

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06

Date: 8 July 2010

TRIAL CHAMBER I

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

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

Public

Redacted 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

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Victims Participation and Reparations
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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* hereby delivers the following 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”.¹

I. History

1. On 12 May 2010 the Chamber issued its Decision on Intermediaries.² As part of its submissions, the defence had expressed its profound concern as to the involvement and role of certain intermediaries in this case, culminating in an application to call two intermediaries (321 and 316) and for disclosure of a substantial amount of information regarding intermediaries in the case.³ The defence suggested that the instances of alleged inappropriate behaviour by the two above-mentioned intermediaries are likely to apply equally to others. Although, contrary to the Chamber’s indication on 7 July 2010 (see below), there was no specific application to call 143, the logic of the defence position is that whenever inappropriate behaviour on the part of an intermediary is established, he or she should be called to give evidence.⁴

2. The Chamber ordered 321 and 316 to give evidence.⁵ For 143, it ordered that his identity is to be disclosed to the defence, in order to enable the latter to conduct necessary and meaningful investigations and to secure a fair trial for the accused.⁶ The Chamber consulted the Victims and Witnesses Unit

¹ 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, 7 July 2010, ICC-01/04-01/06-2515. This was originally filed as confidential, however it was reclassified public upon instruction from the Trial Chamber on 8 July 2010.

² Decision on Intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Conf-Exp. A Public redacted version was issued on 31 May 2010, ICC-01/04-01/06-2434-Red2.

³ ICC-01/04-01/06-2434-Conf-Exp and ICC-01/04-01/06-2434-Red2, paragraph 85.

⁴ ICC-01/04-01/06-2434-Conf-Exp and ICC-01/04-01/06-2434-Red2, paragraph 112.

⁵ ICC-01/04-01/06-2434-Conf-Exp and ICC-01/04-01/06-2434-Red2, paragraph 150.

⁶ ICC-01/04-01/06-2434-Conf-Exp and ICC-01/04-01/06-2434-Red2, paragraph 143.

(“VWU”) and was furnished with a report on the security situation for 143.⁷ Under the final orders, the Chamber ordered the Office of the Prosecutor (“prosecution”) to disclose confidentially to the defence the names, and other necessary identifying information, of intermediary 143 once the necessary protective measures have been implemented.⁸

3. On 3 June 2010, the Chamber was informed that following discussions between representatives of the prosecution and 143 about the impending disclosure of his identity, the VWU was confident that it would be able to implement protective measures for him by 13 June 2010, subject to his willingness to comply.⁹ On 8 June 2010, the Chamber was informed that because of certain particular domestic arrangements for the intermediary – who had been spoken to again – the measures would be put in place, following a delay, during the week of 5 July 2010.¹⁰ Further discussions about the date of implementation occurred on 9 and 10 June 2010, and it has not been reported to the Chamber that at any stage during these exchanges the intermediary indicated doubts about the proposals, or foreshadowed a possible refusal to comply.¹¹

4. On 16 June 2010, during closed session, the following exchanges occurred.¹² During defence questioning of witness 581, the witness was shown the full name of intermediary 143, as written down by prosecution counsel on a piece of paper. He confirmed that this individual is an intermediary for the prosecution.¹³ A little later, in private session, defence counsel put the following name to the witness [REDACTED], to which he responded “that’s

⁷ See ICC-01/04-01/06-2434-Conf-Exp and ICC-01/04-01/06-2434-Red2, paragraph 42; Victims and Witnesses Unit’s report on intermediary DRC-OTP-WWWW-0143, 6 May 2010, ICC-01/04-01/06-2422-Conf-Exp.

⁸ ICC-01/04-01/06-2434-Conf-Exp and ICC-01/04-01/06-2434-Red2, paragraph 150 i).

⁹ Email communication from the VWU to a Legal Officer of the Trial Division, 3 June 2010.

¹⁰ Email communication from the VWU to a Legal Officer of the Trial Division, 8 June 2010.

¹¹ Email communication from the VWU to a Legal Officer of the Trial Division, 9 June 2010; Email communication from the VWU to a Legal Officer of the Trial Division, 14 June 2010.

