**Cour Pénale Internationale**

**International Criminal Court**

Original: **English**

No.: **ICC-01/04-01/06**
Date: **7 March 2011**

**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 "Defence Application Seeking a Permanent Stay of the Proceedings"

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

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**
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**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

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,* delivers the following Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings":[1]

## I. Introduction

1. During the course of the defence evidence in this trial the accused has argued, in written submissions, that the proceedings should be permanently stayed, with the consequence, *inter alia,* that he is entitled to immediate release.[2]

2. The defence argument depends on an analysis of the law relating to the concept of abuse of process, as formulated in this and other courts, coupled with the application of the relevant legal principles to the facts in the case.

3. The Office of the Prosecutor (or "prosecution" or "Prosecutor"), in its submissions (also advanced in writing), does not accept the accused's interpretation of the law or his analysis of the facts. The Prosecutor submits that this application should be rejected in its entirety. It is suggested that the defence application constitutes an abuse of the time of the Court because the accused has advanced unsupported or exaggerated submissions which, taken at their highest, fail to demonstrate an abuse of the process.[3]

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[1] Requête de la Défense aux fins d'arrêt définitif des procédures, 10 December 2010, ICC-01/04-01/06-2657-Conf. A translation was notified on 4 February 2011: Defence Application Seeking a Permanent Stay of the Proceedings, ICC-01/04-01/06-2657-Conf-tENG. On request of the defence, the Chamber extended the page limit to no more than 100 pages pursuant to Regulation 37(2) of the Regulations of the Court by email communication from a Legal Officer of the Trial Division on 1 December 2010.

[2] ICC-01/04-01/06-2657-Conf-tENG, paragraph 1. During the hearing on 17 May 2010, the Chamber requested that the defence provide details on the agenda and timetable for its anticipated abuse of process application, ICC-01/04-01/06-T-286-CONF-ENG ET, page 28, line 18 to page 29, line 10. During the hearing on 25 November 2010, the Chamber finalised the timetable for the abuse application, setting a deadline of 4 p.m. on 10 December 2010 for the defence filing, giving the prosecution and the legal representatives of victims until 31 January 2011 to file their responses and the defence until 4 p.m. on 11 February 2011 to file any reply. ICC-01/04-01/06-T-337-CONF-ENG ET, page 2, line 23 to page 4, line 3.

[3] Prosecution's Response to the Defence's "Requête de la Défense aux fins d'arrêt définitif des procédures", 31 January 2011, ICC-01/04-01/06-2678-Conf, paragraph 37. On request of the prosecution, the Chamber extended

4. One team of legal representatives of victims has argued that the defence application does not provide evidence of an abuse of process that would necessitate an immediate stay of the proceedings. The team suggests that the defence request should be dismissed and the trial ought to continue.[4] The other team, which submitted two separate filings when it should have submitted a single document, also resists the application.[5]

5. The Office of Public Counsel for victims ("OPCV") suggests the abuse of process application should be refused on the basis that it is inappropriate at this stage of the proceedings and it is inadmissible, in particular because it does not comply with the object and purpose of an abuse of process claim.[6] It is contended that if the defence arguments are to be considered at all, those directed at the suggested inappropriate behaviour by the prosecution as regards particular witnesses should be submitted and considered at the end of the trial.[7] However, the OPCV also submits that the application should be refused in its entirety because it lacks a proper foundation.[8]

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the page limit to no more than 100 pages pursuant to Regulation 37(2) of the Regulations of the Court by email communication from a Legal Officer of the Trial Division on 17 January 2011.

[4] Réponse des représentants légaux des victimes a/0001/06, a/0002/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09,et a/0398/09 à la requête de la Défense en abus de procedure, 31 January 2010, ICC-01/04-01/06-2676-Conf, paragraph 48.

[5] Observations du représentant légal des victimes a-0225-06, a-0229-06 et a-0270-07 sur la requête de la Défense aux fins d'arrêt définitif du procès, 31 January 2011, ICC-01/04-01/06-2677-Conf, paragraph 33. A translation was notified on 7 February 2011: Observations of the Legal Representative of Victims a-0225-06, a-0229-06 and a-0270-07 on the Defence Application for a Permanent Stay of the Trial, ICC-01/04-01/06-2677-Conf-tENG. On request of the legal representative, the Chamber extended the page limit to no more than 50 pages pursuant to Regulation 37(2) of the Regulations of the Court by email communication from a Legal Officer of the Trial Division on 19 January 2011; Observations des représentants légaux de la victime a-0051-06 sur la requête de la Défense aux fins d'arrêt définitif du procès, 31 January 2011, ICC-01/04-01/06-2679-Conf, paragraph 34. A translation was notified on 7 February 2011, ICC-01/04-01/06-2679-Conf-tENG. The joint observations do not exceed the page limit set by the Chamber.

[6] Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la "Requête de la Défense aux fins d'arrêt définitif des procédures" datée du 10 décembre 2010, 31 January 2011, ICC-01/04-0/106-2675-Conf, paragraphs 26, 28 and 29. On request of the OPCV, the Chamber extended the page limit to no more than 60 pages pursuant to Regulation 37(2) of the Regulations of the Court by email communication from a Legal Officer of the Trial Division on 19 January 2011.

[7] ICC-01/04-01/06-2675-Conf, paragraph 27.

[8] ICC-01/04-01/06-2675-Conf, paragraph 29.

6. It follows that in order to resolve this matter, it is necessary for the Chamber, first, to determine the precise ambit of the law relating to abuse of process within the general context of this application, and, second, to apply the relevant facts to the established principles of law.

## II. The Relevant Legal Principles

### The Submissions – the Defence

7. Underpinning the defence application is the argument that "[...] proceedings which are irremediably vitiated by serious breaches of the fundamental principles of justice or the norms of a fair trial must be discontinued".[9] As an essential element of its submissions, the defence contends that although a finding of flagrant and intentional misconduct by the prosecution is an important factor to be considered in this context, it is not a necessary prerequisite for affording this remedy to an accused.[10]

8. The defence has sought to summarise the various ways in which the concept of abuse of process has been applied before the *ad hoc* tribunals and the Court, and, as far as the jurisprudence of the former are concerned, the defence submits that the tribunals have established that the remedy is available when, for instance, delays have made a fair trial impossible or the proceedings are vitiated by impropriety or misconduct.[11] It is suggested that "[...] the doctrine of abuse of process is indisputably one of the general principles of law applicable to proceedings before international courts and tribunals".[12]

[9] ICC-01/04-01/06-2657-Conf-tENG, paragraph 5.
[10] ICC-01/04-01/06-2657-Conf-tENG, paragraph 7.
[11] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 9 and 11.
[12] ICC-01/04-01/06-2657-Conf-tENG, paragraph 12.

9. Focussing particularly on the way in which this doctrine has been dealt with by the Appeals Chamber of the ICC, the accused relies on the following formulations:

> Per Judge Pikis, when describing a previous judgement of the Appeals Chamber: "[...] to the extent [the doctrine of abuse of process] aims to stem breaches of fundamental principles of justice, it is endorsed by the Statute as a means of protecting the individual from violations of his/her fundamental rights and in order to ensure a fair trial that earmarks the parameters of the administration of justice."[13]

> Per the Appeals Chamber: "Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."[14]

10. In summary, the defence argues that although the Rome Statute framework has not expressly incorporated an abuse of process procedure into the Court's functions – with the protections this provides for the accused, as well as the wider interests of justice – "it is clear that the Appeals Chamber considers the essential elements of that doctrine as forming part of the applicable law upon which the bench may draw".[15]

11. The defence submits that certain provisions from within the Rome Statute ("Statute") and the Rules of Procedure and Evidence ("Rules") enhance the protection afforded to the accused in this context, by ensuring that his trial is fair: Articles 54(1) (the prosecution's duties with respect to the investigation), 67(1) (the fundamental rights of the accused), 67(2) of the

[13] ICC-01/04-01/06-2657-Conf-tENG, paragraph 14; 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, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06-1486, paragraph 29.
[14] ICC-01/04-01/06-2657-Conf-tENG, paragraph 15; 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, paragraph 39.
[15] ICC-01/04-01/06-2657-Conf-tENG, paragraph 16.

Statute and Rule 77 of the Rules (the Prosecutor's disclosure and inspection obligations) and Article 70 of the Statute (the Chamber's jurisdiction over offences against the administration of justice).[16]

12. The defence acknowledges that it bears the burden of proof in establishing the facts that underpin an abuse of process application, to the "civil" standard (the balance of probabilities).[17]

**The Submissions – the Prosecution**

13. The prosecution relies on the observation from the Appeals Chamber that a fair trial becomes impossible if "breaches of the fundamental rights of the suspect or the accused [...] make it impossible for him/her to make his/her defence within the framework of his rights".[18] It is argued that the Chamber should first consider whether other steps will resolve the suggested infringements of the rights of the accused and ensure a fair trial. The prosecution argues, therefore, that this is an exceptional remedy, which should only be used when no other means of achieving a fair hearing are available. With reference to the jurisprudence of the Appeals Chamber, it is said there is a "very high threshold of gravity" for an abuse of process application, and this suggested remedy is one of "last resort".[19] The prosecution relies on examples of domestic jurisprudence and case law from the International Criminal Tribunal for the former Yugoslavia ("ICTY") to argue that the Chamber should "weigh" the alleged abuse against the

[16] ICC-01/04-01/06-2657-Conf-tENG, paragraph 18.
[17] ICC-01/04-01/06-2657-Conf-tENG, paragraph 19.
[18] ICC-01/04-01/06-2678-Conf, paragraph 34; ICC-01/04-01/06-772, paragraph 39.
[19] ICC-01/04-01/06-2678-Conf, paragraphs 33 and 34; ICC-01/04-01/06-772, paragraphs 30 and 31; 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", 8 October 2010, ICC-01/04-01/06-2582, paragraph 61.

gravity of the charges and the public interest in allowing the trial to reach its natural conclusion.[20]

14. The prosecution submits that given the importance of this issue, the Chamber should only stay the case on the basis of "clear and convincing evidence". The prosecution puts the matter thus:

> The risk of error that a guilty person may be set free without regard to the weight of the evidence is more appropriately pegged at that intermediate standard. The "clear and convincing evidence" standard is justified by the importance of the issue; the fact that given the gravity of the charges and the near-complete status of the trial, a standard of more likely than not (i.e. 51-49 odds) would be insufficient to satisfy the international community that immediate termination is necessary; and that if the Application is denied the Defence can renew its complaints regarding the quality and sufficiency of the evidence at the end of the trial.[21]

**The Submissions – the Legal Representatives of Victims**

15. The legal representatives for the victims jointly represented in team V01 argue that the request of the defence lacks a legal basis within the Statute, the Rules and the Regulations of the Court ("Regulations"); furthermore, it is suggested that the application infringes the victims' right to access to justice and a fair trial, and – for some of them – their rights as witnesses.[22]

16. It is argued that the Rome Statute framework does not explicitly provide for a stay of proceedings on the basis of abuse of process, and that there is no general principle within international law that requires the discontinuance of proceedings when serious breaches of the fundamental principles of justice or the norms of a fair trial are established.[23] Counsel note that in some legal systems other remedies are applied, and, in particular, in the Romano-Germanic tradition although irregular evidence may not be relied

[20] ICC-01/04-01/06-2678-Conf, paragraph 35.
[21] ICC-01/04-01/06-2678-Conf, paragraph 32.
[22] ICC-01/04-01/06-2676-Conf, paragraph 3.
[23] ICC-01/04-01/06-2676-Conf, paragraphs 5 – 7.

on, the trial will ordinarily continue until a final judgment has been reached.[24] If an accusation of false testimony is made, proceedings may potentially be stayed until a ruling has been made on the accusation (although this is not a necessary response).[25] Counsel refer to case law of the European Court of Human Rights ("ECHR") and the ICTY to support the argument that in normal circumstances the trial should continue and stays should be treated as an exception, limited to instances where the accused has been seriously mistreated.[26] Counsel outline the provisions of the Statute dealing with the admissibility of evidence and violations of the administration of justice,[27] and argue that the omission of provisions governing a suspension or stay of the proceedings was not an oversight.[28] Moreover, it is submitted to halt the proceedings because one or several pieces of evidence appear unreliable would prevent the Chamber from establishing the overall truth in the case.[29] Counsel contends that the decision to stay proceedings because of an "abuse of process" should only be taken in extreme cases, and reference is made to the Appeals Chamber's finding that a violation of the rights of the defence should not result in a stay if the Chamber is able to remedy the violation and to maintain control of the proceedings.[30] Counsel submits that when the rules of evidence are violated, the relevant material can be excluded.[31]

17. Addressing the requirement of a fair trial, counsel, *inter alia*, suggests that if the accused is innocent a substantive ruling on the charges is to his benefit, not least because it would prevent further national proceedings (on the basis of the principle of *ne bis in idem*).[32] It is argued that the concept of a fair trial

[24] ICC-01/04-01/06-2676-Conf, paragraph 7.
[25] ICC-01/04-01/06-2676-Conf, paragraph 7.
[26] ICC-01/04-01/06-2676-Conf, paragraphs 9 – 12.
[27] ICC-01/04-01/06-2676-Conf, paragraphs 14 – 17.
[28] ICC-01/04-01/06-2676-Conf, paragraphs 13 and 14.
[29] ICC-01/04-01/06-2676-Conf, paragraph 18.
[30] ICC-01/04-01/06-2676-Conf, paragraphs 18 and 19; ICC-01/4-01/06-2582, paragraphs 58 and 59.
[31] ICC-01/04-01/06-2676-Conf, paragraph 20.
[32] ICC-01/04-01/06-2676-Conf, paragraph 24.

extends beyond the rights of the accused and encompasses the rights of the other participants, particularly the victims.[33]

18. It is argued that the victims are entitled to justice and the truth,[34] and that this application is premature, given the defence has not addressed the totality of the material relied on against the accused, and it is brought before the judges have ruled on the disputed evidence.[35] It is submitted that terminating the proceedings at this stage without taking into account the rights of the victims would be disproportionate, and would prevent the latter from exercising their right to justice and to reparations, which in turn would violate their rights to a fair trial.[36]

19. The OPCV submits, first, that the Chamber should reject the defence application,[37] on the basis, *inter alia*, that it should not have been presented at this stage in the proceedings and that it raises procedural and substantive issues that should not have been presented in a single filing.[38] The OPCV refers to jurisprudence from the Special Court for Sierra Leone ("SCSL") in support of its argument that the defence should have raised its concerns about the conduct of the prosecution's investigation either before or at the start of the trial.[39] It is submitted that the Chamber should reject the defence request relating to the alleged irregularities of the prosecution's investigation as being out of time.[40]

20. The OPCV also relies on the jurisprudence of the SCSL, along with that of the ICTY to argue that the defence should have delayed advancing detailed

[33] ICC-01/04-01/06-2676-Conf, paragraph 25.
[34] ICC-01/04-01/06-2676-Conf, paragraph 26.
[35] ICC-01/04-01/06-2676-Conf, paragraph 28.
[36] ICC-01/04-01/06-2676-Conf, paragraphs 31 and 32.
[37] ICC-01/04-01/06-2675-Conf, paragraphs 29 – 31.
[38] ICC-01/04-01/06-2675-Conf, paragraph 10.
[39] ICC-01/04-01/06-2675-Conf, paragraphs 11 – 13.
[40] ICC-01/04-01/06-2675-Conf, paragraph 14.

submissions on the evidence called by the prosecution until the end of the trial.[41]

21. The OPCV submits that an abuse of process application should only be granted on an exceptional basis[42] and it refers to the jurisprudence of the Appeals Chamber, namely that a stay of the trial for abuse of process is a measure of last resort.[43]

22. In any event, the OPCV submits the defence has failed to produce sufficient evidence to prove negligent or intentional misconduct on the part of the prosecution.[44] It is submitted that the defence has not demonstrated "grave and flagrant" violations of the rights of the accused, nor has it established that any of the alleged violations are sufficiently serious to undermine the integrity of the proceedings, to the extent that it is no longer possible to piece together the constituent elements of a fair trial.[45] The OPCV suggests that for each of the alleged complaints advanced by the defence, the correct response is not to halt the trial but to impose a lesser, more proportionate response, for instance by excluding any affected evidence.[46] Finally, the OPCV submits that the defence has not demonstrated that the proceedings are vitiated as a result of the prosecution's use of intermediaries who may have had connections to the [REDACTED] government of the Democratic Republic of Congo ("DRC").[47]

[41] ICC-01/04-01/06-2675-Conf, paragraphs 16, 19 and 20.
[42] ICC-01/04-01/06-2675-Conf, paragraphs 33 – 37.
[43] ICC-01/04-01/06-2675-Conf, paragraph 40.
[44] ICC-01/04-01/06-2675-Conf, paragraph 42.
[45] ICC-01/04-01/06-2675-Conf, paragraphs 42 – 46.
[46] ICC-01/04-01/06-2675-Conf, paragraphs 48 – 49.
[47] ICC-01/04-01/06-2675-Conf, paragraphs 50 – 56.

## III. The Facts

### The Submissions – the Defence

#### *Introductory Submissions*

23. By way of introduction, the defence maintains that for reasons that are the responsibility of the prosecution, a fair trial of the accused has been rendered impossible on account of serious and irretrievable prejudice to the judicial process of seeking and establishing the truth.[48] The prosecution's failings have deprived the accused of the means to challenge effectively all of the evidence presented by the prosecution, to reveal other possible offences against the administration of justice and to test the reliability of the prosecution's evidence, and, additionally, the accused's ability to tender evidence in his defence has been undermined.[49] The arguments in support of this contention fall into five main elements: i) the role of four "intermediaries" who acted for the prosecution; ii) the Prosecutor's negligence in failing properly to investigate the evidence that he has introduced during the trial, which, in the event, has been revealed – at least in part – as "erroneous or mendacious"; iii) the Prosecutor's deliberate failure to discharge his disclosure and inspection obligations; iv) the part played by certain participating victims; and v) the failure on the Prosecutor's part to act fairly and impartially. In general terms, it is alleged that these five serious failings have each led to profound and irretrievable prejudice to the trial of Mr Lubanga, rendering the process unfair.

