allegations that the Prosecution clearly evinced an intention not to implement the Trial Chamber's orders, it is necessary for this

Chamber to consider the intent and conduct of the Prosecution during the proceedings which form the subject matter of the appeal.

10. The Prosecution submits that, in accordance with the protection system defined by the Statute, the proper process to be followed when deciding protection measures includes the right of the Prosecution to be heard after the Chamber has received advice from VWU.

11. The initial decision on disclosure of information in relation to Intermediary 143 was made following a proper process where the views of the Prosecution were duly heard. The Chamber ordered the disclosure of Intermediary 143's identity *only after* the full protective measures were in place. Declining to grant appeal on the need to disclose his identity, the Chamber also reiterated that disclosure would only occur *after* necessary protective measures were implemented.

12. However, the Chamber subsequently learned that delay in implementing protection could also delay disclosure by up to two weeks. It then varied its decision and directed the Prosecution to disclose the identity of Intermediary 143 immediately "under strict embargo", before protection measures were in place, to the Accused, a defence resource person in the Democratic Republic of the Congo (DRC), and the defence team.

13. In deciding at short notice to vary its decision the Chamber did not follow a proper process. The Chamber asserted its authority "to determine whether protective measures are necessary (following consultation with the VWU under Article 68(4)) […]"[4] but noted that in this case it deemed it to be "unnecessary to seek a further report from the VWU because [it determined that] the disclosure that it ordered was restricted to a very few identified individuals, and accordingly […] there are no enhanced security risks for Intermediary 143".[5] As

[4] Decision, para.27.
[5] Decision, para.19.

the Chamber's factual description recognized, it did not provide an adequate opportunity to the Prosecution to address the Chamber on this issue.

14. The Prosecution submits that, consistent with fundamental principles of due process and the duties of protection established by the Statute, the Chamber had to give the Prosecution a proper opportunity to present its views on the adequate safeguards to ensure the intermediary's protection. The Chamber had to do it even if it was provisionally of the view that variation of its order posed no risk to Intermediary 143 and his family. The opportunity for the Prosecution to present information is crucial. It collects information on security through its investigative activities in the field and during its participation in confidential hearings on protection before other Chambers of the Court. As a consequence, there are two fundamental reasons to require the Prosecution's views: (a) the Chamber's duty to be diligent on matters of protection – which requires an in-depth understanding of the security in the field – demands that the Chamber receive all necessary information and views from the Prosecution before making any determination; and (b) sharing the information at its disposal is a crucial means for the Prosecution to exercise its statutory duties of protection when a case is before a Trial Chamber.

15. The ICTY's Appeals Chamber jurisprudence demonstrates the critical importance of the protection of witnesses for the efficiency and fairness of proceedings and the crucial role of both the Trial Chamber and the Prosecution to achieve this aim. In the *Haradinaj* case, the Appeals Chamber determined that the trial had been held "in an atmosphere where witnesses felt unsafe",[6] and emphasized the duty of trial Chambers to ensure that witnesses feel adequately protected;[7] accordingly, it overturned an acquittal and ordered a partial re-trial

[6] *Prosecutor v.Haradinaj*,. IT-04-84-T, Trial Judgement, 3 April 2008 ("*Haradinaj* Trial Judgement"),para.6.
[7] *Ibid.*

of all accused.[8] Furthermore, in a previous decision, the ICTY Appeals Chamber considered that "[t]he fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. […] The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law."[9]

16. In the Prosecution's view, the Trial Chamber advanced an erroneous interpretation of the protective scheme established in the Statute and the Prosecution role within that overall scheme. Under the Trial Chamber's interpretation, the Prosecution is no longer vested with any duty of protection once a Chamber is "seized of the matter and has ruled".[10]

Prosecution's duty of protection

17. The Prosecution submits that its duty of protection established by Article 68 (1) does not imply a statutory authorization to disregard a Chamber's order on protective measures. As will be argued below,

    (i) The Prosecution has a non-dispensable duty of protection under Article 68, and it endures throughout prosecution.

    (ii) This particular duty (and basic principles of due process) necessarily demands that the Chamber must consider the

[8] *Prosecutor v.Haradinaj* IT-04-84-A, Appeal Judgement, 21 July 2010 ("*Haradina*j Appeal Judgement"),paras.35-49.
[9] *Prosecutor v.Jelisic*, IT-95-10-A, Appeal Judgement, 5 July 2001, (*Jelisic* Appeal Judgement"),para.27.
[10] Decision, para.29.

views and assessment of the Prosecution before deciding on protective measures.

(iii) When protection is implicated by a judicial order, the Prosecution has both the right and duty to object; to contest the decision, including to seek appellate review; and ultimately to propose alternatives that would remedy any infringement on the accused's right to a fair trial, such as withdrawing evidence, stipulating to certain relevant facts that the defence is foreclosed by non-disclosure from exploring, or amending or withdrawing charges.[11]

18. In the instant case, pursuant to this obligation, the Prosecution explored proper and available legal avenues; it announced its intention to seek leave to appeal and requested reconsideration and a variance in the time limit for compliance, as permitted under Regulation 35, in order to engage VWU and implement necessary emergency measures (such as house protection). The order, it bears reminding, was not that VWU was *prohibited* from protecting 143; it was that his identity could and should be disclosed to the Defence even though previously-ordered protective measures had not been implemented. The Prosecution's attempt to provide urgent pre-disclosure protection reflected its intent and effort to comply with the disclosure order. It was seeking to comply with, not subvert, the Chamber's decision.

Characterization as non-compliance

19. In these circumstances, it is respectfully submitted that the Trial Chamber's characterization of the Prosecution's actions as a refusal to comply with the order was unreasonable and simply wrong. The statutory duty of the

[11] Alternative solutions to be explored by the Prosecution and the Chamber are an appropriate way to solve a tension between two competing principles under the Statute (ICC-01/04-01/07-1486OA13, paras.28,44).

Prosecution and the sequence of events summarized above demonstrates that the Prosecution sought to act at all times within the Court's legal framework and used all opportunities to fulfill its statutory duties of protection while respecting the Chamber's authority. It regrets that the Chamber interpreted the Prosecution's efforts to exhaust all effective remedies within the trial process as a determination to stall or to defy its authority.

Proportionality

20. The Prosecution finally submits that the decision to stay proceedings in this case was excessive and disproportionate. Even ignoring the errors previously described and assuming (without admitting) the rationality and fairness of the Chamber's conclusions, the Chamber further erred in failing to grant a proportionate remedy in the face of what it characterised as the Prosecution's errors of approach and attitude.

21. The Chamber had at its disposal a range of alternative remedies that would not affect in such a drastic and final way the continuation of trial proceedings, a measure that impacts on the rights not only of the Prosecution but also of victims and of the communities where the crimes occurred.

