

**APPEALS CHAMBER**

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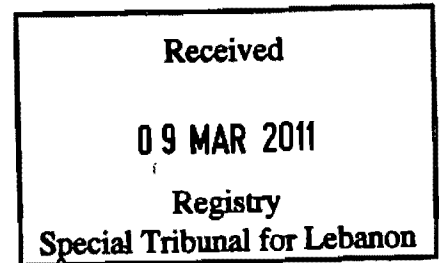
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**DECISION ON THE APPLICATION TO CHALLENGE THE ORDER OF THE  
PRESIDENT OF THE APPEALS CHAMBER TO STAY THE ORDER OF THE  
PRE-TRIAL JUDGE AND TO CALL UPON AMICUS CURIAE**

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1. On 11 October 2010, Mr Jamil El Sayed (hereinafter “the Applicant”) filed an application<sup>1</sup> (hereinafter “the application”) to challenge the Order of the President of the Appeals Chamber<sup>2</sup> (hereinafter “the Order of the President”), of 1 October 2010, by which the President of the Appeals Chamber (hereinafter “the President”) decided *inter alia*:
  - (i) to stay the Pre-Trial Judge’s Order of 17 September 2010<sup>3</sup> until such time as the appellate proceedings are terminated.
  - (ii) to call upon the United Nations to file an *amicus curiae* brief by 6 October 2010 at the latest on the matters raised by the Order of 17 September 2010, in view of the fact that some of the material currently in the custody of the Tribunal would appear to have been transferred by the UN International Independent Investigation Commission.
2. On 15 October 2010, the President addressed a letter to the Vice President of the Tribunal in which he decided to disqualify himself *proprio motu* from the consideration of the present application, in accordance with Rule 25 (A) of the Rules of Procedure and Evidence (hereinafter “the Rules”).

#### **I- SUMMARY OF THE PROCEEDINGS:**

3. On 17 September 2010, the Pre-Trial Judge issued an Order in response to the application filed by Mr Jamil El Sayed on 17 March 2010, in which he concluded, *inter alia*, that:
  - (i) the Tribunal has jurisdiction to rule on the substance of the Application;

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<sup>1</sup> Application to Challenge Two Decisions by the President: (1) To Stay the Order of the Pre-Trial Judge and (2) To Call Upon the United Nations as *Amicus Curiae*, Case No. CH/PTJ/2010/01, dated 11 October 2010.

<sup>2</sup> Scheduling Order, Case No. CH/PRES/2010/02, dated 1 October 2010.

<sup>3</sup> Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed dated 17 March 2010 and Whether Mr. El Sayed Has Standing Before the Tribunal, Case No. CH/PTJ/2010/005, dated 17 September 2010.



- (ii) the Applicant has standing to request access to the documents concerning him in the criminal file related to the *Hariri* case;
  - (iii) and ordered that before pronouncing further on the substance of the Application, written submissions from the Applicant and the Prosecutor, containing the replies to the questions raised in paragraph 57 of this Order, be filed with the Registrar of the Tribunal by 1 October 2010 at the latest.
4. On 28 September 2010, the Prosecutor filed an appeal<sup>4</sup> before the Appeals Chamber against the Pre-Trial Judge's Order of 17 September 2010, requesting the Chamber, *inter alia*, to urgently suspend enforcement of that Order pending its final decision as to the appeal.
5. On 1 October 2010, the President issued an Order :
  - (i) staying the Pre-Trial Judge's Order of 17 September 2010 until such time as the appellate proceedings are terminated;
  - (ii) calling upon the United Nations as *amicus curiae* to submit observations on the matters raised by the Pre-Trial Judge's Order of 17 September 2010.<sup>5</sup>
6. On 11 October 2010, the Applicant Mr Jamil El Sayed filed the present application<sup>6</sup> seeking orders:
  - (i) That the Appeals Chamber entertain his application;
  - (ii) Setting aside the President's decision relating to the stay of enforcement of the Pre-Trial Judge's Order; and

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<sup>4</sup> Appeal of the "Order relating to the jurisdiction of the Tribunal to rule on the application by Mr. El Sayed dated 17 March 2010 and whether Mr El Sayed has standing before the Tribunal" and urgent request for suspensive effect, filing n° OTP/AC/2010/01 dated 28 September 2010.

