

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 16 September 2010

TRIAL CHAMBER I

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

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

Public Redacted Version

**Prosecution's application to take testimony while proceedings are stayed pending
decision of the Appeals Chamber**

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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Other

1. The Prosecution notifies the Chamber that [REDACTED] Intermediary 143, in accordance with the order of Trial Chamber II. The Prosecution [REDACTED] on 13 September 2010 offered, to disclose his identity to the Defence in this case.
2. After the Chamber imposed the stay and directed that no further submissions would be entertained, it clarified that its order did not bar the parties and participants from making filings that are directly relevant to the stay.¹
3. The Prosecution understands that disclosing the identity of Intermediary 143 does not resolve the concerns that triggered the order to stay proceedings. However, the Prosecution invites the Chamber to allow the taking of testimony without lifting the stay, leaving to a later period the determination whether the testimony taken should be admitted in the trial. That provisional action during the pendency of the stay order would serve the interests of the parties, the participants, the witnesses, the Court, and the public. It will also permit the Chamber to give due regard to the rights of the victims and witnesses while allowing the Appeals Chamber to resolve the underlying legal and factual issues.

Submissions

4. The background is set out in detail in the “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”.² On 8 July 2010 the Chamber *sua sponte* determined that a stay was necessary because of “two concurrent but essentially different problems” – first, the Prosecution’s purported material non-compliance with the Chamber’s orders on 7 July to immediately disclose of the identity of Intermediary 143, and second, the impossibility to ensure a fair trial to the accused “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

¹ [REDACTED].

² ICC-01/04-01/06-2544-Red OA18, 30 July 2010.

conflict with his interpretation of the prosecution's other obligations".³ The Chamber further directed that while the stay was in place it would accept only applications for leave to appeal on this issue or any related issue, submissions on the availability of contempt sanctions, and submissions on detention.⁴

5. The Prosecution sought leave to appeal the Stay Decision.⁵ On 15 July 2010, the Chamber granted leave to appeal.⁶ That appeal and the Prosecution's appeal from a simultaneous order releasing the Accused unconditionally⁷ are pending before the Appeals Chamber.⁸
6. [REDACTED]
7. On a parallel track, Trial Chamber II ordered disclosure of Intermediary 143's identity to the defence in that case. After this Chamber stayed the instant trial [REDACTED], Trial Chamber II directed the VWU to implement the full protective measures for him. [REDACTED]
8. In the Stay Decision, this Chamber stated that the Prosecutor's refusal to effect disclosure "may well be [...] time limited, in the sense that a delay of a few days or weeks may result in the prosecution's objections evaporating once protective measures, acceptable to 143, have been implemented".⁹ The Chamber also acknowledged that if this were to occur, it would be asked to continue with the witness's testimony "(and the trial, if it is stayed)".¹⁰

³ "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", ICC-01/04-01/06-2517-Red (Stay Decision), at para 31.

⁴ Stay Decision, para. 31, 32. As previously noted, by email the next day the Chamber added that it also would entertain filings directly relevant to the stay. See f.n. 2, above.

⁵ ICC-01/04-01/06-2520-Red.

⁶ ICC-01/04-01/06-T-314-ENG, p.15 line 20.

⁷ ICC-01/04-01/06-T-314-ENG, pp.17-23 (Release Decision).

⁸ ICC-01/04-01/06-2538-Conf OA18 (Appeal against the Stay Decision); ICC-01/04-01/06-2536 OA 17 (Appeal against the Release Decision). The Appeals Chamber granted the Prosecution's request to suspend the Release Decision on 23 July 2010. ICC-01/04-01/06-2536 OA 17.

⁹ Stay Decision, para. 20.

¹⁰ Stay Decision, para. 20.

9. The Prosecution submits that the Chamber has the inherent authority to effect a partial lifting. As the Appeals Chamber explained, “[n]either the Rome Statute nor the Rules of Procedure and Evidence provides for a ‘stay of proceedings’ before the Court”.¹¹ The Appeals Chamber added that the court’s power to impose a stay derives solely from its role to ensure that the fundamental rights of the accused are not breached.¹² Thus, nothing in the Statute or the Rules defines a stay or specifically limits the Chamber’s power to amend the stay or provisionally allow interim activity notwithstanding the stay. And the power to order a stay is intertwined with the Chamber’s inherent authority to prevent further or more intrusive breaches of the parties’ fundamental rights.

10. With that as the framework, the Prosecution submits that the Chamber has the power to allow testimony to be taken even while it continues a stay of proceedings. The Rome Statute recognises, in other contexts, the authority to take testimony notwithstanding that there is no ongoing proceeding. For example, in Articles 18(6) and 19(8) the Statute provides that the Prosecution can take testimony while the Chamber is still considering admissibility or jurisdictional issues. Article 56 also provides that when presented with a unique investigative opportunity the parties may take testimony in anticipation that the evidence might later be admitted at a future trial. Thus, the possibility of taking evidence notwithstanding that there is no ongoing trial is sanctioned by the Statute. It also would serve the fundamental rights of the accused; the taking of steps at this point will shortcut the process if the stay itself is limited, and by shortcutting the proceedings it will reduce the length of his pre-judgment incarceration.

11. Thus, a proposal to allow the Chamber to hear testimony – in advance of the possible resumption of the trial – that might be admitted without further delay if the stay is lifted, would better serve the rights of the parties and participants, of

¹¹ ICC-01.04-01/06 OA 13, para. 77.

¹² Id. at paras. 77, 78, citing ICC-01/04-01/06 OA 4, at para. 39.

the victims who deserve closure and of witnesses who face continuing stress from the indefinite postponement of their testimony. And it will serve the Court's interest by enabling the use of its resources notwithstanding that the trial is stayed. At the same time, this provisional action during the pendency of the stay order would preserve the Chamber's ruling that trial proceedings must be stayed and permit the Appeals Chamber to resolve the underlying legal and factual issues.

Relief Sought

12. In consideration of the above, the Prosecution:

- (a) notes that on 13 September 2010 it offered to the Defence disclosure of the identity of intermediary 143; and
- (b) requests that the Chamber allow the provisional taking of testimony pending a final decision by the Appeals Chamber.



Luis Moreno-Ocampo
Prosecutor

Dated this 16th day of September 2010
At The Hague, The Netherlands