22. The purported failing was the Prosecution's refusal to disclose this intermediary's identity. If a remedy were required in the face of such refusal, measures far less dramatic and final could have been fashioned to address this issue.[12] For example, in its Decision, the Chamber itself stated that "if the identifying information for 143, despite the order of the Chamber, is not disclosed to the defence, then the Chamber will need to scrutinize the impact of

[12] The Chamber does not appear to have entered the stay and release orders to sanction the Prosecution; instead, it determined that a warning, a predicate for contempt sanctions, was also appropriate.

this eventuality in the context of its overall assessment of the evidence in the case […]".[13] However, the Chamber did not follow the avenue.

23. Instead, it ordered an indefinite stay and unconditional release – the most extreme remedy available – because of its prediction that the Prosecution will continue to refuse to obey future judicial orders in protection matters. No fair basis existed for such an assessment and there is, accordingly, no factual basis for the Chamber's determination and no legal justification for its ultimate action.

Statement of Facts

Intermediary 143

24. Intermediary 143 is a Prosecution intermediary [REDACTED]. He [REDACTED] assisted the Prosecution by liaising with some of the witnesses and with other persons who did not testify, but whose evidence was disclosed to the Defence. He has never been accused of wrongdoing, and as the Chamber acknowledged, the Defence is not seeking to call him as a witness.[14]

25. 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 them to fabricate false testimony. On 15 March 2010, the Trial Chamber found that the Defence was entitled to know the identity of Intermediary 143.[15] 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 some Prosecution witnesses

[13] Decision,para.20.
[14] Decision,para.1, correcting T-312,p.17.
[15] ICC-01/04-01/06-T-261-Conf-ENG, pp.3435.

whose cooperation he had facilitated.[16] On 6 May 2010, the Trial Chamber received a detailed assessment from VWU on the risk that disclosure of 143's identity would entail and the measures that are necessary to manage that risk.[17] [REDACTED].

26. Because of concerns for his safety, and noting that if it cannot protect the confidentiality of persons who assist the Prosecution it will be unable to conduct investigations at all, the Prosecution made an extensive submission that proposed alternatives to the disclosure of this intermediary's identity, including that the Chamber could question the intermediary *in camera* and pose questions suggested by the parties.[18] The Chamber rejected the proposals and on 12 May, it ordered the Prosecution to disclose 143's identity.[19] Accepting the advice of both the Prosecution and the VWU that disclosure of Intermediary 143's identity would pose substantial risks for him and his family, the Chamber expressly required that disclosure would occur only after the protective measures deemed essential by VWU were implemented.[20]

27. The Prosecution sought leave to appeal the disclosure decision.[21] On 2 June the Chamber denied the Prosecution's application for leave to appeal,[22] reiterating that disclosure would be undertaken only after appropriate protective measures were in place.[23]

28. The requirement that disclosure not occur until protective measures were implemented was reiterated on 16 June 2010, during cross-examination of Witness 581, [REDACTED] who had dealings with the intermediary. Accordingly, pursuant to instructions of the Chamber, the defence announced

[16] ICC-01/04-01/06-2434-Red2,paras.43-47,143.
[17] ICC-01/04-01/06-2434-red2,para.42, referring to ICC-01/04-01/06-2422-Conf-exp.
[18] ICC-01/04-01/06-2362.
[19] ICC-01/04-01/06-2434-Conf-Exp. ICC-01/04-01/06-2434-Conf-red; ICC-01/04-01/06-2434-Red2.
[20] ICC-01/04-01/06-2434-Red2,paras.143,150(i).
[21] ICC-01/04-01/06-2453-Conf-Red.
[22] ICC-01/04-01/06-2463.
[23] ICC-01/04-01/06-2463,para.30.

when it was ready to ask questions regarding 143. The Chamber then instructed the witness not to identify 143 by name. The witness dutifully complied, until defence counsel proposed a name in court to him, similar to the name of 143, and asked the witness if he knew that person. The witness replied that the person was intermediary 143. The Chamber responded that disclosure of the protected identity thus occurred "inadvertently".[24]

29. The Prosecution urged that the identity of Intermediary 143 was still confidential information and disagreed that the intermediary's cover was "blown";[25] but recognizing that the Chamber's confirmation potentially compromised the confidentiality of the information, it increased its monitoring activities for Intermediary 143. VWU also told the Chamber five days later that it had informed Intermediary 143 and he responded that he was "satisfied with the current arrangements"[26]

The Events and Order of 6 July 2010

30. The protective measures were due to be implemented in "early July",[27] on or about 5 July.[28] At approximately 1 P.M. on 6 July, a Tuesday, during the testimony of another intermediary, the Chamber informed the Prosecution that it had learned earlier that day that the 143 declined the protective measures and directed the parties to consult with the Registry. It also required a response from the Prosecution within two hours.[29]

[24] ICC-01/04-01/06-T-302-Conf-Eng (Annex-C attached) ,p.3,39,54-58.
[25] ICC-01/04-01/06-T-302-Conf-Eng,p.58; ICC-01/04-01/06-T-312-Eng,p.13.
[26] Decision,para.5.
[27] Decision,para.5.
[28] Ibid; see also T-302-Conf-Eng,p.55.
[29] ICC-01/04-01/06-T-310 (Annex-D attached) ,pp.49-50.

31. After the lunch recess, the Prosecution updated the Court, explaining that the intermediary was requesting that VWU present the protective measures in writing but that the matter could be resolved by the end of the week.[30]

32. The Defence responded that it understood that the intermediary was making additional demands and that disclosure might not occur for two weeks and possibly could take longer. Accordingly it proposed that the Prosecution disclose identity now, to the Defence and the Accused and the resource person.[31]

33. The Prosecution objected, reminding the Chamber that it had required full protective measures before disclosure as the best course to ensure protection.[32]

34. The Chamber overruled the objection[33] and varied its prior order requiring no disclosure until the protective measures were implemented, requiring disclosure that day, including to the Defence resource person working in the DRC.[34]

35. The Prosecution stated that it would seek leave to appeal the decision. The Chamber suspended the order overnight, urging the parties to attempt to work out a solution [REDACTED].[35]

The Events and Order of 7 July 2010

36. On 7 July 2010, the Chamber stated that it would suspend disclosure while it considered a Prosecution application for leave to appeal.[36] It then 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

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[30] ICC-01/04-01/06-T-310,pp.56-59.
[31] ICC-01/04-01/06-T-310,pp.59-60.
[32] ICC-01/04-01/06-T-310,p.61
[33] ICC-01/04-01/06-T-310,p.63-64.
[34] ICC-01/04-01/06-T-310,p.64-65.
[35] ICC-01/04-01/06-T-310,pp.89-90.
[36] ICC-01/04-01/06-T-311 (Annex-E attached) p.2.

were implemented, the Defence could recall the witness or continue questioning him via video-link. The Prosecution agreed. The Defence objected.[37]

In light of the Defence's objections, the Chamber[38] abandoned its compromise proposal and lifted the stay pending an application to appeal, explaining its view that the proposal of disclosure to the defence did not increase the risk to 143 and ordered disclosure within a half hour.[39] 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.