[48] ICC-01/04-01/06-2657-Conf-tENG, paragraph 20.
[49] Réplique de la Défense à la « Réponse des Représentants légaux des victimes a/0001/06, a/0002/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09 et a/0398/09 à la requête de la Défense en abus de procédure », datée du 31 janvier 2011, 11 February 2001, ICC-01/04-01/06-2685-Conf, paragraph 7.

24. The defence submits that excluding inadmissible evidence is an insufficient remedy and this step will not guarantee the accused a fair trial.[50]

25. The submissions on these five distinct (though interrelated) elements are analysed separately for the parties and the participants, and it is important to stress that the summary of the evidence set out in this section of the Decision reflects the submissions of the parties and the participants as opposed to the record of the evidence within the official record of the case or any facts determined by the Chamber. The description that follows is, therefore, no more than a rehearsal of the competing arguments.

***i) The alleged role of the four intermediaries***

26. Addressing the submissions that focus on the role and activities of the intermediaries who acted for the Prosecutor and for whom it is said he is responsible, put generally, it is alleged that they prepared false evidence in order to secure the accused's conviction.[51] It is argued the position is aggravated by the Prosecutor's alleged awareness that intermediaries relevant to this application were also variously working on behalf of, first, the Congolese authorities; second, victims participating in the trial; and, third, the private organisations who arranged for the latter's representation before the Chamber.[52]

*Intermediary 316*

27. Although DRC-OTP-WWWW-0316 ("Intermediary 316"; [REDACTED]), was a [REDACTED] in the Office of the Prosecutor [REDACTED], it is

[50] ICC-01/04-01/06-2685-Conf, paragraph 7 and Réplique de la Défense à la « Prosecution's Response to the "Defence's Requête de la Défense aux fins d'arrêt définitif des procédures " », datée du 31 janvier 2011, 11 February 2011, ICC-01/04-01/06-2688-Conf, paragraphs 18 – 19.
[51] In its reply to the prosecution's response, the defence contends that inconsistencies in the accounts of prosecution witnesses can not be explained by the prosecution's allegation that Hema loyalists and others close to the Accused subjected witnesses to pressure, as it is submitted that there is insufficient evidence to support such a claim. ICC-01/04-01/06-2688-Conf, paragraphs 2 – 3.
[52] ICC-01/04-01/06-2657-Conf-tENG, paragraph 21.

suggested that he started working for the prosecution in or around April 2005, and this continued until 2008, notwithstanding the end of his formal contract.[53]

28. The defence relies on the evidence of DRC-OTP-WWWW-0582 ("Witness 582"; Bernard Lavigne), and DRC-OTP-WWWW-0583 ("Witness 583"; Nicolas Sebire), (who "headed investigations" between 2005 and 2007) to describe the role of Intermediary 316 as regards the conduct of investigations: collecting information; carrying out analysis; identifying, locating and contacting witnesses; introducing witnesses to the Office of the Prosecutor; and arranging travel, identification and photographs.[54]

29. It is said that Witness 583 gave evidence that Intermediary 316 introduced potential witnesses to the Office of the Prosecutor, such as DRC-OTP-WWWW-0015 ("Witness 15"; [REDACTED][55]) and DRC-D01-WWWW-0016 ("defence Witness 16"; [REDACTED]). The defence argues that this demonstrates that Intermediary 316 must have been aware of the aims of the prosecution's investigations and was trusted with confidential information so that he could act for the prosecution, reporting directly to those leading this work (with the latter passing the information up to the highest levels of the Office of the Prosecutor).[56] As a critical element of the defence application it is submitted that Intermediary 316 acted for the prosecution, in its name, on its behalf and following its instructions.[57]

30. Building on this alleged role of Intermediary 316 for the prosecution, the defence summarises the evidence of Witness 15 and defence Witness 16, in

[53] ICC-01/04-01/06-2657-Conf-tENG, paragraph 29.
[54] ICC-01/04-01/06-2657-Conf-tENG, paragraph 30.
[55] In Court, the witness testified that his name is [REDACTED] and that he provided the prosecution with a false name. Transcript of hearing on 16 June 2009, ICC-01/04-01/06-T-192-CONF-ENG CT, page 6, lines 7 – 8.
[56] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 31 and 32.
[57] ICC-01/04-01/06-2657-Conf-tENG, paragraph 33.

particular to the effect that Intermediary 316, induced them to make false statements and contributed to their preparation.[58] The defence refers to the evidence of defence Witness 16, that Intermediary 316 invited him to state falsely to the prosecution that he had been a soldier in the UPC; that he had seen the accused enlist children into the UPC forces; and young girls gave birth whilst in the UPC army.[59] He purportedly met Intermediary 316 in Bunia, when the latter was looking for someone to say something about Thomas Lubanga. He was introduced to investigators, whom he met in Bunia and Kampala in September, October and November 2005, and in both those locations Intermediary 316 discussed the subjects with defence Witness 16 about which the latter was to lie.[60]

31. It is suggested that the evidence of defence Witness 16 was that they talked about his evidence in preparation for each meeting with the investigators, and he provided Intermediary 316 with an update on the developments in the questioning. Defence Witness 16 indicated that he used a notebook containing the names of the relevant commanders who were associated with the names and places of battles.[61] His evidence, as summarised, was that he was offered a small amount of money for telling lies, that he was told he would be leaving Bunia to go abroad and he was induced to allege falsely that he had been threatened in order to secure protective measures (such as relocation).[62]

32. The accused relies on defence Witness 16's evidence that Intermediary 316 provided him with a fake threatening letter (bearing one of his fingerprints) that was passed on to someone acting for the ICC in Bunia. The defence observes that the original copy of this document, which was allegedly

[58] ICC-01/04-01/06-2657-Conf-tENG, paragraph 34.
[59] ICC-01/04-01/06-2657-Conf-tENG, paragraph 35.
[60] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 36 – 38.
[61] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 39 and 40.
[62] ICC-01/04-01/06-2657-Conf-tENG, paragraph 41.

provided to the prosecution by defence Witness 16, has not been tendered to the Chamber.[63]

33. The defence argues that defence Witness 16 followed Intermediary 316's instructions by claiming to have been a UPC soldier, and having seen child soldiers under the age of 15, including a young girl. It is submitted that the statements that defence Witness 16 gave to the investigators in October and November 2005 "appear to be the result of Intermediary 316's contriving to suborn him".[64]

34. Furthermore, the defence maintains that this account was demonstrably false: his evidence varied as to when he joined the UPC; he did not know the meaning of the initials "UPC", notwithstanding his claim to have served as a [REDACTED] (a rank that is said not to have been used); and he was unaware of the name of his brigade or his commander.[65]

35. The evidence of Witness 583 is relied on to contradict Intermediary 316 in that it is suggested Witness 583 testified that defence Witness 16 was introduced by Intermediary 316 as a former FPLC officer.[66] His account, as summarised, was that defence Witness 16 and Intermediary 316 were staying at the same hotel in Kampala several days before the interviews commenced, and Intermediary 316 accompanied defence Witness 16 to and from the interviews each day. On this basis it is averred that it was possible for the two men fraudulently to prepare for the questioning.[67] Witness 583 referred to defence Witness 16 using notes during the interviews.[68]

[63] ICC-01/04-01/06-2657-Conf-tENG, paragraph 42.
[64] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 43 and 45.
[65] ICC-01/04-01/06-2657-Conf-tENG, paragraph 44.
[66] ICC-01/04-01/06-2657-Conf-tENG, paragraph 46.
[67] ICC-01/04-01/06-2657-Conf-tENG, paragraph 47.
[68] ICC-01/04-01/06-2657-Conf-tENG, paragraph 48.

36. The defence alleges that the account given by Intermediary 316 regarding defence Witness 16 "is plagued by contradictions and implausibilities that it lends weight to D01-0016's accusations against him".[69] Further, it is argued that it has been demonstrated that Intermediary 316 suborned defence Witness 16 to support the case against the accused.[70] It is suggested that the evidence from Intermediary 316 that he sought out defence Witness 16 on the basis of a photograph provided to him by the Office of the Prosecutor is contradicted by the account of Witness 583 (just rehearsed) who gave evidence that he was informed of D01-0016's existence by Intermediary 316.[71] Likewise, it is said that Intermediary 316's assertion that he had no contact with defence Witness 16 after the Kampala interviews is undermined by defence Witness 16's evidence and certain documents held by the prosecution.[72]

37. Intermediary 316 is said to have told an investigator on 11 January 2008 that defence Witness 16 had found a letter containing death threats, but in evidence he said that he had not been informed about defence Witness 16's security problems and he denied having told the Office of the Prosecutor that a threatening letter had been found at defence Witness 16's home.[73]

38. Turning to the evidence of Witness 15, the defence relied on his testimony that he met an intermediary from the Office of the Prosecutor who told him to change his name and identity, and he was advised to give a false story. He set out that the person who suggested that he give false evidence to manipulate the investigation was Intermediary 316.[74] In a statement taken

[69] ICC-01/04-01/06-2657-Conf-tENG, paragraph 49. D01-0016 is defence Witness 16.
[70] ICC-01/04-01/06-2657-Conf-tENG, paragraph 53.
[71] ICC-01/04-01/06-2657-Conf-tENG, paragraph 50.
[72] ICC-01/04-01/06-2657-Conf-tENG, paragraph 51.
[73] ICC-01/04-01/06-2657-Conf-tENG, paragraph 52.
[74] ICC-01/04-01/06-2657-Conf-tENG, paragraph 54.

thereafter, Witness 15 reiterated that he had lied at the request of Intermediary 316.[75]

39. The defence emphasises the following suggested features of the evidence of Witness 15, which he gave when he reappeared before the Chamber between 17 and 22 March 2010. He said he met Intermediary 316 through defence Witness 16 in Kampala (it is argued that this contention was supported by defence Witness 16).[76] He was introduced to investigators of the Office of the Prosecutor once Intermediary 316 had persuaded him to change his name; and it was proposed that he should repeat a newspaper story about an arms and munitions deal. Witness 583 asked Witness 15 to set out this account to MONUC, when it was immediately realised that it was false.[77] The defence relies on the evidence of Witness 583 that Intermediary 316 was present at the first meeting in Kampala on 3 October 2005, along with the account concerning the arms deal and the interviews held in Bunia in November 2005.[78] Witness 15 stated that Intermediary 316 lied when he claimed the costs of travelling from the country, given that he lived in town. He alleged that Intermediary 316 taught him, in general terms, an untrue story about his activities as a soldier in the UPC army that he expanded on with the prosecution. Prior to each interview with the investigators he met Intermediary 316 at a hotel in order to rehearse the lies he was later to tell. His account was that Intermediary 316 persuaded him to conceal his identity and that of his parents (whom he said were dead); his ethnic group and education (as regards the latter, Intermediary 316 obtained a false state diploma given he failed this exam in 2002-2003); and the identities of the commanders he came into contact with, in order to frustrate any research into him.[79]

[75] ICC-01/04-01/06-2657-Conf-tENG, paragraph 55.
[76] ICC-01/04-01/06-2657-Conf-tENG, paragraph 56.
[77] ICC-01/04-01/06-2657-Conf-tENG, paragraph 56.
[78] ICC-01/04-01/06-2657-Conf-tENG, paragraph 58.
[79] ICC-01/04-01/06-2657-Conf-tENG, paragraph 56.

40. Additionally it is suggested Witness 15 alleged that he had been threatened on numerous occasions by Intermediary 316, who was present during his first meeting with investigators from the prosecution, having pressurised him when he initially refused to repeat the story they had prepared. Intermediary 316 told him to say that he had difficulties reading, and he showed him a notebook containing various names and statements. He was persuaded by Intermediary 316 to obtain some money by falsely suggesting his child was unwell.[80]

41. The defence analysed the statements given by Witness 15 to investigators from the prosecution in October and November 2005 and in May 2006, in order to demonstrate their suggested lack of truth. The defence highlights that he claimed to have served in different and opposing armed groups, and it is stressed that he could not describe the structure and organisation of the UPC, notwithstanding his claim to have served as an [REDACTED] and a member of [REDACTED]'s team. Furthermore, it is said he could not give the names of the commanders who were otherwise referred to by codenames. He was unable to explain what the letters "FNI" stood for or describe how it was organised, despite his alleged responsibility for a [REDACTED], as delegated by the FNI Chief of Staff, Mr Ngudjolo. It is argued that he lied when he claimed that [REDACTED] promoted him to the rank of [REDACTED], because this rank did not then exist in the FPLC.[81]

42. The defence argues that Witness 583 has materially supported the account of Witness 15. In particular, it is suggested that Witness 583 indicated that the latter was introduced by Intermediary 316 notwithstanding the latter's account; Intermediary 316 was present, and played a role, at the first

[80] ICC-01/04-01/06-2657-Conf-tENG, paragraph 56.
[81] ICC-01/04-01/06-2657-Conf-tENG, paragraph 57.

meeting in Kampala; and he invited Witness 15 to go to MONUC to pass on information about arms dealing, and Intermediary 316 consented to this course. Finally in this regard, it is suggested that Intermediary 316 organised interviews in Bunia between Witness 15 and the investigators in November 2005.[82]

43. The defence highlights that Intermediary 316 gives an account that is contradicted, and in particular the defence focuses on his evidence that the Office of the Prosecutor told him to locate Witness 15, having pointed him out in a photograph. It is argued that this account is undermined by Witness 15 and Witness 583 (set out above in the case of the latter). [83] The defence suggests that Intermediary 316 lied, therefore, when he denied putting Witness 15 in touch with the Office of the Prosecutor in Kampala in late 2005, on the basis of the accounts of Witness 583 and Witness 15.[84]

44. The defence relies on the evidence of DRC-OTP-WWWW-0038 ("Witness 38"; [REDACTED]) in particular to contradict the evidence of Intermediary 316 over issues such as his introduction by Intermediary 316 to the Office of the Prosecutor (which Intermediary 316 denied).[85]

45. Witness 38 indicated that he discussed the substance of his evidence with Intermediary 316, and he was often in contact with Intermediary 316, along with DRC-OTP-WWWW-0183 ("Witness 183"; [REDACTED]) and [REDACTED]. [86]

46. It is argued that the Prosecutor was in possession of information that demonstrated the role of Intermediary 316 was likely to cause serious

[82] ICC-01/04-01/06-2657-Conf-tENG, paragraph 58.
[83] ICC-01/04-01/06-2657-Conf-tENG, paragraph 60.
[84] ICC-01/04-01/06-2657-Conf-tENG, paragraph 61.
[85] ICC-01/04-01/06-2657-Conf-tENG, paragraph 64.
[86] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 65 and 67.

prejudice to the integrity of the judicial process. It is suggested that from the outset the prosecution knew that Intermediary 316 held a position in the [REDACTED] and that he used [REDACTED] to assist him with tasks assigned by the Office of the Prosecutor.[87] It is suggested that the prosecution jeopardised its independence by assigning essential investigative missions to an agent of the [REDACTED], because an element of the prosecution was thereby entrusted to individuals who had an interest in securing a conviction of the accused.[88] It is argued that the infiltration of the prosecution's investigations by [REDACTED] acting under the instructions of state authorities interested in the conviction of the accused have irremediably removed all credibility and legitimacy from the trial.[89]

47. It is said that on a number of occasions between 2005 and 2008 the Prosecutor was informed that Intermediary 316 was passing on false information.[90] By way of example it is suggested that internal reports reaching the highest level of the Office of the Prosecutor revealed that Intermediary 316 had lied to investigators about the situation of three potential former FNI child soldiers. The investigators noted that one of the child soldiers introduced by Intermediary 316 appeared to have been coached. It is said that this was left uninvestigated.[91]

48. Two emails sent by Witness 583 to his superiors in May 2006 contain doubts that are expressed about expenditure allegedly incurred by Intermediary 316. In an investigator's note dated 18 June 2010 on events that occurred between 2006 and 2009, it is suggested that Intermediary 316 has little credibility.[92] When Intermediary 316 was questioned by the Office of the Prosecutor in May 2008 he admitted to having lied, and having persuaded

[87] ICC-01/04-01/06-2657-Conf-tENG, paragraph 69.
[88] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 318 – 322.
[89] ICC-01/04-01/06-2685-Conf, paragraph 8.
[90] ICC-01/04-01/06-2657-Conf-tENG, paragraph 72.
[91] ICC-01/04-01/06-2657-Conf-tENG, paragraph 73.
[92] ICC-01/04-01/06-2657-Conf-tENG, paragraph 73, referring to DRC-OTP-0230-0456, page 5.

someone else to lie, to the investigators in order to obtain monies to meet a personal debt. In October 2008, Intermediary 316 informed the prosecution that his assistant (Witness 183) had been murdered and that his killers were seeking him out. He repeated this claim when he was questioned on this issue again in October 2009 and in November 2010. However, the Prosecutor accepts that Witness 183 is alive. Finally, in May 2008 the Office of the Prosecutor decided not to refer Intermediary 316 to the Victims and Witnesses Unit ("VWU") because the threats he had alleged had not been established and his family had provided varying accounts relating to the same events. [93]

49. By way of summary, therefore, it is argued that although from a range of materials Intermediary 316 was clearly to be suspected of providing false information or eliciting false evidence, the Office of the Prosecutor chose to continue working with him until at least April 2008, avoiding investigating the reliability of the material he provided or alerting the Chamber to the potential difficulties.[94]

*Intermediary 321*

50. It is said that between January and December 2007 DRC-OTP-WWWW-0321 ("Intermediary 321"; [REDACTED]) acted regularly for, and on the instructions of, the Office of the Prosecutor. Thereafter, he provided assistance on an *ad hoc* basis.[95] To illustrate this contention, it is averred that between January and February 2007 the Office of the Prosecutor asked Intermediary 321 to locate DRC-OTP-WWWW-0157 ("Witness 157"; [REDACTED]) and to set up a meeting with investigators. On 27 March 2007 Intermediary 321 contacted the Office of the Prosecutor to report that Witness 298 had asked for protection. In November 2007 the Office of the

[93] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 72 and 73.
[94] ICC-01/04-01/06-2657-Conf-tENG, paragraph 74.
[95] ICC-01/04-01/06-2657-Conf-tENG, paragraph 75.

