

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 OA 18

Date: 8 October 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 document

Judgment

on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “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”

shs

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims
Mr Paul Kabongo Tshibangu
Ms Carine Bapita Buyangandu
Mr Luc J. M. Walley

Registrar
Ms Silvana Arbia

Shs

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber I entitled “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” of 8 July 2010 (ICC-01/04-01/06-2517-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Trial Chamber I of 8 July 2010 entitled “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” is reversed.

REASONS

I. KEY FINDINGS

1. Orders of the Chambers are binding and should be treated as such by all parties and participants unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.
2. Even if there is a conflict between the orders of a Chamber and the Prosecutor’s perception of his duties, the Prosecutor is obliged to comply with the orders of the Chamber.
3. Sanctions under article 71 of the Statute are the proper mechanism for a Trial Chamber to maintain control of proceedings when faced with the deliberate refusal of a party to comply with its orders. Before ordering a stay of proceedings because of a

party's refusal to comply with its orders, a Trial Chamber should, to the extent possible, impose sanctions and give such sanctions reasonable time to bring about compliance.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. Background to the Impugned Decision

4. The decision of Trial Chamber I (hereinafter: "Trial Chamber") to stay the proceedings arose in the context of litigation over the Prosecutor's use of intermediaries, i.e. persons who have introduced witnesses to the Prosecutor or who have contacted witnesses on his behalf, including allegations that some intermediaries had sought to induce witnesses to testify falsely before the Court.

5. On 12 May 2010, the Trial Chamber rendered the "Decision on Intermediaries" wherein it ordered, *inter alia*, the identity of intermediary 143 to be disclosed to Mr Lubanga Dyilo "once the necessary protective measures [were] implemented", but decided that there was not a sufficient basis to call intermediary 143 to testify.¹ Although no specific allegations were made against intermediary 143, the testimony of several witnesses called by Mr Lubanga Dyilo contradicted or put into question in some respect evidence given by witnesses who were introduced to the Prosecutor by intermediary 143.² On 19 May 2010, the Prosecutor sought leave to appeal the Decision on Intermediaries.³ On 2 June 2010, the Trial Chamber rejected the Prosecutor's application for leave to appeal.⁴

¹ ICC-01/04-01/06-2434-Conf-Exp, paras 143 and 150 (i). A confidential redacted version was issued on 20 May 2010 as ICC-01/04-01/06-2434-Conf-Red. Corrigenda for both versions were issued on 27 May 2010 as ICC-01/04-01/06-2434-Conf-Exp-Corr and ICC-01/04-01/06-2434-Conf-Red-Corr respectively, while a public redacted version was issued on 31 May 2010 as ICC-01/04-01/06-2434-Red2. All references herein are to the public redacted version.

² See Decision on Intermediaries, paras 43-47.

³ "Prosecution's Application for Leave to Appeal the 'Decision on Intermediaries'", 19 May 2010, ICC-01/04-01/06-2453-Conf-Exp. A confidential redacted version was filed on 25 May 2010 as ICC-01/04-01/06-2453-Conf-Exp, and a public redacted version was filed on 8 June 2010 as ICC-01/04-01/06-2453-Red. All references herein are to the public redacted version.

⁴ "Decision on the prosecution request for leave to appeal the 'Decision on Intermediaries'", ICC-01/04-01/06-2463.

6. On 8 June 2010, the Victims and Witnesses Unit (hereinafter: "VWU") informed the Trial Chamber that the implementation of protective measures for intermediary 143 would be delayed until the week of 5 July 2010.⁵

7. On 6 July 2010, as Mr Lubanga Dyilo was about to commence his questioning of intermediary 321, the Prosecutor informed the Trial Chamber that intermediary 143 was requesting a written proposal of protective measures and that the disclosure of his identity might be further delayed until 16 July 2010 or later.⁶ The Trial Chamber considered that, for Mr Lubanga Dyilo to properly question intermediary 321, he needed to know the identity of intermediary 143.⁷ It observed that the possible additional delay would "inevitably be substantial, and that delay has to be seen in the context of the very considerable delays that have already been experienced in relation to this trial".⁸ In order to move the trial forward while adequately protecting intermediary 143 from any risks from disclosure of his/her identity, the Trial Chamber ordered the limited disclosure of the identity of intermediary 143 to counsel for Mr Lubanga Dyilo, her assistants in the courtroom and the team's resource person in the Democratic Republic of the Congo only.⁹ The Trial Chamber stressed that there was to be "an absolute embargo on any dissemination of this information to anyone else" and that no investigative steps should be taken based on this information before a further order of the Trial Chamber.¹⁰ Upon being informed that the Prosecutor intended to apply for leave to appeal this order, the Trial Chamber stayed the order overnight.¹¹

8. In the morning of 7 July 2010, the Trial Chamber asked Mr Lubanga Dyilo whether it would be possible to start his questioning of intermediary 321 in general

⁵ See Trial Chamber I, "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", 8 July 2010, ICC-01/04-01/06-2517-Conf, para. 3. A public redacted version was filed on the same day as ICC-01/04-01/06-2517-Red (hereinafter: "Impugned Decision"). All references herein are to the public redacted version.

⁶ ICC-01/04-01/06-T-310-RED-ENG, p. 56, line 13 to p. 59, line 3.

⁷ ICC-01/04-01/06-T-310-RED-ENG, p. 63, lines 18-24.

⁸ ICC-01/04-01/06-T-310-RED-ENG, p. 64, lines 5-8.

⁹ ICC-01/04-01/06-T-310-RED-ENG, p. 64, line 15 to p. 65, line 5.

¹⁰ ICC-01/04-01/06-T-310-RED-ENG, p. 64, line 22 to p. 65, line 3.

¹¹ ICC-01/04-01/06-T-310-CONF-ENG, p. 90, lines 6-25. While the Trial Chamber's oral decision to stay the order overnight occurred in closed session, this fact was made public by the Trial Chamber in the Impugned Decision, para. 9.

but to defer questions regarding intermediary 143 to a later stage.¹² Mr Lubanga Dyilo objected to this proposal, stating that it was impossible to separate questions related to intermediary 143 from more general questions, noting that the issue before the Trial Chamber concerned the falsification of testimony and arguing that intermediary 321 might change his testimony related to intermediary 143 if it were to be postponed.¹³ The Prosecutor argued that separating the questioning was feasible.¹⁴

9. On 7 July 2010, at around 11h00, the Trial Chamber found that there was no increased risk to intermediary 143 from limited disclosure of his/her identity and that there was therefore no necessity to continue to suspend the order on disclosure pending the filing of an application by the Prosecutor for leave to appeal.¹⁵ The Trial Chamber ordered the Prosecutor to disclose the identity of intermediary 143 “within the next half-an-hour” (hereinafter: “First Order of Disclosure”).¹⁶ The Prosecutor neither disclosed the intermediary’s identity within the time-limit nor sought an extension of the time-limit before its expiry.