<sup>5</sup> See *supra* note 2

<sup>6</sup> See *supra* note 1.



(iii) Enforcement of the President's decision to invite the United Nations as *amicus curiae*

7. On 12 October 2010 the President issued an Order<sup>7</sup> referring the matter to the Appeals Chamber, with its composition constituted as set out in the Order<sup>8</sup> issued on the same day relating to the composition of the Appeals Chamber.
8. On 15 October 2010, the President addressed a letter<sup>9</sup> to the Vice President in which he decided to disqualify himself *proprio motu*.
9. On 18 October, the Prosecutor filed a response<sup>10</sup> to the application in which he requested that it be dismissed entirely.
10. On 1 November 2010, M. El Sayed filed a rejoinder<sup>11</sup> to the Prosecutor's response in which he disputed the Prosecutor's arguments and repeated his demands.

## II- ARGUMENTS OF THE PARTIES:

### A. The Applicant's brief:

11. In his brief dated 11 October 2010, the Applicant raises the following grounds in support of the application :
  - (i) the President's two decisions, are *ultra vires* pursuant to Rule 140 of the Rules and, pursuant to the general principles of public policy, the Appeals Chamber has jurisdiction to rule on the application ;<sup>12</sup>

<sup>7</sup> Order Referring Matter to the Appeals Chamber, Case No. CH/PRES/2010/04, dated 12 October 2010.

<sup>8</sup> Order on Composition of the Appeals Chamber, Case No. CH/PRES/2010/03, dated 12 October 2010.

<sup>9</sup> Letter of the President to the Vice President, dated 15 October 2010

<sup>10</sup> Prosecutor's Response to « recours contre deux décisions du Président : (1) suspendre l'ordonnance du Juge de la mise en état (2) inviter les Nations Unies comme *amicus curiae* », Filing No OTP/AC/2010/02, dated 18 October 2010.

<sup>11</sup> Rejoinder to the Prosecutor's Response, dated 1 November 2010.

<sup>12</sup> Paragraph 4 of the Application.



- (ii) The decision to stay an order falls within the power of the Appeals Chamber, not the President, pursuant to Rule 126 (F) of the Rules. As the President's decision is *ultra vires*, it should be declared null and void;<sup>13</sup>
- (iii) The President's decision to stay the enforcement of the Pre-Trial Judge's Order has no basis in law since it adversely affects the Applicant, as opposed to the Prosecutor, who has an interest in his claim being ruled upon without unwarranted delay;<sup>14</sup>
- (iv) The enforcement of the decision to call upon the United Nations as *amicus curiae* must be stayed, given that such a decision falls under the power of the Appeals Chamber and not the President, pursuant to Rule 131. This is especially due to such a decision being *ultra petita* in nature, going as it does beyond the subject of the Prosecutor's appeal;<sup>15</sup>

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<sup>13</sup> Paragraphs 6 to 8 of the Application.

<sup>14</sup> Paragraphs 9 to 11 of the Application.

<sup>15</sup> Paragraphs 13 and 14 of the Application.



- (v) The President's stay of the enforcement of the Pre-Trial Judge's Order of 17 September 2010 is inconsistent with his invitation to the United Nations to submit observations and it breaches the provisions of Rule 131 of the Rules as the invitation was made without hearing the parties and, particularly as being decided on appeal, the Applicant is denied his right of appeal.<sup>16</sup>

**B. The Prosecutor's response:**

12. On 18 October 2010, the Prosecutor filed a response to Mr El Sayed's application, requesting that it be dismissed. It was submitted that:

- (i) the appeal is inadmissible for lack of procedural basis, in that the Applicant violated Rule 140 by failing to seek leave from the President before requesting that the Order be reconsidered;<sup>17</sup>
- (ii) if, in the event, the Chamber were to allow the appeal, it should reject the Applicant's claims of *ultra vires*, since the President acted in accordance with Articles 8(2) and 10 of the Statute, Rule 32 (B) of the Rules, and out of concern for judicial economy;<sup>18</sup>
- (iii) the President did not err in extending an invitation to the United Nations to submit observations as *amicus curiae*, as this derives from the proper administration of justice pursuant to Rule 32 (B). Further Rule 131 is not applicable to the case at hand given that the President's Order does not refer to it, that the Applicant is not a "Party" within the meaning of Rule 131 and that this Rule only applies to proceedings before the Trial Chamber.<sup>19</sup>

<sup>16</sup> Paragraphs 15 to 19 of the Application.