37. The Chamber entertained the reconsideration application in a hearing that afternoon.[40] The Prosecution underscored its objection to 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. However, the Prosecution added that it was not asserting "a clash between organs. This is a fundamental principle for us".[41]

38. The Prosecution also reiterated its reservations concerning disclosure particularly to the defence resource person[42] with specific reference to a pre-trial investigation initiated by the Registry into his conduct. The Chamber characterized those concerns as unsubstantiated and refused to consider them.[43]

39. Finally, the Prosecution argued that the benefit of immediate disclosure did not outweigh the risk posed; limited disclosure would not expedite the trial or

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[37] ICC-01/04-01/06-T-311,p.3-9.
[38] ICC-01/04-01/06-T-311,p.8.
[39] ICC-01/04-01/06-T-311,p.13.
[40] ICC-01/04-01/06-T-312 (Annex-F attached) ,p.3.
[41] ICC-01/04-01/06-T-312,pp.13-14.
[42] ICC-01/04-01/06-T-312,pp.9-12.
[43] ICC-01/04-01/06-T-312,p.10. [REDACTED]. Notwithstanding this evidence, the Trial Chamber took solace from the fact that, given the "character and the calibre of those who represent the accused", the defence team would only continue to employ their Resource Person if they are "personally convinced that there is no risk that he will deliberately, or otherwise, breach the orders" of the Trial Chamber (T-312,p.11).

diminish the probability that the current witness would have to be recalled once the embargo on investigations was lifted[44] – a point previously made by the Defence.[45] The Prosecution also underscored the importance of VWU protection as well as its own duty to not disclose unless sufficient protective measures were in place.[46] It explained that the Prosecution would "give up witnesses, […] give up cases if necessary, if we think the disclosure is going to jeopardize our persons".[47]

40. 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"[48] 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).[49]

41. Before expiration of the deadline, the Prosecution informed the Chamber of its intent to seek a variation of the time-limit.[50] At 16:41, roughly an hour after the order to disclose was entered and 11 minutes past the deadline, 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.[51] The Prosecution expressly noted its obligation to comply with the Chamber's instructions while also fulfilling its statutory duties of protection.[52]

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[44] ICC-01/04-01/06-T-312,p.12.
[45] ICC-01/04-01/06-T-T-311,p.4.
[46] ICC-01/04-01/06-T-312,pp.6-8,12-13.
[47] ICC-01/04-01/06-T-312,p.8.
[48] ICC-01/04-01/06-T-312,p.20.
[49] ICC-01/04-01/06-T-312,pp.21-22.
[50] Decision,para.13.
[51] ICC-01/04-01/06-2515.
[52] ICC-01/04-01/06-2515,para.1.

42. During consultation with the VWU, it learned that the Chamber had not informed VWU of the variation in the disclosure order. Accordingly, the VWU had not had the opportunity to inform the intermediary of the impending disclosure, assess the effect on his security, or implement interim measures. The Prosecution filed supplementary information to its request for variation and informed the Chamber of its consultations with the VWU.[53] That document reiterated the Prosecutor's acknowledged duty to comply with the Chamber's instructions, along with its independent statutory obligation of protection. And it repeated 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 legal duty under the Statute.[54]

The Impugned Decision

43. On 8 July 2010, the Chamber issued the impugned Decision. It noted that it was "unnecessary to seek a further report from the VWU because [it determined that] the disclosure that it ordered was restricted to a very few identified individuals, and accordingly […] there are no enhanced security risks for Intermediary 143".[55] It also suggested that the Prosecution's account of VWU's position on the merits of disclosure without protection was inaccurate and unreliable.[56]

44. On the merits, 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

[53] ICC-01/04-01/06-2516.
[54] ICC-01/04-01/06-2516,paras.6,8,10.
[55] Decision,para.19.
[56] Decision,para.14. [REDACTED].

the Chamber)".[57] Moreover, based on what the Prosecution "appears to argue", it found that "the Prosecutor [...] does not consider that he is bound to comply with judicial decisions that relate to [...] protection",[58] and that the Prosecutor "claims a separate authority which can defeat the orders of the Court, and which thereby involves a profound, unacceptable and unjustified intrusion into the role of the judiciary".[59] The Trial Chamber concluded that "the 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."[60]

45. As a consequence of the stay, the Chamber also ordered that the Accused be released unconditionally.[61]

The Prosecution's Ground of Appeal

46. The Prosecution's ground of appeal is that the Trial Chamber erred when it concluded that it was necessary to stay the proceedings as an abuse of the process of the Court because of: (i) the Prosecution's material non-compliance with the Chamber's orders of 7 July 2010; and (ii) the Prosecution's alleged clearly evinced intention not to implement the Chamber's orders that are made in an Article 68 context, if it considers they conflict with his interpretation of the

[57] Decision,para.20.
[58] Decision,paras.21,23-24.
[59] Decision,para.27.
[60] Decision,para.31.
[61] ICC-01/0-01/06-T-314,pp.21-22.

Prosecution's other obligations. The ground of appeal involves the following specific errors, each of which materially affects the Decision:[62]

(a) The Trial Chamber erred when it found that the Prosecutor refused to comply with the Chamber's orders of 7 July 2010;

(b) The Trial Chamber erred by misconstruing the position of the Prosecution with respect to its duties of protection, finding as a result that the Prosecution's position constituted an unjustified intrusion into the role of the judiciary and prevents the Chamber from ensuring the fairness of the proceedings and the rights of the accused; and

(c) The Chamber erred in concluding that the Prosecution's actions constituted an abuse of process and imposed a premature and unnecessary remedy by staying the proceedings.

47. The Chamber should have, but failed, to consult with the Prosecution in advance of varying the protection for 143. Its refusal to consult and its order of immediate disclosure created an emergency situation that required the Prosecution to make extraordinary efforts. The Prosecution did not refuse to comply and never stated that it is entitled to defy a judicial order, but instead exercised rights available to it as a party. Even had the Prosecution refused to comply, the remedy of stopping the trial and ordering the unconditional release of the accused was disproportionate, punitive, and unwarranted.