10. In the afternoon of 7 July 2010, the Prosecutor orally requested the Trial Chamber to reconsider the First Order of Disclosure (hereinafter: “Prosecutor’s Request for Reconsideration”).¹⁷ At around 15h40 on 7 July 2010, the Trial Chamber, having considered the Prosecutor’s request for reconsideration, again ordered the Prosecutor to disclose, under the same restricted conditions, the identity of intermediary 143 by 16h30 of the same day (hereinafter: “Second Order of Disclosure”).¹⁸ Again, the Prosecutor neither disclosed the intermediary’s identity nor sought an extension of the time-limit before the time-limit’s expiry.

11. At 16h41, 11 minutes after the second time-limit expired, the Prosecutor filed a request for an extension of the time-limit for the disclosure or, alternatively, a stay of proceedings pending further consultations with the VWU regarding the protective measures afforded intermediary 143 (hereinafter: “Prosecutor’s Request for Variation

¹² ICC-01/04-01/06-T-311-RED-ENG, p. 2, lines 13-24.

¹³ ICC-01/04-01/06-T-311-RED-ENG, p. 3, line 4 to p. 4, line 25.

¹⁴ ICC-01/04-01/06-T-311-RED-ENG, p. 6, line 4 to p. 6, line 16.

¹⁵ ICC-01/04-01/06-T-311-RED-ENG, p. 13, lines 17-25.

¹⁶ ICC-01/04-01/06-T-311-RED-ENG, p. 14, lines 18-20.

¹⁷ ICC-01/04-01/06-T-312-ENG, p. 1, line 25 to p. 14, line 2.

¹⁸ ICC-01/04-01/06-T-312-ENG, p. 22, lines 1-3.

sls

of the Time-Limit”).¹⁹ In this request, the Prosecutor emphasised that he was “bound by autonomous statutory duties of protection that [he] had to honour at all times”²⁰ and that it was “indispensable that prior to any disclosure being effected, the Prosecution be satisfied that it is acting in compliance with its specific duties under the Statute and the Rules”.²¹

12. At 18h51 of the same day, the Prosecutor filed the “Prosecution’s Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay” wherein he stated:

The Prosecution is sensitive to its obligation to comply with the Chamber’s instructions. However, it also has an independent statutory obligation to protect persons put at risk on account of the Prosecution’s actions. It 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. The Prosecutor accordingly has made a determination that the Prosecution would rather face adverse consequences in its litigation than expose a person to risk on account of prior interaction with this Office. This is not a challenge to the authority of the Chamber, it is instead a reflection of the Prosecution’s own legal duty under the Statute.²²

2. The Impugned Decision and subsequent proceedings

13. On 8 July 2010, the Trial Chamber rendered the “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”²³ (hereinafter: “Impugned Decision”). In this decision, the Trial Chamber ordered a stay of proceedings “as an abuse of the process of the Court because of the [Prosecutor’s] 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

¹⁹ “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 VWU”, ICC-01/04-01/06-2515.

²⁰ Prosecutor’s Request for Variation of the Time-Limit, para. 3.

²¹ Prosecutor’s Request for Variation of the Time-Limit, para. 4.

²² ICC-01/04-01/06-2516, para. 6.

²³ ICC-01/04-01/06-2517-Conf. A redacted version was filed on the same day as ICC-01/04-01/06-2517-Red. All references herein are to the redacted version.

shs

considers they conflict with his interpretation of the prosecution's other obligations".²⁴

14. The Trial Chamber stated that, of these two problems, the first one might be "time-limited".²⁵ In other words, if the protective measures originally foreseen were implemented, the Prosecutor may disclose the identity of intermediary 143. However, if the Prosecutor did not then disclose the intermediary's identity, the Chamber considered that it would "need to scrutinize the impact of this eventuality in the context of its overall assessment of the evidence in the case, and the fairness of the proceedings against the accused".²⁶ It emphasised that "the Chamber is currently hearing evidence on a confined, but significant, issue that includes the allegation that the prosecution has knowingly employed, or made use of, intermediaries who influenced individuals to give false testimony, thereby abusing its powers" and that the failure to disclose the identity of intermediary 143 was "likely to be relevant to [the] defence abuse application".²⁷

15. The Trial Chamber stated that the second problem revealed "a more profound and enduring concern".²⁸ It observed that the Prosecutor "appear[ed] to argue that the prosecution has autonomy to comply with, or disregard, the orders of the Chamber, depending on its interpretation of its responsibilities under the Rome Statute framework".²⁹ The Trial Chamber stated that "[t]he Rome Statute framework makes it clear that the Chamber, once seized of the case, is the only organ of the Court with the power to order and vary protective measures vis-à-vis individuals at risk on account of work of the ICC".³⁰ It indicated that the responsibilities of the Prosecutor under article 68 of the Statute are subject to the Trial Chamber's "overarching responsibility" to ensure a fair trial and "do not give him license, or discretion, or autonomy to disregard judicial orders because he considers the Chamber's Decision is inconsistent with his interpretation of his obligations".³¹ It added that the Appeals Chamber's judgments "expressly indicated that disagreements as to protective

²⁴ Impugned Decision, para. 31.

²⁵ Impugned Decision, para. 20.

²⁶ Impugned Decision, para. 20.

²⁷ Impugned Decision, para. 20.

²⁸ Impugned Decision, para. 21.

²⁹ Impugned Decision, para. 21.

³⁰ Impugned Decision, para. 23.

