

1 International Criminal Court

2 Trial Chamber I - Courtroom 2

3 Presiding Judge Adrian Fulford,

4 Judge Elizabeth Odio Benito and Judge René Blattmann

5 Situation in the Democratic Republic of the Congo -

6 ICC-01/04-01/06

7 In the case of The Prosecutor v. Thomas Lubanga Dyilo

8 Thursday, 15 July 2010

9 (The hearing starts at 2.31 p.m.)

10 (Open session)

11 THE COURT USHER: All rise.

12 PRESIDING JUDGE FULFORD: Good afternoon. Two main issues
13 on this afternoon's agenda. The first that falls logically for
14 consideration is the Prosecution's application for leave to appeal
15 set out fully in writing in document 2520, dated yesterday.

16 Maître Mabilille, looked at realistically in terms of the test
17 under the Statute, do you resist the application for leave to appeal?

18 MS MABILLE: (Interpretation) My colleague,
19 Mr Biju-Duval, will make a few observations on the leave to appeal,
20 if that suits you, your Honour.

21 PRESIDING JUDGE FULFORD: Of course, thank you. Yes, Mr
22 Biju-Duval.

23 MR BIJU-DUVAL: (Interpretation) Your Honour, a few brief
24 observations. The Defence does not challenge the possibility for the
25 OTP to exercise its right to request leave for appeal regarding the

1 decision to stay proceedings, the ruling made by the Chamber, but the
2 Defence does have an observation about the formulation of one of the
3 questions that the OTP would like to bring before the Appeals Chamber;
4 namely, the first question.

5 PRESIDING JUDGE FULFORD: Can I - slipping as ever,
6 Mr Biju-Duval, into the irritating habit of interrupting counsel - can
7 I ask you whether you would have any opposition to a formulation of
8 the questions that reflects our decision staying the proceedings as
9 follows, and I'll say this slowly, "Whether it was necessary to stay
10 these proceedings as an abuse of the process of the Court because of:

11 (i) the Prosecution's material non-compliance with the
12 Chamber's orders of 7 July 2010; and

13 (ii) the Prosecutor's clearly evinced intention not to
14 implement the Chamber's orders that are made in an Article 68 context,
15 if he considers they conflict with his interpretation of the
16 Prosecution's other obligations."

17 If it is right - if it is right - that that reflects the
18 decision that we took, would you oppose leave to appeal being granted
19 to address those two questions?

20 MR BIJU-DUVAL: (Interpretation) The Defence has no
21 objection to the Appeals Chamber being seized of the two matters that
22 you have spoken of, your Honour.

23 PRESIDING JUDGE FULFORD: If necessary, Mr Biju-Duval, we
24 shall come back to you later. Thank you very much.

25 Anything from the representatives of victims?

1 MS MASSIDDA: No, your Honour, we have nothing to add. Thank
2 you.

3 PRESIDING JUDGE FULFORD: Thank you, Ms Massidda.

4 Mr Guariglia, anything you want to say?

5 MR GUARIGLIA: Your Honour, it is not -- obviously, this
6 is a very reasonable framing of the issues. However, we have some
7 concerns in the sense that the element of proportionality that for
8 us is a critical factor as framed in our second issue would be missing
9 from your Honour's formulation. By this I mean that, even if the Chamber
10 was satisfied that as a technical situation of non-compliance had taken
11 place, and independently of our autonomous duties of protection under
12 the Statute and the manner in which the Prosecution interpreted those
13 duties, we would still want to argue before the Appeals Chamber that
14 a stay of proceedings was not a proportionate remedy for that technical
15 breach. So, for us, that would be a point that we think the Appeals
16 Chamber should be allowed to entertain and it also would be important
17 for the purposes of clarifying the scope of stay of proceedings as
18 abuse of discretion and one that exceptional remedy may properly be
19 used. Thank you, your Honour.