¹² Transcript of hearing on 16 June 2010, ICC-01/04-01/06-T-302-CONF-ENG CT. Although this transcript is marked confidential, the majority of the submissions and evidence referred to occurred in public session.

¹³ ICC-01/04-01/06-T-302-CONF-ENG CT, page 39, lines 12 – 23.

the name of Mr 143".¹⁴ The prosecution accepted that at least to a certain extent, adopting the expression of the Presiding Judge, the cover of 143 was "blown".¹⁵

5. The Chamber was informed on 21 June 2010 that 143 had been told about what had happened in court, as set out above, and he responded that he was satisfied with the current arrangements and had no further security concerns. Also, plans continued for the implementation of the full security measures in early July 2010.¹⁶
6. However, on 6 July 2010 the Chamber was informed that the security measures could not be put in place because 143 either rejected them outright or intended to require adjustments.¹⁷ The Chamber was informed by the VWU that, *inter alia*, a significant financial component had been raised by 143. During submissions on 6 July 2010,¹⁸ the prosecution explained that the witness wanted the entire proposal set out in writing, so that it could be discussed with him by Friday 9 July 2010.¹⁹ If 143 agrees to these measures, the Chamber was told that they cannot be implemented until, at the earliest, Friday 16 July 2010.²⁰
7. The defence proposed a compromise, namely that it received full disclosure of the identifying information for 143, for use in questioning in private session only, with the information restricted to the core defence team in court, Mr Lubanga and the long-term "resource person" in the Democratic Republic of

¹⁴ ICC-01/04-01/06-T-302-CONF-ENG CT, page 55, lines 15 – 17.

¹⁵ ICC-01/04-01/06-T-302-CONF-ENG CT, page 58, lines 14 – 16.

¹⁶ Email communication from the VWU to a Legal Officer of the Trial Division, 21 June 2010.

¹⁷ Email communication from the VWU to a Legal Officer of the Trial Division, 6 July 2010; Transcript of hearing on 6 July 2010, ICC-01/04-01/06-T-310-CONF-ENG ET, page 1, lines 15 – 25. Although this transcript is marked confidential, the submissions and decisions referred to occurred in public session.

¹⁸ ICC-01/04-01/06-T-310-CONF-ENG ET.

¹⁹ ICC-01/04-01/06-T-310-CONF-ENG ET, pages 56, lines 13 – 22.

²⁰ ICC-01/04-01/06-T-310-CONF-ENG ET, page 57, lines 2 – 4.

the Congo ("DRC").²¹ The prosecution opposed this suggestion, arguing that disclosure should await full protective measures.²²

8. On 6 July 2010, once the Chamber had heard submissions, it ruled that the relevant information, in its entirety, should be provided to the defence (counsel and their assistants, and the "resource person").²³ It was stressed "emphatically" that the information should not go beyond those individuals – that there is an absolute embargo on dissemination of this information to anyone else, and that no investigative steps were to be taken that are based on this information in any way.²⁴ The prosecution unsurprisingly immediately indicated that the Chamber's order was understood and would be implemented.²⁵

9. At the end of the hearing on 6 July 2010, the prosecution informed the Court that they intended to apply for leave to appeal, and that they required the full 5 days provided by the Rome Statute framework to file their application. The Chamber stayed its order overnight, to give time for reflection.²⁶

10. At the beginning of the hearing on 7 July 2010, the Chamber, having heard submissions, ruled as follows:

On 12 May 2010, the Chamber delivered its decision on intermediaries. At paragraph 143, the Chamber observed as follows as regards the issue of disclosure of the identity of intermediary 143: "In the event the Chamber is sure that, in order to enable the Defence to conduct necessary and meaningful investigations and to secure a fair trial for the accused, it is strictly necessary for his identity to be disclosed. Without his identity, this will not be possible. The Chamber reminds the Defence that this information is disclosed confidentially solely for the purposes of bona fide trial preparation. However, the evidence concerning this intermediary does not meet the criteria for ordering him to be called in the context of the abuse of process application.

²¹ ICC-01/04-01/06-T-310-CONF-ENG ET, page 59, lines 13 – 24.