³¹ Impugned Decision, para. 24.

measures are to be decided by the Chamber” and should not “be resolved by the unilateral and un-checked action of the Prosecutor”.³²

16. The Trial Chamber concluded that, in these circumstances, it was necessary to stay proceedings as “the fair trial of the accused [was] no longer possible, and justice [could not] be done, not least because the judges [had] lost control of a significant aspect of the trial proceedings as provided under the Rome Statute framework”.³³

17. On 15 July 2010, following an application from the Prosecutor, the Trial Chamber orally granted the Prosecutor leave to appeal the Impugned Decision,³⁴ ordered the release of Mr Lubanga Dyilo³⁵ and gave the Prosecutor and the Deputy Prosecutor an oral warning of sanctions for misconduct under article 71 of the Statute and rule 171 of the Rules of Procedure and Evidence, should there be any continuing breach of its orders.³⁶ The Chamber decided to await the outcome of the appeal against the Impugned Decision before taking any further action with respect to imposing sanctions.³⁷

B. Proceedings before the Appeals Chamber

18. On 19 July 2010, the Prosecutor filed a request for an extension of the page limit for his document in support of the appeal.³⁸ The Appeals Chamber granted the Prosecutor's request on 22 July 2010.³⁹

³² Impugned Decision, para. 29, referring to *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, “Judgment on the appeal of the Prosecutor against the ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules’ of Pre-Trial Chamber I”, 26 November 2008, ICC-01/04-01/07-776 (OA 7) (hereinafter: “*Katanga and Ngudjolo Chui* OA 7 Judgment”), para. 93.

³³ Impugned Decision, para. 31.

³⁴ ICC-01/04-01/06-T-314-ENG, p. 14, line 5 to p. 17, line 7. Leave to appeal was granted with respect to “whether it was necessary to stay [the] proceedings as an abuse of process of the Court because of: (i) the Prosecution’s material noncompliance with the Chamber’s orders of 7 July 2010; and (ii) 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.”

³⁵ ICC-01/04-01/06-T-314-ENG, p. 17, line 8 to p. 22, line 8.

³⁶ ICC-01/04-01/06-T-314-ENG, p. 22, lines 9-20.

³⁷ ICC-01/04-01/06-T-314-ENG, p. 22, line 21 to p. 23, line 3.

³⁸ “Prosecution’s Application for an extension of page limit for its document in support of appeal against Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, ICC-01/04-01/06-2523.

³⁹ “Decision on the Prosecutor’s application for an extension of page limit for his document in support of appeal”, ICC-01/04-01/06-2532.

19. On 22 July 2010, a victim represented by Mr Paul Kabongo Tshibangu and Ms Carine Bapita Buyangandu filed an application to participate in both the present appeal and the appeal against the decision to release Mr Lubanga Dyilo (OA 17).⁴⁰ On 28 July 2010, victims represented by Mr Luc Walleyne filed an application to participate in the present appeal.⁴¹

20. On 26 July 2010, the Prosecutor filed 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”.⁴² On 28 July 2010, Mr Lubanga Dyilo challenged the admissibility of this document on the ground that it violated the requirements of regulation 36(3) of the Regulations of the Court.⁴³ On the same day, the Prosecutor filed a response in which he conceded that the document exceeded the word limit and requested the Chamber to extend the word limit or order him to re-file the document.⁴⁴ On 30 July 2010, the Appeals Chamber ordered the Prosecutor to re-file the document.⁴⁵ Later that day, the Prosecutor filed the corrected “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”⁴⁶ (hereinafter: “Document in Support of the Appeal”).

21. On 6 August 2010, the Prosecutor filed his response to the victims’ applications to participate in which he did not oppose the participation of the victims but drew attention to the fact that five of the victims represented by Mr Walleyne had “not yet

⁴⁰ “Request for Participation in the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 (ICC-01/04-01/06-2517-Conf) and against the Decision to Release the Accused of 15 July 2010 (ICC-01/04-01/06-T-314)”, ICC-01/04-01/06-2533-Conf-tENG. A redacted version, dated 22 July 2010, was registered on 24 July 2010 as ICC-01/04-01/06-2533-Red.

⁴¹ “Application to Participate in the Appeal Proceedings Against the Decision of 8 July 2010 to Stay the Proceedings”, ICC-01/04-01/06-2541-tENG.

⁴² ICC-01/04-01/06-2538-Conf.

⁴³ “Observations de la Défense relatives à l’irrecevabilité du « Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July to stay the proceedings for abuse of process », daté du 26 juillet 2010”, ICC-01/04-01/06-2539.

⁴⁴ “Prosecution’s Response to the Defence Observations and Request for an Extension of the Word Limit or Authorization to Re-file its Document in Support of Appeal”, ICC-01/04-01/06-2540.

⁴⁵ “Decision on the ‘Observations de la Défense relatives à l’irrecevabilité du « Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July to stay the proceedings for abuse of process », daté du 26 juillet 2010”, ICC-01/04-01/06-2543.

⁴⁶ ICC-01/04-01/06-2544-Conf. A public redacted version was filed on the same day as ICC-01/04-01/06-2544-Red. All references herein are to the redacted version.

been granted victim status in this case”.⁴⁷ On 16 August 2010, Mr Lubanga Dyilo filed his response in which he stated that, with the exception of these five victims, he did not oppose the victims’ applications to participate.⁴⁸

22. On 9 August 2010, Mr. Lubanga Dyilo filed the “Defence Response to 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’”⁴⁹ (hereinafter: “Response to the Document in Support of the Appeal”).

23. On 11 August 2010, the Registrar filed the “Registry’s additional information relevant to 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’” (hereinafter: “Registry’s Additional Information”).⁵⁰ On 1 September 2010, the Prosecutor filed the “Prosecution’s observations on ‘Registry’s additional information relevant to 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’”⁵¹ in which he requested to be heard if the Appeals Chamber chose to receive comments from the Registry.

24. On 18 August 2010, the Appeals Chamber rendered the “Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Decision to Stay the Proceedings”⁵² by which it permitted victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0051/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09, and a/0398/09 to participate in the appeal. The Appeals Chamber rejected applications for participation by the five victims who had not been recognised as participants in the case.

⁴⁷ “Prosecution’s consolidated response to applications by Legal Representatives of victims to participate in the appeals against the decisions to stay the proceedings and to release the accused”, ICC-01/04-01/06-2549.

⁴⁸ “Observation de la Défense sur les demandes des victimes aux fins de participation à l’appel de la Décision du 8 juillet 2010 ordonnant la suspension des procédures”, ICC-01/04-01/06-2554.

⁴⁹ ICC-01/04-01/06-2550-Conf-tENG. A redacted version was filed on the same day as ICC-01/04-01/06-2550-Red.

⁵⁰ ICC-01/04-01/06-2551-Conf. Pursuant to an order of the Appeals Chamber, a public redacted version was filed on 4 October 2010 as ICC-01/04-01/06-2551-Red.