Prosecutor again contacted Intermediary 321 in order for the latter to organise a meeting between several children and DRC-OTP-WWWW-0581 ("Witness 581"; [REDACTED]) in Bunia. Intermediary 321 was contacted by telephone and he met Witness 581 in person, who gave Intermediary 321 instructions. Between November and December 2007 the Office of the Prosecutor asked Intermediary 321 to organise interviews in [REDACTED], and Intermediary 321 indicates that the investigators contacted him whenever an interview was completed. Following the interviews in [REDACTED], Intermediary 321 was asked to provide money for the interviewees to return home and mobile telephones for some of the witnesses. In December 2007 Intermediary 321 was involved in discussions, at the behest of the Prosecution, with DRC-OTP-WWWW-0297 ("Witness 297"; [REDACTED]) over the latter's accommodation. Thereafter, in January 2008 Intermediary 321 accompanied Witness 297 and [REDACTED] to [REDACTED] airport. During the same month he was contacted by investigators concerning DRC-OTP-WWWW-0213 ("Witness 213"; [REDACTED]).[96]

51. After these events, Intermediary 321 remained in direct contact with the Office of the Prosecutor, in particular investigator [REDACTED], and direct contact was maintained after he was relocated in January 2008. By way of example, it is said that Witness 581 met Intermediary 321 in [REDACTED] on at least two occasions in 2008 and again in 2009.[97] Witness 581 indicated that Intermediary 321 was remunerated on the same basis as any other intermediary working for the prosecution.[98]

52. On the basis of this summary of the evidence, it is argued that it has been demonstrated that Intermediary 321 regularly acted on the instructions of

[96] ICC-01/04-01/06-2657-Conf-tENG, paragraph 76.
[97] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 77 and 78.
[98] ICC-01/04-01/06-2657-Conf-tENG, paragraph 79.

the Office of the Prosecutor and worked under its supervision, for more than a year, as regards particularly Witness 157, Witness 213, DRC-OTP-WWWW-0294 ("Witness 294"; [REDACTED]), Witness 297 and DRC-OTP-WWWW-0298 ("Witness 298"; [REDACTED]). Therefore, it is said he was an agent of the prosecution. [99]

53. Building on this foundation, it is suggested that it has been demonstrated that Intermediary 321 encouraged witnesses to give false evidence. The defence focuses on the evidence of defence Witness 3 and DRC-D01-WWWW-0004 ("defence Witness 4"; Claude Ndjango), summarising their account as including the allegation that Intermediary 321 encouraged young boys from [REDACTED] to make false claims to investigators from the Office of the Prosecutor that they had been enlisted by the armed wing of the UPC (including Witness 213, Witness 294, Witness 297 and Witness 298, who each gave evidence). [100] Defence Witness 4 maintained that Intermediary 321 asked him and others to give a false story to the prosecution that he had been enlisted in the UPC, and he was promised assistance, training and money. He said the lies included their names, where they lived and their ages. He gave evidence that he was coached in his false account by Intermediary 321, over a number of days.[101]

54. Defence Witness 4 said that he travelled with a false student card provided by the Office of the Prosecutor, with incorrect information as to his name, age and village.[102]

55. Defence Witness 3 maintained that Intermediary 321 told children that an NGO was going to assist them to train to become [REDACTED], and they

[99] ICC-01/04-01/06-2657-Conf-tENG, paragraph 80.
[100] ICC-01/04-01/06-2657-Conf-tENG, paragraph 81.
[101] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 82 – 85.
[102] ICC-01/04-01/06-2657-Conf-tENG, paragraph 88.

would be given money if they agreed to claim they had been child soldiers.[103] Defence Witness 3 was accompanied by [REDACTED], when he went to [REDACTED] to meet investigators from the prosecution, and at the request of Intermediary 321 he falsely claimed to be the [REDACTED]. He said that Intermediary 321 asked him to use the name [REDACTED]. He said that he signed several documents for the Office of the Prosecutor using different names.[104] The defence relies on his account that Intermediary 321 encouraged [REDACTED] to claim falsely that he was a child soldier and his mother had been killed during the war in [REDACTED], and he encouraged children to lie about their home village.[105]

56. The defence furthermore relies on the evidence of defence Witness 3 and defence Witness 4 that in order to be relocated they were encouraged by Intermediary 321 to lie, saying that defence Witness 3 had been questioned by the UPC.[106]

57. Generally, the defence suggests that the evidence demonstrates that Intermediary 321 solicited false evidence from potential witnesses.[107]

58. The defence rehearses evidence from Witness 297 (*viz.* statements made to the defence) that he had been told by Intermediary 321 to say he had been recruited by force and that if they testified against Thomas Lubanga (and if he was found guilty) they would be given money.[108] It is observed that he did not maintain these assertions when giving evidence before the Chamber.[109]

[103] ICC-01/04-01/06-2657-Conf-tENG, paragraph 91.
[104] ICC-01/04-01/06-2657-Conf-tENG, paragraph 92.
[105] ICC-01/04-01/06-2657-Conf-tENG, paragraph 93.
[106] ICC-01/04-01/06-2657-Conf-tENG, paragraph 94.
[107] ICC-01/04-01/06-2657-Conf-tENG, paragraph 95.
[108] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 99 and 100.
[109] ICC-01/04-01/06-2657-Conf-tENG, paragraph 101.

59. Witness 298 was introduced to the Office of the Prosecutor by Intermediary 321. The defence sets out a summary of his evidence given at the outset of his testimony before the Chamber, to the effect that he had been encouraged to lie and he was taught a story over 3 ½ years. He said that he had never been to a training camp. However, it is observed after an interruption of the hearing he withdrew these assertions.[110]

60. The defence advances an analysis of the lists of children, the evidence contained in them and the evidence given about them, to suggest that the children introduced to Witness 581 were selected by Intermediary 321.[111] It is argued that the children, or most of them, were living in [REDACTED], most particularly in the [REDACTED],[112] and it is said that the evidence establishes that Intermediary 321 gathered the children at his home before introducing them one-by-one to Witness 581. The defence argues that there is evidence to support the suggestion that false accounts were engineered at preparatory meetings.[113]

61. The proposition is relied on that Intermediary 321 encouraged defence Witness 4 to give the false identity of Jacques Byaruhanga.[114] Similarly, it is said that the evidence establishes that Intermediary 321 encouraged individuals to claim falsely that they were the parents of children screened by Witness 581 and sent to [REDACTED].[115]

62. It is contended that all of the witnesses introduced to the Office of the Prosecutor by Intermediary 321 have made manifestly false statements about their alleged military activities in the armed wing of the UPC as child

[110] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 102 – 104.
[111] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 106 – 107.
[112] ICC-01/04-01/06-2657-Conf-tENG, paragraph 108.
[113] ICC-01/04-01/06-2657-Conf-tENG, paragraph 110.
[114] ICC-01/04-01/06-2657-Conf-tENG, paragraph 111.
[115] ICC-01/04-01/06-2657-Conf-tENG, paragraph 113.

soldiers under the age of 15.[116] In support of this proposition, the defence analyses the evidence (including by reference to contradictory material) of Witness 298,[117] Witness 297, [118] Witness 213[119] and Witness 294.[120]

63. By way of summary, it is argued that the untruthful nature of the evidence of all the witnesses introduced by Intermediary 321 to the Office of the Prosecutor supports the accounts of defence Witness 3 and defence Witness 4, to the effect that he encouraged them to lie about their military involvement with the UPC, their civil status, their homes and their schooling so as to prevent the process of verification.[121]

64. Against that background the following clear proposition is advanced: "[t]he senior staff of the Office of the Prosecutor knew or should have known that using the services of W-0321[122] would seriously affect the reliability of the evidence collected".[123] Furthermore, it is alleged that the circumstances should have led the Office of the Prosecutor to stop using Intermediary 321 and to review the relevant evidence.[124]

65. The defence sets out a summary of evidence which it suggests supports the proposition that Intermediary 321 worked on behalf of participating victims whilst he was also working with the Office of the Prosecutor. He acted as an intermediary for [REDACTED], who organised participation by victims in the proceedings against the accused. The evidence of Intermediary 321 is referred to in order to establish that Witness 157 had contact with [REDACTED] before being introduced to the Office of the Prosecutor, and

[116] ICC-01/04-01/06-2657-Conf-tENG, paragraph 114.
[117] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 116 – 121.
[118] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 122 – 126.
[119] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 127 – 130.
[120] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 131 – 136.
[121] ICC-01/04-01/06-2657-Conf-tENG, paragraph 137.
[122] This is Intermediary 321.
[123] ICC-01/04-01/06-2657-Conf-tENG, paragraph 138 (heading).
[124] ICC-01/04-01/06-2657-Conf-tENG, paragraph 138.

that Intermediary 321 introduced DRC-OTP-WWWW-0299 ("Witness 299"; [REDACTED]) to lawyers working for [REDACTED] (who are now representing victims in the proceedings against the accused). Intermediary 321 is said to have confirmed introducing Witness 298 to [REDACTED] and to having assisted Witness 298 with his application to participate in these proceedings.[125]

66. The defence argues that the prosecution should not have recruited an individual who (usually) worked as an intermediary on behalf of participating victims: it is said this breaches the obligations of impartiality, equality and independence that ought to be met by the Office of the Prosecutor; furthermore, it is suggested that once an individual is employed as an intermediary of the prosecution he or she should cease working on behalf of participating victims.[126]

67. It is submitted that victims are "naturally" interested in the conviction of the accused, and this should have automatically alerted the prosecution to the serious risk of biased and inappropriate behaviour on the part of Intermediary 321 in the context of those he contacted.[127]

68. Evidence is rehearsed to the effect that in November 2007 and March 2008,[128] the Office of the Prosecutor became aware of "manifestly fraudulent behaviour" on the part of Intermediary 321. First, it is said that on 16 November 2007 Witness 581 noted that the list of children provided by Intermediary 321 for screening, which Intermediary 321 said he had compiled on the instructions of DRC-OTP-WWWW-0031[129] ("Intermediary

[125] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 139 and 140.
[126] ICC-01/04-01/06-2657-Conf-tENG, paragraph 141.
[127] ICC-01/04-01/06-2657-Conf-tENG, paragraph 142.
[128] In its application the defence refers to January 2008. However, the evidence submitted in support of the claim is dated March 2008.
[129] This individual also testified as a prosecution witness. As the defence focuses on his role as an intermediary rather than a witness, in this Decision he is referred to as Intermediary 31.

31"; [REDACTED]), differed from the list of children "that it was understood Intermediary 321 would provide to the Office of the Prosecutor". It is submitted that this was brought to the attention of senior staff of the Office of the Prosecutor and no convincing explanation for the discrepancy was provided.[130]

69. On 4 March 2008, Witness 581 realised that a potential witness, claiming to be Jacques Byaruhanga, whom he had screened in November 2007 and whom the investigators [REDACTED]and [REDACTED] had met in [REDACTED] in December 2007 was Claude Ndjango (defence Witness 4). This difference as to identity was brought to the attention of senior staff of the Office of the Prosecutor. It is argued that the interviews of Witness 581 and Intermediary 321, as well as (indirectly) the interview of [REDACTED], demonstrated that Intermediary 321 was "behind" defence Witness 4's use of a false identity.[131]

70. It is highlighted that in March 2008[132] the prosecution was in possession of evidence demonstrating that Intermediary 321 was responsible for, at the least, extremely suspicious behaviour; indeed, it is argued there was strong evidence that he had tampered with evidence.[133] Instead of carrying out a full review of the activities of this Intermediary, the defence complains nothing was done.[134]

*Intermediary 143*

71. The core submission as regards DRC-OTP-WWWW-0143 ("Intermediary 143"; [REDACTED]) is that the prosecution had reason to suspect that he

[130] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 143 and 144.
[131] ICC-01/04-01/06-2657-Conf, paragraphs 145 and 146.
[132] As noted above, the reference to "January" instead of March appears to be a typographical error in the defence application.
[133] ICC-01/04-01/06-2657-Conf-tENG, paragraph 147.
[134] ICC-01/04-01/06-2657-Conf-tENG, paragraph 148.

suborned prosecution witnesses whilst he was acting for the Office of the Prosecutor.[135]

72. The defence relies on the "not disputed" fact that Intermediary 143 was employed by the Office of the Prosecutor under contracts that were regularly renewed from 1 June 2005 until 2010. Thereafter, Intermediary 143 indicated [REDACTED].[136]

73. By way of a summary of his activities, it is rehearsed that Intermediary 143 introduced 24 witnesses to the Office of the Prosecutor (five have given evidence in this trial) and he is said to have had contact with at least 14 other witnesses. In particular, his contact with Intermediary 31, Intermediary 145, Intermediary 316 and Intermediary 321 is noted,[137] as well as his role generally in organising travel arrangements, identification papers and the consent for X-rays, and helping victims to fill in applications to participate. It is said he was concerned with the health and safety of witnesses.[138]

74. The defence alleges that Intermediary 143 was in regular and direct contact with, and was controlled by, investigators from the Office of the Prosecutor and their superiors, and he acted on their instruction. It is averred that he was informed of the prosecution's investigative objectives and Witness 582 indicated that these were developed on the basis of information provided by Intermediary 143.[139]

[135] ICC-01/04-01/06-2657-Conf-tENG, paragraph 149.
[136] ICC-01/04-01/06-2657-Conf-tENG, paragraph 150.
[137] As is also noted by the prosecution in its response, the defence refers to the transcript of Intermediary 321's testimony on 4 November 2010, which appears to be a mistake since DRC-OTP-WWWW-0145 and Intermediary 316 are not mentioned.
[138] ICC-01/04-01/06-2657-Conf-tENG, paragraph 151.
[139] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 152 and 153.

75. The defence develops submissions to the effect that Intermediary 143 had contact with witnesses "who have all made manifestly mendacious statements".[140] Dual status witnesses DRC-OTP-WWWW-0007 ("Witness 7"; [REDACTED]), DRC-OTP-WWWW-0008 ("Witness 8"; [REDACTED]), DRC-OTP-WWWW-0010 ("Witness 10"; [REDACTED]) and DRC-OTP-WWWW-0011 ("Witness 11; [REDACTED]) were all introduced to the prosecution by Intermediary 143 as former child soldiers. Similarly, Intermediary 143 introduced non-trial witnesses DRC-OTP-WWWW-0006 ("Witness 6"; [REDACTED]) and DRC-OTP-WWWW-0009 ("Witness 9"; [REDACTED]) whose statements were before the Pre-Trial Chamber and were used for the confirmation of charges. It is said that the evidence in the trial has demonstrated that these individuals have "all made manifestly mendacious statements".[141] The defence has set out a detailed analysis of the evidence relied on this regard.[142]

76. Against that background, the defence submits that the Prosecutor had sufficient information to suspect that Intermediary 143 had suborned and manipulated evidence. It is asserted that the Office of the Prosecutor was aware that Intermediary 143 was acting for the prosecution at the same time that he was acting for victims who were assisted and represented by the OPCV: in particular, he assisted in their applications to participate in the capacity of the "person acting on behalf of the victim". On this basis it is argued that a clear risk of bias was created that should have alerted the prosecution to the need to exercise caution over any evidence gathered by him.[143]

[140] ICC-01/04-01/06-2657-Conf-tENG, paragraph 155.
[141] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 154 and 155.
[142] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 156 – 174.
[143] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 175 – 178.

77. Additionally, it is suggested that the Prosecutor was in possession of information that raised serious doubts about Intermediary 143's impartiality and reliability. The defence argues that the financial requests made by Intermediary 143 as far back as 2007 should have aroused suspicion as to his reliability as an intermediary – indeed, some of them were considered excessive by representatives of the Office of the Prosecutor.[144]

78. On 23 February 2006, investigators sent a report to senior prosecution officials concerning three potential witnesses that cast doubt over the credibility and reliability of Intermediary 143 and Intermediary 316.[145]

79. It is suggested that during 2008, Intermediary 143 provided the prosecution with identity documents of dubious authenticity. The particular materials relied on are the attestation of birth for Witness 297 (on the basis of information provided to the civil registry services by Intermediary 143 alone), the allegedly fake identity card for defence Witness 4 and the attestations of birth for Witness 7, Witness 8, Witness 10 and Witness 11 (all prepared on the same day by the same civil registry official, with dates, it is suggested, that do not match the dates of birth of these witnesses in the register of the Independent Electoral Commission ("IEC")).[146]

80. The defence argues that the evidence concerning the negotiations between Intermediary 143 and the VWU demonstrates Intermediary 143's tendency to misrepresent situations in order to protect his personal and financial interests. It is suggested that he failed to provide evidence that the VWU considers trustworthy of his income from "[REDACTED]", as well as from the by-products of [REDACTED] and [REDACTED]. Moreover, it is said his contentions in this regard are contradicted by the information in his

[144] ICC-01/04-01/06-2657-Conf-tENG, paragraph 179.
[145] ICC-01/04-01/06-2657-Conf-tENG, paragraph 180.
[146] ICC-01/04-01/06-2657-Conf-tENG, paragraph 181.

'Personal History Form' (which indicated that [REDACTED] is his only employer and that he was paid on the basis of completed projects).[147]

*Intermediary 31*

81. Intermediary 31 acted as intermediary for, or had contact with, Witness 7, Witness 8, Witness 11, Witness 157, DRC-OTP-WWWW-0293 ("Witness 293"; [REDACTED]), Witness 294, Witness 298 and Witness 299.[148]

82. It is said that Intermediary 31 was recruited as an intermediary for the Office of the Prosecutor in 2005 and that he continued in this role until at least 2008. During that period it is alleged he was paid an estimated $23,000, having received a monthly allowance since March 2007. By March 2010 he was still receiving allowances from the prosecution for accommodation and subsistence.[149] On this basis, it is argued that he played a central role as intermediary over a long period of time.

83. The defence relies particularly on the evidence of Witness 157 to demonstrate that witnesses who had had contact with Intermediary 31 were untruthful. In short, it is suggested that the testimony of Intermediary 31 and DRC-D01-WWWW-0025 ("defence Witness 25"; Patient Dieumerci Nobirabo Todabo) along with certain documentary evidence, demonstrate that contrary to his assertion, Witness 157 was not a soldier in the armed wing of the UPC; that he gave incorrect evidence concerning his age; and he made false assertions as to his education. It is argued that the manifest untruthfulness highlighted by the defence "strongly corroborates" the contention that Intermediary 31 "encouraged many potential witnesses to give false testimony".[150]

[147] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 182 – 183.
[148] ICC-01/04-01/06-2657-Conf-tENG, paragraph 184.
[149] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 185 – 188.
[150] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 189 – 195.