A. The Trial Chamber erred in concluding that the Prosecution refused to implement its orders when the Prosecution pursued its remedies.

48. As established by the facts of the case, the Prosecution's actions were the consequence of a process that shortchanged its ability to respond to a new proposal on a critically important issue. The Prosecution was faced with a

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[62] ICC-01/04-01/07-1497OA8,para 37; ICC-01/04-169,para.84.

unilateral decision from the Chamber on a matter of protection, a subject about which multiple organs (Prosecution, VWU, and Chambers) share responsibility. Having been assured repeatedly that its intermediary's identity would be disclosed only after he and his family were protected, the Prosecution was surprised by a wholly different decision. The Chamber announced a new course and determined, as a matter of extreme haste, that this changed position presented no risk to the intermediary. It issued orders to be implemented, literally within a matter of minutes, on a matter that was of obvious controversy and dispute.

49. In so doing, it denied the Prosecution sufficient time to assess circumstances and present updated facts. The Prosecution's objections were dismissed out of hand, with no explanation other than the Chamber was sure the Accused and the defence team would respect the confidentiality of this highly sensitive identity information and the embargo imposed on its use.[63] In reaching this decision spontaneously and unilaterally, the Chamber disallowed the ability of the Prosecution to investigate and then report on the most current security situation on the ground.[64] And it disallowed the Prosecution's ability to argue matters, including confidential decisions, concerning specific protection issues about which the Chamber might not be aware. In short, the Chamber denied the Prosecution the opportunity to establish that disclosure without any protective measures would violate the Court's unitary responsibility to persons at risk.

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[63] The Prosecution had no reason to anticipate this Decision, given the uniform practice of chambers not to disclose security information even under embargo before authorized protection is in place. Rather, chambers routinely authorize redactions when the information would identify persons, specifically for security reasons. Nor would the Prosecution have expected that the Chamber would deem disclosure to the defence under embargo to be sufficient, since such an order had previously resulted in the near-disclosure of 143's identity defence counsel had asked a question that elicited an identification of the intermediary (T-302,p.55). Given the allegations against the defence resource person and the prior investigation into his activities (fn.43) the Prosecution would not have reasonably anticipated that the Chamber would have ordered disclosure to him.

[64] As acknowledged by the Appeals Chamber, the Prosecution "is in the field" and has specific knowledge of "the situation in the ground"; ICC-01/04-01/07-776OA7,paras.98-100.

50. In somewhat related fashion, this Chamber recently considered what timeliness meant in the context of a party's request for relief. It observed that

> "a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in a 'timely manner'. The Appeals Chamber interprets 'timely manner' to mean that the parties must act within a reasonable time. However, *what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance*."[65]

51. In that decision, the Appeals Chamber considered whether the Accused failed to act with sufficient diligence. But its discussion applies equally to this circumstance. Here, it cannot be said that the Chamber provided a reasonable opportunity to the Prosecution to present its views or that the Prosecution unreasonably delayed submitting its motions and applications. The matter first arose at approximately 15:30 on 6 July; the first 7 July order *sua sponte* directing disclosure without protection demanded that the Prosecution act within 30 minutes; the second order required compliance within 50 minutes. Within a span of approximately 28 hours, the Prosecution had argued twice against the disclosure, attempted to obtain a stay sufficient to allow it to seek leave to appeal, urged the Chamber to reconsider, filed an application for a limited variance of the expedited time limit, and attempted to ensure interim emergency protection.

[65] ICC-01/04-01/07-2259OA10,para.54, emphasis added.

52. As noted previously, the ICTY Appeals Chamber also has stated:

> "[t]he fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. […] The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law."[66]

53. Thus, even though the Chamber assumed that disclosure under the modalities established in the order did not pose any risk to 143 and its family, it nonetheless had a duty to ensure that its determination was correct. For those purposes it was essential to allow the Prosecution to share its assessment of the facts and any information in the Prosecution's possession relevant for the determination. This was also the fair process to follow vis-à-vis the Prosecution, since once a case is before a Trial Chamber, the main opportunity for the Prosecution to discharge its duties of protection under the Statute will be through representations to that Chamber. The Prosecution cannot be faulted for attempting to offer information and views to the Chamber after the fact, given that it was denied a full opportunity beforehand.[67] Nor was it abusive for the Prosecutor to seek additional time to consult with the VWU, particularly in light

[66] *Jelisic* Appeal Judgement,para.27.
[67] Since the Prosecution cannot instruct VWU to provide protective measures, the ability to make its case to the Chamber on matters of protection may be the only tool available to the Prosecution to protect a person who is at risk because of his interaction with it.

of its prior assessment that the intermediary and his family were at risk and required the highest protective measures before his identity was disclosed.[68]

54. Against this background, the Chamber's characterization of the Prosecution's actions as a refusal to comply with the Chamber's order was wholly unreasonable.[69] The sequence of facts enunciated above demonstrates that the Prosecution acted at all times within the Court's legal framework and used all available opportunities to fulfill its statutory duties of protection while respecting the Chamber's authority. If the Chamber's reasoning is correct, then every request by a party that a Chamber reconsider a prior ruling or seeks a variation of a time-limit enshrined in a judicial order will present a situation of non-compliance. A Chamber may disagree with the manner in which a party exercises its litigation rights in relation to an order it has issued, but it cannot penalize the legitimate exercise of those rights by regarding it as non-compliance.

55. In this sense, the requests for variation of time to disclose pending consultations with VWU first and then implementation of interim measures were initiatives taken to *comply* with the order in a manner that offered sufficient safeguards for 143. Illustrative of the Chamber's flawed approach is that the Chamber did not reject those variations and then renew the disclosure order: rather, in a single decision, the Chamber rejected the requests, made a finding of non-compliance and decided to stay the proceedings.

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[68] Rule 17(2)(a)(ii). VWU has the obligation to assess security risks and recommend protective measures. To perform that function it needs to be informed. However the Court chose not to consut VWU because "disclosure […] was restricted to a very few identified individuals, and […] there are no enhanced security risks for intermediary 143." Decision,para.19.

[69] *Haradinaj* Appeal Judgment, para.12: "When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence. Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber".

56. A seriously flawed interpretation of the distribution of protective duties under the Statute, and in particular a rejection of the role of the Prosecution in this regard, further underpins and ultimately invalidates the Chamber's rationale. Under the Chamber's interpretation, the Prosecution has no duties of protection once a Chamber is "seized of the matter and has ruled",[70] even if the Chamber has ruled without consultation and without respect for the Prosecution's role. As it will be argued in more detail below, contrary to the Chamber's view, the Statute does not vest any particular organ of the Court with exclusive duties of protection, but rather establishes a model that involves the sharing of responsibility and adequate coordination between all organs of the Court.