⁵¹ ICC-01/04-01/06-2564.

⁵² ICC-01/04-01/06-2556.

25. On 23 August 2010, the victims represented by Mr Walleyne filed their observations⁵³ (hereinafter: “Observations of Victims Represented by Mr Walleyne”). On 24 August 2010, victim a/0051/06, represented by Mr Tshibangu and Ms Buyangandu, filed a document containing observations on both on the appeal against the decision to release Mr Lubanga Dyilo and the present appeal⁵⁴ (hereinafter: “Observations of Victim a/0051/06”).

26. On 27 August 2010, the Prosecutor filed a consolidated response to the observations of the victims⁵⁵ (hereinafter: “Prosecutor’s Response to Victims’ Submissions”). Mr Lubanga Dyilo filed a consolidated response to the victims’ observations on 30 August 2010⁵⁶ (hereinafter: “Mr Lubanga Dyilo’s Response to Victims’ Submissions”).

III. PRELIMINARY ISSUES

A. Request for an oral hearing

27. The Appeals Chamber notes that the Prosecutor requested an oral hearing on the appeal “given the importance of the case and the complexity of the issues”.⁵⁷ The Appeals Chamber, recalling rule 156 (3) of the Rules of Procedure and Evidence, considered that an oral hearing would be unnecessary in the present appeal and would only delay the consideration of the appeal in contravention of rule 156 (4) of the Rules of Procedure and Evidence. It therefore did not hold an oral hearing.

B. Registry’s Additional Information

28. The Appeals Chamber took note of the Registry’s Additional Information but considered that this filing was not relevant to the merits of the present appeal and that

⁵³ “Observations on behalf of victims a/0001/06, a/0002/06, a/0003/06, a/00049/06 [sic], a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0053/09, a/0249/09, a/0292/09 and a/0398/09 on the appeal against Trial Chamber I’s decision of 8 July to stay the proceedings”, ICC-01/04-01/06-2559-Conf-tENG. A public redacted version was filed on the same day as ICC-01/04-01/06-2559-Red-tENG.

⁵⁴ “Observations of the Legal Representatives of Victim a/0051/06 on the Appeal against the Decision to Stay Proceedings for Abuse of Process of 8 July 2010 and the Appeal against the Decision to Release the Accused of 15 July 2010”, ICC-01/04-01/06-2560-tENG.

⁵⁵ “Prosecution’s Response to the Victim’s Observations on the Appeal against Trial Chamber I’s Decision of 8 July 2010 to Stay the Proceedings for Abuse of Process”, ICC-01/04-01/06-2562.

⁵⁶ “Defence Response to the Observations of the Legal Representatives of the Victims concerning the Appeal against the Decision Ordering the Stay of Proceedings”, ICC-01/04-01/06-2563-Conf-tENG. A public redacted version was filed on 7 October 2010 as ICC-01/04-01/06-2563-Red. All references herein are to the redacted version.

⁵⁷ Document in Support of the Appeal, para. 92.

the Registrar's offer therein to provide further considerations⁵⁸ was not necessary for the disposition of the appeal. Consequently, the Appeals Chamber did not seek further information from the Registrar or comments from the Prosecutor.

C. Filing of confidential documents

29. The Appeals Chamber reminds all participants in the proceedings as well as the Registrar of the necessity to state the factual and legal basis for filing documents confidentially.⁵⁹ The filing of a public redacted version, while appreciated, does not obviate the need to comply with this requirement.⁶⁰ Moreover, the Appeals Chamber reminds parties and participants that “[t]he explanation provided by the participant must be framed so as to allow the Chamber to assess whether or not the classification chosen by the participant should be retained or altered”.⁶¹

IV. ARGUMENTS OF THE PARTIES AND PARTICIPANTS

A. Arguments of the Prosecutor

30. In his Document in Support of the Appeal, the Prosecutor puts forward a single ground of appeal, namely 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 [the Prosecutor’s] interpretation of the Prosecution’s other obligations”.⁶²

31. The Prosecutor contends that this ground of appeal involves the three following specific errors:

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

⁵⁸ See Registry’s Additional Information, para. 14.

⁵⁹ See regulation 23 *bis* of the Regulations of the Court.

⁶⁰ See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’”, 12 July 2010, ICC-01/04-01/07-2259 (OA 10), para. 15.

⁶¹ See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 26.

⁶² Document in Support of the Appeal, para. 46.

Sh

(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.⁶³

32. With respect to the first alleged error, the Prosecutor contends that he did not refuse to comply with the orders of the Court but instead exercised rights available to him as a party. He argues that, even though the Chamber assumed that the disclosure under the modalities established in its orders did not pose any risk to intermediary 143, the Trial Chamber nevertheless should have consulted the Prosecutor in advance of varying the protective measures applicable to intermediary 143.⁶⁴ The Prosecutor asserts that the Trial Chamber, by acting "unilaterally", did not provide a reasonable opportunity to the Prosecutor to present his views before ordering the disclosure of the identity of intermediary 143.⁶⁵ He contends that he "cannot be faulted for attempting to offer information and views to the Chamber after the fact, given that [he] was denied a full opportunity beforehand. Nor was it abusive for [him] to seek additional time to consult with the VWU".⁶⁶ He alleges that, following the Trial Chamber's reasoning, "every request by a party that a Chamber reconsider a prior ruling or seeks a variation of a time-limit will present a situation of non-compliance"⁶⁷. The Prosecutor concludes that the Trial Chamber "cannot penalize the legitimate exercise of [his] rights by regarding it as non-compliance".⁶⁸

33. With respect to the second alleged error, the Prosecutor argues that "the Statute does not focus the responsibilities and duties of protection on one particular organ" but rather establishes a system in which "all organs share responsibility and must consult and act in a coordinated fashion to provide adequate protection".⁶⁹ The Prosecutor argues that this responsibility applies to the Prosecutor during trial⁷⁰ and

⁶³ Document in Support of the Appeal, para. 46.

⁶⁴ Document in Support of the Appeal, paras 51-53.

⁶⁵ Document in Support of the Appeal, para. 49.

⁶⁶ Document in Support of the Appeal, para. 53.

⁶⁷ Document in Support of the Appeal, para. 54.

⁶⁸ Document in Support of the Appeal, para. 54.

⁶⁹ Document in Support of the Appeal, paras 60-61.