84. On 23 February 2006 the Office of the Prosecutor indicated that his behaviour had created doubts about his credibility and dealings with him were to be suspended. This information was passed to the executive committee of the Office of the Prosecutor.[151]

85. Witness 582 provided an explanation as to why he mistrusted Intermediary 31 and suggested that he had been insistent about playing a decisive role in the Office of the Prosecutor's investigations.[152]

86. On the basis of all this evidence it is argued that the prosecution should have ceased employing his services and that any evidence gathered by him ought to have been thoroughly checked. Instead, the Office of the Prosecutor continued to use him and called him as a witness.[153]

***ii) The Prosecutor knew that certain evidence was untruthful or erroneous, or he failed to investigate its reliability***

87. It is averred that the Prosecutor introduced manifestly false testimony – whether it was given deliberately or in error – without first having conducted "necessary investigations to ascertain its reliability". It is argued, therefore, that as a result of prosecutorial negligence, namely the failure properly to research the evidence that has been given during the trial, "erroneous or mendacious" testimony has caused serious and irremediable prejudice to the trial.[154] The level of negligence alleged is high: that the Prosecutor deliberately refused to address information that should have alerted him to the risk that certain evidence he proposed to call was false or

[151] ICC-01/04-01/06-2657-Conf-tENG, paragraph 196.
[152] ICC-01/04-01/06-2657-Conf-tENG, paragraph 197.
[153] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 198 and 199.
[154] ICC-01/04-01/06-2657-Conf-tENG, paragraph 22.

had been suborned, and he did not inform the Chamber of the risks posed by this evidence; indeed, it is argued that the Prosecutor deliberately withheld evidence in this regard. It is also suggested that in certain public statements made on his behalf and relevant to this issue, the Prosecutor displayed a bias that is incompatible with his statutory duties.[155]

88. Therefore, it is contended that the Prosecutor deliberately neglected his obligations with regard to the investigations. The defence relies on the prosecution's obligation to investigate incriminating and exonerating circumstances alike, and it suggests that the Prosecutor is additionally obliged to ensure that the evidence he intends to rely on at trial is reliable.[156]

89. The defence highlights a suggested inequality in the resources of the prosecution and the accused that means that the prosecution's obligation to investigate exonerating circumstances "effectively and impartially" is an essential condition for a fair trial (Article 67(2) of the Statute). The defence argues that the obligation in this regard "refers to all evidence which, when examined, may help to resolve a factual issue in favour of the accused".[157]

90. The defence additionally submits that all the exonerating material discovered by the prosecution must be disclosed to the defence "in good time" to ensure that the defence can exercise its rights.[158]

91. The accused, in the context of this application, suggests that the Prosecutor deliberately neglected to check the identity and civil status of the witnesses who have been called and he intentionally failed to ensure the credibility of their statements.[159]

[155] ICC-01/04-01/06-2657-Conf-tENG, paragraph 23.
[156] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 229 and 230.
[157] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 232 and 233.
[158] ICC-01/04-01/06-2657-Conf-tENG, paragraph 234.
[159] ICC-01/04-01/06-2657-Conf-tENG, paragraph 235.

92. It is argued to be "self-evident" that the Prosecutor has a fundamental obligation to verify the identity and civil status of the witnesses he is to call. It is said this is a particular and fundamental obligation in this case because "age is one of the essential elements of the crimes with which the Accused has been charged". However, instead, "the Prosecutor eschewed the obvious investigative measures and chose to be satisfied with documents which lacked any guarantee of authenticity, supplied by "intermediaries" over whom he exercised no control".[160]

93. In development of these general submissions, the defence highlights that the prosecution failed to verify relevant details concerning its witnesses – particularly those allegedly abducted from their families when aged between 10 and 14 years – with their parents and family members, save for Witness 298, Witness 294 and Witness 157.[161]

94. Similarly, it is argued that the prosecution should have checked the details of its witnesses with institutions that were likely to hold reliable records. These institutions are said to include the IEC, which is authorised to issue voters' cards to those over 18, and the relevant schools whose registers give the full "civil status" and place of residence for their pupils. It is contended that the prosecution avoided making any enquiries with the IEC until the defence deployed duplicate voters' cards in 2010, and the Office of the Prosecutor did not make any enquires at the relevant schools (*viz.* those the witnesses were allegedly attending at the time of their enlistment).[162]

95. The defence objects to the alternative course adopted by the prosecution: asking intermediaries to obtain birth certificates (or similar documents, such

[160] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 236 and 237.
[161] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 238 and 239.
[162] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 240 – 243.

as state diplomas) for some of the witnesses; it is suggested these documents were potentially fraudulent.[163]

96. In these circumstances, the argument is advanced that "by deliberately neglecting to satisfy himself of the identity and civil status of his witnesses, the Prosecutor made it possible for witnesses to appear under a false identity and deprived the Defence of the means with which to test their credibility".[164]

97. Furthermore, it is averred that the "Office of the Prosecutor did not verify any of the allegations of its witnesses, and in particular of those claiming to have left their family environment at an early age in order to join armed militias".[165] For instance, it is suggested that notwithstanding the claim of all the witnesses who said they were former child soldiers that they had been attending school at the time of their enlistment, no enquiries were made with the various schools to establish whether they were registered or whether their schooling had been interrupted.[166]

98. It is also alleged that: "[...] the Defence has not received disclosure of any statements by the commanders, soldiers, pupils or friends the witnesses mentioned in the statements they gave to the investigators. It must be inferred that they were not contacted for verifications."[167] It is similarly suggested that the prosecution did not check with the *chefs de collectivités* where the witnesses lived in order to establish if they were enlisted or abducted.[168]

[163] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 244 – 246.
[164] ICC-01/04-01/06-2657-Conf-tENG, paragraph 247.
[165] ICC-01/04-01/06-2657-Conf-tENG, paragraph 248.
[166] ICC-01/04-01/06-2657-Conf-tENG, paragraph 249.
[167] ICC-01/04-01/06-2657-Conf-tENG, paragraph 250.
[168] ICC-01/04-01/06-2657-Conf-tENG, paragraph 251.

99. The defence analyses the circumstances of witnesses DRC-OTP-WWWW-0089 ("Witness 89"; [REDACTED]) and DRC-OTP-WWWW-0555 ("Witness 555"; [REDACTED]) to demonstrate what are said to be the Prosecutor's investigative failures since 2005.[169] In summary, the "[...] failure to investigate properly led the Office of the Prosecutor to present before the Chamber testimonies which were manifestly mendacious, while depriving the Defence of the means to cross-examine them properly, except where the Defence itself managed by chance to gather the information and documents required for its case."[170]

100. The defence suggests that the accounts of Witness 582 and Witness 583 provided the Chamber with two particular justifications for the prosecution's failure to investigate: i) the adverse security situation prevented the investigators from moving beyond a limited area in the town of Bunia; and ii) investigations in the field created a risk for particular witnesses.[171] The defence meets these contentions by suggesting that although the safety of individuals is relevant, this obligation "[...] cannot release the Office of the Prosecutor from its statutory responsibilities in respect of investigations, nor can it diminish the burden of proof incumbent upon it."[172] Furthermore, it is argued that whatever the precise nature of the justification relied on by the prosecution, "[...] the failure to investigate exonerating circumstances makes the trial unfair to the Accused, by exposing him to false testimonies and depriving him of the means with which to counter them."[173]

[169] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 252 – 258.
[170] ICC-01/04-01/06-2657-Conf-tENG, paragraph 259.
[171] ICC-01/04-01/06-2657-Conf-tENG, paragraph 260.
[172] ICC-01/04-01/06-2657-Conf-tENG, paragraph 261.
[173] ICC-01/04-01/06-2657-Conf-tENG, paragraph 262.

### *iii) The alleged deliberate failure by the prosecution to disclose material in a timely manner*

101. The defence argues that the prosecution has adopted an overly restrictive, and thereby improper, interpretation of its disclosure obligations.[174] The defence describes the Chamber's Decisions on disclosure, in the following way:

> The Accused's right to receive disclosure of potentially exculpatory evidence is absolute and constitutes a major prerequisite for a fair trial. The Chamber has ruled that the Prosecution is under an obligation to disclose potentially exculpatory material as soon as is practicable throughout the trial period, as is required by article 67(2) of the Statute, as well as any rule 77 evidence, that is, any and all evidence that is material to the preparation of the defence, be it internal communication within the Office of the Prosecutor, investigator's notes, or any other type of documents. The Prosecutor must expeditiously fulfil his disclosure obligations throughout the trial.
>
> On 8 April 2008, the Chamber stated that the Accused has an absolute entitlement to receive all potentially exculpatory evidence, even if the weight of certain evidence may be undermined by other evidence.[175]

102. Against that background, the defence submits that the prosecution has fallen into error by deciding that although evidence may diminish the credibility of a witness, disclosure is not necessary if the Prosecutor's assessment of the witness is that he or she is credible on the basis of all the evidence in his possession. It is said that this approach is "patently erroneous" and "arouses legitimate suspicion that the Office of the Prosecutor has deliberately omitted to disclose significant exculpatory evidence to the Defence."[176]

103. Addressing the allegation that the prosecution has deliberately delayed disclosure of evidence that is material to the preparation of the defence case, the defence highlights the fact that delayed disclosure by the prosecution has caused considerable delays to the case. The defence reminds the

[174] ICC-01/04-01/06-2657-Conf-tENG, paragraph 267.
[175] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 263 and 264.
[176] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 265 – 267.

Chamber of its earlier submissions that late disclosure has caused prejudice to the accused.[177]

104. The defence has provided the Chamber with what are said to be examples of deliberate delays in the disclosure of evidence relevant to the credibility of prosecution witnesses. The first relates to Witness 157. The defence suggests that on 4 November 2009 the Office of the Prosecutor obtained the original version of various school documents concerning this witness that demonstrate that he was over 15 years of age during the period when he (falsely) claimed to have been enlisted in the UPC. It is submitted that although the documents were directly relevant to his credibility, the Office of the Prosecutor "waited" until 8 March 2010 to disclose them to the defence.[178] Witness 581 first testified between 14 and 17 June 2010. However, on 11 June 2010 the defence had asked the prosecution to disclose the list, sent by Intermediary 321 to Witness 581, of those who were to be screened. The prosecution, in response, indicated that these lists were not sent in written form. Following the evidence of Witness 581, on 29 June 2010 the defence repeated its request and the prosecution effected disclosure on 30 June 2010 (after the witness had completed his evidence). It is suggested that the disclosed material reveals that Witness 581 "had improperly understated the fact that the different lists of children to be met were completely inconsistent, which is a crucial element in weighing the honesty of Intermediary W-0321".[179]

105. Additionally, it is argued that deliberate delays as regards disclosure "call into question" the honesty of the intermediaries. By way of example, the defence argues that on 16 June 2009 Witness 15 raised questions about the honesty of Intermediary 316, and that since January 2010 the honesty of the

[177] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 268 and 269.
[178] ICC-01/04-01/06-2657-Conf-tENG, paragraph 271.
[179] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 272 and 273.

prosecution's intermediaries generally, and Intermediary 316 in particular, "constituted one of its principal lines of defence".[180] Notwithstanding these developments, it is suggested that a significant body of material relevant to the credibility of Intermediary 316 was not disclosed until June and November 2010, and one piece of evidence was disclosed after he had testified.[181] The defence in Annex 2 provides examples of late disclosure in relation to Intermediary 316, including a table establishing the apparent apprehension on the part of the prosecution that Intermediary 316 would sell information and that he would retaliate if his requests for financial assistance from the Office of the Prosecutor were not met.[182]

106. In a similar vein, Intermediary 31 testified between 24 June and 3 July 2009 although his status as an intermediary was disclosed later. On 1 November 2010, the Office of the Prosecutor disclosed a memorandum to the defence, dated 23 February 2006, which indicated that – at that time – the conduct of this individual had caused the prosecution "to doubt his reliability".[183]

107. The defence alleges that there have been instances of deliberate delays in disclosing obviously exculpatory evidence. The first example relates to the provision on 20 October 2010 of the notes of an interview conducted on 13 September 2006 with [REDACTED], Thomas Lubanga's [REDACTED] for the entirety of the period covered by the charges. In the interview he indicated that he had not seen any child soldiers under the age of 15 in the UPC, and he suggested that the accused was "against recruiting child soldiers". It is alleged that no explanation has been provided as to why this "quite obviously exculpatory" evidence was not disclosed until four years after it was taken by the prosecution.[184]

[180] ICC-01/04-01/06-2657-Conf-tENG, paragraph 274.
[181] ICC-01/04-01/06-2657-Conf-tENG, paragraph 275.
[182] ICC-01/04-01/06-2657-Conf-tENG, paragraph 276; ICC-01/04-01/06-2657-Conf-Anx2.
[183] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 277 – 278.
[184] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 279 and 280.

108. The argument is emphasised that not only do the delays remain wholly unjustified but they also have had the effect of depriving the defence of the opportunity properly to investigate and question witnesses giving evidence before the Court.[185]

109. It is submitted that the prosecution is obliged, on the basis of internationally recognised principles, to inform the Chamber, the defence and the participants immediately if it becomes aware that evidence it has called is false.[186] It is suggested that "[...] the Prosecutor called before the Chamber witnesses of whose mendacity he could not have been unaware and, after several witnesses had been examined, deliberately omitted to inform the Chamber that certain fundamental elements of their statements were false".[187] By way of example the accused suggests that disclosure has revealed that Intermediary 316 introduced a number of witnesses to the prosecution, thereby contradicting his account that he only made contact with witnesses already known to the Office of the Prosecutor. It is observed that the prosecution did not inform the Chamber that Intermediary 316 had given false evidence on this issue when testifying before the Chamber. Similarly, on 23 October 2008, Intermediary 316 told the Office of the Prosecutor that Witness 183 had been killed and on 5 November 2008 Intermediary 316 provided the prosecution with further details about Witness 183's death. On 3 July 2009, the Office of the Prosecutor learnt that this information was false: Witness 183 was still alive. During his evidence before the Court Intermediary 316 maintained that Witness 183 had been killed, and the prosecution only made clear that he is still alive when the Chamber requested clarification.[188] By way of a final example, the defence

[185] ICC-01/04-01/06-2657-Conf-tENG paragraph 281.
[186] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 282 and 283.
[187] ICC-01/04-01/06-2657-Conf-tENG, paragraph 284.
[188] ICC-01/04-01/06-2657-Conf-tENG, paragraph 285.

alleges that Witness 157, who had stated he had been a child soldier when under the age of 15, was to give evidence in both the present trial and the trial of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("*Katanga*" trial or case). The accused in the *Lubanga* trial challenged his testimony by reference to certain school documents and thereafter the prosecution decided not call him as a witness in the *Katanga* trial. However the defence and Trial Chamber I were not informed of this change of tactics, following the witness's evidence in this trial.[189]

***iv) Alleged collaboration between participating victims***

110. The defence particularly highlights the alleged role of a Congolese political figure (participating victim a/0270/07) as an exacerbating factor in this abuse of process submission: it is said he was responsible for a scheme perpetrated by certain individuals to steal the identities of others, resulting in a series of perjured witnesses giving evidence before the Chamber.[190]

111. By way of elaboration, the defence contends that during the trial evidence has been provided that participating victims a/0225/06 and a/0229/06, at the instigation of victim a/0270/07, have provided false identities and that all three have made false statements to the Chamber.[191] The defence has provided a substantial analysis of the evidence relevant to this contention. It is argued that the evidence shows that a/0225/06 and a/0229/06 usurped the identities of DRC-D01-WWWW-0032 ("defence Witness 32"; [REDACTED]) and DRC-D01-WWWW-0033 ("defence Witness 33"; [REDACTED]) at the instigation, and whilst under the control of a/0270/07, and the evidence supporting this contention is set out in detail. In particular, defence Witness 32 and defence Witness 33 indicated that a/0270/07 falsely encouraged

[189] ICC-01/04-01/06-2657-Conf-tENG, paragraph 285.
[190] ICC-01/04-01/06-2657-Conf-tENG, paragraph 25.
[191] ICC-01/04-01/06-2657-Conf-tENG, paragraph 200.

pupils from the [REDACTED] to say they had been child soldiers, and on this basis to apply to participate in the proceedings before the ICC.[192]

112. It is argued that the evidence of DRC-D01-WWWW-0034 ("defence Witness 34"; Bertin Ukunya Nyona) reveals that a/0270/07 was in charge of recruiting minors who had been members of rebel groups, and that Victim a/0270/07 attempted to present the son of defence Witness 34 (defence Witness 32) falsely as a former soldier from a rebel group.[193]

113. Furthermore, it is observed that defence Witness 34 disputes the information that was provided as to his son's birth and the suggestion [REDACTED].[194]

114. The defence analyses evidence introduced in the trial to demonstrate that identities had been stolen in the way set out above.[195]

115. Relying particularly on the evidence of defence Witness 32 and defence Witness 33, the defence argues that a/0270/07 deliberately arranged for a/0225/06 and a/0229/06 to testify using assumed identities and that all three have lied in their evidence before this Court.[196] The defence suggests that it was untruthful to allege that the [REDACTED] served as a base for UPC soldiers from 5 January 2003 to 20 January 2003 and that during that period pupils were forcibly enlisted.[197]

116. Additionally, the defence, on the basis of the evidence of DRC-D01-WWWW-0035 ("defence Witness 35") and defence Witness 32, alleges that a/0270/07 tried to obstruct defence investigations by intimidation.[198]

[192] ICC-01/04-01/06-2657-Conf-tENG, paragraphs 200 – 208.
[193] ICC-01/04-01/06-2657-Conf-tENG, paragraph 210.
[194] ICC-01/04-01/06-2657-Conf, paragraphs 211 and 220.
[195] ICC-01/04-01/06-2657-Conf, paragraphs 212 – 215.
[196] ICC-01/04-01/06-2657-Conf, paragraphs 216 and 217.
[197] ICC-01/04-01/06-2657-Conf, paragraphs 218 and 219.
[198] ICC-01/04-01/06-2657-Conf, paragraphs 221- 223.