²² ICC-01/04-01/06-T-310-CONF-ENG ET, page 61, lines 10 – 22.

²³ ICC-01/04-01/06-T-310-CONF-ENG ET, page 63, line 5 to page 65, line 5.

²⁴ ICC-01/04-01/06-T-310-CONF-ENG ET, page 64, line 22 to page 65, line 5.

²⁵ ICC-01/04-01/06-T-310-CONF-ENG ET, page 65, lines 21 – 22.

²⁶ ICC-01/04-01/06-T-310-CONF-ENG ET, page 89, line 3 to page 90, line 25.

In the final orders of the Chamber in that decision, at paragraph 150 the Chamber ordered as follows: "The Prosecution is ordered to: (i) disclose confidentially to the Defence the names and other necessary identifying information of the intermediary 143 (...) once the necessary protective measures have been implemented." It is clear, on the basis of those extracts from our decision on intermediaries, that the Chamber was concerned to ensure that two things occurred: first, that the Defence had full disclosure of identifying information in order to enable it to carry out meaningful investigations in the DRC; and, second, that before those investigations commenced necessary protective measures were implemented.

Extensive proposals were put together in order to ensure that intermediary 143 is properly and sufficiently protected. As rehearsed in this Court yesterday afternoon, the original plan which had been explained to intermediary 143 and which he had accepted was very recently called into question by him.

The current position is that it is unclear as to whether he is simply going to reject the proposals that have been put forward by the Victims and Witnesses Unit, or whether he is going to accept them but only on the basis that further ingredients are added to the proposals.

We are told that we will not know his position in all likelihood until the end of Friday of this week and, thereafter, if the proposals are accepted, whether modified or not, they will not be implemented until the end of next week.

A position that, as we understand it, was acceptable to the Defence and canvassed in open court yesterday was that questioning of this witness should continue with the Defence having been provided with the full identifying information for 143, but the dissemination of that information is for the time being limited to those in the Defence team present in Court, including the accused, and the resource person who operates in the DRC. It was expressly recognised by counsel for the accused that no investigative steps would be taken and that information would not be handed on to any other person without prior leave of the Chamber.

At the close of play yesterday, Mr Sachdeva on behalf of the Prosecution indicated that the Prosecution intend to seek our leave to appeal the disclosure order that we made, which was entirely consistent with the limited disclosure regime that I have just outlined. We asked the parties to reflect on the position overnight. Mr Biju-Duval this morning has indicated that for the accused it would be unworkable for him to divide up his questions so that the 143 issues are reserved until a later date. He submits that the issues that he wishes to explore as regards that individual are intrinsically bound up with all of the other areas which he wishes to explore.

Mr Sachdeva, for the Prosecution, argues that a divided cross-examination is achievable and that the Chamber should require the Defence to conduct this examination in two stages, leaving the 143 issues until after protective measures have been implemented. Otherwise there are no proposals before the Chamber as to how we can proceed, apart from simply adjourning until there is a resolution of the security issues for 143.

Against that background, we return therefore to the decision that we handed down on intermediaries. As already stressed, the underpinnings of the decision on 143 included the critical element that disclosure should not undermine proper protective measures. That is a safeguard that we do not intend to water down.

In our judgment the proposal outlined by the Chamber, which as I have said we understood to be acceptable to the Defence, namely that disclosure should be limited to those in Court today and the Defence resource person with no investigative steps being taken until a further order was issued by the Chamber, does not materially undermine the position of 143, or in any way enhance any risk that may exist for him.

There are no reasons to suppose that any member of the Defence team, or the accused, will breach the clear indication that we have given as regards the effective non-use of this material save for questions by Mr Biju-Duval, and in those circumstances we intend to vary our decision of 12 May 2010 by ordering, as we did last night, that there should be limited disclosure to the Defence team that will encompass those in Court today, including the accused and the resource person, but limited in the sense that its use is only for the purposes of Mr Biju-Duval's questions.

In those circumstances we do not consider that there is any potential increased risk to 143 and, [. . .] we do not consider it necessary to suspend that order pending any application that may be made by the Prosecution for leave to appeal. It would, in our view, only be necessary to suspend that order if there was a risk that it would enhance or increase the security risk for 143.