⁷⁰ Document in Support of the Appeal, para. 62.

Shs

that the Trial Chamber therefore “erred by concluding that it has a monopoly of protective functions”.⁷¹ The Prosecutor further contends that his duty of protection is compatible with the ultimate responsibility of the Chamber to ensure that any protective measures taken by the Court are not prejudicial to the rights of the accused and a fair and impartial trial.⁷² The Prosecutor claims not to challenge the Trial Chamber’s authority.⁷³ However, he contends that, if a Chamber’s order entails, in his view, tangible risks to a person, the Prosecutor “must engage with the Chamber and exhaust all available means to seek adjustments or variations to [the Chamber’s] order to avert that risk”.⁷⁴ The Prosecutor submits that both the right of a person to protection and the right of an accused to a fair trial “are absolute and must be accommodated without compromise”.⁷⁵ In case of possible tension between these two rights, he submits as an appropriate solution that “the [Trial] Chamber may decide to draw inferences in favour of the accused and to refrain from ordering disclosure”.⁷⁶

34. With respect to the third alleged error, the Prosecutor alleges that, even if the Trial Chamber correctly found that the Prosecutor’s behaviour constituted an abuse of process, a stay of proceedings was an “excessive and premature remedy”⁷⁷ and that “the Trial Chamber abused its discretion when, as a remedy of first resort, it exercised a power that should be used sparingly and when no other remedies are appropriate”.⁷⁸ The Prosecutor asserts that the Trial Chamber could have made findings of “contempt” under article 71 of the Statute to punish the Prosecutor⁷⁹ and could have imposed other remedies less onerous than a stay of proceedings to compensate Mr Lubanga Dyilo. The Prosecutor alleges that the Trial Chamber did not sufficiently explore other possible remedies such as dividing Mr Lubanga Dyilo’s cross-examination of intermediary 321 or suspending briefly the proceedings until interim security measures were implemented.⁸⁰ He contends that the Trial Chamber could have requested the Prosecutor to stipulate to certain facts or to withdraw or amend

⁷¹ Document in Support of the Appeal, paras 65-66.

⁷² Document in Support of the Appeal, para. 67.

⁷³ Document in Support of the Appeal, para. 67.

⁷⁴ Document in Support of the Appeal, para. 68.

⁷⁵ Document in Support of the Appeal, para. 69.

⁷⁶ Document in Support of the Appeal, para. 69.

⁷⁷ Document in Support of the Appeal, para. 72.

⁷⁸ Document in Support of the Appeal, para. 75 (footnotes omitted).

⁷⁹ Document in Support of the Appeal, paras 77-79.

⁸⁰ Document in Support of the Appeal, paras 82-83.

Shs

charges or could have drawn legal and factual inferences in favour of Mr Lubanga Dyilo or excluded witnesses introduced by the intermediary in question.⁸¹

35. The Prosecutor distinguishes the Impugned Decision from the previous decision of the Trial Chamber to stay proceedings in July 2008.⁸² He alleges that, unlike the prior stay, the Impugned Decision concerned only one isolated order, and there was no prospect that the factual underpinnings of the Impugned Decision would arise again.⁸³

B. Arguments of Mr Lubanga Dyilo

36. Mr Lubanga Dyilo contends that the Prosecutor's descriptions of the facts and proceedings are incomplete and distort the decisions of the Trial Chamber.⁸⁴

37. With respect to the Prosecutor's first alleged error, Mr Lubanga Dyilo points out that the Prosecutor did not appeal the Trial Chamber's First and Second Orders of Disclosure, and he states that these orders are therefore final. He submits that any alleged procedural irregularity with respect to these orders is irrelevant to the present appeal which concerns solely the consequences of non-compliance with the orders.⁸⁵ Mr Lubanga Dyilo submits that, in any event, the Trial Chamber gave the Prosecutor sufficient opportunity to present his views prior to these orders and that the Prosecutor does not specify any facts or information which he could not have submitted prior to the orders of the Trial Chamber.⁸⁶

38. Mr Lubanga Dyilo observes that the orders of the Trial Chamber have not been implemented because of a deliberate decision of the Prosecutor and not because of any insurmountable external obstacles. He contends that "[t]his objective situation can only be seen as a refusal [by the Prosecutor] to comply with the Chamber's orders".⁸⁷

⁸¹ Document in Support of the Appeal, paras 84-85.

⁸² Document in Support of the Appeal, paras 89-90, referring to *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486 (OA 13) (hereinafter: "*Lubanga OA 13 Judgment*").

⁸³ Document in Support of the Appeal, paras 89-90.

⁸⁴ Response to the Document in Support of the Appeal, para. 1.

⁸⁵ Response to the Document in Support of the Appeal, para. 56.

⁸⁶ Response to the Document in Support of the Appeal, paras 57-58.

⁸⁷ Response to the Document in Support of the Appeal, para. 59.

slw

He submits that the only procedural right that the Prosecutor possessed to contest the orders was to seek leave to appeal, which he declined to do.⁸⁸

39. With respect to the Prosecutor's second alleged error, Mr Lubanga Dyilo contends that the Prosecutor puts forward an interpretation of his rights and obligations which is incompatible with the legal texts of the Court and the normal functioning of a judicial institution.⁸⁹ Mr Lubanga Dyilo indicates that it is indisputable that the Trial Chamber has authority over the Prosecutor with respect to the protection of persons and that the exercise of the Prosecutor's responsibility under article 68 of the Statute is subject to the authority of the Trial Chamber.⁹⁰ He submits that even where the Prosecutor has the right to be heard prior to the decisions of the Trial Chamber this does not confer on the Prosecutor the privilege to oppose *a posteriori* the implementation of these decisions.⁹¹ He states that the Prosecutor "considers himself entitled to refuse to implement an order by the Chamber provided that he takes responsibility for the procedural or disciplinary consequences of such refusal".⁹² He argues that it is "unacceptable that the implementation of a judicial decision should be subject to the Prosecutor's discretion, and to his personal interpretation of his obligations and of the interests at stake".⁹³

40. With respect to the Prosecutor's third alleged error, Mr Lubanga Dyilo argues that the stay of proceedings is a "logical and inevitable consequence" of the behaviour of the Prosecutor.⁹⁴ He argues that the refusal of the Prosecutor to comply with the Trial Chamber's orders "has obstructed the Defence effort to demonstrate the existence of a concerted plan to manipulate evidence in which the Office of the Prosecutor was implicated, and has accordingly made it impossible to conduct a fair trial".⁹⁵ He argues that the alternative measures suggested by the Prosecutor, such as excluding certain charges or evidence, would have been insufficient to compensate for

⁸⁸ Response to the Document in Support of the Appeal, para. 60.