<sup>17</sup> Paragraphs 7 to 12 of the Prosecutor's Response.

<sup>18</sup> Paragraphs 13 to 15 of the Prosecutor's Response.

<sup>19</sup> Paragraphs 16 to 20 of the Prosecutor's Response.



**C. The Applicant's rejoinder :**

13. On 1 November 2010, the Applicant filed a rejoinder to the Prosecutor's response in which he repeats his demands, and argues:

- (i) That the application is procedurally justified<sup>20</sup>: despite the absence of a specific text it is based on *ultra vires*; nor is it a reconsideration request, since it has not been submitted to the organ that issued the decision as a single Judge, but to the Chamber. Alternatively, if the Chamber were to consider Rule 140 of the Rules as applicable to the present application, it does not provide for a two-stage challenge and the President, in referring the matter to the Appeals Chamber, has implicitly given his authorization to the Chamber to rule on the matter.
- (ii) That the stay is a power given to the Appeals Chamber, and that there was no urgency warranting the stay of the Pre-Trial Judge's Order<sup>21</sup>.
- (iii) That Rule 131 empowers the Chamber, after having heard the parties to invite an *amicus curiae*, this being an explicit provision which imposes *inter partes* and two-tier proceedings and gives jurisdiction to a designated organ<sup>22</sup>.
- (iv) That the Applicant is a party to the present proceedings; the Applicant has established standing in his reply to the Prosecutor's response submitted to the Pre-Trial Judge on 17 June 2010; furthermore, standing before the Appeals Chamber turns wholly upon whether there is standing at first instance<sup>23</sup>.

<sup>20</sup> Paragraphs 2 to 5 of the Rejoinder.

<sup>21</sup> Paragraphs 6 and 7 of the Rejoinder.

<sup>22</sup> Paragraph 9 of the Rejoinder.

<sup>23</sup> Paragraphs 10 and 11 of the Rejoinder.



### III- STATEMENT OF REASONS:

#### A. As to the possibility for the Appeals Chamber to rule on the present application in the absence of the President:

14. The Appeals Chamber is composed of five judges including the President, with no designated alternate judges. The *proprio motu* withdrawal of the President reduces its composition to four judges. This, however, cannot be seen as interfering with the legality of its composition. There being only five Judges of the Appeals Chamber, the necessity principle requires that the remaining four Judges exercise its jurisdiction<sup>24</sup>. Consequently the Appeals Chamber remains the appropriate forum for the present application with jurisdiction to rule on it accordingly.

15. To resist this conclusion would result in a denial of justice and would violate the principle of the right of access to a court, as set out in Article 14 of the 1966 International Covenant on Civil and Political Rights and Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. This principle, which consequently prohibits the denial of justice, is considered one of the globally recognized fundamental law principles.<sup>25</sup> In the same spirit, paragraphs (A), (B) and (D) of Rule 26 of the Rules set out the aforementioned principles in the context of regulating “the absence of a judge”, providing by way of a number of hypothetical situations, for the possibility for the Chamber, in the interests of justice,

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<sup>24</sup> See Grant HAMMOND, *Judicial Recusal, Principles, Process and Problems*, Oxford and Portland, Hart Publishing, 2009, where, on the principle of necessity, the author asserts in page 99 that “[ ] there cannot be a litigation system in which it is impossible to litigate a given case”. He then states that: “Whether the rule of necessity can be resorted to in final courts depends very much on the structural arrangements of that court [..]” (see p. 100). He further states: “A proper concern, if a judge is “lost” to a final court by recusal, is that it will end up short-handed, and may have no power to substitute another judge or justice. The only final appellate court in the common law world that appears to have this difficulty is the United States Supreme Court and it has already been noted that this has caused real difficulties in that court.” (See p. 84). That Court is, in this respect, a practical example of the application of the principle of necessity, where the bench is frequently composed of eight of the nine Judges, where one recuses him or herself.