57. The Chamber acted in a manner that appears to be incompatible with the duty of all organs of the Court to act in a coordinated fashion in matters of protection.[71] As a result, it entered a decision which, in the Prosecution's informed view runs foul of the Court-wide duty to "protect persons who are at risk on account of their interaction with the Court". When, after the fact, the Prosecution, through resort to the Court's legal procedure, sought to have the decision modified or suspended to avoid any risks to 143, the Chamber penalized the Prosecution by entering a finding of non-compliance and ordering a stay of proceedings. The Chamber's ruling is unfounded and unjust, and should be reversed by the Appeals Chamber.

B. The Prosecution did not assert or imply that it had the authority to disregard judicial orders.

58. The Chamber erred by misconstruing the position of the Prosecution with respect to its duty of protection, and by finding that the Prosecution's position constitutes an unjustified intrusion into the role of the judiciary and prevents

[70] Decision,para.29.
[71] ICC-01/04-01/07-776OA7,para.98.

the Chamber from ensuring the fairness of the proceedings and the rights of the accused.[72]

59. Moreover, the Decision loses sight of the critical importance of matters of protection of persons in the context of international criminal jurisdictions and of a proper dialogue between organs to ensure that adequate protection is warranted. A recent judgement of the Appeals Chamber of the ICTY demonstrates the critical importance of the protection of witnesses for a proper presentation of evidence. In *Haradinaj*, involving a trial "in an atmosphere where witnesses felt unsafe",[73] the Trial Chamber took inadequate steps to guarantee that witnesses could feel protected and thus testify for the Prosecution. Without those witnesses, the Trial Chamber then acquitted the accused. The Appeals Chamber overturned the acquittal and ordered a partial re-trial of all accused. It explained: "For the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them".[74]

(a) The proper interpretation of the Prosecution's statutory duties

60. At the heart of the Trial Chamber's characterization of the Prosecution's conduct lies an erroneous interpretation of the distribution of protective functions under the Statute. The Chamber appears to consider that once it is seized with a case and it has "ruled",[75] then the Prosecution can no longer exercise any autonomous duties of protection. However, the Rome Statute, as clarified by the Appeals Chamber, does not focus the responsibilities and duties

[72] The Prosecution repeatedly acknowledged that it is bound by the orders of the Chamber and that it did not intend to challenge its authority (ICC-01/04-01/06-T-312,pp.13-14; ICC-01/04-01/06-2516,para.6; ICC-01/04-01/06-2515,para.1). It was *in this context* that the Prosecution submitted that "[i]t *should* not comply, or be asked to comply, with an Order that may require it to violate its separate statutory obligation by subjecting the person to a foreseeable risk" (ICC-01/04-01/06-2516,para.6, emphasis added). However, this was advanced to explain the reasons why the Prosecution could resort to litigation, if necessary; the Prosecution never argued that it considered that it must not comply with such and order or that the Chamber cannot issue a particular order.
[73] *Haradinaj* Trial Judgement,para.6.
[74] *Haradinaj* Appeal Judgement,paras.35-49.
[75] Decision,para.29.

of protection on one particular organ; rather, it requires all organs of the Court to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".[76] The Appeals Chamber confirmed that ensuring that witnesses are appropriately protected is "a responsibility of the Court as a whole".[77] When performing their respective protective functions, the organs of the Court are also required to cooperate and consult to achieve the highest possible level of protection. As the Appeals Chamber explained, "[c]onsultation, cooperation and advice are all part of ensuring that individuals are not put at risk […]".[78]

61. In this sense, the Court's legal framework establishes a *system* to provide protection to persons at risk due to their interaction with the Court, in which all organs share responsibility and must consult and act in a coordinated fashion to provide adequate protection. It is essential that the role of each component of this system is observed and respected in order for the system, and the Court itself, to function competently. This is particularly so given the context in which the Court operates: situations of ongoing conflict, where the groups involved in the crimes prosecuted before the Court remain active and retain the ability to intimidate and harm people, and where national authorities may be unable to provide security and fully control its territory.

62. Within this system of protection, Articles 68(1), 54(1)(b) and 54(3)(f) define the authority and responsibilities of the Prosecution. They require the Prosecution to provide protection to persons at risk on account of their interaction with the Prosecution. Article 68(1) states that "[t]he Prosecutor *shall* take such measures particularly during the investigation and prosecution of […] crimes". "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

[76] Article 68(1).
[77] ICC-01/04-01/07-776OA7,para.101.
[78] ICC-01/04-01/07-776OA7,para.98.

purpose".[79] The word "shall" in Article 68(1), given its ordinary meaning and the context in which it is used, underlines that this is a mandatory duty upon the Prosecutor to take appropriate measures to protect persons interacting with it. Article 68(1) also specifies that the Prosecution's duty of protection applies "particularly during the investigation and prosecution of […] crimes".[80] Hence, there is no doubt that the Prosecution duty to protect persons equally applies during trial.[81]

63. The Appeals Chamber agrees with the existence of a protective function for the Prosecution. It specified that "the Prosecutor undoubtedly is responsible under the Statute to ensure that appropriate measures are taken to protect the safety of victims and witnesses".[82] It also found that the Prosecution has "a general mandate in relation to protection matters under articles 54(3)(f) and 68(1) [which] ensur[e] that the Prosecutor takes general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses".[83]

64. Article 54, which generally sets out the duties and powers of the Prosecutor with respect to investigations and prosecutions, also imposes protective functions. Article 54(3)(f) in particular empowers the Prosecutor to "[t]ake necessary measures, or request that necessary measures be taken, to ensure the […] protection of any person […]". The Appeals Chamber also expressly endorsed this authority,[84]finding that Article 54(3)(f) "demonstrates an intention that protection should, in principle, be available to anyone put at risk by the

[79] Vienna Convention on the Law of Treaties, Article 31(1);ICC-01/04-168OA3,para.33.
[80] ICC-01/04-01/07-776OA7,DissOp,paras.15-17.
[81] The term "prosecution" means "a proceedings instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence ofa person charged with a crime" (Black's Law Dictionary).
[82] ICC-01/04-01/07-776OA7,para.80.
[83] ICC-01/04-01/07-776OA7,para.98.
[84] ICC-01/04-01/07-475OA,paras.44,47.

investigation of the Prosecutor".[85] And it recognized the particular expertise and knowledge of the Prosecution in security and protection matters, stemming from its activities in the territories where the crimes occurred and the victims and witnesses reside.[86]

65. The Trial Chamber, however, rejected, as irrelevant, the above authorities because "the Appeals Chamber was not addressing the [same] situation as here".[87] However, the general principles -- that the Prosecutor is responsible and has a mandate to protect persons at risk on account of their interaction with the Prosecution -- apply.

