



Original: English

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

Date: 25 February 2010

TRIAL CHAMBER I

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

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

Public Redacted Version

**Prosecution's Submissions in Response to Trial Chamber's
Oral Request of 10 February 2010**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

Ms Paolina Massidda

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

The Defence stated that it intends “to prove to the Chamber that many of the Prosecution's witnesses came before the Court and testified knowing that they would be giving inaccurate information to the Court” and that “this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor”.¹ This argument was raised for the first time on 27 January 2010 and is based on allegations regarding two intermediaries who helped the Prosecution to contact witnesses.

The information presented by the Defence was never put to the witnesses themselves, because the Defence deliberately chose not to present its case at the appropriate time. Having failed to directly put these allegations to the relevant prosecution witnesses, the Prosecution submits there is substantial reason to bar the Defence from challenging their credibility on these grounds now.

Even now, the full detail of the Defence's allegations and evidence is not being provided to the Prosecution or the Chamber. The summaries of anticipated defence evidence are insufficient and, in one case so far, the information appeared to be inaccurate. The recent application by the Defence requesting the Chamber to [REDACTED] that directly relates to Defence witnesses 2, 3 and 4 demonstrates how relevant information has been withheld.² It was unfair not to have provided the Prosecution with the record of the interview in advance of the testimony of these three defence witnesses.

The Prosecution will soon file an application to prohibit the Defence from leading evidence on critical and material issues that have not been put to

¹ ICC-01/04-01/06-T-236-CONF-ENG ET, 27 January 2010, page 20, lines 16-23 (“27 January 2010 Transcript”).

² ICC-01/04-01/06-2307-Conf, 19 February 2010.

witnesses during cross-examination or provided or communicated to the Prosecution in advance of the Defence case. The application will include in greater detail its complaints regarding the tactics used by the Defence to ambush the Court and the Prosecution with undisclosed allegations that were improperly withheld from the witnesses whose credibility is now being impugned. It will also explain the procedural background: that early in the proceedings the Chamber imposed a process that required (a) notice to the Prosecution, and (b) that matters on which witnesses' credibility would be challenged must first be put to the witnesses during cross-examination. The Defence declined to provide advance notice of its documents and evidence on the ground that it did not intend to present a "positive case". It gave no explanation for its failure to comply with the second procedural requirement. The Defence provided only bare-boned accounts that in almost every instance omitted the critical facts that underlie its claim of abuse of process.

This submission responds to the Chamber's specific questions regarding whether the Prosecution intends to interview or reinterview the intermediaries, provide those statements to the Defence, and call the intermediaries as witnesses. It also responds to the question whether there should be greater disclosure of the identities of the Prosecution's intermediaries.

On those points, the Prosecution first reminds the Chamber that the environment in which intermediaries operate is dangerous and risk of harm is high both to them and to witnesses who may have interacted with them. In the Prosecution's submission it would be a dereliction of its duty of care towards its intermediaries and the witnesses with whom they deal if their identities were to be disclosed to the Defence, not least because there are no allegations against them. Beyond the obligation to protect *these* intermediaries and witnesses, it is essential to the success of the ICC that

intermediaries not be revealed unless there is the most pressing reason. The Prosecutor's mandate to investigate and prosecute the world's most serious offences cannot succeed without the use of trusted and reliable intermediaries; any action by the Court that chills the ability of the Prosecution to protect their identities and securities will chill the Prosecution's ability to obtain assistance by other intermediaries in future cases.

Given the information provided thus far, the Prosecution will consider the possibility of calling Intermediary W-321 , but does not currently intend to call any other intermediary as a witness. Nor is there any reason, on the existing information, to conduct substantive reinterviews of them and submit those statements to the defence. This view, of course, may change once the specific allegations against them are disclosed. But, having had less than one month's notice of the defence case, and with inadequate information as to its factual basis, the Prosecution has not made any significant change to its strategy as regards the issue of intermediaries.

Procedural Background

1. At the commencement of the examination of trial witness 15 by the Prosecution, the witness made certain allegations against an Office of the Prosecutor (OTP) intermediary (intermediary [REDACTED]).³ The evidence of witness 15 was adjourned and the Chamber instructed the Prosecution to take a further statement.⁴ The further statement of witness 15 was taken by the Prosecution, in the presence of members of the *Lubanga* defence team, on [REDACTED].⁵

³ ICC-01/04-01/06-T-192-CONF-ENG ET, 16 June 2009, page 5, lines 15-19, page 6, lines 7-17, page 10, lines 15-25 and page 11, lines 1-13.