In conclusion, the disclosure that we ordered last night is to be effected today.²⁷

11. The Chamber went on to indicate that it expected disclosure to occur within the next half-an-hour, and arranged for the Court to reconvene at 14.30 for the continuation of the defence's questions.²⁸ The Court adjourned at 10.32.²⁹

12. The order was not complied with. The history to what occurred is summarised in the Chamber's second Ruling, delivered later the same day, as follows:

Earlier this morning, the Chamber revisited the issue of disclosure of the relevant identifying information for intermediary 143. We ordered that the material that discloses his identity was to be provided to the Defence. That order was made some time before half-past-10. At 12.45 the Chamber was informed, because we were copied on an email, that disclosure had not been effected. That led to an email from the Prosecution indicating that the Prosecutor wished for this issue to be re-ventilated and an application was to be made for us to reconsider our decision.

Counsel for the Prosecution has appeared before us this afternoon. In essence, the points that are made are as follows. On the procedural underpinnings of this application, it is argued that the Chamber has an inherent power to revisit its decisions and we are reminded that on one occasion at least the Chamber has varied an earlier order.

²⁷ Transcript of hearing on 7 July 2010, ICC-01/04-01/06-T-311-CONF-ENG ET, page 9, line 20 to page 13, line 25. Although this transcript is marked confidential, the submissions and decisions referred to occurred in public session.

²⁸ ICC-01/04-01/06-T-311-CONF-ENG ET, page 14, line 1 to page 16, line 2.

²⁹ ICC-01/04-01/06-T-311-CONF-ENG ET, page 16, line 3.

Addressing the substance, counsel has underlined the obligation of the Court generally and the Office of the Prosecutor in particular to protect those who are affected by their interaction with the Court. We interpolate to observe that, in a very large number of decisions that have been issued by this Chamber, that obligation has been recognised in full and the Chamber has taken a very large number of steps to try to ensure that all of those who have had dealings with the Court are protected to the extent necessary.

Counsel argues that, because of the present state of play in Bunia, an individual is at risk of being killed if the Hema community considers him or her to be a traitor. Building on that submission, it is argued that the order the Court made earlier today places 143 at risk.

Given that submission, it is of importance to underline the history to the determination that we arrived at. The original application from the Defence was for 143 to be called as a witness. In our view, some significance is to be attached to that position on the part of the accused. It is said on his behalf by counsel that it is positively necessary in order to develop his Defence for 143 to be brought to this Court to give evidence and to be cross-examined.

In our decision on intermediaries we concluded that, although the threshold had been crossed for disclosure of his identity to be effected, the circumstances did not, certainly at this stage, justify him being called as a witness. However, because we ordered disclosure so that meaningful investigations in the DRC could take place, we ordered at paragraph 150 of our decision of 12 May 2010 that all necessary protective measures should be implemented prior to the disclosure of his identity.

As a result of that order, the Victims and Witnesses Unit investigated his present circumstances. Without descending into the detail of the matter, a comprehensive plan or package was put together which, in the view of the relevant organ of this Court, satisfactorily met all of the known security concerns.

That proposal was communicated to intermediary 143. He accepted them, but asked - again for reasons which we need not explore - that their implementation was delayed. The Victims and Witnesses Unit consulted with the Court, and we agreed to a significant delay in implementation to match the request that 143 had made. Accordingly, these are security measures approved by the relevant organ of this Court, whose very job it is to make assessments of this kind, and accepted by both the intermediary and the Judges of this Chamber.

The date for implementation was the week immediately following 2 July. At the very last moment, 143 indicated that he now wished to question the arrangements that had been put in place. It isn't clear, as we indicated this morning, whether he will reject the proposals outright, or whether additional requests are being made. Either way, it means that at the earliest any measures will not be implemented until the end of next week and, given the attitude now demonstrated by 143, there is an appreciable risk that implementation will be delayed significantly beyond then.

Against that background, we next need to investigate the current position before the Chamber. Mr Biju-Duval, on behalf of the accused, has begun his questioning of intermediary 321. It has always been clear to the Bench and to the parties and the participants that one essential ingredient of his examination will include the relationship, if any, between 143 and 321 and other intermediaries.