20 THE INTERPRETER: Message from the English booth: If the
21 OTP counsel could be reminded to slow down, the interpreters would
22 be most grateful.

23 PRESIDING JUDGE FULFORD: Thank you, Mr Guariglia.

24 Take a moment, Mr Biju-Duval.

25 MR BIJU-DUVAL: (Interpretation) Your Honour, it would

1 appear that the issue of proportionality is included in the formulation
2 that has been suggested by the Chamber.

3 PRESIDING JUDGE FULFORD: One would always hope as well
4 perhaps that the Chamber's decisions are in any event proportional,
5 but there we are. Right. Thank you all very much for your assistance
6 on that issue.

7 Issue 2, we can proceed on the basis, given the submissions
8 that have been advanced, that leave will be granted, certainly on some
9 basis, the accused's detention. Mr Guariglia, part of your
10 submissions have been directed at that issue. Is there anything else
11 that you would wish to say on the issue in addition to what has been
12 set out in writing?

13 MR GUARIGLIA: No, your Honour.

14 PRESIDING JUDGE FULFORD: Thank you very much.
15 Victims representatives?

16 MS MASSIDDA: May I ask the indulgence of the Chamber for
17 only one minute, your Honour?

18 PRESIDING JUDGE FULFORD: Certainly, Ms Massidda.
19 Certainly.

20 MS MASSIDDA: Thank you. Thank you, your Honour. I will
21 then address the Chamber on behalf of the legal representatives.

22 (Interpretation) It would appear to us, your Honours, that
23 your decision of 8 July last which ordered the stay of proceedings,
24 and not halt of the proceedings against Thomas Lubanga, does not justify
25 the release of Mr Lubanga. In this regard we would wish to remind

1 all that the approach taken by the Trial Chamber in its decision regarding
2 release of the accused on 2 July 2008, according to which one cannot -- it
3 is stated one cannot justify the maintaining in detention of the accused
4 to guarantee that he will appear and to preserve the inquiry, and that
5 was very much criticised in the ruling from the Appeal Chamber, and
6 this later led to a decision taken by the Appeal Chamber.

7 It would also appear that the appellate chamber clearly
8 appealed that a conditional or temporary stay of proceedings, as is
9 the case here, should not necessarily lead to, and inevitably lead
10 to, the release of the person in question.

11 Furthermore, the Appeal Chamber stated as well that, in
12 accordance with the provisions of the Statute, a person who has been
13 detained remains in custody during the pending of the proceedings unless
14 his or her interim release is sanctioned by the Court under the provisions
15 of Article 60 of the Statute. Considering as well that the detention
16 of the accused during the entire procedures is the rule in the case
17 at Bar, since the decision of your Chamber taken on 8 July 2010 did
18 not halt the proceedings, the principles set out by the Chamber - by
19 the appellate chamber - should continue in the case at hand.

20 Looking beyond the fact that the situation currently
21 prevailing in the eastern part of the RDC is still unstable, the legal
22 representatives of victims would also like to draw the Chamber's
23 attention to the fact that the accused, over the course of the trial,
24 learned the identities of all the witnesses from the OTP, as well as
25 the identity of many victims taking part in this trial.

1 In this particular case the charges still stand against the
2 accused. They are serious charges and we must continue to take into
3 account the seriousness of these charges. Thus, we are asking the
4 Chamber to uphold and continue detention of Mr Lubanga.

5 Thank you.

6 PRESIDING JUDGE FULFORD: Yes, thank you, Ms Massidda. I
7 think it needs to be stressed as well, doesn't it, in relation to the
8 Appeals Chamber decision of 2008, that at paragraph 18 the Judges of
9 the Appellate Chamber made it clear that it is not necessary for the
10 Trial Chamber to await the outcome of the appeal before dealing with
11 the issue of release. I'm sure that you agree that that was one
12 ingredient of the decision of that Chamber back in July two years ago.