<sup>25</sup> *Golder v United Kingdom*, ECHR, Application no. 4451/70, 21 February 1975, para. 35. *Deweere v Belgium*, Application no. 6903/75, 27 February 1980, para. 49. Human Rights Committee, General Comment No. 32: “Article 14 Right to equality before courts and tribunals and to a fair trial”, CCPR/C/GC/32, 23 August 2007.





to continue to examine a case, despite the absence of one of the Appeals Chamber Judges.

16. Moreover, Rule 188(B) of the Rules provides that the Appeal Judgment shall be rendered by a majority of Judges. This majority can still be achieved in the current Appeals Bench even though the Appeals Chamber remains composed of four judges.
17. Under the aforementioned Rules, the *proprio motu* withdrawal of the President of the Appeals Chamber, who cannot be replaced by an alternate Judge<sup>26</sup> nor can the case be referred to another Chamber, does not in any way prevent the other Judges of the Chamber from being seized of this case and ruling on it appropriately<sup>27</sup>.

**B. As to the formal conformity of the Application with the Rules:**

18. First it should be noted that the Order issued by the President on 15 October 2010 referring the present application to the Appeals Chamber, is to be seen as a grant of leave to reconsider, as provided for by Rule 140 of the Rules.
19. In accordance with the provisions of Rule 140, it falls within the *proprio motu* powers of the Chambers, or at the request of a Party, to reconsider a decision other than a judgment or sentence in order to avoid any injustice. The President's Order, being an interlocutory decision rather than a judgment or sentence, allows the Applicant the

<sup>26</sup> We construe Article 8(3) of the Statute as not permitting the course provided for by Rule 27(A) of an alternate Judge sitting in the Appeals Chamber.

<sup>27</sup> The Special Court for Sierra Leone has also considered this situation where the Appeals Chamber was confronted with a motion for disqualification of one of its members (see : *Prosecutor against Issa Hassan Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case n°SCSL-2004-15-AR15, 13 March 2004). Having granted the request to disqualify the judge in question, the Appeals Chamber nonetheless did not consider itself prevented from continuing its deliberations with a bench of four (see : *Prosecutor against Augustine Gbao*, Decision on the Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case n° SCSL-2004-15-AR72(E), 25 May 2004, *Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Sesay – Decision on Confidential Motion Seeking Disclosure of Documentation relating to the Motion on the Recruitment of Child Soldiers, Case n°SCSL-04-15-PT, 28 July 2004, *Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Gbao – Decision on Appeal Against Decision on Withdrawal of Counsel, SCSL-04-15-AR73, 23 November 2004)



possibility to seek its reconsideration, insofar as he claims to have suffered an injustice because the decision was not taken by the Chamber but by the President. The Applicant submitted that the President acted *ultra vires*, which caused prejudice to the Applicant because his right to defence was ignored and his right to two tier proceedings denied, also unjustifiably delaying the ruling on his case. As such claims by the Applicant are *prima facie* to be taken seriously, there exists a legal basis which justifies allowing his application, in accordance with Rule 140.

**C. As to the grounds for setting aside the Order to stay the enforcement of the Pre-Trial Judge's Order:**

20. The President, in his Order the subject of this Application, granted the Prosecutor's request in his appeal, and ordered the stay of the Pre-Trial Judge's Order. Even though Rule 126 (F) of the Rules applies to motions requiring certification, it applies by analogy to all applications on appeal.
21. In this regard, Rule 126 (F) states that the appeal cannot, of itself, have suspensive effect unless the Appeals Chamber so orders. In accordance with this provision, the President cannot decide by himself, even if this might be done in the interests of speeding up the judicial process, to order the stay of the enforcement of the Pre-Trial Judge's Order, subject of the Prosecutor's Appeal. This stay of enforcement is not of an administrative nature similar to the powers vested in the President by Article 10 of the Tribunal's Statute (hereinafter "the Statute") or Rule 32, but rather of a jurisdictional nature that falls exclusively within the powers of the full Appeals Chamber.
22. Consequently, the President's Order subject of the application, which stayed the enforcement of the Pre-Trial Judge's Order of 17 September 2010, having been issued on his initiative alone and not by the full Appeals Chamber, must be considered null and void.