⁸⁹ Response to the Document in Support of the Appeal, para. 63.

⁹⁰ Response to the Document in Support of the Appeal, para. 65.

⁹¹ Response to the Document in Support of the Appeal, para. 66.

⁹² Response to the Document in Support of the Appeal, para. 68.

⁹³ Response to the Document in Support of the Appeal, para. 69.

⁹⁴ Response to the Document in Support of the Appeal, paras 80-82.

⁹⁵ Response to the Document in Support of the Appeal, para. 75.

shs

the prejudice suffered by Mr Lubanga Dyilo.⁹⁶ He submits that sanctions under article 71 of the Statute would also not compensate such prejudice.⁹⁷

C. Observations of the victims and responses thereto

41. The victims represented by Mr Walleyne argue that the unconditional and definitive stay of proceedings ordered by the Trial Chamber is “disproportionate, premature and unjustified”.⁹⁸ They state that proceedings before the Court concern not only the Prosecutor and the accused but also the victims who are also entitled to a fair trial.⁹⁹ They assert that a permanent stay of proceedings would violate the victims’ rights of access to justice.¹⁰⁰ They also assert that Mr Lubanga Dyilo’s resource person has put pressure on witnesses.¹⁰¹

42. Victim a/0051/06 alleges that the decision of the Trial Chamber to stay the proceedings is “wrong in law”.¹⁰² This victim contends that the Trial Chamber did not give enough time to the VWU to propose alternative security measures¹⁰³ and that the Prosecutor’s consideration of issues of protection should not be seen as abuse of process.¹⁰⁴ Victim a/0051/06 contends that the stay of proceedings would lead to the denial of justice for Mr Lubanga Dyilo as well as for the victims.¹⁰⁵ The victim also alleges threats have been made to witnesses.¹⁰⁶

43. The Prosecutor concurs with the observations of the victims and requests the Appeals Chamber take them into consideration.¹⁰⁷

⁹⁶ Response to the Document in Support of the Appeal, para. 77.

⁹⁷ Response to the Document in Support of the Appeal, para. 78.

⁹⁸ Observations of Victims Represented by Mr Walleyne, para.15.

⁹⁹ Observations of Victims Represented by Mr Walleyne, paras 6 and 10.

¹⁰⁰ Observations of Victims Represented by Mr Walleyne, para. 10.

¹⁰¹ Observations of Victims Represented by Mr Walleyne, footnote 9. The Appeals Chamber ordered the victims to file, by 16h00 on 7 October, a second redacted version in which this information was not redacted. “Order on the filing of public redacted versions of two documents”, 6 October 2010, ICC-01/4-01/06-2580-Conf. As of the expiry of this time-limit, the victims had not yet filed this second redacted version, but the Appeals Chamber sees no difficulty in referring to such information before the second redacted version is filed

¹⁰² Observations of Victim a/0051/06, para. 3.

¹⁰³ Observations of Victim a/0051/06, para. 5.

¹⁰⁴ Observations of Victim a/0051/06, para. 10.

¹⁰⁵ Observations of Victim a/0051/06, para. 12.

¹⁰⁶ Observations of Victim a/0051/06, para. 6.

¹⁰⁷ Prosecutor’s Response to Victims’ Observations, paras 2 and 5.

Shs

44. Mr Lubanga Dyilo focuses his response on the allegations of threats against witnesses. He claims that these are unfounded and that to take such considerations into account would be prejudicial to the rights of the accused and a fair trial.¹⁰⁸

V. DETERMINATION BY THE APPEALS CHAMBER

45. The Appeals Chamber observes that, throughout the Document in Support of the Appeal, the Prosecutor commingles arguments against the Impugned Decision with challenges to the Trial Chamber's prior orders to disclose the identity of intermediary 143.¹⁰⁹ However, as correctly pointed out by Mr Lubanga Dyilo, neither the First nor the Second Order of Disclosure is on appeal.¹¹⁰ The Appeals Chamber, therefore, does not address the specific challenges to the First and Second Orders of Disclosure and restricts its consideration to whether the Prosecutor refused to comply with the orders of the Trial Chamber and the propriety of the Trial Chamber's decision to impose a stay of proceedings as a consequence.

A. The binding nature of the Trial Chamber's orders and whether the Prosecutor refused to comply with such orders

46. It is undisputed that the Prosecutor did not fulfil the terms of the First Order of Disclosure within that order's specified time-limit. It is equally undisputed that the Prosecutor did not fulfil the terms of the Second Order of Disclosure within its time-limit. The Prosecutor failed to comply with both orders and remained in non-compliance at the time of the Impugned Decision. The Prosecutor does not contend that his non-compliance was caused by any external factor. He was aware of the orders and voluntarily chose to pursue other actions which he considered to be justified rather than to comply with the orders. The Prosecutor's non-compliance was deliberate. The Appeals Chamber finds that such wilful non-compliance constituted a clear refusal to implement the orders of the Chamber. To characterise such wilful non-compliance as anything other than refusal, as the Prosecutor does in his Document in Support of the Appeal, is, at best, disingenuous. At worst, it is an expression of what

¹⁰⁸ Mr Lubanga Dyilo's Response to Victims' Observations, paras 10-19.

¹⁰⁹ See, e.g., paras 6, 12-16, 56-66.

¹¹⁰ See Response to the Document in Support of the Appeal, paras 42 and 56. The Appeals Chamber notes that, in granting leave to appeal, the Trial Chamber also informed the Prosecutor that issues related to the First and Second Orders of Disclosure were not on appeal. ICC-01/04-01/06-T-314-ENG, p. 15, line 20 to p. 17, line 7.

the Trial Chamber correctly described as “a more profound and enduring concern”,¹¹¹ namely that the Prosecutor may decide whether or not to implement the Trial Chamber’s orders depending on his interpretation of his obligations under the Statute.