13 MS MASSIDDA: Absolutely, your Honour.

14 PRESIDING JUDGE FULFORD: Thank you.

15 (Trial Chamber confers)

16 PRESIDING JUDGE FULFORD: Maître Mabilille?

17 MS MABILLE: (Interpretation) Your Honour, members of the
18 Bench, in the view of the Defence the decision taken on 8 July 2010
19 is a definitive decision that halts the proceedings. Of course, the
20 Judges are in the best position to take stock of this, but on our side
21 we are of the opinion that the decision was handed down for two
22 fundamental reasons.

23 First of all is the fact that the Prosecution refused to
24 comply with two orders from the Chamber calling upon the OTP to provide,
25 under some very strict conditions, the name and a certain number of

1 identifying information relating to intermediary 143. However, the
2 Chamber also indicated in its decision that there was another issue,
3 an issue was -- that was described by the Chamber as deeper and more
4 persistent; namely, the role that the Prosecutor has taken upon himself.
5 In the appeal the Prosecution continued to stress these two items;
6 namely, non-disclosure, and continues to play this role to enjoy the
7 prerogatives and rights that he believes he enjoys, and he believes
8 that the Chamber does not have any oversight or control over this.

9 We find ourselves in a position where the ruling from the
10 Chamber is a definitive one; one that brings the proceedings to a halt.
11 This situation, a definitive halt of the proceedings, was envisioned
12 by the Appellate Chamber in its ruling of 21 October 2008, and in that
13 ruling - I refer to paragraph 36 - the ruling indicated, and I quote,
14 "Consequently, in principle, if it is ordered that a permanent stay
15 of proceedings be implemented, an irrevocable one, the accused will
16 be released because maintaining the person in detention would not be
17 compatible with the exercise of the criminal -- rather, the penal
18 jurisdiction of the Court." So there you have it. That is our first
19 argument.

20 I am finding myself in the position to provide a secondary
21 argument because, in the latest filing from the Prosecution, it is
22 said -- he speaks of a provisional stay, a temporary one. And so,
23 secondarily, if this is a provisional stay, the Appellate Chamber also
24 indicated in its ruling of 21 October 2008 -- and once again, I refer
25 you to the relevant paragraph, paragraph 37, in the case of a conditional

1 release, and the Court of Appeal gives us - I was going to say its
2 modus operandi - indicating that the Chamber should review all the
3 circumstances that are relevant. In particular, the Appellate Chamber
4 was thinking of 58(1) and also Article 60 of the Statute.

5 I will begin with Article 68 of the Statute that indicates
6 that the person must be judged without an excessive delay. And I would
7 also like to quote the other text, 64, which says that "The Pre-Trial
8 Chamber ensures that the detention of the accused shall not continue
9 for an excessive period of time because of an unjustifiable delay that
10 is due to the Prosecution. If such a delay does occur, the Court shall
11 review the possibility of releasing the person in question with or
12 without conditions."

13 What situation do we find ourselves facing today? In our
14 opinion, it cannot be challenged that, if the trial were stayed, what
15 would be the consequence? Well, it would be -- I make reference to
16 the position taken by the OTP. I would even say the situation is such
17 that -- well, far more serious than the earlier stay of proceedings.
18 In fact, in the previous ruling that gave rise to the stay of proceedings,
19 the OTP acted recklessly, signing confidentiality agreements with their
20 sources, pursuant to the Statute at 69(3), knowing full well that at
21 one particular point he would have to disclose the information to the
22 Defence but, to ensure that the trial could resume, he had to convince
23 his sources so that the trial could, indeed, resume.

24 Today - and this is where the situation is far more
25 serious - the Prosecutor is the one and only person responsible for

1 the delays caused by this new stay. We note, and the Chamber knows
2 well that Mr Thomas Lubanga has been incarcerated in the Scheveningen
3 prison since 17 March 2006; in other words, for more than four years.
4 The Defence today argues that Thomas Lubanga must be released because
5 the delay is no longer, in any way, shape or form, reasonable.