117. It is averred that the evidence establishes that a/0270/07 lied as to his dealings with defence Witness 35.[199]

118. It is contended that "[t]hese grave breaches of the rules of evidence are part of a concerted plan designed and executed by a political and administrative figure [REDACTED] close to President Kabila". The defence alleges that since 2006, a/0270/07 has been a member of [REDACTED]. It is said that "it is common knowledge that [REDACTED] has always supported President Kabila". The argument relied on in this context is that "public opinion will tend towards the view, whether correct or wrong, that the highest Congolese political authorities have sought to hijack the judicial process for political ends".[200]

***v) The allegation that the Prosecutor has breached his obligations of fairness and impartiality***

119. It is suggested that it is "clear" that the prosecution is bound by duties of impartiality and fairness towards the accused and that in this trial the Prosecutor has, with great regularity, displayed a bias against the accused that is "incompatible with his functions".[201]

120. It is said that this suggested failure on the part of the Prosecutor is revealed by "public statements in which grossly erroneous or blatantly intemperate claims were made". By way of examples, the defence relies on the 12 May 2010 Decision on the interview with Ms Le Fraper du Hellen and a novel by Mr Gil Courtemanche, who worked as a consultant for the Office of the Prosecutor from April 2008 to November 2009 ("during which time the book

[199] ICC-01/04-01/06-2657-Conf, paragraphs 224 and 225.
[200] ICC-01/04-01/06-2657-Conf, paragraphs 226 – 228.
[201] ICC-01/04-01/06-2657-Conf, paragraphs 286 and 287.

was prepared, written and published"). It is said that the links between the novel and the current trial are extremely obvious and the accused is depicted as being "manifestly guilty of a number of atrocious crimes, including those being tried by the Chamber". The defence alleges that Mr Courtemanche was invited by the Prosecutor to write a book on the present trial and that "there is no doubt that the Prosecutor was informed of the content of the book prior to its publication and gave his consent". On this basis it is alleged that "[b]y authorising one of his staff to publish a book – even a work of fiction – including content which is inconsistent with the impartiality obligations of the Office of the Prosecutor, the Prosecutor signally failed to comply with his statutory obligations and attempted to exert influence over the ongoing judicial process by gravely inappropriate means".[202]

**The Submissions – the Prosecution**

121. The prosecution has set out detailed submissions that address each of the separate arguments of the defence, as rehearsed below.

*i) The alleged Role of the Four Intermediaries*

122. The prosecution, by way of summary, submits that none of the intermediaries played a decisive role in the investigation; that the prosecution had no reason to suspect that any of them had incited perjury, and that in any event there is conflicting evidence as to whether or not some of the witnesses called in this case have lied at the behest of certain intermediaries or otherwise.[203] On this basis it is contended that these are all matters that should be resolved at the conclusion of the case,[204] and that in

[202] ICC-01/04-01/06-2657-Conf, paragraphs 288 – 297.
[203] ICC-01/04-01/06-2678-Conf, Introduction and paragraphs 30, 38, 39 and 183.
[204] ICC-01/04-01/06-2678-Conf-Conf, Introduction.

any event the Chamber first has to consider whether other procedural avenues or remedies are available to address the violations of the rights of the accused before imposing a stay.[205]

123. The prosecution relies on the difficult circumstances it confronted when investigating in the DRC, and in Ituri in particular, following the opening of the investigation on 23 June 2004.[206] The evidence of Witness 582 and Witness 583 are particularly relied on in this context. It is said that the lack of security became a critical feature,[207] and given the lack of a police force and the continued hostilities, the risk to witnesses associated with the investigation has been a feature of the pre-trial and trial stages of the case.[208] The prosecution argues that most of the former child soldiers and other witnesses were from the Hema community and that some of them came under pressure to withdraw their statements, to lie or to refuse to cooperate with the ICC.[209] Examples of this suggested pressure are provided from Witness 297,[210] Intermediary 321, [211] Witness 213,[212] Witness 38 and others.[213]

124. Against this background the Office of the Prosecutor decided to rely on intermediaries and it is argued that this approach is widely considered to be "best practice" during investigations.[214] In summary, the proposition is that the use of intermediaries between 2005 and 2007 was necessary, due to the prevailing insecurity in Ituri.[215]

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[205] ICC-01/04-01/06-2678-Conf, paragraph 34.
[206] ICC-01/04-01/06-2678-Conf, paragraphs 1 – 13.
[207] ICC-01/04-01/06-2678-Conf, paragraph 4.
[208] ICC-01/04-01/06-2678-Conf, paragraphs 5 – 8.
[209] ICC-01/04-01/06-2678-Conf, paragraph 9.
[210] ICC-01/04-01/06-2678-Conf, paragraph 10.
[211] ICC-01/04-01/06-2678-Conf, paragraph 11.
[212] ICC-01/04-01/06-2678-Conf, paragraphs 11 and 12.
[213] ICC-01/04-01/06-2678-Conf, paragraph 12.
[214] ICC-01/04-01/06-2678-Conf, paragraph 14.
[215] ICC-01/04-01/06-2678-Conf, paragraphs 15 and 16.

125. The prosecution's overall position as to the role of the intermediaries is summarised as follows:

> At no stage during the investigation were intermediaries involved in taking statements of potential witnesses, making decisions as to which witnesses to retain or withdraw or which lines of investigations/inquiry to pursue. Intermediaries provided crucial assistance to the conduct of the investigation but were excluded from the investigative decision-making process. Additionally, barring very few exceptions, intermediaries were expressly excluded from interviews and screenings. Intermediaries were also not privy to substantive information.[216]

126. Instead, it is submitted that the evidence reveals that they served two main purposes: to identify and then contact potential witnesses, and to collect and provide security information regarding the region, particularly to the extent that this material was relevant to potential witnesses.[217] The prosecution relies on suggested evidence from Witness 582, namely that the intermediaries were excluded from the initial interviews.[218]

127. The prosecution submits that the main defence argument – "that Prosecution witnesses lied [...] at the behest of corrupt intermediaries who had 'decisive' roles in the investigation", a state of affairs the prosecution either knew or had reason to be aware of – is not only "baseless" but should be addressed at the end of the trial.[219]

*Intermediary 316*

128. The prosecution highlights that this individual acted as an intermediary for two trial witnesses (Witness 15 and Witness 38) and it rejects the suggestion that he played a "decisive" role. The evidence of Witness 583 is relied on, including his account that Intermediary 316 was used to "localise militia members, in particular UPC members". It is said he acted on instructions from the Office of the Prosecutor and his primary task was to provide

[216] ICC-01/04-01/06-2678-Conf, paragraph 17. See also paragraph 38.
[217] ICC-01/04-01/06-2678-Conf, paragraph 18.
[218] ICC-01/04-01/06-2678-Conf, paragraph 18.
[219] ICC-01/04-01/06-2678-Conf, paragraphs 26 – 30.

security information, for instance on "militia-men".[220] The prosecution analyses the evidence relevant to the suggestion that Intermediary 316 played an instrumental role and argues that this contention by the defence is unfounded. It is suggested that, to the contrary, the evidence demonstrates that Intermediary 316 undertook tasks of a logistical nature and various examples are rehearsed in support of this argument.[221] The prosecution argues that the central evidence relied on by the defence to say that Intermediary 316 induced witnesses to be untruthful is based on the account of "self-confessed liars", Witness 15 and defence Witness 16,[222] and the prosecution relies on an extensive analysis of the different accounts given by, and relevant to, Intermediary 316, Witness 15, Witness 38 and defence Witness 16.[223] As regards the evidence concerning defence Witness 16 the prosecution summarises its contentions as follows:

> In sum, the allegation that in 2005 DW-0016 gave a wholly false 1,000 page statement to investigators about the Accused and the UPC, crafted by Intermediary 316, and thereafter continued to provide false information to the OTP at Intermediary 316's urging, is uncorroborated, conflicts with other evidence, and as a matter of common sense is implausible. It cannot support a conclusion that the OTP set out to suborn perjury at trial.[224]

129. With Witness 15, it is contended that there is an evidential dispute that the Chamber should resolve in due course: "[o]n the key issues, however, the 'oath against oath' contest between Witness 15 and Intermediary 316 [...] does not establish that Intermediary 316 induced false evidence against the accused, much less that he did so with the knowledge of the Prosecution".[225]

130. The prosecution highlights that Intermediary 316 introduced Witness 38 to the Office of the Prosecutor and that Witness 38 refuted any suggestion that he lied or had been induced by Intermediary 316 to do so, and the

[220] ICC-01/04-01/06-2678-Conf, paragraph 41, footnote 98 and paragraph 42.
[221] ICC-01/04-01/06-2678-Conf, paragraphs 43 and 44.
[222] ICC-01/04-01/06-2678-Conf, paragraph 46.
[223] ICC-01/04-01/06-2678-Conf, paragraphs 47 – 59 and paragraph 69.
[224] ICC-01/04-01/06-2678-Conf, paragraph 60.
[225] ICC-01/04-01/06-2678-Conf, paragraph 62.

prosecution describes the relevant evidence it submits supports this suggestion.[226]

131. The prosecution stresses that even if the Chamber concluded there is *prima facie* evidence that Intermediary 316 had suborned witnesses, the defence has failed to identify "evidence showing that the OTP *knew* Intermediary 316 asked witnesses to lie and/or fabricate evidence".[227] Similarly, the prosecution resists the defence argument that it "failed in its duty to inform the Chamber of its concerns about Intermediary 316".[228] It is argued that the prosecution had no reason to believe that witnesses introduced by Intermediary 316 had been induced to lie. It is suggested that the contact between Intermediary 316 and the DRC government, and his employment with the [REDACTED], fails to establish that he was likely to cause prejudice to the integrity of the trial process. In this regard, the prosecution highlights what it describes as the lack of evidence produced by the defence.[229]

132. Finally, for Witness 15 and defence Witness 16 the prosecution relies on the fact that they were both interviewed by an experienced investigator (in the absence of Intermediary 316) who did not have any reason to doubt the statements they had provided. Therefore, it is submitted "the OTP had no cause to suspect, let alone know, that Intermediary 316 had induced witnesses to lie".[230]

*Intermediary 321*

133. The prosecution submits that the evidence reveals that Intermediary 321 "did not supplant the role and function of the investigators of the OTP and

[226] ICC-01/04-01/06-2678-Conf, paragraphs 69 – 71.
[227] ICC-01/04-01/06-2678-Conf, paragraph 73.
[228] ICC-01/04-01/06-2678-Conf, paragraph 77.
[229] ICC-01/04-01/06-2678-Conf, paragraphs 77 and 78.
[230] ICC-01/04-01/06-2678-Conf, paragraph 79.

was not used to conduct investigations." Instead it suggested the evidence demonstrates that from 2004 he worked in the Ituri region with an NGO dealing with children, and in 2007 he assisted the prosecution as an intermediary with Witness 157, Witness 213, Witness 294, Witness 297 and Witness 298.[231] On the basis of the review of the evidence provided in its submissions, it is argued by the prosecution that there is no evidential support for the allegation that Intermediary 321 encouraged the prosecution witnesses he introduced to lie about being child soldiers in the UPC.[232] As with other intermediaries, it is contended "there is no support for the Defence supposition that the OTP knew or should have known that Intermediary 321 corrupted evidence".[233]

134. The prosecution, during the course of its submissions, reviewed the evidence of Witness 297, Witness 298 and defence Witnesses 3 and 4. It is highlighted that the defence has relied substantially on certain inconsistencies in the evidence of Witness 297[234] and the prosecution argues the defence has overstated these as well as certain contradictions between Witness 298 and Witness 299;[235] and it is suggested that the accounts of defence Witnesses 3 and 4 are "tenuous and unreliable".[236] The prosecution resists the argument that the account of Intermediary 321 is unreliable because he provided children to it whose names were not on the list of children originally requested by the prosecution:[237] it is said that only the prosecution decided if the children met the requisite criteria[238] and there is a credible explanation for the discrepancy.[239]

[231] ICC-01/04-01/06-2678-Conf, paragraph 80.
[232] ICC-01/04-01/06-2678-Conf, paragraph 84.
[233] ICC-01/04-01/06-2678-Conf, paragraph 85.
[234] ICC-01/04-01/06-2678-Conf, paragraphs 86 – 88.
[235] ICC-01/04-01/06-2678-Conf, paragraph 92.
[236] ICC-01/04-01/06-2678-Conf, paragraph 94.
[237] ICC-01/04-01/06-2678-Conf, paragraph 109.
[238] ICC-01/04-01/06-2678-Conf, paragraph 111.
[239] ICC-01/04-01/06-2678-Conf, paragraph 110.

135. The prosecution does not accept that there is any significance in the fact that Intermediary 321 also worked as an intermediary for the NGO [REDACTED]. It is suggested that it was necessary for the prosecution to use intermediaries who are in touch with potential victims or witnesses.[240] It is argued that these organisations are usually the only way for victims to participate in these proceedings.[241]

136. It is averred that the evidence does not reveal any knowledge on the part of the prosecution of alleged acts of "subornation".[242]

*Intermediary 143*

137. The prosecution suggests that there is no evidence to support the contention that Intermediary 143 induced witnesses to lie or to fabricate evidence, in the context of introducing Witness 7, Witness 8, Witness 10, Witness 11 and Intermediary 31, and having had dealings with DRC-OTP-WWWW-145, Intermediary 316 and Intermediary 321 (and others).[243] It is said that the evidence does not support any suggestion that Intermediary 143 determined the objectives of the investigation or was aware of its relevant details.[244] The prosecution provides a detailed analysis of the elements of the relevant evidence to argue that there is a complete absence of material to show that witnesses who had contact with Intermediary 143 lied, or that Intermediary 143 persuaded them to lie. [245] The prosecution suggests that the inconsistencies relied on by the defence do not have the significance advanced by the accused. It is said that "minor" contradictions on the part of the witnesses "do not alter the fact that [the] witnesses all gave detailed accounts of their participation as child soldiers in the UPC".[246]

[240] ICC-01/04-01/06-2678-Conf, paragraph 112.
[241] ICC-01/04-01/06-2678-Conf, paragraph 112.
[242] ICC-01/04-01/06-2678-Conf, paragraph 113.
[243] ICC-01/04-01/06-2678-Conf, paragraph 115.
[244] ICC-01/04-01/06-2678-Conf, paragraph 116.
[245] ICC-01/04-01/06-2678-Conf, paragraphs 117 – 130.
[246] ICC-01/04-01/06-2678-Conf, paragraph 119.

138. Furthermore, it is argued that even if the allegations of subornation are accepted by the Chamber, there is no evidence that the prosecution knew that Intermediary 143 asked witnesses to lie or fabricate evidence.[247] Having analysed the documents, along with other material, that are said relate to this contention, it is suggested that there is nothing that should have led the prosecution to suspect the possibility of "subornation and manipulation".[248]

*Intermediary 31*

139. As with the other relevant intermediaries, it is argued that there is no evidence that Intermediary 31 induced witnesses to lie or fabricate evidence.[249] The Prosecutor contends that the assertion that he played a decisive role in the investigations is unsupported, particularly given the payment of $23,000 and certain allowances by the prosecution in 2007 or later (save for one exception) occurred once Intermediary 31 had left Ituri. Furthermore, it is said this money was not for services as an intermediary but because he was in the OTP's protection programme.[250]

140. It is argued that the defence has failed to substantiate the allegation that Intermediary 31 was responsible for any lies allegedly told by Witness 7, Witness 8, Witness 11, Witness 157, Witness 293, Witness 298 or Witness 299. It is contended that "nowhere does the Defence link Intermediary 31 with any of these allegedly untruthful statements" [251] and the prosecution suggests there is no evidence that he encouraged "many" potential witnesses to give false evidence, particularly since he only acted for a short period of time as the intermediary for one individual, Witness 157.[252]

[247] ICC-01/04-01/06-2678-Conf, paragraph 121.
[248] ICC-01/04-01/06-2678-Conf, paragraph 130.
[249] ICC-01/04-01/06-2678-Conf, paragraph 131.
[250] ICC-01/04-01/06-2678-Conf, paragraph 132.
[251] ICC-01/04-01/06-2678-Conf, paragraph 133.
[252] ICC-01/04-01/06-2678-Conf, paragraphs 133 and 134.

141. The prosecution similarly submits that the reasons provided by the defence as to why it should have suspended collaboration with him are unpersuasive, namely the report by the two investigators dated 23 February 2006 and the evidence of Witness 582. The prosecution relies on the suggested later assessment of Intermediary 31's credibility following the February 2006 report and the fact that Witness 582 had no more than limited contact with Intermediary 31, and that his assessment was in any event based on personal impressions.[253]

***ii) The prosecutor knew that certain evidence was untruthful or erroneous, or he failed to investigate its reliability***

142. Generally, the prosecution avers that it conducted its investigation thoroughly and in accordance with its obligations under Article 54(1)(a) and (b) of the Statute. Although the prosecution had to develop a strategy that met the conditions in the DRC (and Ituri in particular), it argues that these "realities" did not impact on its obligation to investigate exonerating and incriminating evidence alike. [254] As to verification of evidence, the prosecution submits that under Article 54(1)(b) of the Statute this is a matter for prosecutorial discretion depending on the facts and the circumstances of each case; however, it is argued that the evidence of Witness 582 and Witness 583 demonstrates that appropriate steps were taken to ensure the reliability of evidence, having made proper allowance for the security situation in the region and including the need to protect witnesses and ensure the confidentiality of the investigation.[255] As to the allegation that the prosecution failed to verify the information provided by the alleged former child soldiers, it is submitted that the accounts that were provided did not raise any cause for concern, and in any event there is no obligation to use

[253] ICC-01/04-01/06-2678-Conf, paragraphs 135 and 136.
[254] ICC-01/04-01/06-2678-Conf, paragraphs 138 and 139.
[255] ICC-01/04-01/06-2678-Conf, paragraph 140.

any particular methods in order to investigate the truthfulness of the accounts provided by the witnesses. It is contended that imposing a requirement to make checks with the witness's families would be to impose "an impractical and dangerous standard", given the grave security and privacy concerns.[256] Witness 582 indicated that the policy of the Office of the Prosecutor was to avoid routine contact with the families of witnesses;[257] however, notwithstanding this general approach, the prosecution interviewed some family members (*i.e.* the parents of Witness 298, Witness 294, Witness 157, Witness 7 and Witness 8).[258]

143. As to the suggested need to contact the *chefs de collectivités*, the prosecution relies on the evidence of Witness 582 that these individuals had close ties to the militia and it would have created a risk to reveal the cooperation of alleged child soldiers with the OTP. Similarly, Witness 583 indicated that the prosecution was denied access to the IEC and in any event Witness 582 explained this would not have been of assistance because the IEC records contained the ages of adults rather than children. The prosecution suggests that the records of many institutions at the relevant time were likely to be incomplete or inaccurate. Witness 582 indicated that the prosecution attempted to verify the ages of the child witnesses, *inter alia*, by obtaining civil documents and conducting medical examinations.[259] The prosecution arranged for X-rays to be taken and, on occasion, it used alternative methods of verification, such as interviewing representatives of the military or political organisations with which the witnesses had allegedly been involved.[260]

[256] ICC-01/04-01/06-2678-Conf, paragraph 142.
[257] ICC-01/04-01/06-2678-Conf, paragraph 143.
[258] ICC-01/04-01/06-2678-Conf, paragraphs 143 and 144.
[259] ICC-01/04-01/06-2678-Conf, paragraph 145.
[260] ICC-01/04-01/06-2678-Conf, paragraphs 146 and 147.