23. However, the stay being a provisional measure which may be taken at any time during the proceedings, the Appeals Chamber has decided that the interests of justice require that it immediately seize itself of the matter. We proceed to examine the Prosecutor's appeal, where he requests the stay of enforcement of the Order of the Pre-Trial Judge as a matter of urgency until the final decision is issued.



**D. As to the request made by the Prosecutor in his Appeal seeking urgent suspension of the enforcement of the Order of the Pre-Trial Judge:**

24. Decisions about suspending a decision pending appeal fall for consideration by the Appeals Chamber alone. In the particular circumstances,<sup>28</sup> the Appeals Chamber must examine the effect that enforcing a potentially erroneous decision taken by the court at first instance can have on the proceedings before these same judges,<sup>29</sup> the rights of the Parties and the proper administration of justice. In this regard, it should be noted that a stay may affect in whole or in part the disposition of an order or decision.
25. In the Order of 17 September 2010 the Pre-Trial Judge decided: (i) the Tribunal has jurisdiction to rule on the merits of the application by Mr Jamil El Sayed to seek access to the documents in the *Hariri* case file which concern him; (ii) Mr Jamil El Sayed should be recognized as having standing before the Tribunal in this regard; (iii) the Parties should be invited to submit their arguments to enable a discussion as to the extent of the limitations and restrictions to the right of access to the case file before pronouncing further on the merits of the request.
26. It is clear from this decision that, in order to be able to rule on the standing, and then later on the merits of the application, the Pre-Trial Judge first considered the jurisdiction of the Tribunal to rule on such an application. In light of this reasoning, the solution to the aforementioned issues appears closely linked to that of jurisdiction.
27. This is all the more important given that decisions on motions challenging jurisdiction are preliminary issues susceptible to interlocutory appeal in accordance with Rule 90 (B) (i). Although according to paragraph (E) of the same Rule it is related to motions challenging an indictment, it nevertheless expresses the general principle of ensuring the proper administration of justice which has been adopted by the Lebanese Code of

<sup>28</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Request of Mr. Thomas Lubanga Dyilo for Suspensive Effect of his Appeal Against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06 OA 11, 22 April 2008, para. 7.

<sup>29</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Request of Mr. Thomas Lubanga Dyilo for Suspensive Effect of his Appeal Against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06 OA, Dissenting Opinion of Judge Pikis, 13 May 2008, para. 9.



Criminal Procedure,<sup>30</sup> itself a source of interpretation of the Rules pursuant to Rule 3 (A) (iv).

28. Thus, any solution the Appeals Chamber might provide, within the context of the appeal lodged by the Prosecutor against the Pre-Trial Judge's Order of 17 September 2010 relating to whether the Tribunal has jurisdiction to rule on Mr El Sayed's appeal, could automatically affect the responses to the other issues raised, the issue of standing and the merits of the application among others. Given that all these issues are dependent upon each other, in accordance with Rule 126 (F) and in the interests of proper administration of justice, the Appeals Chamber must rule on the stay of enforcement of the disposition of the Pre-Trial Judge's Order in its entirety and until the final decision is rendered regarding the Prosecutor's appeal.