6 Now, with regard to 68(a) we have made a number of
7 observations - that was two years ago - and the observations that we
8 made on 58(1) remain valid today and, thus, we call upon the Chamber
9 to release Thomas Lubanga and to do so without any further delay.

10 Thank you very much, your Honour, members of the Bench.

11 PRESIDING JUDGE FULFORD: Mr Guariglia, I don't want to turn
12 this into a tennis match at Wimbledon, but is there anything else you
13 want to say?

14 MR GUARIGLIA: Yes, your Honour. Mrs Criscitelli will
15 address the Court on these issues. I think that the Prosecutor has
16 to address a couple of those points.

17 PRESIDING JUDGE FULFORD: Certainly.

18 MS CRISCITELLI: Thank you, your Honour, and I will be very
19 brief.

20 This is a conditional stay. It's one that hopefully would
21 be of brief duration. Unlike the situation in the earlier appeal where
22 the Prosecution and the Defence and the Court were awaiting something
23 from an external force, in this instance the ultimate problem here
24 was a need for a few extra days to implement -- I don't plan to argue
25 the merits, and I see the Court leaning forward.

1 PRESIDING JUDGE FULFORD: Well, Ms Criscitelli, I've
2 delayed leaning forward. You've started off, I'm afraid, on a basis
3 that we don't recognise; the suggestion that this is a conditional
4 stay. This is not a conditional stay. It is a stay which could have
5 led to an application by the Prosecution to lift it if the Prosecution
6 was prepared to follow the Chamber's orders. The Prosecution has not
7 taken that route. Instead, you have filed notice of appeal solely
8 against the decision imposing the stay. Now, the stay didn't attach
9 any conditions to it. This is an unconditional stay.

10 Now, you have got to advance your submissions either on that
11 basis, or you've got to explain to us how it is that the Prosecutor
12 says this is a conditional stay when that doesn't reflect the language
13 that we very clearly used in the decision.

14 MS CRISCITELLI: Well, I -- we interpreted this stay as an
15 order saying, as your Honour said, the trial will not continue until
16 the Prosecution complies by producing the identity of the informant,
17 so in that sense it was conditional. The fact that the Prosecution's
18 filed a notice of appeal from that does not diminish the conditional
19 nature. If, for example, the protection measures would be sufficient
20 to render the Prosecution comfortable about disclosure of the identity,
21 the Prosecution would comply with the order.

22 PRESIDING JUDGE FULFORD: You're only focusing on an element
23 and, I'm afraid to say, it's not an accurate representation. The
24 Chamber said that these proceedings were stayed because the two orders
25 that we issued on 7 July were not complied with. That was point one.

1 Point two was that this Chamber was not prepared to contemplate continued
2 proceedings in which the Prosecutor had indicated that he considered
3 that, certainly in a particular and critical area of the work of this
4 Court, he had the option of not complying with the decisions, orders
5 and judgments and rulings of this Chamber. Now, that's not a
6 conditional stay, Ms Criscitelli; that's a stay imposed for reasons,
7 full stop.

8 MS CRISCITELLI: Then turning from the conditional stay
9 issue to whether release should be ordered as if this case is over - and
10 that seems to be the import of the Court's suggestion - either it's
11 a conditional stay or it is permanent, which means it is a permanent
12 suspension at least until the Appeals Chamber considers the matter
13 and sends it back. The pendency, or at least proposed pendency of
14 the appeal, adds at least a conditional element to what the Chamber
15 intended to be a permanent stay. So in that sense, depending on - I'm
16 not sure that it matters - whether the Chamber identified it as a
17 conditional stay or not, the fact remains that application for leave
18 to appeal has been filed and --

19 PRESIDING JUDGE FULFORD: It's a stay under appeal --

20 MS CRISCITELLI: And --

21 PRESIDING JUDGE FULFORD: -- which the Prosecution, as we
22 understand it, is not intending to seek to persuade us to lift it.
23 It is instead intending to exercise its appellate rights and this stay
24 is therefore, currently, if we grant leave, going to be appealed.