Mr Biju-Duval has indicated two things. The first is that, as a result of the current position of 143, he is prepared to continue his questioning of 321, notwithstanding the fact that the Defence as yet has made no investigations into the position of 143, but second he asks that he is given full disclosure of 143's identity limited to those who are in this courtroom and the long-term resource person employed by the Defence who works for the team in the DRC.

It is his position that he cannot split his questioning so as to deal with non-143 issues now, reserving the other parts of his questioning that do involve that individual to a later date. He submits that course would be artificial and it would have too great a tendency to render the examination ineffective.

Counsel for the Prosecution suggests that the order we have made is premature, that it will lead to partial disclosure and that it will gain little, if anything, in terms of the progression of this trial. We do not accept that submission.

Given the position just rehearsed on the part of the Defence, it is quite clear that if our decision of earlier today is implemented, then the questioning of 321 can proceed, of course always with the understanding that there may be some post-investigative issues that may need to be dealt with discretely, for instance, by way of a video link in due course. Critically, the Defence position is that the substantive examination of 321 can continue immediately.

What, then, are the risks? The question is posed because that is the principal - indeed, the only - reason for counsel asking us today to revisit our decision of this morning. Protective measures in full have been offered to the intermediary. For a significant period of time, he accepted them and the Court proceeded towards their implementation. For no reason that has been explained to us he now has decided to question them and to ask for a variation, but the fundamental position still remains. Protective measures have been offered, which are deemed by the relevant body of this Court to be satisfactory, and that offer has not in any way been withdrawn.

Furthermore, the limited disclosure that we have ordered, in our judgment, has the result of ensuring that there is no deterioration in the security position of that individual. Disclosure will be to counsel and to their assistants. It will include the accused and one individual in the DRC, who has now worked for a substantial period of time with senior and responsible members of the Bar and whose position is trusted by them.

Although questions have been raised by the Prosecution in the past as regards his practices and his integrity, there has been no conclusion adverse to that individual that has been drawn by anyone in a responsible position in this Court that has been brought to our attention.

It is not unimportant to observe that the position of the accused is that he positively wishes 143 to be called in order to support his case. We feel that somewhat tends to undermine the suggestion by the Prosecution this afternoon that he is likely to be killed because he is thought to be a traitor, presumably by Mr Lubanga. We are entirely satisfied that the order that we made this morning was appropriate and fully satisfies the protective requirements in relation to this individual. The Court, as we stressed this morning, does not in any way water down the requirement that we should ensure that all those who are affected by their interaction with the Court should receive appropriate protection. We consider that in ample measure that has happened in relation to 143 and, notwithstanding his present disinclination to accept

the offer that has been made, we have secured his position by limiting disclosure to those present in this Court and to the resource person in the DRC, and with the clearest and firmest instruction that the information that is to be disclosed to the Defence should not be revealed or used for any purposes other than questioning inside this courtroom, absent a further order from this Chamber.

We have not dealt with the procedural issue. It seems to us that the importance of this matter in terms of timing is such that it would be an arid and unnecessary exercise to consider, perhaps somewhat pedantically, whether or not, strictly, we have authority in this situation to revisit this morning's decision.

We, therefore, order disclosure of this information by half-past-4 this afternoon. We hope that we are not going to be called upon to revisit this issue again.

We will sit at half-past-9 tomorrow morning, when Mr Biju-Duval will continue with his examination.³⁰

13. The Court's order was not implemented. Instead, shortly before 16.30 the Chamber was informed that the prosecution was to file 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".³¹ In that document, having referred to the 16.30 deadline, the following was set out:

1. The Prosecution has an obligation to comply with the Chamber's instruction, but also to fulfil its statutory duties of protection. **The Prosecution consider that it cannot disclose the information in the current circumstances, but will consult with the VWU as to whether the security situation allows for disclosure now.** Also, it is critical to know whether there is any need to implement urgent interim measures prior to disclosure. It intends to request such advice from VWU on an urgent basis. The Prosecution accordingly requests a variation of the time-limit imposed by the Trial Chamber for disclosure until such advice is provided by the VWU.