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<sup>30</sup> Article 213 of the Lebanese Code of Criminal Procedure: "*Rulings on the merits of a dispute that are not final may be appealed only when the final judgment has been delivered Rulings on any objection raised under Article 73 of this Code, rulings on release, and rulings whereby the Single Judge dismisses the case without addressing the merits, shall be exempted from this principle*"; Article 73 of the Lebanese Code of Criminal Procedure: "*The defendant, or his advocate in the absence of his client and the Public Prosecutor's Office may raise any of the following objections once only prior to the questioning of the defendant 1 Objection to jurisdiction, 2- .* "



**E. As to the grounds submitted to suspend enforcement of the Order of the President after calling upon the United Nations as *amicus curiae*:**

29. In his Application, Mr El Sayed requests a stay of enforcement of the President's Order, and specifically the part calling upon the United Nations as *amicus curiae*. However, the United Nations responded to the President's invitation and filed the submissions in question on 1 October 2010, before the Applicant filed the present application and before the Chamber had rendered this decision. Therefore the request for a stay is purposeless. But, and in light of the arguments submitted by the Applicant in his brief, the request for a stay may be interpreted as being implicitly directed at the exclusion of the United Nations' submissions from the case file.
30. In his brief of 18 October, the Prosecutor submitted in response to the application that Rule 131 of the Rules cannot be applied to the case at hand because, in the Order referring to the Appeals Chamber, subject of the present appeal, no reference is made to this Rule.<sup>31</sup> The submission must be rejected, since the only reference to intervention by an *amicus curiae* in the proceedings is that found in Rule 131. Thus, the invitation to the United Nations in the case at hand can only have been extended pursuant to this Rule.
31. Moreover, the Prosecutor also submitted that Rule 131 refers to the "Parties" when, in his opinion, the Applicant is not a "Party" according to Rule 2.<sup>32</sup> This submission must also be rejected, for the reason that Mr El Sayed was already considered to be a Party in the proceedings before the Pre-Trial Judge and in lodging his appeal against him the Prosecutor has considered him as such in the proceedings before the Appeals Chamber.
32. Rule 131 (A) enables the Chamber to decide in the interests of the case to invite as *amicus curiae* a State, an organization or a person to submit written observations on issues, or to appear before it. Contrary to the argument put forward by the Prosecutor

<sup>31</sup> Paragraph 17 of the Prosecutor's Response.

<sup>32</sup> *Idem*.



in his brief,<sup>33</sup> this provision which applies to the proceedings before the Trial Chamber also applies to the Appeals Chamber in accordance with Rule 176 (B). It follows that such an invitation falls within the remit of the Chamber and not that of its President alone. Consequently, the President's decision in his Order subject of the application, to call upon the United Nations as *amicus curiae* to submit observations on the issues raised by the Pre-Trial Judge's Order dated 17 September 2010, must be considered *ultra vires*, which renders it null and void.

33. Moreover, the fact that the United Nations responded to this invitation and filed on 1 October 2010, before the Tribunal, an *amicus curiae* brief on the inviolability of United Nations documents, before Mr El Sayed's present application was filed, cannot make good the deficiency, given that the invitation to do so came from an authority without jurisdiction in the matter.

34. Accordingly, since the invitation to the United Nations as *amicus curiae* was irregular, having been received from a body lacking jurisdiction to issue it, the Appeals Chamber determines that the United Nations brief filed in this case falls outside the proper bounds of the *dossier*. We leave to the full Appeals Chamber, which is seized of the Prosecutor's Appeal, the determination upon the appropriateness and legality of calling upon the United Nations as *amicus curiae*.

#### **IV- DISPOSITION:**

**For these reasons,**

**The Appeals Chamber,**

**DETERMINES** that the Chamber composed of four Judges has authority to rule on the application.

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<sup>33</sup> Paragraph 18 of the Prosecutor's Response.



**DETERMINES** that the application formally conforms with the Rules of the Tribunal.

**DETERMINES** that the Order of the President dated 1 October 2010, to stay the Pre-Trial Judge's Order of 17 September 2010, be set aside;

**ORDERS** that the effect of the Pre-Trial Judge's Order of 17 September 2010 be stayed until the date of the decision of the Appeals Chamber upon the appeal of the Prosecutor;

**DETERMINES** that the Order of the President of 1 October 2010, concerning the invitation to the United Nations to submit observations as *amicus curiae*, be set aside;

**DECLARES** that the United Nations brief filed in this case falls outside the proper bounds of the *dossier* unless and until the full Appeals Chamber, seized of the Prosecutor's appeal, rules on the matter

Done in English, Arabic and French, the French text being authoritative.

Leidschendam, 8 November 2010.

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Judge Ralph Riachi

Presiding