25 MS CRISCITELLI: That's correct. So the question then if,

1 as we would certainly hope the Appeals Chamber can consider this appeal
2 on an expedited basis, which we will be asking once application for
3 leave is granted, the delay of what I would hope to be no more than
4 a couple of months, would render this necessarily the kind of case
5 in which the person should be released, whether the Statute entitles
6 release, whether the conditions under which the person could be released
7 would be satisfied, would be met.

8 And I would remind the Court that it has found in part that
9 the accused -- that the accused constitutes sort of a risk of flight -- I
10 don't know that those are the exact words, but the notion is if released
11 there's no way to guarantee his return. And with the appeal, there
12 is of course - in our view, at least - the possibility that the judgment
13 on appeal would be reversed and the case would be back to trial, and
14 we would be in a situation where a person has been released and may
15 not be within the jurisdiction.

16 All of these are other points, but we would also say that
17 notwithstanding the fact that this has been appealed by the Prosecution,
18 we certainly hope that there is a way forward. It is not in anybody's
19 interests to lock down this trial for an indefinite period, so release
20 to the Prosecution is not an option, but neither is a prolonged delay
21 of the proceedings. It's not in the interests of the Prosecution,
22 it's not in the interests of the Defence. We don't believe it's in
23 the interest of the Court. It's certainly not in the interest of the
24 victims and the witnesses.

25 So we -- I will accept for this point that the stay that

1 has been imposed is intended to be a stay without sort of conditions,
2 it's just a stay, but as a practical matter, this stay we do not believe
3 is going to be a permanent one such that the trial itself is suspended
4 and the charges are dismissed.

5 So viewing it in that context and considering -- well, sort
6 of considering the procedures that we are confronting and the process
7 of the case right now, there is no justification, there are no sufficient
8 change of circumstances, to warrant the release of the fugitive
9 conditionally or unconditionally.

10 We would also ask that if the Court is inclined to issue
11 an order either releasing the person unconditionally or establishing
12 the likelihood of a hearing to determine conditions, and where the
13 person is to be released and what country can enforce the conditions
14 and all of those factors that the Appeals Chamber looked at in Bemba,
15 that that action at least be suspended to permit the Appeals Chamber
16 to determine whether that decision to go forward with a release or
17 a conditional release itself would be subject to appeal and to a
18 suspension.

19 Thank you.

20 PRESIDING JUDGE FULFORD: Thank you very much,
21 Ms Criscitelli. Anything else, Maître Mabilille?

22 MS MABILLE: (Interpretation) No, your Honour.

23 PRESIDING JUDGE FULFORD: Thank you very much. We will sit
24 again at quarter-past-3.

25 (Recess taken at 3.03 p.m.)

1 (Upon resuming at 3.23 p.m.)

2 THE COURT USHER: All rise. Please be seated.

3 PRESIDING JUDGE FULFORD: In this oral decision the Bench
4 addresses three issues.

5 I. Application for leave to appeal.

6 On 8 July 2010, the Chamber stayed these proceedings as an
7 abuse of the process of the Court (document 2517). The issue was summed
8 up by the Court as follows, at paragraph 31 of that decision:

9 "[...] the Prosecutor has elected to act unilaterally in
10 the present circumstances, and he declines to be 'checked' by the Chamber.
11 In these overall circumstances, it is necessary to stay these
12 proceedings as an abuse of the process of the Court because of the
13 material non-compliance with the Chamber's orders of 7 July 2010, and
14 more generally, because of the Prosecutor's clearly evinced intention
15 not to implement the Chamber's orders that are made in an Article 68
16 context, if he considers they conflict with his interpretation of the
17 Prosecution's other obligations. Whilst these circumstances endure,
18 the fair trial of the accused is no longer possible, and justice cannot
19 be done, not least because the Judges will have lost control of a
20 significant aspect of the trial proceedings as provided under the Rome
21 Statute framework [...]"