47. Under the Statute, the Trial Chamber, subject only to the powers of the Appeals Chamber, is the ultimate guardian of a fair and expeditious trial. Article 64 (2) of the Statute provides that it is the Trial Chamber which shall ensure that the trial is conducted fairly, expeditiously and with full respect for the rights of the accused. As correctly noted in the Impugned Decision, the Appeals Chamber has previously confirmed that “[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (Article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges”.¹¹²

48. The authority of the judges over the parties within the context of the trial does not negate any Statutory duties of the Prosecutor, but, as Mr Lubanga Dyilo correctly notes,¹¹³ it does mean that when there is a conflict between the Prosecutor’s perception of his duties and the orders of the Trial Chamber, the Trial Chamber’s orders must prevail. This is a fundamental criterion for any trial to be fair. The Appeals Chamber fully endorses the statement of the Trial Chamber that “[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations”.¹¹⁴ Orders of a Trial Chamber are binding orders, to be implemented unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.

49. It is not, as the Prosecutor submits, that “[i]f the [Trial] 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

¹¹¹ Impugned Decision, para. 21.

¹¹² Impugned Decision, para. 25, citing *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 13 June 2008, ICC-01/04-01/06-1401, para. 88 and its confirmation by the Appeals Chamber in the *Lubanga* OA 13 Judgment, para. 76.

¹¹³ See Response to the Document in Support of the Appeal, para. 65.

¹¹⁴ Impugned Decision, para. 27.

non-compliance”.¹¹⁵ It was not the requests for reconsideration or variation of a time-limit that the Trial Chamber considered to constitute non-compliance, but rather the Prosecutor’s failure to fulfil the terms of the orders within the prescribed time-limits. The Appeals Chamber need not consider whether and to what extent parties may seek reconsideration of orders of a Trial Chamber or variations of time-limits for consideration of such orders.¹¹⁶ Even if the Prosecutor’s Request for Reconsideration and the Prosecutor’s Request for Variation of the Time-Limit had been made within the respective time-limits (which they were not), they would not have altered the Prosecutor’s obligations under the First and Second Orders of Disclosure. The filing of a request by a party does not, in itself, suspend the effect of an order; only a judicial decision may alter the legal effects of a judicial order.

50. There is no exception to the general principle that the Prosecutor (or other parties and participants) must follow the orders of the Trial Chamber when it comes to issues of protection. Indeed, article 68 (1) of the Statute specifically provides that, whatever measures the Prosecutor may take with respect to the protection of victims and witnesses, “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.¹¹⁷ Reading this provision together with the responsibility of the Trial Chamber to ensure a fair trial, it is clear that the Prosecutor’s duties are subordinate to the authority of the Trial Chamber. Moreover, the responsibility of the Trial Chamber under article 64 (2) of the Statute explicitly encompasses ensuring not only that a trial is conducted fairly, expeditiously and with full respect for the rights of the accused, but also that the trial is conducted with “due regard for the protection of victims and witnesses”.

¹¹⁵ Document in Support of the Appeal, para. 54.

¹¹⁶ The Appeals Chamber notes nevertheless that the Trial Chamber indulged the Prosecutor to a considerable degree. As the Prosecutor himself acknowledges, “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.” Document in Support of the Appeal, para. 51. Despite all these indulgences by the Trial Chamber, the Prosecutor continued to refuse to comply with its orders.

¹¹⁷ Although in this appeal the intermediary is neither a victim nor a witness, the Appeals Chamber has previously held that other persons at risk may be considered to fit within the framework established for such protection. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475 (OA) (hereinafter: “*Katanga and Ngudjolo Chui* OA Judgment”).

51. The Prosecutor's use of jurisprudence of the Appeals Chamber to suggest that there is a non-hierarchical relationship of coordination and consultation between the Trial Chamber and the Prosecutor¹¹⁸ mischaracterises that jurisprudence, which, in fact, reaffirms the authority of the Chambers over the Prosecutor in relation to matters of protection. In the first judgment cited by the Prosecutor, the pertinent issue before the Appeals Chamber concerned the respective roles and responsibilities of the Prosecutor and the VWU in matters of relocation of witnesses.¹¹⁹ The language of the Appeals Chamber that the Prosecutor selectively uses to suggest that there is a relationship of consultation or cooperation between organs pertained to the relationship between the Office of the Prosecutor and the VWU. It did not concern the relationship between the Chambers and other organs. Contrary to the Prosecutor's assertions, the Appeals Chamber characterised the role of the Pre-Trial Chamber in that instance not as part of this consultation process but rather as the "ultimate arbiter" in case of disagreement between the Prosecutor and the VWU.¹²⁰ According to the Appeals Chamber, such disagreements "should ultimately be decided by the Chamber dealing with the case – and should not be resolved by the unilateral and un-checked action of the Prosecutor".¹²¹

52. The second judgment that the Prosecutor cites to suggest that he has duties which trump the authority of the Trial Chamber is equally contradicting of his position. That judgment concerned the proper scope of redactions to material disclosed by the Prosecutor to the defence. The entire judgment was based on the premise that (1) in general, it is ultimately for the relevant Chamber and not the Prosecutor to assess and decide on measures which may restrict the rights of the defence in order to protect individuals and (2) with respect to redactions of information from material and evidence to be disclosed to the Defence specifically, the Prosecutor may only redact such information with the authorisation of the competent Chamber.¹²²

53. This is not to minimise the importance of consultation, where appropriate, between the relevant organs of the Court as specified in the Court's legal texts and

¹¹⁸ Document in Support of the Appeal, paras 60-63.

¹¹⁹ *Katanga and Ngudjolo Chui* OA 7 Judgment.

¹²⁰ *Katanga and Ngudjolo Chui* OA 7 Judgment, paras 93-98.

¹²¹ *Katanga and Ngudjolo Chui* OA 7 Judgment, para. 93.

¹²² *Katanga and Ngudjolo Chui* OA Judgment, paras 59-60.

shb

prior jurisprudence¹²³ or the importance of the Prosecutor alerting the Trial Chamber of information in his possession concerning matters of protection. However, once a judicial order is made, those subject to it are obliged to comply with its terms.

54. In sum, the Appeals Chamber is not persuaded by the first and second errors alleged by the Prosecutor. It finds that the Trial Chamber did not err when it found that the Prosecutor refused to comply with the First and Second Orders of Disclosure. The Appeals Chamber also finds that, irrespective of whatever duties the Prosecutor may have, he is obliged to comply with the orders of the Trial Chamber.