⁴ ICC-01/04-01/06-T-192-CONF-ENG ET, 16 June 2009, page 7, lines 5-15.

⁵ [REDACTED]

2. On 17 and 18 September 2009, the Prosecution conducted a re-interview of the other trial witness who had been brought into contact with the OTP by intermediary [REDACTED].⁶ On 6 and 7 October 2009, the Prosecution also interviewed intermediary [REDACTED] to investigate the allegations made by witness [REDACTED].⁷ In each case the statement or transcript was disclosed to the Defence.
3. On 2 October 2009, the Prosecution filed an application seeking leave of the Trial Chamber to “consult/interview potential court witnesses in order to enable the Prosecution to adequately prepare for the Defence case and investigate the allegations raised by [REDACTED]”.⁸
4. On [REDACTED], the Prosecution interviewed intermediary 321 with a view to preparing for the Defence case,⁹ although at this point in time there were no allegations against this intermediary.
5. The brief summary related to defence witness 4 provided by the Defence to the Prosecution on 3 September 2009 mentioned that [REDACTED].¹⁰ In its Omnibus Application of 2 October 2009, the Prosecution requested an order from the Chamber for further details regarding the proposed evidence the Defence witnesses intend to give, including specifically in respect of the assertion of [REDACTED].¹¹
6. On 4 December 2009, the Defence provided the Prosecution with the partial name of a person whom Defence witnesses would [REDACTED].¹² In light of this information, the Prosecution re-interviewed intermediary 321 in

⁶ [REDACTED]. The statement taken during the course of this interview, bearing the [REDACTED]. Both items were then disclosed to the Defence in fully unredacted form on 25 September 2009.

⁷ The transcripts of this interview were disclosed to the Defence on 17 November 2009 and a CD containing the 10 transcripts was provided to the Chamber on 17 February 2010.

⁸ ICC-01/04-01/06-2144-Red, page 4, at (iii)-(iv). See also paras. 34 and 39. On 4 December 2009, the Chamber authorised the Prosecution to interview potential court witnesses, subject to their consent (ICC-01/04-01/06-2201-Conf, paras. 23-25). [REDACTED].

⁹ The transcripts of this interview were disclosed to the Defence on 26 January 2010

¹⁰ [REDACTED]

¹¹ "Prosecution's Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution's preparation for the Defence case", ICC-01/04-01/06-2144-Conf, paras. 10 and 15.

¹² [REDACTED]

[REDACTED] to put these specific allegations to him.¹³ The results of this interview were also disclosed to the Defence. Defence witnesses 3 and 4 elaborated on the allegations against intermediary 321 in the course of their testimony.¹⁴

7. The Defence first raised the involvement of intermediaries as a substantive issue in the case in its opening statement on 27 January 2010, with the statement that the Defence intends “to prove to the Chamber that many of the Prosecution's witnesses came before the Court and testified knowing that they would be giving inaccurate information to the Court” and that “this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor”.¹⁵
8. In the hearing on 10 February 2010, the Chamber alerted the Prosecution that in due course it would be seeking information on the Prosecution's proposed strategy as regards the issue of intermediaries,¹⁶ and in particular:
 - will the Prosecution be re-interviewing all intermediaries involved with the child soldiers and, if so, the timing of those re-interviews and the proposed disclosure of the statements taken as a result;
 - whether the Prosecution has complied with its disclosure obligations, including on an ongoing basis in light of the direction of the defence case;
 - whether the identity of intermediaries should continue to be kept confidential in light of the recent allegations and direction of the defence case;

¹³ The transcripts of the Prosecution's second interview with intermediary 321 from 21-22 January 2010 were disclosed to the Defence on 9 February 2010.

¹⁴ ICC-01/04-01/06-T-239 – ICC-01/04-01/06-T-241 (D01-0003) and ICC-01/04-01/06-T-242 – ICC-01/04-01/06-T-243 & ICC-01/04-01/06-T-245 (D01-0004).

¹⁵ ICC-01/04-01/06-T-236-CONF-ENG ET, 27 January 2010, page 20, lines 16-23 (“27 January 2010 Transcript”).