144. The prosecution argues that the evidence of its witnesses was not necessarily rendered untruthful because of the existence of contradictions or inconsistencies, given the various potential explanations that existed for this state of affairs (the Chamber notes that detailed examples are provided by the prosecution in support of this proposition).[261]

145. The prosecution accepts that it is obliged to inform the Chamber if "it knew" that false evidence had been introduced. The prosecution submits it has not breached this requirement: it has discarded evidence when it has doubted its reliability and it has informed the Chamber if untruths have been revealed - by way of example, the prosecution states that upon discovering that Witness 7 and Witness 8 are brothers and not cousins, it "informed the Court".[262]

146. The prosecution does not accept that it is under an obligation to inform the defence of the strategic decision to withdraw Witness 157 in the *Katanga* case.[263]

***iii) The alleged deliberate failure by the prosecution to disclose material in a timely manner***

147. The prosecution denies that it has deliberately disclosed material late. It is argued that from the outset the prosecution implemented a system to identify information in its possession that is either exculpatory or covered by Rule 77 of the Rules, and that the guidelines adopted by the prosecution have "favoured" disclosure, notwithstanding the fact that it has provided similar material to the defence. The prosecution suggests that it has continually conducted searches of the material in its possession, in a way

[261] ICC-01/04-01/06-2678-Conf, paragraphs 149 – 154.
[262] ICC-01/04-01/06-2678-Conf, paragraph 175.
[263] ICC-01/04-01/06-2678-Conf, paragraph 177.

that has met what it describes as "an expanding and at times unclear definition of 'relevance'". The Prosecutor submits that any material that was served late was not the result of 'a pattern of Prosecutorial misconduct', and that none of the instances of alleged late disclosure have rendered it impossible to provide the accused with a fair trial.[264]

148. The prosecution cites evidence to support the suggestion that it "robustly pursued" investigative steps in relation to exculpatory evidence, and in particular the account of Witness 582 is rehearsed to support this contention.[265] The Office of the Prosecutor suggests that to date it has disclosed over 100 statements of potentially exculpatory witnesses, approximately 1000 items with potentially exculpatory effect and over 3000 items that are material to the preparation of the defence; [266] additionally, the evidence review guidelines are rehearsed in detail. The prosecution underlines that it not only determined whether material in its possession was incriminatory, exculpatory or "Rule 77 material" (on the basis, in part, of relevance), but it also considered whether there were restrictions on disclosure (for instance under Rules 81 and 82 of the Rules). The latter issue led to consultations with other divisions of the Court, "third parties", including the "information provider" and any relevant witness.[267] The prosecution submits that it sought guidance from the Chamber when instances of doubt arose as to whether items should be provided to the defence; it disclosed information protected by Rule 81(1) of the Rules as well as some evidence it considered irrelevant; it adopted a "liberal" as opposed to a restrictive interpretation of its obligations in this area; and it conducted searches in response to individual disclosure requests, as well as repeatedly reviewing its document collection on its own initiative.[268]

[264] ICC-01/04-01/06-2678-Conf, Introduction.
[265] ICC-01/04-01/06-2678-Conf, paragraph 20.
[266] ICC-01/04-01/06-2678-Conf, paragraph 21.
[267] ICC-01/04-01/06-2678-Conf, paragraph 22.
[268] ICC-01/04-01/06-2678-Conf, paragraph 23.

149. Therefore, it is argued that the allegation that the prosecution deliberately failed to disclose relevant material in a timely manner is unfounded. It is suggested that the prosecution hired 15 legal assistants to assist the trial team in its review of disclosure, and the ongoing nature of the disclosure exercise reveals that the prosecution kept the evidence collection continually under review, in order to ensure that appropriate disclosure was effected as the issues in the case emerged. The prosecution "also readily concedes [...] that items may well fall through the cracks and that its searches and review processes are fallible" (*e.g.* the interview notes for [REDACTED]). It is said that the "inadvertent omissions and delays in the course of disclosing more than 5,000 items over nearly five years is unsurprising".[269] The prosecution relies on its response of 15 March 2010 to the allegation of late disclosure.[270] The prosecution sets out a detailed explanation in order to meet specific instances of suggested deliberate delay in disclosure. For the school records concerning Witness 157 it is contended that the four-month delay was primarily the result of forensic tests in France;[271] for the allegation that, in relation to Witness 581, there was delay in disclosing the list of individuals screened in November 2007, the prosecution relies on its submissions to the defence request of 15 December 2010,[272] and particularly that Witness 581 was recalled to deal with the issue;[273] and as regards Intermediary 316 (receipts, expenses documents, statements and interview records) and Intermediary 31 (an internal memorandum) the prosecution outlines the history to the disclosure of individual documents.[274]

[269] ICC-01/04-01/06-2678-Conf, paragraphs 156 and 157.
[270] ICC-01/04-01/06-2678-Conf, paragraphs 158 and 159.
[271] ICC-01/04-01/06-2678-Conf, paragraph 160.
[272] ICC-01/04-01/06-2678-Conf, paragraph 161; Prosecution's Response to the "Cinquième requête de la Défense aux fins de depôt de documents" of 15 December 2010, ICC-01/04-01/06-2760-Conf, particularly paragraphs 11 – 14.
[273] ICC-01/04-01/06-2678-Conf, paragraph 161.
[274] ICC-01/04-01/06-2678-Conf, paragraphs 162 – 170.

150. The prosecution relies particularly on an internal mistake as regards the suggested deliberate delay in disclosing the interview notes of [REDACTED] between September 2006 and October 2010. It is suggested these were found during "the expanded searches across internal databases conducted in October 2010 following the decision on screening notes, ICC-01/04-01/06-2585. They were then disclosed without delay."[275] Furthermore, it is argued that the prosecution has earlier disclosed similar information, and there is no evidence to support the contention that any delays in disclosure were part of a deliberate policy to withhold material.[276]

151. Finally on this issue, the prosecution avers that the defence has failed to establish any specific, as opposed to theoretical, prejudice that has been occasioned by late disclosure. It is argued that "the Defence fails to specify which material the Prosecution failed to disclose on time and the line of inquiry it has been deprived of pursuing or the witnesses it was unable to question further".[277]

***iv) Alleged collaboration between participating victims***

152. The prosecution submits that it is not responsible for the alleged activities of the three relevant participating victims (a/0225/06, a/0229/06 and a/0270/07), not least because it advocated the presentation of the relevant evidence (the "views and concerns") during the sentencing or reparations phase. It is submitted, therefore, that the suggested unreliability of the evidence in this context does not constitute prosecutorial misconduct, and in any event the alleged collusion does not undermine the fair trial of the accused.[278]

[275] ICC-01/04-01/06-2678-Conf, paragraph 171.
[276] ICC-01/04-01/06-2678-Conf, paragraphs 172 and 173.
[277] ICC-01/04-01/06-2678-Conf, paragraph 174.
[278] ICC-01/04-01/06-2678-Conf, paragraphs 180 – 182.

***v) The allegation that the Prosecutor has breached his obligations of fairness and impartiality***

153. The prosecution resists the defence submissions on this issue (*viz.* the submissions concerning Ms Le Fraper du Hellen and Gil Courtemanche) on the basis, *inter alia,* that the Chamber has ruled on suggested demonstrations of a lack of fairness and impartiality of this kind. The prosecution suggests that this aspect of the defence application is frivolous.[279]

**The Submissions – the Legal Representatives of Victims**

154. The legal representatives for the victims jointly represented in team V01 take issue with the allegations made by the defence against Intermediary 321, and their submissions address the relationship between this individual and the victims and victims' organizations.[280] Moreover, counsel submit that contradictions between witnesses do not prevent a fair trial.[281] The evidence of Witness 298 is relied on and it is argued that contradictions concerning a name or a date of birth do not prove that the witness has lied.[282] Finally, counsel address certain issues concerning Witness 9 (victim a/0049/06), who has not been called to given evidence.[283]

155. One of the legal representatives for the victims jointly represented in team V02 (Mr Keta) seeks to demonstrate by way of argument that a/0225/06 and a/0229/06 did not usurp the identities of defence Witnesses 32 and 33, and he identifies several factors that, in his submission, demonstrate that the defence claim is misconceived.[284] Additionally, he challenges the defence

[279] ICC-01/04-01/06-2678-Conf, paragraphs 178 and 179, referring to ICC-01/04-01/06-2433.
[280] ICC-01/04-01/06-2676-Conf, paragraphs 34 – 40.
[281] ICC-01/04-01/06-2676-Conf, paragraph 40.
[282] ICC-01/04-01/06-2676-Conf, paragraphs 41 – 44.
[283] ICC-01/04-01/06-2676-Conf, paragraphs 45 – 47.
[284] CC-01/04-01/06-2677-Conf-tENG, paragraphs 14 – 19.

assertion that a/0270/07 was involved in usurping the identities of certain witnesses.[285]

156. The other counsel acting for team V02 (Ms Bapita and Mr Kabongo) concentrate on the defence claim that Intermediary 143 recorded a false age and produced a duplicate voter card in support, bearing a different identity from the victim represented by counsel, which had been obtained in violation of the procedure set out in the relevant electoral law.[286] Counsel criticises the defence reliance on this card alone instead of referring to all the documents that are generally available in order to establish this individual's age.[287]

157. The OPCV advances a number of observations on the evidence relating to the identity, dates of birth, and school and identification documents of Witness 7, Witness 8, Witness 10 and Witness 11, and it submits observations on the evidence relating to their status as former soldiers.[288] In essence, the OPCV argues that the defence allegations relating to their identities and dates of birth and the facts surrounding their enrolment into the UPC are unfounded.[289] As to their evidence, it is submitted that the indications are that they are reliable witnesses, having testified under oath, and that even allowing for the inconsistencies relied on by the defence, these are not sufficient to undermine the probative value of their accounts, viewed as a whole.[290] The OPCV analyses and criticises the later telephone interviews.[291] The OPCV further criticises the evidence given by certain defence witnesses, submitting that defence Witness 4 in particular admitted

[285] ICC-01/04-01/06-2677-Conf-tENG, paragraphs 23 – 30.
[286] ICC-01/04-01/06-2679-Conf-tENG, paragraphs 13 – 23.
[287] ICC-01/04-01/06-2679-Conf-tENG, paragraphs 24 – 26, 28 – 34.
[288] ICC-01/04-01/06-2675-Conf, paragraphs 57 – 116.
[289] ICC-01/04-01/06-2675-Conf, paragraph 92.
[290] ICC-01/04-01/06-2675-Conf, paragraphs 92 – 96.
[291] ICC-01/04-01/06-2675-Conf, paragraphs 97 – 103.

to having been pressured to come give false testimony before the Chamber.[292]

158. The OPCV suggests the trauma experienced by these witnesses, along with their concerns for their safety and that of their families[293] explains the alleged incomplete or inaccurate statements given by them to the prosecution (particularly in 2005).[294]

## IV. Applicable Law

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

> **Article 21 of the Statute**
> **Applicable law**
> 1. The Court shall apply:
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

> **Article 54 of the Statute**
> **Duties and powers of the Prosecutor with respect to investigations**
> 1. The Prosecutor shall:
> (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

[292] ICC-01/04-01/06-2675-Conf, paragraph 105.
[293] ICC-01/04-01/06-2675-Conf, paragraphs 108 – 116.
[294] ICC-01/04-01/06-2675-Conf, paragraph 116.

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
(c) Fully respect the rights of persons arising under this Statute.

**Article 64 of the 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:
[...]
(c) Subject to any other relevant provisions of this Statue, 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.
[...]
9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:
(a) Rule on the admissibility or relevance of evidence.
[...]

**Article 67 of the Statute**
**Rights of the accused**
1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
[...]
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
[...]
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
[...]
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

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 69 of the Statute**
**Evidence**
[...]
4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia,* the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

**Article 70 of the Statute**
**Offences against the administration of justice**
1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
(b) Presenting evidence that the party knows is false or forged; Rome Statute of the International Criminal Court
(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
(e) Retaliating against an official of the Court on account of duties performed by that or another official;
(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
[...]

**Rule 63 of the Rules**
**General provisions relating to evidence**
[...]
2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.
[...]

**Rule 64 of the Rules**
**Procedure relating to the relevance or admissibility of evidence**
1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with Article 64, paragraph 10, and Rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

**Rule 76 of the 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 exparte 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.

## V. Analysis and Conclusion

### *The Relevant Principles*

160. The Appeals Chamber was "driven" to conclude "that the Statute does not provide for stay of proceedings for abuse of process as such".[295] Nonetheless, it determined, having observed that the doctrine of abuse of process has had, *ab initio*, a human rights dimension (given it is largely associated with remedying breaches of the rights of the accused), that the rights of the accused safeguarded by the Statute should be interpreted and applied subject to internationally recognised human rights standards (see Article 21(3) of the Statute). In this context the jurisdiction of the Court is to be exercised "in accordance with internationally recognised human rights norms.[296]

161. When the Appeals Chamber first considered this particular inherent jurisdiction,[297] it identified it as a "sui generis application" (*viz.* a procedural step not envisaged by the Rules of Procedure and Evidence or the Regulations of the Court); it is a power possessed by the Court which is invoked to remedy breaches of the process in the interests of justice.[298]

162. As part of its review of the approach of various common law countries to the concept of abuse of process, the Appeals Chamber approvingly cited the following principles:[299]

[295] ICC-01/04-01/06-772, paragraph 35.
[296] ICC-01/04-01/06-772, paragraph 36.
[297] ICC-01/04-01/06-772.
[298] ICC-01/04-01/06-772, paragraph 24.
[299] ICC-01/04-01/06-772.

> 30. Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.
>
> 31. The power to stay proceedings should be sparingly exercised, as repeatedly stressed by English courts and lastly noted in *Jones v. Whalley*. Room for its exercise is provided where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course.
>
> 32. In the United States of America, the doctrine of abuse of process has had a mixed reception, recognising on the one hand its existence but confining its application within very narrow straits.[300]

163. The Appeals Chamber also analysed the approach taken within the Romano-Germanic legal system to a stay of proceedings for abuse of process:[301]

> 33. The doctrine of abuse of process as known to English law finds no application in the Romano-Germanic systems of law. The principle encapsulated in the Latin maxim *male captus bene detentus* has received favourable reception in the French case of *re Argoud* but not an enthusiastic one in the old case of *re Jollis*. The German Constitutional Court too appears to have endorsed like principles to those approved in *re Argoud*. But where serious violations of the fundamental rights of the accused or international law are involved, the rule is mitigated.

164. Thereafter, describing the principle of abuse of process as a part of the jurisdiction of the judges of the ICC (as a principle or doctrine associated with the administration of justice[302]), the Appeals Chamber indicated:

> 39. Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in Huang v. Secretary of State, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

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[300] ICC-01/04-01/06-772.
[301] ICC-01/04-01/06-772.
[302] ICC-01/04-01/06-772, paragraph 26.

165. In a later review of the exercise of this power, the Appeals Chamber observed:

> 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". 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".[303]

166. The Chamber therefore, in this context, needs to ask the following two questions: **first,** would it be "odious" [304] or "repugnant" [305] to the administration of justice to allow the proceedings to continue, or **second** have the accused's rights been breached to the extent that a fair trial has been rendered impossible.[306]

167. The Appeals Chamber had indicated that "[a] Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached".[307]

168. On the basis of the jurisprudence summarised above, this undoubtedly drastic remedy is to be reserved strictly for those cases that necessitate, on careful analysis, taking the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy).

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[303] ICC-01/04-01/06-2582.
[304] ICC-01/04-01/06-772, paragraph 27.
[305] ICC-01/04-01/06-772, paragraph 30.
[306] ICC-01/04-01/06-772, paragraph 37.
[307] 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, paragraph 84.

169. The Chamber is not persuaded by the approach proposed by the prosecution that the application should only be granted on "clear and convincing evidence". [308] So long as the facts supporting the abuse application are properly substantiated, it is unnecessary to impose further restrictions on the Chamber's exercise of its judicial discretion, particularly in the way suggested.

***i) The Four Intermediaries***

*Intermediary 316*

170. The defence alleges that this intermediary – a "[REDACTED]" – worked for the prosecution between 2005 and 2008 in a range of roles that included a wide variety of witness-related activities. The defence relies on the suggestion that the Prosecutor knew that Intermediary 316 was a member of the [REDACTED], and that he used [REDACTED] to assist in his work for the prosecution. The argument is that this infiltration into the prosecution's investigations by agents of the state which sought the accused's conviction fatally undermines the legitimacy of this trial. The defence submits that the prosecution knowingly or unwittingly became the Congolese government's instrument and as a result abusive judicial proceedings have been instituted before this Court against the accused (who is the political opponent of the Congolese President, the individual said to have initiated Mr Lubanga's arrest and transfer to the ICC).