2. Should the Trial Chamber consider that this request should not be granted, then the Prosecution requests, in the alternative, that trial proceedings be stayed pending consultations and implementation of the necessary protective measures, in the interests of the overall safety and well-being of intermediary 143.

3. **The Prosecution is bound by autonomous statutory duties of protection that it must honour at all times.** Beyond taking any step that may have adverse consequences for the safety and well-being of a person, the Prosecution must take all necessary steps to prevent any risk or harm.

³⁰ Transcript of hearing on 7 July 2010, ICC-01/04-01/06-T-312-ENG ET WT, page 15, line 21 to page 22, line 6. Although this transcript is marked confidential, the submissions and decisions referred to occurred in public session.

³¹ ICC-01/04-01/06-2515.

4. In the instant case, the Prosecution considers it 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.³² (emphasis added throughout)

14. At 19.02 the Chamber was provided with a courtesy copy of 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”.³³ The Chamber was informed that the VWU, having been informed of the Orders of the Chamber, as set out above, maintains its earlier security assessment.³⁴ The Chamber was informed that the VWU has interpreted its Order as including a requirement that it should send someone immediately to inform 143 of the decision of the Chamber, and to discuss interim measures that can be implemented on an urgent basis to enhance the current level of protection.³⁵ The Chamber interpolates to observe that in light of the VWU’s submissions set out hereafter, there is reason to doubt the accuracy and reliability of this submission. It was said that the prosecution had impressed upon the VWU the need for “immediate action” following the Chamber’s order and “in furtherance of the Prosecution’s own effort and desire to comply with the Chamber’s instructions without jeopardizing the safety of the Intermediary and his family”.³⁶ The Prosecutor then set out the following:

6. 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 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

³² ICC-01/04-01/06-2515, paragraphs 1 – 4.

³³ Prosecution’s Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay, 8 July 2010, ICC-01/04-01/06-2516 (filed on 7 July 2010 and notified on 8 July 2010). This was originally filed as confidential and was reclassified public upon instruction from the Trial Chamber on 8 July 2010.

³⁴ ICC-01/04-01/06-2516, paragraph 2.

³⁵ ICC-01/04-01/06-2516, paragraphs 2 – 3.

³⁶ ICC-01/04-01/06-2516, paragraph 4.

Chamber, it is instead a reflection of the Prosecution's own legal duty under the Statute.³⁷ (emphasis added)

15. The Prosecutor then purported to rely on two Decisions of the Appeals Chamber, quoting passages in which his obligation to ensure that appropriate protective measures are taken to protect the safety of victims and witnesses was referred to, in the context of an analysis, *inter alia*, of the protective roles that are variously undertaken by the VWU and the prosecution.³⁸
16. The Prosecutor suggested his office is "torn between competing obligations" and that it is endeavouring to resolve the "dilemma" by obtaining an expeditious response from the VWU, "to make sure that measures are in place that will protect all interests in the proceedings".³⁹ It was set out that the length of time needed to follow this course is uncertain, and that the assessment of the VWU (*viz.* maintaining its earlier assessment) "warrants a limited amendment of the order."⁴⁰
17. On 8 July at 13.51, the VWU informed the Chamber that the disclosure of the name of 143 to the defence under the conditions ordered by the Chamber does not pose a threat to the intermediary.⁴¹

II. Applicable Law

18. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

³⁷ ICC-01/04-01/06-2516, paragraph 6.

³⁸ 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, paragraph 80; 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, paragraphs 44 and 47.

³⁹ ICC-01/04-01/06-2516, paragraph 8.

⁴⁰ ICC-01/04-01/06-2516, paragraphs 9 – 10.

⁴¹ Email communication from the VWU to the Legal Adviser of the Trial Division, 8 July 2010.

**Article 64 of the Rome Statute (“Statute”)
Functions and powers of the Trial Chamber**

[. . .]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

[. . .]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

**Article 67 of the Statute
Rights of the accused**

[. . .]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

**Article 68 of the Statute
Protection of the victims and witnesses and their participation in the proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[. . .]

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

[. . .]