¹⁶ ICC-01/04-01/06-T-243-CONF-ENG ET, 10 February 2010, pp. 4-12 (“10 February 2010 Transcript”).

- whether the Prosecution will be calling the intermediaries as witnesses, and if so when.

9. The Prosecution hereby provides information in response to the Chamber's request.¹⁷ The Prosecution files this information on a confidential basis, as it makes reference to details and to submissions which are currently classified as confidential or which were made during closed session.

Submissions

10. The Prosecution has disclosed the identities of two intermediaries. It does not currently intend to disclose the identities of any other intermediaries. It also does not intend to investigate, through interviews or reinterviews, the intermediaries it used, or to call them as rebuttal witnesses. The facts presented thus far are insufficient to rise to the substantial level that would justify disclosure and requiring them to appear at trial.

11. It bears reminding that the intermediaries have not provided substantive evidence on the crimes being charged, and their role in this case has not been as percipient witnesses. Additionally, the issue is alleged abuse of process by the Prosecution; accordingly, the focus should be not whether intermediaries approached some children and proposed that they lie – a point we do not concede -- but whether persons within the OTP knew or had reason to know that this was occurring. The Prosecution states categorically that it did not believe that that was the case. The possibility of misconduct unknown to the Prosecution cannot form the basis for prosecutorial abuse of process.

Intermediaries and other field assistants are essential to perform essential tasks

¹⁷ [REDACTED]

12. The OTP relies on intermediaries to conduct activities related to its investigations in the field, due to the precarious security situation in the Ituri region and in the DRC generally. It is not an exaggeration to say that the prosecutions themselves are impossible without the assistance of intermediaries. The Prosecution has no local police force and within the DRC operates in potentially hostile environments. Persons do not necessarily trust the ICC and, having survived often horrific events, are cautious about coming forward publicly to tell their stories. Additionally, persons may be at risk if it appears that they are even considering cooperation with the ICC. Nor can the ICC investigators act in the region without subjecting themselves to significant personal risk.
13. The reliance on intermediaries is not confined to the investigations in the DRC. The Chamber cannot ignore the reality of this Court – it is an institution to prosecute the most severe crimes committed by persons in power who heretofore have avoided justice by threats and intimidation. The use of threats and intimidation is not going to end simply because the ICC is in operation. In all the cases that are likely to be brought before this Court, investigators from the Hague are not going to be able to enter the territory of a country convulsed by crimes against humanity and openly investigate and interview prospective witnesses.
14. In short, the assistance of intermediaries is critical to the effective work of the Court. They carry out certain tasks in the field that staff members of the OTP cannot carry out without creating suspicion. [REDACTED] the community and have information, to which ICC outside investigators cannot possibly have access, to assist in identifying potential witnesses. They are able to contact individuals or collect documents without attracting attention and putting individuals at risk.

15. The Prosecution has made considerable effort to identify and evaluate intermediaries' reliability, knowledge, integrity and ability to perform tasks discretely to protect themselves, witnesses and the ongoing investigation. It does not recruit any intermediary until the evaluation is complete. Thereafter, the OTP continues to monitor and evaluate their productivity, loyalty, accuracy, security, reliability and honesty.
16. The OTP also relies on other persons for limited and confined assistance to the OTP. These persons are not intermediaries per se, since they are not used on an ongoing basis; instead, they perform important functions in dealing with specific witnesses or OTP sources.¹⁸
17. The assistance of intermediaries does not end with the bringing of charges. In both the *Lubanga* and *Katanga* cases, intermediaries remain essential in assisting the OTP [REDACTED] prosecution witnesses or [REDACTED] evidence and witnesses. Certain intermediaries also perform essential tasks for other organs of the Registry, such as the Victims Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPCV).

Disclosure of the identities of intermediaries who are not percipient witnesses unnecessarily subjects them to significant risk and threatens the functions of the Court

18. Many of the intermediaries used by the OTP in this case are [REDACTED] Many intermediaries [REDACTED] Living where they live, [REDACTED] they are at real, documented, risk on account of the activities they undertake for the OTP and for other organs of the Court.
19. These are risks known to the Prosecution and, in some instances, the Court as well. For example, as early as 2005, [REDACTED] applied to this Court

¹⁸ In the DRC1 investigation, the OTP has used approximately [REDACTED] third-party individuals to assist in contacting potential witnesses and sources.

seeking, *inter alia*, protection for [REDACTED] .¹⁹ In [REDACTED], the OTP received information of armed attacks against the staff of an [REDACTED] to undertake specific functions in the field. In [REDACTED], the OTP received information of a threat and attack against the staff of an [REDACTED] working with youth and accused of assisting with ex-child soldiers against Thomas Lubanga. In [REDACTED], the OTP learned of cases of harassment against [REDACTED] accused of collaborating with the ICC.