66. Accordingly, the Chamber, while correctly recognizing its own duty and power to order protective measures and to vary those measures, erred by concluding that it has a monopoly of protective functions. It also erred in concluding because it alone may "determine whether protective measures are necessary",[88] it need not give the Prosecution the opportunity to present its views before deciding the matter. Both Article 68(1) and the jurisprudence of the Appeals Chamber unambiguously provide that the protection of persons at risk on account of the activities of the Court is a duty and a responsibility of the Court as a whole, including the Prosecution.[89]

(b) The proper exercise of the Prosecution's protective duties is perfectly compatible with a Trial Chamber's judicial authority under the Statute

67. There is no incompatibility between the Chamber's judicial powers and the protective duties of the Prosecution. The Prosecution agrees that the Chamber is the ultimate arbiter on fairness of the proceedings and has the authority to

[85] ICC-01/04-01/07-475OA,para.44.
[86] ICC-01/04-01/07-776OA7,paras.98,101.
[87] Decision,para.29.
[88] Decision,para.27.
[89] ICC-01/04-01/07-776OA7,para.101.

ensure that the trial is conducted with full respect for the rights of the accused. Article 68(1) also gives the Chamber the ultimate responsibility to ensure that any protective measures taken by the Court, including by the Prosecution, are "not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[90] The protective functions attributed to the Prosecution do not imply that the Prosecution has a statutory authorization to disregard a Chamber's orders, nor has that ever been the Prosecution's position. To the extent that the Chamber interpreted the Prosecution's position differently, its interpretation is erroneous.[91]

68. Rather, when faced with an order that under its professional assessment entails tangible risks to a person, the Prosecution must engage with the Chamber and exhaust all available means to seek adjustments or variations to order to avert that risk. This process may entail consultations with the Chamber and VWU. Or it may properly involve litigation in order to prevent either actual harm or elevation of the risk. It may also involve exploring alternatives with the Chamber that can render implementation of the order unnecessary. Such alternatives can include stipulating to certain relevant facts, withdrawing evidence and amending or withdrawing the charges.[92]

69. The Chamber has a duty and the ultimate authority to solve any potential tension between the right of a person to protection and the right of an accused to a fair trial.[93] Both of these rights are absolute and must be accommodated without compromise.[94] For instance, and as it will be developed below, when

[90] Decision,paras.24, 26.
[91] Decision,paras.26-27.
[92] The Prosecution and the Chamber could explore alternative solutions to resolve a tension between two competing principles under the Statute (ICC-01/04-01/07-1486OA13,paras.28, 44).
[93] ICC-01/04-01/07-475OA,para.57: "any difficulties caused to the defence by a limitation on its rights [is] sufficiently counterbalanced by the procedures followed [and it must put in place] adequate safeguards to protect the interests of the accused".
[94] The right to "protective measures where someone's life or well-being is seriously at risk[…]is not to be weighed against other considerations, […] it is effectively absolute" (ICC-01/04-01/06-T-312,pp 4-5); see also ICC-01/04-01/07-475OA,paras.54,56,58.

faced with a situation where under the Prosecution's assessment disclosure of the identity of a person entails a risk,[95] the Chamber may decide to draw inferences in favour of the accused and to refrain from ordering disclosure. In the Decision, the Chamber itself stated that "if the identifying information for 143, despite the order of the Chamber, is not disclosed to the defence, then the Chamber will need to scrutinize the impact of this eventuality in the context of its overall assessment of the evidence in the case […]".[96] However, the Chamber did not follow this avenue.

70. Some of the measures adopted by the Chamber or by the Prosecution to solve the tension between the rights of the accused and the right of persons to be protected may result in adverse consequences for the Prosecution's case. The Prosecution argued that it would accept such consequences rather than expose a person who is interacting or has interacted with it at risk.[97] In the view of the Prosecution, accepting such an outcome is the direct result of its duty of protection. This does not mean that the Prosecution is defying the Chamber's authority or otherwise intruding into the role of the judiciary.[98] To the contrary, it confirms that the Prosecution agrees that the Chamber has the power to impose measures that have adverse consequences for its case in order to ensure the fairness of the proceedings and the rights of the accused.

71. The Chamber's flawed interpretation of the Prosecution's statutory duties of protection and its misunderstanding of the Prosecution's actions directly impacted on its erroneous characterization of the Prosecution's stance. In light of the statutory principles described above and the facts of the case, it was unwarranted to construe the Prosecution's urgings, in its argument for

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[95] Although the Chamber is not bound by the assessment of the Prosecution, it should seek the advice of the Prosecution and VWU on matters related to protection and it may defer to their specific knowledge and expertise. In case of doubt, the Chamber should err on the side of protection.
[96] Decision,para.20.
[97] ICC-01/04-01/06-2516,para.6.
[98] Decision,paras.26-27.

reconsideration and in the request for a variance of the time limits, as a refusal to comply with the Chamber's order. The Prosecution cited its statutory obligation to protect as a basis for its request for reconsideration and to vary the disclosure deadline. But it did not assert that this authority overrode the Court's judicial power or that it could exercise its powers with impunity. Its arguments were not defiance or disobedience. The Prosecution instead attempted to exercise its right to be heard on a matter on which it shares statutory responsibility and about which it has particularly relevant information and perspective. It took legitimate procedural steps aimed at persuading the Chamber first to reconsider and then to allow provision of interim emergency protective measures before compliance in order specifically to comply with the order.

C. Even had the Prosecution deliberately disobeyed a judicial order, suspension of the trial was unwarranted, excessive, and an abuse of the Chamber's discretion.

72. Finally, the Trial Chamber erred in the exercise of its discretion when it imposed the excessive and premature remedy of a stay of proceedings.[99] This decision was predicated on both the Prosecution's supposed non-compliance with an order from the Chamber and its reliance on its protection duties under Article 68.[100] The Chamber erroneously concluded that the Prosecutor willfully disobeyed a Court order and that it intended to disobey future orders involving protection, which it construed as an abuse of the process of the Court. From that finding of abuse, it determined that a stay was required since it was "impossible to piece together the constituent elements of a fair trial",[101] a fair trial was "no longer possible", and justice could not be done "because the

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[99] ICC-01/04-01/07-2259OA10,para.34: the Appeals Chamber "will not reverse the Impugned Decision simply because it would have decided differently. It can only do so when it finds that the Trial Chamber exercised its discretion incorrectly".
[100] Decision,para.31.
[101] Decision,para.30.

judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework".[102]