B. The propriety of imposing a stay of proceedings in response to the Prosecutor's refusal to comply with or to accept as binding the orders of the Trial Chamber

55. A stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute. It is an exceptional remedy. The Appeals Chamber has held that “[w]here a fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. [...] If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped”.¹²⁴ This judgment sets a high threshold for a Trial Chamber to impose a stay of proceedings, requiring that it be “impossible to piece together the constituent elements of a fair trial”.¹²⁵

56. At the same time, it should be recalled that the Appeals Chamber has held that, as with other decisions,¹²⁶ “[a] Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its innate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been

¹²³ See, in particular, *Katanga and Ngudjolo Chui* OA 7 Judgment.

¹²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”, 14 December 2006, ICC-01/04-01/06-772 (OA 4) (hereinafter: “*Lubanga* OA 4 Judgment”), para. 37.

¹²⁵ *Lubanga* OA 4 Judgment, para. 39.

¹²⁶ See, e.g., *Prosecutor v. Joseph Kony et al.*, Appeals Chamber, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, ICC-02/04-01/05-408, paras 79-80.

reached”.¹²⁷ The Appeals Chamber therefore should not substitute its judgment for that of the Trial Chamber but rather should review whether the Trial Chamber went beyond its margin of appreciation in determining that the threshold was met.

57. The Appeals Chamber notes that the Trial Chamber did not impose the stay of proceedings solely on the basis of the non-disclosure of the intermediary’s identity, but that it relied also, and as a necessary part of its decision, on its determination that the Prosecutor clearly evinced the intention not to implement orders of the Trial Chamber that are made in an article 68 context if he considers they conflict with his interpretation of his own duties.¹²⁸ The Trial Chamber found that the scope of the Prosecutor’s clearly evinced intention not to comply with orders of the Trial Chamber was not limited to the specific issue of the disclosure of identities of intermediaries, but extended to all “judicial decisions that relate to [...] the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the prosecution”.¹²⁹ According to the Trial Chamber, such decisions had characterised “[a] very considerable part” of its work, in particular decisions “on the extent of disclosure, and particularly whether redactions are to be imposed, maintained, varied or lifted”.¹³⁰ It was in this context that the Prosecutor’s refusal to comply with the Trial Chamber’s orders must be understood, and it was on this basis that the Trial Chamber concluded the Prosecutor’s refusal to comply with its orders constituted not just a delay in the smooth conduct of proceedings but rendered a fair trial impossible.¹³¹

58. The Appeals Chamber has previously found that proper management of the disclosure regime including ongoing monitoring of the necessity of maintaining redactions is a key part of ensuring a fair trial, holding, in logic which even more strongly applies to a Trial Chamber, that Pre-Trial Chambers have a continuing duty to review restrictions on disclosure to ensure they are necessary and sufficiently counterbalanced by other procedures.¹³² In the present case, the Prosecutor’s refusal

¹²⁷ *Lubanga* OA 13 Judgment, para. 84.

¹²⁸ Impugned Decision, para. 21.

¹²⁹ Impugned Decision, para. 21.

¹³⁰ Impugned Decision, para. 22.

¹³¹ Impugned Decision, para. 20.

¹³² *Katanga and Ngudjolo Chui* OA Judgment, paras 59-61 and 70-73. See also *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure

to comply with or to be bound by the orders of the Trial Chamber extended to a significant part of the trial and concerned issues of the trial's fundamental fairness. It threatened not only Mr Lubanga Dyilo's right to be tried without undue delay but also the fairness of the proceedings as a whole. If a Trial Chamber loses control of such a significant and fundamental part of proceedings because of the Prosecutor's refusal to comply with its orders, it would indeed be impossible to ensure a fair trial, and a stay of proceedings would then be justified.

59. However, the Appeals Chamber finds that the Trial Chamber had not yet lost control of the proceedings in this case. The Appeals Chamber notes that article 71 of the Statute provides Trial Chambers with a specific tool to maintain control of proceedings and, thereby, to ensure a fair trial when faced with the deliberate refusal of a party to comply with its directions. The purpose of such sanctions is not merely, as the Prosecutor suggests,¹³³ to punish the offending party, but also to bring about compliance. This is evidenced by rule 171 (4) of the Rules of Procedure and Evidence, which provides that, in relation to fines imposed under article 71, "in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative". Given their specific inclusion in the Statute and Rules of Procedure and Evidence, sanctions under article 71 and rule 171 are the normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber.

60. Recourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits. Doing so, rather than resorting to the significantly more drastic remedy of a stay of proceedings, is in the interests, not only of the victims and of the international community as a whole who wish to see justice done, but also of the accused, who is potentially left in limbo, awaiting a decision on the merits of the case against him by the International Criminal Court or another court.¹³⁴ Accordingly, the Appeals Chamber finds that, to the extent

pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 (OA 3), paras 37 and 38.

¹³³ Document in Support of the Appeal, para. 76.

¹³⁴ In this regard, the Appeals Chamber notes, without taking a position on its interpretation, that article 20 (2) of the Statute provides only that "[n]o person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court".

possible,¹³⁵ a Trial Chamber faced with a deliberate refusal of a party to comply with its orders which threatens the fairness of the trial should seek to bring about that party's compliance through the imposition of sanctions under article 71 before resorting to imposition of a stay of proceedings.

61. In predicating the stay of proceedings on its perceived loss of control over proceedings from that point forward, the Trial Chamber did not conclude that a fair trial already had become irreparably impossible. To the contrary, the Trial Chamber considered that, if the circumstances changed, a fair trial could conceivably become possible once again. There was, as such, no obstacle to imposing sanctions and allowing them a reasonable opportunity to induce compliance and, therefore, to change the very circumstances which made a fair trial prospectively impossible. In the view of the Appeals Chamber, the Trial Chamber therefore exceeded its margin of appreciation when it found that it had lost control of the proceedings and that, consequently, a fair trial had become impossible and a stay of proceedings was required. It is the view of the Appeals Chamber that, before ordering the stay of proceedings, the Trial Chamber should have imposed sanctions and given such sanctions a reasonable time to bring about their intended effects.

VI. APPROPRIATE RELIEF

62. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to reverse the Impugned Decision.

¹³⁵ The Appeals Chamber does not preclude the possibility that, in some situations, a fair trial may have become irreparably impossible, including for reasons unrelated to the refusal of a party to comply with its orders, and that a stay would be justified before the imposition of sanctions.

Done in both English and French, the English version being authoritative.



Judge Sang-Hyun Song
Presiding Judge

Dated this 8th day of October 2010

At The Hague, The Netherlands