22 It is to be observed at the outset that this application
23 for leave to appeal is unopposed by the Defence, save that the accused
24 is concerned as to the precise formulation of the questions which are
25 posed for determination by the Appeals Chamber.

1 In the application for leave to appeal (document 2520), the
2 Prosecution suggests that leave should be granted, first, because the
3 decision of the Chamber affects (i) the fair and expeditious conduct
4 of the proceedings or (ii) the outcome of the trial, and, second, (iii)
5 its immediate resolution will materially advance the proceedings (these
6 are the elements of the test established under the relevant provision,
7 Article 82(1)(d) of the Statute).

8 Given the Chamber has halted the trial unconditionally, the
9 Prosecution's submissions in support of this application do not require
10 any exhaustive analysis. The decision is centrally concerned with
11 the fairness of the proceedings, for the reasons analysed by the Chamber
12 in its judgment on the stay, and, in the most fundamental sense, their
13 expeditiousness.

14 Furthermore, the outcome of the trial clearly arises
15 following the stay and an immediate resolution of this issue will
16 materially advance the proceedings inter alia by establishing whether
17 or not the trial should continue to a conclusion.

18 To use the language of the application, these matters are
19 all essentially "beyond dispute" (paragraph 39).

20 The Chamber therefore proposes to grant leave, but it
21 expressly disavows the summary of the issue that arises on this appeal
22 as set out in paragraph 54 of the application (and, indeed, elsewhere).

23 The Chamber assessed that intermediary 143 was not materially
24 at risk on account of the disclosure order, given its limited nature.
25 It is to be observed that the Victims and Witnesses Unit agreed with

1 this assessment. Therefore, this appeal does not concern, as suggested
2 by the Prosecutor, "whether the Prosecution has to disclose the identity
3 of a person who is at risk and who has not yet received protective
4 measures which have been assessed as necessary by the Prosecution."

5 Similarly, there are other paragraphs in the Prosecution's
6 application, such as paragraph 7, which the Chamber does not agree
7 with, but it is not appropriate or right in the course of this decision
8 to enter into the merits of the matter.

9 The Chamber observes that intermediary 143 is a potentially
10 critical individual, whose identity it has determined must be disclosed
11 and whose role should be investigated during the course of the
12 presentation of the Defence. The accused already knows his name (or
13 close thereto, his cover having effectively been "blown") and, as just
14 observed, his identity is relevant to the central underpinnings of
15 the Defence abuse submission.

16 Leave is granted on both of the issues identified by the
17 Chamber as set out in the paragraph quoted above; namely, whether it
18 was necessary to stay these proceedings as an abuse of the process
19 of the Court because of:

20 (i) the Prosecution's material noncompliance with the
21 Chamber's orders of 7 July 2010; and

22 (ii) the Prosecutor's clearly evinced intention not to
23 implement the Chamber's orders that are made in an Article 68 context,
24 if he considers they conflict with his interpretation of the
25 Prosecution's other obligations.

1 The Chamber is not persuaded that it is necessary to add
2 in a reference to proportionality as suggested by prosecuting counsel.
3 If there is an order of the Court, the rule of law means that it must
4 be obeyed and not avoided. If the Prosecutor considers that it is
5 a disproportionate order, his remedy is to appeal it. Therefore, any
6 argument as to proportionality in reality only relates to the two orders
7 of 7 July which have not been appealed.

8 II. Order on the accused's detention.

9 History: This is the second occasion on which the Chamber
10 has stayed these proceedings because of the Prosecution's abuse of
11 the process. The first was on 13 June 2008 (document 1401) when the
12 Chamber decided that a fair trial of the accused was not possible,
13 given the material non-disclosure by the Prosecutor of potentially
14 exculpatory materials which the Chamber was told were covered by
15 confidentiality agreements entered into pursuant to Article 54(3)(e)
16 of the Rome Statute.