**Rule 76 of the Rules of Procedure and Evidence (“Rules”)
Pre-trial disclosure relating to prosecution witnesses**

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 77 of the Rules

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 81 of the Rules

Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.
2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.
5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

Rule 84 of the Rules**Disclosure and additional evidence for trial**

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 87 of the Rules**Protective measures**

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted *ex parte*;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

Regulation 42 of the Regulations of the Court
Application and variation of protective measures

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.
3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.
4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

III. Analysis

19. The Chamber observes that it was unnecessary to seek a further report from the VWU because the disclosure that it ordered was restricted to a very few identified individuals, and accordingly, as set out above, there are no enhanced security risks for intermediary 143. The Appeals Chamber has approved, in different context, limited disclosure of this kind.⁴² Prosecution counsel's argument that this order may lead in these circumstances to inadvertent disclosure is unsustainable – that risk must be negligible given the extensive directions from the Chamber. No allegations of bad faith were advanced, save indirectly by reference to some previous allegations that have been made against the defence "resource person". These have not led to any findings that have been brought to the Chamber's attention that are adverse to that individual.

⁴² ICC-01/04-01/07-475, paragraphs 70 and 71.

20. The history set out above reveals two concurrent but essentially different problems. The first – the immediate cause of the present hiatus – is the Prosecutor’s unequivocal refusal to implement the repeated orders of this Chamber to disclose the identity of 143 (in highly restricted circumstances, determined by the Chamber). It may well be that this first difficulty is time-limited, in the sense that a delay of a few days or weeks may result in the prosecution’s objections evaporating once protective measures, acceptable to 143, have been implemented. No doubt, if that occurs, the Chamber will be asked to continue with the evidence of 321 (and the trial, if it is stayed) because it is proposed that in those altered circumstances he can be questioned by the defence on a fair basis. However, if the identifying information for 143, despite the orders of the Chamber, is not disclosed to the defence, then the Chamber will need to scrutinize 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. Notably, 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. Failure to disclose information which is relevant for the examination of witnesses testifying in this context is likely to be relevant to defence abuse application.

21. The second problem, however, reveals a more profound and enduring concern. The Prosecutor, by his refusal to implement the orders of the Chamber and in the filings set out above, has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who have been affected by their interaction with the Court, in the sense that they have had dealings with the prosecution. Essentially, for the issues covered by Article 68 in this way, he appears 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.

Article 68(1) of the Statute provides as follows:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

22. A very considerable part of this Chamber's judicial work during the present trial has related to protective measures that have been subject of Rulings, following contact between prosecution witnesses and other individuals who were contacted by the prosecution (and their families) in the context of the Prosecutor's obligations to disclose materials to the defence under Articles 64(3)(c) and 67(2) of the Statute, and Rules 76 and 77 of the Rules. Essentially, the Chamber has decided on the extent of disclosure, and particularly whether redactions are to be imposed, maintained, varied or lifted.

23. The 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. Rules 81 and 87 of the Rules are explicit in the sense that only a Chamber may order protective measures, such as those accorded to intermediary 143, and generally it is for the Chamber to make necessary orders for disclosure, under Rule 84 of the Rules. Further, Regulation 42 of the Regulations of the Court provides that measures ordered by a Chamber shall remain in place subject to revision by the Chamber.

24. Article 68 of the Statute gives the Prosecutor positive protective obligations when investigating and prosecuting crimes – "the Prosecutor shall take such

measures particularly during the investigation and prosecution of such crimes” – but those responsibilities do not give him licence, or discretion, or autonomy to disregard judicial orders because he considers the Chamber’s Decision is inconsistent with his interpretation of his obligations. As framed in Article 68(1) of the Statute, the prosecution’s obligations are subject to the Chamber’s overarching responsibility to ensure that the accused receives a fair trial – “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The latter decision is solely for the Chamber, and it is not for the prosecution to seek to determine for the purposes of this trial what constitutes fairness for an accused.