171. Furthermore, it is asserted that he was a trusted employee, who knew the aims of the investigation and he acted for the Office of the Prosecutor. In discharging that role, it is alleged he persuaded witnesses to give false

[308] ICC-01/04-01/06-2678-Conf, paragraph 32.

evidence and coached them to tell lies. During the course of his employment, it is submitted the Office of the Prosecutor became concerned Intermediary 316 was passing on false information, and internal reports tended to indicate that he had lied to investigators in relation to the situation of three former FNI soldiers. Queries were raised about various expense claims, and the defence relies on an apparent lie told by Intermediary 316 that his assistant (Witness 183) had been killed. Notwithstanding these suggested difficulties as regards the integrity of this individual, the prosecution continued to use his services until at least April 2008 and it has relied on evidence in this trial that he introduced.

172. The prosecution submits that Intermediary 316's employment with the [REDACTED] and his direct contact with the DRC government does not indicate that he was likely to cause serious prejudice to the integrity of the process. The prosecution highlights that Intermediary 316 acted for two trial witnesses and it contests the suggestion that his role was in any sense decisive, submitting that he acted on instructions from the Office of the Prosecutor with the primary task of providing security information. The prosecution submits that there is an absence of evidence that the prosecution knew or had reason to believe that Intermediary 316 had asked witnesses to lie or fabricate evidence.

173. The legal representatives do not address the allegations relating to Intermediary 316.

*Intermediary 321*

174. The defence relies on the suggestion that between January and December 2007 Intermediary 321 acted under the instructions of the Office of the Prosecutor as an intermediary and was paid for this work. Thereafter, it is said he provided assistance of this kind on an *ad hoc* basis. He was asked to

contact potential witnesses and to set up meetings or interviews. He was also involved in their transport, establishing means of contact (such as by providing mobile telephones) and discussing their accommodation. It is suggested that in this role of "agent" he encouraged witnesses to provide false evidence and that the senior staff of the Office of the Prosecutor either knew or should have known that using Intermediary 321 would seriously affect the reliability of the evidence he was concerned with. The defence relies particularly on the discrepancies as regards the lists of children to be screened in support of the argument that the prosecution was alerted to the risk of fraudulent behaviour on the part of this intermediary, along with the difficulties concerning the identity of Jacques Byaruhanga. His position is further criticised on the basis that he was simultaneously assisting participating victims, thereby creating the risk of partiality. The defence argues that by March 2008, at the latest, the prosecution was in possession of information that called into question the reliability of this intermediary and demonstrated that he may have tampered with evidence, and yet his position was not reviewed.

175. The Prosecutor agrees that it employed this intermediary, who worked with various former child soldiers, and who separately acted for an NGO in Ituri. It is suggested that there is no sustainable basis for alleging that he encouraged witnesses to lie, or that the prosecution was aware of or had been alerted to this possibility. The prosecution argues that the discrepancies as to the names, and the role played by Intermediary 321 with the NGO, did not provide any basis for suspecting improper behaviour or the risk of partiality on his part.

176. Only the legal representatives team V01 addresses the position of Intermediary 321. Counsel describe his involvement with the victims and they resist the suggestion that his contact with Witness 298 and the

prosecution may have constituted a violation of the rights of the defence or his entitlement to a fair trial. It is submitted that the evidence does not support the defence allegations against this intermediary.

*Intermediary 143*

177. The principal submission from the defence is that the Office of the Prosecutor had reason to suspect that this intermediary had persuaded witnesses to lie whilst he was acting for the prosecution. It is suggested the Office of the Prosecutor employed him between 2005 and 2010 and as with other intermediaries, he is said to have been concerned with multiple aspects of their arrangements, including travel, identification and their health and safety. It is argued that he was in close contact with investigators from the prosecution, acting on their instruction and with knowledge of their investigative objectives. It is said that the prosecution had sufficient information to suspect that Intermediary 143 was instrumental in securing false testimony from certain witnesses he dealt with (including a report sent on 23 February 2006 to senior prosecution officials and various suspect identification documents), and that the prosecution knew he was acting for victims whilst working for the Office of the Prosecutor. Furthermore, it is said that the Prosecutor should have been alerted to possible impropriety on the part of Intermediary 143 on the basis of some of his financial claims.

178. The prosecution suggests there is no sustainable basis for alleging that he encouraged witnesses to lie or that the prosecution was aware of, or had been alerted to, this possibility.

179. Counsel for the OPCV resists the defence allegations that dual status Witnesses 7, 8, 10 and 11 were subject to any acts of subornation or manipulation by Intermediary 143 or any other intermediaries or employees of the Office of the Prosecutor. She submits that the defence challenges the

probative value of the evidence presented by these witnesses without demonstrating that the procedure followed in collecting and presenting this evidence is defective or flawed, in a manner that would justify staying the proceedings.

*Intermediary 31*

180. Intermediary 31 acted as the intermediary for a number of witnesses, and it is said that he was employed in that general role between 2005 and (at least) 2008. The defence submits that there is reason to suggest that he encouraged potential witnesses to provide false evidence. The defence refers to events in February 2006 when concerns were raised as to his credibility and dealings with him were suspended (it is said the executive committee of the Office of the Prosecutor was alerted to this turn of events). The defence relies on evidence concerning his remuneration. Overall, the defence argues that his employment with the prosecution should have been terminated and any evidence gathered by him required thorough investigation; instead, it is averred his services continued to be used and he was called to give evidence.

181. The prosecution argues that there is no evidence to demonstrate that Intermediary 31 induced witnesses to lie or to fabricate evidence. Similarly, the prosecution resists the proposition that he played a decisive role in its investigations and submissions are advanced as to the circumstances of the payments from the Office of the Prosecutor. It is submitted that the relevant conclusions reached in the February 2006 were later revised in a subsequent credibility assessment.

182. As set out above, counsel for the OPCV challenges the defence allegation that its clients, dual status Witnesses 7, 8, 10 and 11, were suborned by Intermediary 31 (or anyone else).

*Conclusions*

183. As the defence has indicated, at least since January 2010 the position of some of the intermediaries has been a key element of the accused's defence. As a result, the Chamber has issued a number of decisions in which it has ensured that he is able to address the matters relevant to this area of evidence. On 31 May 2010 the Chamber issued its Decision on Intermediaries,[309] in which it established the overarching approach to this issue. The Chamber summarised the general position as follows:

> 135. The precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial. Contrary to the prosecution's argument, the defence submissions are not dependent on speculative assertions: they are, to an important extent, clearly evidence based. Given the extensive rehearsal of the relevant testimony and documents set out above, it is unnecessary to repeat in detail the particular facts on which defence counsel rely; instead, the Chamber needs to focus on the consequences of the material now before the Court.

Thereafter, the Chamber proceeded to make orders as to how the intermediaries were to be handled:

> 139. On the basis of the history and the submissions set out extensively above, and applying the Rome Statute framework and the analysis just rehearsed, the Chamber has adopted the following approach:
>
> a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.
>
> b. The threshold for disclosure is whether *prima facie* grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules. Given the evidence before the Chamber that some intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Chamber considers that in these circumstances the defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade

[309] ICC-01/04-01/06-2434-Red2.

one or more individuals to give false evidence. However, in each instance the Chamber has investigated, and will investigate, the potential consequences of an order for disclosure for the intermediary and others associated with him, and whether lesser measures are available. Applications in this regard will be dealt with by the Chamber on an individual basis.

c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.

d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.

e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.

f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to prima facie grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

140. There is evidence, at this stage of the case, from a range of witnesses that intermediaries 321 [...] and 316 [...] may have misused their positions in varying ways, but the underlying allegation is that they have persuaded or invited witnesses to give false testimony to the Court. Moreover, there is evidence that this behaviour may have extended beyond those two intermediaries. For instance, prosecution witness 15 [...], testified that there were a number of intermediaries who were in touch with witnesses, and that the intermediaries knew each other and collaborated, and given the extensive allegations made against two of the key intermediaries, there is a real risk that similar evidence may exist in relation to other intermediaries or collaborators, if their roles are fully investigated and researched. The identities of intermediaries 316 [...] and 321 [...] have already been revealed.

141. The Chamber is of the view, in light of the extensive allegations made against intermediaries 316 [...] and 321 [...], that it is in the interests of a fair trial for these two individuals to be called to deal with the suggestions that they attempted to persuade one or more individuals to give false evidence. Their testimony before the Court is likely to assist the Chamber in resolving, first, the criticisms that have been levelled against them; second, some of the extensive conflicts in the evidence that have emerged during the trial; and, third, the possible contacts between intermediaries. Therefore, the prosecution is ordered to call intermediaries 316 [...] and 321[...] following the defence witnesses relevant to abuse of process and before the submissions of the parties and the participants on this issue. Should they refuse to give evidence, a full explanation is to be provided to the Chamber.

184. The Chamber went on to make a number of detailed orders as regards the possibility that Intermediary 316 may need protection against self-

incrimination[310] and it addressed the issue of disclosure of the identities of other intermediaries, in particular Intermediary 143 (disclosure of identity ordered)[311] and W-0081, W-0123, W-0154, W-0254 and W-0290 (identities withheld).[312]

185. The Chamber concluded the substantive orders as follows:

> 146. The defence has applied for an order for the prosecution to call one or more individuals who were in charge of its investigations, in order to give evidence about the use of intermediaries in this case. The Chamber notes that the first witness to testify in the Katanga and Ngudjolo case on 25 November 2009 was an investigator of the Office of the Prosecutor called at the request of Trial Chamber II *inter alia* to provide it with general information on the conduct of the investigations into the facts to be presented during the course of the trial. Given the questions that have been raised as to the recruitment and supervision of the intermediaries, and the contacts between some of them, the Chamber is of the view that a witness (*viz.* the appropriate representative identified by the prosecution) called to testify as to the approach and the procedures applied to intermediaries is likely to assist the court in resolving the various issues that have arisen. In these circumstances, the prosecution is to call the appropriate representative following the defence witnesses on the abuse of process application, prior to the submissions of the parties and the participants.[313]

As a result of this order, Witnesses 583 and 583 were called to give evidence. Finally, the Chamber made the following order:

> 147. On a linked issue, given the extensive criticisms that have been directed at two key intermediaries, the Chamber accedes to the defence request for a schedule setting out the known contacts between the intermediaries, between the intermediaries and the witnesses, and between the witnesses. This should indicate, inter alia, the dates of meetings, the names of those present and the location. [314]

186. The parameters of the evidence in relation to the role of the intermediaries have expanded following this Decision of 31 May 2010. By way of example, the defence requested details concerning expenses incurred by the prosecution in relation to five intermediaries, "arguing they are relevant

[310] ICC-01/04-01/06-2434-Red2, paragraph 142.
[311] ICC-01/04-01/06-2434-Red2, paragraph 143.
[312] ICC-01/04-01/06-2434-Red2, paragraph 145.
[313] ICC-01/04-01/06-2434-Red2.
[314] ICC-01/04-01/06-2434-Red2.

because they assist in establishing that certain prosecution witnesses and intermediaries received substantial material benefit in connection with their work for the Office of the Prosecutor".[315] It was suggested that these documents tended to demonstrate the existence of a prosecution policy of securing false testimony.[316] Granting the application, the Chamber resolved the issue in the following way:

> 63. Given that the role of certain intermediaries, as well as the alleged improper payments to intermediaries and witnesses, have become live issues in the case, the Chamber considers that these documents are relevant to "matters that are properly to be considered by the Chamber in its investigation of the charges against the accused".
>
> 64. In the Chamber's view, the documents bear sufficient indicia of reliability, given they are official reimbursement receipts originating from the prosecution, along with invoices that were submitted for reimbursement, the latter having been accepted by the prosecution. Therefore, the invoices and receipts are, prima facie, probative.
>
> 65. In light of the above, these documents are relevant to, and probative of, the issues the Chamber is considering, and given the indicia of reliability it is fair for them to be introduced into evidence.[317]

187. Similarly, there have been oral rulings on disclosure in this context (*viz.* the 21 October 2010 Decision).[318]

188. The Chamber is of the view that this is not a situation in which alleged prosecutorial misconduct has disabled the accused from properly defending himself. The Chamber has responded comprehensively to the defence submissions so as to ensure that the totality of the available evidence on the relevant intermediaries is explored during the trial. Four intermediaries have been called to give evidence; the investigators who were principally responsible for each of them have testified; and the prosecution has indicated that it has effected disclosure of all relevant materials, following various rulings by the Chamber. Reverting, therefore, to the question posed

[315] Decision on the defence request for the admission of 422 documents, 26 October 2010, ICC-01/04-01/06-2595-Conf, paragraph 15. Public redacted version issued 17 November 2010, ICC-01/04-01/06-2595-Red.
[316] ICC-01/04-01/06-2595-Red, paragraph 16.
[317] ICC-01/04-01/06-2595-Red.
[318] ICC-01/04-01/06-T-317-CONF-ENG, page 1, line 19 to page 3, line 11.

by the Chamber in paragraph 166 above, the Chamber is unpersuaded, in these circumstances, that "the accused's rights have been breached to the extent that a fair trial has been rendered impossible".

189. Turning to the first part of the question posed in paragraph 166, whether it would be would it be "odious" or "repugnant" to the administration of justice to allow the proceedings to continue, this is a matter of judgment, an exercise of discretion involving judicial assessment. As rehearsed above, the Appeals Chamber has made it clear that this power is to be exercised sparingly, and it is dependent on a finding that the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action, making it unacceptable for justice to embark on its course.[319] Furthermore, the Appeals Chamber has emphasised that:

> 28. The power to stay proceedings is par excellence a power assumed by the guardians of the judicial process, the judges, to see that the stream of justice flows unpolluted. As stressed, in the recent decision of the English Court of Appeal R. v. S (SP) it is a discretionary power involving "an exercise of judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence."[320]

190. In what is arguably its most serious claim, the defence suggests that, as an agent of the [REDACTED], Intermediary 316 had taken his orders from the Congolese President whilst working as a prosecution intermediary. The defence submits that the prosecution knowingly became the Congolese government's instrument, enabling it to abuse these trial proceedings to the prejudice of the accused (who is the political opponent of the Congolese President, the individual said to have initiated Mr Lubanga's arrest and transfer to the ICC).

191. To substantiate this allegation, the defence relies on the suggestion that,

[319] ICC-01/04-01/06-772, paragraph 31.
[320] ICC-01/04-01/06-772.

from the outset, the Prosecutor was aware of Intermediary 316's position of responsibility within the [REDACTED] and his use of other [REDACTED] agents to assist him in the tasks assigned to him by the Office of the Prosecutor. The defence has indicated that during the evidence of Intermediary 316, he described in precise detail the duties he performed for the [REDACTED] and his direct contacts with central government.[321]

192. In addition, the defence alleges that the prosecution was aware that Intermediary 316 was passing false information to the prosecution. It is suggested that internal reports that reached the highest level of the Office of the Prosecutor revealed that Intermediary 316 had lied to the investigators regarding the situation of three potential former FNI child soldiers. The investigators noted that one of the child soldiers introduced by Intermediary 316 appeared to have been coached. It is said that this was left uninvestigated.[322] Moreover, two emails sent by Witness 583 to his superiors in May 2006 set out the doubts that were expressed about expenditure allegedly incurred by Intermediary 316. In an investigator's note dated 18 June 2010 it is suggested that Intermediary 316 had little credibility as regards events that occurred between 2006 and 2009. When Intermediary 316 was questioned by the Office of the Prosecutor in May 2008, he admitted to having lied, and having persuaded someone else to lie, to the investigators in order to obtain money to meet a personal debt. In October 2008, Intermediary 316 informed the prosecution that his assistant (Witness 183) had been murdered and that his killers were seeking him. He repeated this claim when he was questioned on this again in October 2009 and in November 2010. However, the Prosecutor accepts that Witness 183 is alive. Finally, in May 2008 the Office of the Prosecutor decided not to refer Intermediary 316 to the VWU because the threats he had alleged had not

[321] ICC-01/04-01/06-2657, paragraphs 69 and 70.
[322] ICC-01/04-01/06-2657, paragraphs 72 and 73.

been established, and his family had provided varying accounts of the same events.[323]

193. In the view of the Chamber, these alleged facts, as relied on by the defence, are incapable of substantiating the suggested inference that the Office of the Prosecutor was aware that it had been infiltrated by agents of the Congolese President, who was seeking, by introducing false evidence, to secure a conviction of the accused.[324] Put otherwise, the evidence relied on concerning Intermediary 316's alleged involvement with the [REDACTED] along with the allegations that he was passing false information to the ICC could not properly lead to the suggested inference that the prosecution was aware that it was being manipulated so as to secure the conviction of Mr Lubanga for political reasons. To this extent, the defence "theory of instrumentalization"[325] has not been made out on the evidence advanced.

194. Furthermore, the defence submits that four intermediaries employed in the DRC incited witnesses to lie in the ways extensively rehearsed above, and that they demonstrated other forms of inappropriate or dishonest behaviour. It is said that members of the Office of the Prosecutor either knew that there were doubts as to the integrity of these intermediaries (and thereafter failed to investigate whether the relevant evidence was reliable), or the prosecution failed to ensure that their work was properly supervised and monitored.

195. Not every example of suggested prosecutorial misconduct will lead to a permanent stay of the proceedings; instead, this is a matter of fact and degree, given that the Chamber has to decide whether it would be

[323] ICC-01/04-01/06-2657, paragraph 73.
[324] As submitted by the OPCV, the defence has provided no evidence that the prosecution was influenced (much less instrumentalized) by the [REDACTED] or, more generally, the DRC Government. ICC-01/04-0/106-2675-Conf, paragraph 54.
[325] ICC-01/04-01/06-2657, paragraph 321.

"repugnant" or "odious" to the administration of justice to allow the case to continue. For instance, a stay of proceedings may well be the appropriate remedy if actions by the Prosecutor threaten basic human rights, the foundations of a fair trial or the rule of law. Clear examples of situations where a stay may be necessary include the material mistreatment of the accused in order to obtain evidence (*e.g.* by use of torture) or the non-disclosure of significant exculpatory evidence. Furthermore, the Chamber must weigh the nature of the alleged abuse of process against the fact that only the most serious crimes of concern for the international community as a whole fall under the jurisdiction of the Court.