17 On that earlier occasion, having imposed the stay, the
18 Chamber granted leave to appeal on 2 July 2008 and proceeded to order
19 the accused's release on the basis that under Article 58(1)(b) of the
20 Statute, his detention prior to the commencement of the trial can only
21 be justified if it is necessary to ensure his appearance at trial,
22 to ensure he does not obstruct or endanger the investigation or the
23 Court proceedings, or where it is necessary to prevent the person from
24 continuing with the commission of crimes within the jurisdiction of
25 the Court, arising out of the same circumstances (document 1401,

1 paragraph 29).

2 The Chamber ordered Mr Lubanga's unconditional release
3 (subject to Rule 185 of the Rules of Procedure and Evidence), given
4 that in the Chamber's estimation a fair trial of the accused was
5 impossible and the entire justification for his detention had been
6 removed, save that it delayed the implementation of the order by five
7 days in order to protect the Prosecution's appellate rights and, if
8 an appeal was lodged, the Chamber ordered the further delay of the
9 order for release pending a decision by the Appeals Chamber on whether
10 or not to suspend the order for release (if suspensive effect was
11 requested in the application for leave to appeal) (document 1401,
12 paragraphs 35 and 36).

13 This decision was the subject of revision by the Appeals
14 Chamber on 21 October 2008 (document 1487) in the sense that the Appeals
15 Chamber decided that the Trial Chamber should have considered the full
16 range of options, up to and including unrestricted release, as available
17 to it, particularly when a conditional stay is imposed (paragraph 35
18 and following).

19 The Appeals Chamber at paragraph 18 emphasised that, with
20 an event of this kind, the Chamber is not expected to delay considering
21 the accused's detention until after the conclusion of the substantive
22 appeal.

23 As regards the instant stay of proceedings, the Prosecution
24 has indicated that it will apply for suspensive effect if leave to
25 appeal is granted (document 2520, paragraph 55). In those

1 circumstances, the Chamber is, at this stage, asked to take no further
2 steps in the proceedings and including by way of considering the issue
3 of his detention until it has resolved the application for leave to
4 appeal and, if granted, the Appeals Chamber has resolved the issue
5 of suspensive effect (document 2520, paragraph 56).

6 The arguments in support of these propositions focus on the
7 need to avoid unnecessary prejudice, to avoid the waste of the Court's
8 resources on proceedings which may be rendered moot if leave and
9 suspensive effect are granted, and generally to prevent unnecessary
10 litigation (document 2520, paragraph 56.)

11 The Prosecution seeks to distinguish this stay of proceedings
12 from the earlier stay principally on the basis - as it is argued - that
13 the Chamber envisaged that this stay is only temporary. In support
14 of that argument, the Prosecution relies on paragraph 31 of the decision
15 imposing the stay in which the expression "whilst the stay is in place"
16 appears (document 2520, paragraph 58).

17 In argument before us this afternoon, counsel for the
18 Prosecution has suggested that our decision imposing a stay was a
19 conditional order.

20 In addition, it is contended that the delay will not be
21 extensive. A period of two months has been alluded to as a time period
22 within which the Appeals Chamber may be able to determine the substantive
23 appeal.

24 For its part, the OPCV has focused on the Appeals Chamber
25 judgment, to which reference has been already made, and particularly

1 to the possible dangers to victims if the accused is released, and
2 those submissions are advanced against the background that these are,
3 on any view, serious charges which remain in existence even if in
4 abeyance.

5 Analysis:

6 Focusing therefore on the issue of the accused's continued
7 detention, the present circumstances are essentially
8 indistinguishable from the situation that confronted the Chamber in
9 July 2008. The Chamber has again decided that the Prosecution has
10 materially breached one of its fundamental obligations, leading to
11 the conclusion that the fair trial of the accused is thereby rendered
12 impossible.