73. As argued above, the Prosecution disputes the presumption of deliberate disobedience underpinning the Chamber's Decision as well as the Chamber's interpretation of the Prosecution's position vis-à-vis its duties of protection. However, and regardless of the correctness of those findings, the Prosecution submits that it did not establish a situation in which the essential preconditions of a fair trial are missing. Consequently, the Chamber's obligations to ensure fairness of the proceedings pursuant to Article 64(2)[103] did not require it to halt the trial because of abuse of process.[104]

74. In this same case, the Appeals Chamber had noted that "[n]ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial".[105]

75. Not only did the two elements articulated as the justification for the stay of this case fail to reach the magnitude required by the Appeals Chamber, but also the Trial Chamber had less onerous remedies at its disposal to deal with the situation. Thus, the Trial Chamber abused its discretion when, as a remedy of first resort, it exercised a power that should be used sparingly[106] and when no other remedies are appropriate.[107]

[102] Decision,para.31.
[103] ICC-01/04-01/06-1486,para.76; Decision,para.26.
[104] The Chamber exceeded the "margin of appreciation [conceded by the Appeals Chamber to the Trial Chamber] as to whether and when the threshold meriting a stay of proceedings has been reached" (ICC-01/04-01/06-1486OA13,para.84).
[105] ICC-01/04-01/06-772OA4,para.30.
[106] Ibid.,para.31.
[107] DPPvHussain(1994),158,J.P.R.,602, Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited, *Criminal Law Review*, Nov.1995,864-874.

76. Instead, as a punitive sanction against the Prosecution for its purported defiance of the Court's order, the Chamber could have made findings under Article 71. As remedies for the Defence, to compensate for the one to two week delay or the interruption of the cross-examination, the Chamber could have fashioned remedial presumptions, required stipulations, or made findings adverse to the Prosecution. The imposition of a stay, however, was clearly excessive and unwarranted.

(a) Contempt citations under Article 71

77. The Prosecution does not concede that Article 71 sanctions would have been appropriate in this case: rather, it strongly disputes the conclusion that it refused to comply and that efforts to pursue legal avenues can be penalized. But even in the hypothesis that the Chamber was satisfied that a situation of non-compliance had arisen, a proper avenue to deal with it would have been Article 71 proceedings, not a stay of the trial.

78. The Statute expressly regulates the consequences of non-compliance with an order from the Court in Article 71 (together with Rule 171) in the form of a sanction for misconduct before the Court. In fact, in the instant case the Chamber also resorted to these provisions, issuing a formal warning to the Prosecutor and Deputy Prosecutor for refusing to comply with the directions of the Court.[108]

79. This is, moreover, the normal avenue that domestic jurisdictions follow when they intend to sanction, inter alia, offences of parties and participants against the Court. The adoption of such measures does not require discontinuance of the main proceedings. Further, nothing in the language of Article 71 itself suggests that the commencement of any proceedings thereunder must negatively impact on the continuation of trial proceedings.

[108] T.314,pp.22-23.

(b) Remedies less onerous than a stay of proceedings

80. The Prosecution is mindful that, as held by the Appeals Chamber, "a Chamber ordering a stay of the proceedings enjoys a margin of appreciation based on the intimate understanding of the process".[109] However, when upholding the Trial Chamber's first decision to stay proceedings, the Appeals Chamber expressly considered that in that instance the Chamber "had explored several alternatives" which had not proven successful before ordering the stay.[110]

81. In contrast, the sole issue before the Trial Chamber here was the potential for a week or two delay in the case,[111] which in the context of a trial that has already lasted for 18 months is not significant. Moreover, the harm to the defence from non-disclosure –the short-term delay of trial -- was insignificant. Indeed, it would have been abusive to jeopardize a person at risk in order to avoid a brief delay.

82. But even if the prospect of delay was sufficiently critical, the Chamber did not seriously test the availability or effectiveness of other measures. For example, the Chamber failed to fully explore its initial proposal of proceeding with the Defence cross-examination and deferring to a later stage those questions that required the Defence's knowledge of Intermediary 143's identity. The Chamber, in fact, initiated this proposal, which was additionally endorsed by the Prosecution; solely because the Defence objected, the Chamber then abandoned this idea. It also failed to consider that the Defence could ask questions about 143 without knowing his name, much as it had done when questioning Witness 581.[112] Or the Defence could have conducted part of its examination without fully exploring the connection between the testifying witness and 143 and

[109] ICC-01/04-01/06-1486OA13,para.84.
[110] ICC-01/04-01/06-1486OA13,para.98.
[111] T-310,p.64.
[112] This process was proposed by the Defence and endorsed by the Chamber (T-300, pp.6-7,40-41; T-302,pp.2,38-40). Accordingly, W-321 would have been told 143's name and then answered questions regarding a person identified in Court as 143 but known to the witness by his actual name.

further developed the issue later, during cross-examination after the recess, much the same way direct and cross-examinations of prior witnesses had been interrupted and resumed.[113]

83. The Chamber also could have briefly suspended the proceedings until the interim security situation of Intermediary 143 was adequately resolved.[114] Had the Chamber consulted with VWU before ordering disclosure it would have found that [REDACTED].[115] [REDACTED].

84. If the Chamber considered that these practical remedies did not sufficiently manage the impact of the lack of disclosure on the expeditiousness and fairness of the proceedings, it had other available options: counsel for the Prosecution had indicated that it was willing to sacrifice part of its case and accept appropriate consequences, if this was necessary to prevent any risk to 143.[116] Such measures could have included stipulating to certain facts that the Defence wished to explore, withdrawing evidence, and amending or withdrawing charges.[117] In particular, the Chamber could have drawn legal and factual inferences in favor of the Accused in the context of the Defence's abuse of process application ("a confined, but significant issue" according to the Chamber).[118] The Chamber was aware of that possibility but chose not implement it: "if the identifying information for 143, despite the orders of the Chamber is not disclosed to the defence, then *the Chamber will need to scrutinize*

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[113] See for instance W-17, whose evidence was interrupted. He was cross-examined only after another witness had been heard (ICC-1/04-01/06-T-154-Conf-Eng, p.83).
[114] T-311,p12; Decision,para.10,p.7.
[115] ICC-01/04-01/06-2518-Conf,p.4. This is even more relevant as the Chamber acknowledged in public session that the Defence was in possession of 143's name since 16 June 2010 (Decision,para 9; T-312,p.8).
[116] T-312,p.6; ICC-01/04-01/06-2520-Red.,para.9.
[117] ICC-01/04-01/06-1486OA13, para.44 in relation to para.28. In the ICTY *Tadic* case, and after evidence that a Prosecution witness had committed perjury was presented in court, the Prosecution invited the Chamber to disregard his testimony and "acknowledged that, as a consequence, the accused had no case to answer in respect of most of the allegations in subparagraph 4.3 of the Indictment". See *Prosecutor v. Tadic*, Trial Judgment, IT-94-1, 7 May 1997, para.33. See also the UK case *R. v Ward* [1993] where the Court of Appeal ruled on the consequences of the Prosecution's refusal to disclose evidence on the ground of public interest immunity. The Court stated that "If, in a whole exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that *the prosecution will have to be abandoned"* (Emphasis added)
[118] Decision,para.20.