196. As already indicated, the competing positions of the parties and the participants, and the relevant evidence on this issue, have been fully investigated during the course of the trial, and it is possible there may be additional evidence. Furthermore, the central focus of this application is directed at, and is limited to, the activities of the four intermediaries who it employed in the DRC (for the reasons and in the circumstances described by the prosecution), along with the suggestion that members of the prosecution team were aware, or should have been aware, of their alleged improper behaviour, and that the Prosecutor failed to supervise, investigate or control these four intermediaries or to scrutinise the evidence from the witnesses with whom these four individuals were in contact.

197. This is undoubtedly an important and a highly contentious issue in the case, but in the judgment of the Chamber the alleged abuse on the part of the prosecution, even taken at its highest, would not justify staying the case at this stage. Given the ability of the Court to resolve all the relevant factual issues in due course (including, for instance, the suggested involvement of [REDACTED]) and bearing in mind this application only relates to one, albeit significant, area of a wider case, it would be a disproportionate

reaction to discontinue the proceedings at this juncture.

198. Contrary to the submission of the defence,[326] the Chamber will be able, in due course, to reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence based on the suggested failure by the Office of the Prosecutor to supervise or control the individual intermediaries and to act on indications of unreliability (together with the consequences of any adverse findings in this regard, which the defence alleges taints all the prosecution's evidence).[327]

199. Accordingly, bearing in mind that the Chamber does not accept that the evidence relied on demonstrates that the prosecution knowingly became the Congolese government's instrument, it is unnecessary, at this point, for the Chamber to reach any decision as to the many factual issues raised on this aspect of the application. Even accepting, for the sake of argument, the defence submissions at their highest that the Prosecutor knew that there were doubts as to the integrity of the four intermediaries, staying the proceedings, as an exercise of judgment, would be disproportionate.

***ii) The Prosecutor knew that certain evidence was untruthful or erroneous, or he failed to investigate its reliability***

200. The defence submits, in essence, that the prosecution introduced "manifestly false testimony" without conducting appropriate checks, and including by way of verifying the identities and civil status of its witnesses, particularly given the importance of the age of many of the witnesses in this case. Similarly, it is alleged it failed in many instances to make relevant

[326] ICC-01/04-01/06-2657-Conf-tENG, paragraph 300.
[327] ICC-01/04-01/06-2657-Conf-tENG, paragraph 304.

enquiries of the members of the witnesses' families, with the IEC or with their schools, friends, commanders, fellow pupils or the *chefs de collectivités*. The defence relied on particular circumstances concerning Witness 89 and Witness 555. Counsel additionally submits that the prosecution called witnesses to give evidence without revealing that certain aspects of their accounts were false (*i.e.* Intermediary 316 and Witness 157). It is argued that these alleged failings on the part of the prosecution have fatally prejudiced the position of the accused.

201. The prosecution argues that it made all reasonable checks, bearing in mind the conditions in which it was operating, the risks to those that the defence suggest should have been contacted (such as members of the witnesses' families) and the inadequate nature of, or the impossibility of accessing, the documentary records of the kind referred to by the accused. Furthermore, the prosecution submits that it did conduct a process of verification in the circumstances rehearsed extensively above, although it refutes the suggestion that there was reason to suspect that it was in possession of unreliable information. It is argued that contradictions between witnesses, or otherwise, do not necessarily mean that the witnesses in question should be considered unreliable.

202. Two of the legal representatives acting for team V02 criticise the limited evidence relied on by the defence in support of its claims in this regard. The legal representatives of the victims jointly represented in team V01 submit that contradictions as to name or date of birth do not prove that a witness has lied. Similarly, the OPCV submits that the trauma experienced by witnesses, as well as their concerns for their safety and that of their families, can properly explain the contradictions and inconsistencies in their statements.

203. As with issue i), the Chamber needs to ask the following two questions: **first,** would it be "odious" or "repugnant" to the administration of justice to allow the proceedings to continue, or **second** have the accused's rights been breached to the extent that a fair trial has been rendered impossible.

204. Even taking the accused's submissions at their highest, the suggested failure to check and investigate the statements of the prosecution's witnesses, and any other relevant evidence in the Prosecutor's possession, or to reveal the alleged weaknesses in the accounts of Intermediary 316 and Witness 157, cannot properly be characterised as "illegal conduct" of a kind that would make it "repugnant" or "odious" to continue the trial of the accused. Similarly, the suggested breaches of the accused's rights under Article 54(1)(a) and (b) of the Statute would not constitute such a serious violation of the statutory safeguards as to make his trial *ipso facto* unfair. The Chamber is persuaded that it will be able, at the end of the case, to review in detail the instances in which it is suggested the prosecution failed in its duty to ensure that it was submitting reliable evidence. If the Chamber concludes that this occurred in any of the instances relied on by the defence, the appropriate remedy will lie in the Court's approach to the evidence in question, and particularly the extent to which it is to be relied on. A failure to ensure that the Chamber has received reliable evidence, especially when the prosecution was on notice that significant doubts existed in relation to material in question, may affect the Chamber's conclusions on the relevant area or issue. On the facts advanced by the defence on this issue, the suggested failings on the part of the prosecution – including the suggestion that on occasion the Prosecutor deliberately avoided the process of verification – are not so egregious as to necessitate the termination of the trial.

205. Accordingly, here also it is unnecessary, at this point, for the Chamber to

reach any decision as to the various factual issues raised on this aspect of the application: accepting, for the sake of argument, the defence submissions at their highest, this is not a situation in which, as an exercise of judgment, a stay of proceedings is called for. The alleged failings on the part of the prosecution can be addressed as part of the ongoing trial process.

***iii) The alleged deliberate failure by the prosecution to disclose material in a timely manner***

206. In essence it is suggested that the prosecution adopted a false basis for disclosure by deciding that although material in its possession may tend to diminish the credibility of a witness, disclosure is not necessary if the Prosecutor's overall assessment of the witness is that he or she is credible on the basis of all the evidence in his possession. In addition, the defence relies on a number of instances of late disclosure, some of which are alleged to have been deliberate. The examples include the suggested late disclosure of documents relevant to Witness 157, Witness 581 (after the witness had testified), Intermediary 316 and Intermediary 31 (again after the witness had testified). The defence relies on the failure to make prompt disclosure of exculpatory material relevant to [REDACTED].

207. The prosecution has provided a detailed explanation (*viz.* annexes 1 and 4 to its submissions) of the disclosure decisions it has made in this case as regards the suggested instances of late disclosure. The Prosecutor accepts that, on occasion, mistakes have been made; he rejects, however, any suggestion that any of the delays have been deliberate.

208. The legal representatives of victims do not make any observations concerning alleged late disclosure by the prosecution.

209. As with issues i) and ii), the Chamber needs to ask the following two questions: **first,** would it be "odious" or "repugnant" to the administration of justice to allow the proceedings to continue, or **second** have the accused's rights been breached to the extent that a fair trial has been rendered impossible.

210. The Court has established the principles to be applied by the prosecution to disclosure, and it has exercised control over this process by ruling on individual applications by the prosecution and the defence as regards various individual issues of principle that have arisen during the trial, along with particular items or areas of evidence that have been disputed *inter partes*. The principal examples include i) the Decision on Intermediaries (referred to above), in which the Chamber held that in light of the extensive allegations made against several of the intermediaries used by the prosecution, additional disclosure was necessary in order to ensure a fair trial;[328] ii) the Decision on the defence request for disclosure of screening notes, in which it held that any information in the possession of the prosecution relating to its knowledge of the alleged irregular behaviour of three of its intermediaries was disclosable, and in consequence it ordered disclosure of tables of contacts relating to those intermediaries;[329] and iii) the Decision on the prosecution's disclosure obligations (discussed below) in which the Chamber reviewed the prosecution's approach to disclosure and granted a defence request for additional information relating to one of the prosecution's witnesses who had contacts with a number of the relevant intermediaries, and who also worked as an intermediary for the prosecution.[330]

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[328] ICC-01/04-01/06-2434-Red2, paragraphs 19 and 22.
[329] Decision on the defence request for disclosure of screening notes, 13 October 2010, ICC-01/04-01/06-2585-Conf, reclassified as public pursuant to the Trial Chamber's order of 10 November 2010, ICC-01/04-01/06-2585.
[330] Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWW-0031, ICC-01/04-01/06-2656-Conf, 7 December 2010 and Public redacted version filed 20 January 2011, ICC-01/04-01/06-2656-Red.

211. On 12 November 2010, in response to an order by the Chamber,[331] the prosecution filed a report explaining the circumstances regarding a recently-disclosed investigator's memorandum that contained a negative assessment of Intermediary 31, and it set out the general principles that it has applied to disclosure during this case.[332] The Chamber addressed the assertion, summarised in paragraph 102 above, that the prosecution adopted a false basis for disclosure for internal credibility assessments by deciding that:

> 16. The prosecution is correct in its contention that the evaluations or assessments of its investigators are not ordinarily disclosable; instead, it is the information and material that led to any relevant evaluations or assessments that, depending on the circumstances, should be provided to the defence under Article 67(2) of the Statute or Rule 77 of the Rules. For example, in this situation, to the extent that the credibility of witness 31 is in issue in this trial, the circumstances of the delay on his part in providing documents and other material to the prosecution (including, for instance, the requests and the opportunities to do so), which led to the investigators' decision to cease contact with this witness for some time, may well have constituted information which should have been provided to the defence. The fact that he eventually supplied additional notebooks and other documents to the prosecution does not "wipe the slate clean" - rather, the circumstances relating to the (lengthy) period whilst this material was not forthcoming may constitute disclosable material.[333]

212. In the view of the Chamber the suggested failure to make prompt disclosure (which is alleged on occasion to have been deliberate, and which sometimes was effected after the relevant witness had testified) cannot properly be characterised as something that would render it "odious" or "repugnant" to the administration of justice to allow the proceedings to continue. Similarly, the suggested individual breaches of the accused's right to disclosure (whether viewed individually or collectively) do not constitute such a serious violation of the statutory safeguards as to make his trial *ipso facto* unfair. The Chamber will continue throughout the trial to review, as

[331] Transcript of hearing on 5 November 2010, ICC-01/04-01/06-T-326-ENG ET WT, page 3, line 3 to page 4, line 5; page 6, line 12 to page 7, line 12; and page 9 lines 3 – 11 .
[332] Prosecution Submissions on Disclosure pursuant to Trial Chamber's I Order of 5 November 2010, ICC-01/04-01/06-2625-Conf, 12 November 2010. Public redacted version filed on 17 November 2010, ICC-01/04-01/06-2625-Red.
[333] ICC-01/04-01/06-2656-Red.

necessary, the prosecution's disclosure. It is clear from the extensive submissions from the parties that the Chamber will be able, at the end of the case, to review in detail the instances in which it is suggested the prosecution failed in its duty to make timely disclosure of certain relevant materials in its possession. If the Chamber concludes that this occurred on any of the occasions relied on by the defence, the appropriate remedy will lie in the Court's approach to the evidence in question, and particularly the extent to which the relevant testimony and other materials are to be relied on. A failure to ensure that the accused received all the material to which he is entitled (at an appropriate stage in the proceedings, or at all) may affect the Chamber's conclusions on the area or issue in question. The Chamber has considered in detail the allegations that the prosecution deliberately withheld disclosable material. This is an extremely serious allegation, but the circumstances in which this is alleged to have occurred – certainly by reference to the examples that have been provided – are limited in number: school documents relevant to Witness 157 (disclosed late); an email sent from Witness 581 to his supervisors, providing the names of children to be screened (disclosed late); "credibility" material for Intermediary 316, including information concerning the "death" of Witness 183 (disclosed late); an internal prosecution memorandum containing an assessment of the credibility of Intermediary 31 (disclosed late); notes of interviews with [REDACTED] (disclosed late); and the decision not to call Witness 157 in the *Katanga* trial (the defence discovered this information independently). If the Chamber determined that any of these instances constituted deliberate late disclosure, an appropriate sanction would fall to be imposed, but on the facts and examples advanced by the defence, this issue will be resolved properly at the end of the trial, and the relatively limited instances of alleged deliberate non-disclosure relied on do not make it unfair or repugnant to continue the trial.

213. Accordingly, once again it is unnecessary, at this point, for the Chamber to reach any decision as to the various factual issues raised on this aspect of the application: accepting, for the sake of argument, the defence submissions at their highest, this is not a situation in which, as an exercise of judgment, a stay of proceedings is called for. The alleged failings on the part of the prosecution can be addressed as part of the ongoing trial process.

***iv) Alleged collaboration between participating victims***

214. In essence, the defence relies on the alleged role of a Congolese political figure (participating victim a/0270/07), suggesting he was responsible for a scheme perpetrated by certain individuals to steal the identities of others, resulting in a series of perjured witnesses who have testified before the Chamber. It is said that participating victims a/0225/06 and a/0229/06, at the instigation of victim a/0270/07, have provided false identities and have made false statements to the Chamber. It is argued that this was part of a concerted plan by someone who is [REDACTED] close to President Kabila (*viz.* it is said a/0270/07 has been [REDACTED]. On this basis it is argued that "public opinion will tend towards the view, whether correct or wrong, that the highest Congolese political authorities have sought to hijack the judicial process for political ends".[334]

215. The prosecution submits that it is not in any sense responsible for this alleged state of affairs.

216. Counsel for the victims jointly represented in team V01 take issue with the defence allegations of conspiracy and false testimony. One of the legal representatives for the victims jointly represented in team V02 challenges

[334] ICC-01/04-01/06-2657-Conf, paragraphs 226 – 228.

the specific defence claims relating to the alleged conspiracy between a/0225/06, a/0229/06, and a/0270/07.

217. The Chamber has approached this issue by applying the same two questions as for i), ii) and iii) above, which it is unnecessary to repeat. It is wholly untenable to argue that the suggested activities of these three individuals, even if accepted in their entirety, render the fair trial of the accused impossible or the continued proceedings "odious" or "repugnant". If the Chamber concluded that "the highest Congolese political authorities" had sought to hijack the judicial process, it would be able to reflect that conclusion it its approach to the evidence in question, and particularly the extent to which it is to be relied on. It is not "repugnant" or "odious" to address these issues as part of the ongoing trial process.

218. Accordingly, as with i), ii) and iii) above it is unnecessary, at this point, for the Chamber to reach any decision as to the various factual issues raised on this aspect of the application: accepting, for the sake of argument, the defence submissions at their highest, this is not a situation in which, as an exercise of judgment, a stay of proceedings is called for. The alleged improper and unlawful activities of these three individuals can be addressed as part of the ongoing trial process.

***v) The allegation that the Prosecutor has breached his obligations of fairness and impartiality***

219. It is alleged that the Prosecutor has displayed a bias against the accused that is incompatible with his functions and obligations. The key examples of this allegation are the March 2010 interview with Ms Le Fraper du Hellen and a novel by Mr Gil Courtemanche, who worked as a consultant for the Office

of the Prosecutor from April 2008 to November 2009 when the book, it is suggested, was written and published.

220. The prosecution suggests that this aspect of the defence application is frivolous.

221. The Chamber has clearly indicated its disapproval of out-of-court statements by either party of this kind. In the Decision on the press interview with Ms Le Fraper du Hellen[335] (at that time the Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor) the following approach was outlined:

> 52. The Chamber is wholly uninfluenced by these misleading and inaccurate remarks, but it deprecates the prosecution's use of a public interview, first, to misrepresent the evidence and to comment on its merits and weight, and including by way of remarks on the credibility of its own witnesses in the context of a trial where much of the evidence has been heard in closed session with the public excluded; second, to express views on matters that are awaiting resolution by the Chamber, thereby intruding on the latter's role; third, to criticise the accused without foundation; and, finally, to purport to announce how the Chamber will resolve the submissions on the abuse of process application, and, moreover, that the accused will be convicted in due course and sentenced to lengthy imprisonment at the end of the case.
>
> 53. Although on this occasion the Chamber does not intend to take any action beyond expressing the strongest disapproval of the content of this interview, if objectionable public statements of this kind are repeated the Chamber will not hesitate to take appropriate action against the party responsible.

222. It follows that neither the interview nor the novel (regardless whether the latter is admitted into evidence or not) will have any adverse influence on the approach of the Chamber when determining any of the substantive issues in this case, and most particularly the guilt or innocence of the accused. Furthermore, to the extent that it is proper to infer an attitude or an approach on the part of the Prosecutor from the public statements or writings of these two individuals, this would be insufficient to reach the conclusion that: **either** it would be "odious" or "repugnant" to the

[335] ICC-01/04-01/06-2433.

administration of justice to allow the proceedings to continue, **or** the accused's rights have been breached to the extent that a fair trial has been rendered impossible.

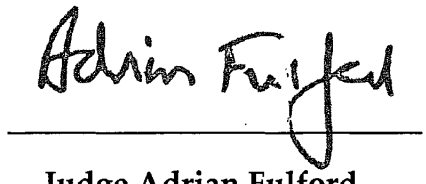
## VI. Oral Hearing

223. Given the extensive nature of the written submissions generally, the Chamber concluded that oral argument was unnecessary.

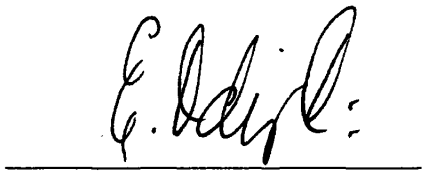
## VII. Disposition

224. For the reasons set out above, this application on the part of the accused to stay the proceedings as an abuse of the process of the court is refused.

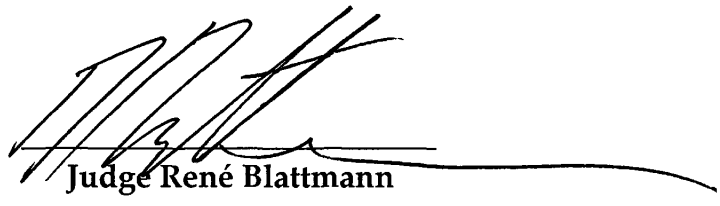
Done in both English and French, the English version being authoritative.



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 7 March 2011

At The Hague, The Netherlands