13 The Prosecutor has not applied to lift the stay and, instead,
14 the OTP has indicated that, "The Prosecutor ... has made a determination
15 that the Prosecution would rather face adverse consequences in its
16 litigation than expose a person to risk on account of prior interaction
17 with this office." (Document 2516, paragraph 6.)

18 On that basis it is wholly unclear what the result will be
19 if the Appeals Chamber upholds the impugned decision and, particularly
20 on the basis of the written submissions by the Prosecution, it is by
21 no means certain that compliance with court orders will in those
22 circumstances be assured. Therefore this cannot be described as
23 necessarily constituting a temporary stay, nor has it been imposed
24 conditionally.

25 As just rehearsed, the Prosecution has not applied to lift

1 the stay, but instead has elected to exercise its appellate rights.
2 In these circumstances whether this trial will continue at some stage
3 in the future is essentially unknown, and the future of the case will
4 depend inter alia on the eventual decision of the Appeals Chamber and
5 potentially on the attitude of the Prosecution thereafter. However,
6 other matters may in due course arise for consideration.

7 The Chamber can only address the present situation. The
8 trial has been halted because it is no longer fair, and the accused
9 cannot be held in preventative custody on a speculative basis; namely,
10 that at some stage in the future the proceedings may be resurrected.

11 As set out above, the Appeals Chamber addressed the issue
12 of the circumstances in which an accused should be released, and
13 particularly whether his release ought to be the subject of restrictions,
14 in its judgment of 21 October 2008 (document 1487) in which it observed
15 that the Trial Chamber must take into account inter alia the conditional
16 nature of the stay, if that is the situation, when considering
17 unconditional release and, moreover, it should consider all the
18 available options at its disposal (paragraph 31).

19 Given, as just set out, the Chamber has imposed an
20 unconditional stay of proceedings, and bearing in mind the wholesale
21 uncertainty of whether this case will restart at some future time,
22 together with the length of time the accused has already been in custody,
23 anything other than unrestricted release will be unfair.

24 The accused, therefore, shall be released unconditionally
25 save for the following. This order shall not be enforced until the

1 five day time limit for an appeal has expired. If an appeal is filed
2 within the five day time limit against this order granting release,
3 and if a request is made to suspend its effect, the accused shall not
4 leave detention until the Appeals Chamber has resolved whether this
5 order granting release is to be suspended. In any event, the order
6 releasing the accused shall only be implemented after arrangements
7 have been made for his transfer to a State that is obliged to receive
8 him (see Rule 185 of the Rules of Procedure and Evidence).

9 III. A warning under Article 71 of the Statute.

10 The Prosecutor has failed to implement two of the Chamber's
11 orders; those of 7 July 2010. For the reasons set out in the decision
12 imposing the stay, this constituted a deliberate and in our judgment
13 wholly unjustified refusal to comply with the directions of the Court
14 under Article 71 of the Statute.

15 Under Rule 171 of the Rules of Procedure and Evidence, we
16 hereby give the Prosecutor and the Deputy Prosecutor an oral warning
17 of sanctions in the event of any continuing breach of our orders; the
18 Deputy Prosecutor on 8 July 2010 having identified those members of
19 the Bar as the individuals responsible for the refusal to comply with
20 the Chamber's orders.

21 The Chamber is unpersuaded that this warning should await
22 the outcome of the appeal, given it is the inevitable consequence of
23 our decision imposing the stay. However, it is fair that the issue
24 of sanctions should await the outcome of the appeal.

25 Therefore, in the event of continued noncompliance with our

1 orders of 7 July 2010, the Chamber will adjourn further action under
2 Article 71 and Rule 171 until the Appeals Chamber decision on the
3 substantive appeal.

4 That concludes this oral decision.

5 Thank you all very much for your attendance. We will rise.

6 (The hearing ends at 3.51 p.m.)