the impact of this eventuality in the context of its overall assessment of the evidence in the case[...]".[119]

85. Hence, the Chamber could have chosen not to rely upon or exclude witnesses introduced to the Prosecution by this intermediary;[120] or it could have requested the Prosecution to withdraw the charges in relation to those areas where the Chamber considered non-disclosure had a material impact. Remarkably, this same Trial Chamber offered a similar avenue to the Prosecution in the context of the first stay of proceedings because of non-disclosure of documents obtained under Article 54(3)(e) agreements.[121] The Appeals Chamber endorsed this alternative when it found that in instances of non-disclosure of a limited number of exculpatory documents covered by Article 54(3)(e) there were other alternatives than staying the proceedings, such as "amending or withdrawing the charges".[122] Previously, this measure was not considered practicable due to the "large scale" of the material collected under confidentiality agreements. In contrast, in the instant case the Prosecution is found to be in abuse of process of the Court in part by failing to abide to one order relating to the disclosure of the identity of *one* person, and only for a limited period of time.

86. Finally, it was excessive to order the stay on the notion, as stated by the Chamber, that the Prosecutor "evinced [the] intention not to implement the

[119] Ibid.

[120] Similarly, in *Prosecutor v.Boskoski*, Trial Judgment, IT-04-82-T, 10 July 2008, para.18, where a ICTY Trial Chamber stated that it was unsatisfied with the veracity of a witness' testimony and that it would not rely on his evidence. There have been instances in national proceedings where the prosecution failed to comply with disclosure obligations and the trial court accordingly excluded evidence or dismissed charges, only to be reversed on appeal on the ground that the trial court abused its discretion by failing to consider less severe remedies. State v.Umpenhour, 2000,W.L.281746 (Ohio App.6 Dist.2000). In People v.Petru, 367,N.E.2d,980 (Ill.App.Ct.1977): the appellate court noted that "the trial court could have more reasonably enforced its disclosure orders and accomplished its purpose of insuring both the State and the defendant a fair trial by one of several other means less stringent than [the exclusion of all but one witness's evidence]".

[121] The Chamber stated that the Prosecution should drop charges where non-disclosed exculpatory material has a material impact on the Chamber's determination of the guilt or innocence of the accused:ICC-01/04-01/06-1401,para.6

[122] ICC-01/04-01/06-1486OA13,para.44 in relation to para.28. The documents were not disclosed due to lack of consent of the information provider in the context of art.54(3)(a).

Chamber's orders made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution's other obligations".[123]

87. The Prosecution has already addressed the legitimacy of the Chamber's conclusion and interpretation of the Prosecutor's efforts and statements. Because it is factually unsupported, the claim that the Prosecutor deemed itself able to refuse compliance at will[124] was an improper basis for staying the trial. Nonetheless, even if the Chamber correctly interpreted the Prosecution's actions, the Chamber should first have sanctioned the Prosecution to address the purportedly contemptuous conduct. Discontinuing the trial was excessive.

88. Nor can a finding of abuse of process be predicated on the Chamber's *belief* that the Prosecution does not consider that it is bound by orders of the Chamber, its prediction that the Prosecution will continue to disregard orders without justification, or its conclusion that if trial is not stopped immediately there are no other means available to prevent the Prosecution from behaving contemptuously. Rather, the ordinary measure is to cite the Prosecutor for contempt and take additional steps in the event of future disobedience.

89. Finally, this case should be distinguished from the first stay ordered by the Trial Chamber. Then, the Appeals Chamber found that the stay was not an abuse of discretion. It considered the recurring and unresolved problem that had motivated the stay (non-disclosure of exculpatory documents obtained under Article 54(3)(e)), which had been raised in the pre-trial proceedings and repeatedly before trial;[125] the number of documents that still had to be disclosed at the time the stay was ordered (only two out of 156 UN documents had been disclosed);[126] and the fact that there was no prospect that the situation would

[123] Decision,para.31; T-314,p.16.
[124] Decision,para.28.
[125] ICC-01/04-01/06-1487OA13,para.90 ("the Trial Chamber rendered the Impugned Decision nine months after the issue had been raised […] and one week before trial"); see also paras.85-91.
[126] Ibid.para.91.

change, since "at the time the Trial Chamber rendered the Impugned Decision […] it was not even clear that the Trial Chamber would be given access to all or the majority of the documents obtained from the UN".[127]

90. In clear contradiction, this scenario features the *first* instance of alleged non-compliance, pertaining to *one* isolated order and the Chamber's interpretation of the Prosecution's position in respect of its duties under Article 68. The Prosecution had never been accused of willfully refusing to comply with an order of the Chamber before. Indeed, the Trial Chamber does not identify any prior violation or foresee any future protection issue in its Decision. Nor is there any prospect that the factual underpinnings of the Decision will arise again: the Chamber itself, when denying the Prosecution's request for leave to appeal its first decision on disclosure mentioned that "there is no present prospect of future orders for disclosure of the identities of intermediaries".[128]

91. Finally, here the Prosecution attempted to delay disclosure the intermediary's identity only until interim protective measures were in place.[129] And it continues to do so, [REDACTED].[130] In fact, VWU is currently working to implement the full protective measures ordered for this intermediary so that his identity can be disclosed to the defence teams in the *Katanga and Ngudjolo* trial.[131]

[127] Ibid.para.91.
[128] ICC-01/04-01/06-2463,paras.31,33. This was one of the main reasons for the Chamber to conclude that the requirements of Article 82(1)(d) had not been met.
[129] Ibid., paras.91,97, a contrario.
[130] ICC-01/04-01/06-2519-Conf.
[131] ICC-01/04-01/07-2287-Red.

Request for an Oral Hearing

92. The Prosecution acknowledges that the Appeals Chamber has never entertained in-court argument in an interlocutory appeal. However, given the importance of the case and the complexity of the issues, the Prosecution proposes that oral argument would be appropriate in this instance.

Relief Sought

93. For the reasons set out above, the Prosecution requests that the Appeals Chamber overturn the impugned findings, reverse the Decision and direct the Trial Chamber to lift the stay of the proceedings.

Luis Moreno-Ocampo,

Prosecutor

Dated this 30th day of July 2010

At The Hague, The Netherlands