25. This Chamber in its “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”,⁴³ set out at paragraph 88:

[...] The 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 [...].⁴⁴

26. In its Judgment on the appeal of the Prosecutor against the above Decision of Trial Chamber I,⁴⁵ the Appeals Chamber observed as follows:

The Trial Chamber correctly noted its responsibility under article 64 (2) of the Statute to ensure the fairness of the proceedings and the obligation under article 21 (3) of the Statute to apply and to interpret the Statute consistently with internationally recognised human rights.⁴⁶

⁴³ 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.

⁴⁴ ICC-01/04-01/06-1401, paragraph 88.

⁴⁵ 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.

⁴⁶ ICC-01/04-01/06-1486, paragraph 76.

27. No 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. The judges, not the Prosecutor, decide on protective measures during the trial, once the Chamber is seized of the relevant issue, as regards victims, witnesses and others affected by the work of the Court, and the prosecution cannot choose to ignore its rulings. It is for the Chamber to determine whether protective measures are necessary (following consultation with the VWU under Article 68(4) of the Statute); their nature; and whether they are consistent with the accused's right to a fair trial. These are issues for the Court, and the Court alone, to determine, having heard submissions and having considered all the information the judges consider necessary and relevant. The Prosecutor now claims a separate authority which can defeat the orders of the Court, and which thereby involves a profound, unacceptable and unjustified intrusion into the role of the judiciary.

28. The Prosecutor has chosen to prosecute this accused. In the Chamber's judgment, he cannot be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations. In order for the Chamber to ensure that the accused receives a fair trial, it is necessary that its orders, decisions and rulings are respected, unless and until they are overturned on appeal, or suspended by order of the Court.

29. The Chamber has considered the two authorities from the Appeals Chamber relied on by the prosecution. Although reference is made in those Decisions to Article 54(3)(f) of the Statute and the prosecution's right to take or request necessary measures to protect any individual during investigations, the Appeals Chamber was not addressing the situation – as here – when the

Chamber is seized of the matter and has ruled, and the Prosecutor thereafter declines to implement the order. The Appeals Chamber specifically set out the principle that disclosure should be made “in full”, and that non-disclosure is the exception to this general rule.⁴⁷ Furthermore, the Appeals Chamber expressly indicated that disagreements as to protective measures (*i.e.* relocation) are to be decided by the Chamber dealing with the case, “and [they] should not be resolved by the unilateral and un-checked action of the Prosecutor”.⁴⁸

30. The Appeals Chamber has endorsed the Trial Chamber’s right – indeed obligation – to stay the proceedings if they constitute an abuse of the process, because “it is impossible to piece together the constituent elements of a fair trial”.⁴⁹ The Chamber ruled that a conditional stay cannot be imposed indefinitely.⁵⁰

IV. Conclusions

31. Therefore, the Prosecutor has elected to act unilaterally in the present circumstances, and he declines to be “checked” by the Chamber. In these overall circumstances, it is necessary to stay these proceedings as an abuse of the process of the Court because of the material non-compliance with the Chamber’s orders of 7 July 2010, and more generally, because of the Prosecutor’s clearly evinced intention not to implement the Chamber’s orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution’s other obligations. Whilst these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done, not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute

⁴⁷ ICC-01/04-01/07-475, paragraph 70.

⁴⁸ ICC-01/04-01/07-776, paragraph 93.

⁴⁹ ICC-01/04-01/06-1486, paragraphs 77 and 78.

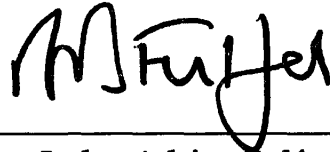
⁵⁰ ICC-01/04-01/06-1486, paragraph 81.

framework. Whilst the stay of the proceedings is in place, the Chamber will deal with any application for leave to appeal on this or any related issue that is filed.

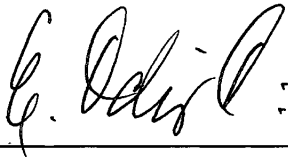
32. Otherwise, the Chamber will only entertain submissions regarding the possible application of Article 71 of the Statute at 15.30 on 8 July 2010,⁵¹ and submissions on the accused's detention at 9.30 on 15 July 2010.

⁵¹ The parties and participants were notified by way of email on 7 July 2010 at 18.08.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 8 July 2010

At The Hague, The Netherlands