20. The risk to the security of the intermediaries cannot seriously be questioned. It is the Prosecution's strongest commitment that persons who assist shall not be jeopardized as a consequence of their assistance. Nor can the Chamber doubt that identifying intermediaries in this case will effectively chill the willingness of intermediaries in future situations or investigations to assist the Prosecution or the Court.

The Prosecution's approach to the confidentiality of the identity of the intermediaries

21. As a general principle, the Prosecution is opposed to the disclosure of the identity of its intermediaries. This practice is entirely consistent with the practice of national and international courts, albeit in a different context – the protection of confidential informants who provide “tips” to the investigating authorities but are not percipient witnesses. Those courts recognize that in the investigation and prosecution of certain kinds of cases, such as criminal organizations with enormous power and hierarchies, it is essential to have information that can only come from someone on the ground and not obviously associated with the authorities. They likewise recognize that the possibility of informant assistance would end altogether if informants' identities were readily identified, and as a result the prosecution and conviction of the most serious offenders would also end.

¹⁹ [REDACTED].

Thus, disclosure is never required unless the informant himself is a percipient witness; if he is merely a tipster who brought a case to the prosecution or identified prospective witnesses, the way to challenge the reliability of the evidence is not to challenge the original tipster, but to challenge the resulting evidence.

22. Notwithstanding this principle, in addition to diligently investigating discrete allegations of misconduct by intermediaries thus far during the trial,²⁰ when witnesses have revealed the name of an intermediary during testimony the Prosecution has disclosed the identity of the particular intermediaries in other documents.²¹ However, the Prosecution continues to object to the blanket disclosure of the identity of intermediaries in general, and maintains its position that full disclosure be considered on a case-by-case basis. Only when there are allegations of impropriety in relation to a particular intermediary's role should the balance shift from protection of witnesses, the intermediary themselves and prejudice to ongoing investigations and towards disclosure.

23. The evidence presented by the Defence provides no basis to impugn the integrity of intermediaries on a wholesale basis. Rather, at this stage the Court is faced with specific allegations raised in relation to two individuals. As a result, the Prosecution does not intend to conduct interviews of intermediaries where there are no live issues in relation to their integrity or their work. The Prosecution does not consider that the mere fact that someone is an intermediary, or that a witness has been put in contact with the Prosecution by a third-individual, in the absence of any allegations against the conduct of that person, could form the basis for the disclosure of their identity. If the disclosure of the identity of all intermediaries becomes

²⁰ See para. 1, above.

²¹ For example, following witness [REDACTED] during private session testimony, the Prosecution disclosed the identity of intermediary [REDACTED] in other documents. In addition, other measures may satisfy the legitimate forensic interests of the defence, such as disclosure of precisely which witnesses have been in contact with a particular intermediary rather than the identity of the intermediary – see e.g. *Prosecution v Katanga and Ngudjolo*, ICC-01/04-01/07-1817, 1 February 2010, paras. 20-23.

the standard, it will seriously impair the Prosecution's ability to recruit and use intermediaries as a practice, and will prejudice its ability to investigate these cases.

24. In addition, even where the identity of an intermediary has been disclosed to the Defence, the Prosecution submits that their identities should not be revealed to the public on the basis of unsubstantiated allegations, or for the ease and comfort of witnesses when testifying about these allegations, for four principal reasons.
25. First, publicly naming intermediaries would put them squarely at risk as they will be named as having cooperated with the Prosecution by facilitating contact with witnesses who have testified against Accused persons before the Court. Given the instability in the region, the strong influence of UPC and FNI/ FRPI supporters in Ituri and the pressure faced by those who cooperate with the OTP, these intermediaries may be at significant risk should their identities become known to the public. The intermediaries do not all [REDACTED] are available.
26. Second, disclosure to the public could expose the intermediaries' association with [REDACTED] at risk. The intermediaries perform essential logistical functions and are vital to the OTP's ability to [REDACTED] limited network coverage. Given the contacts [REDACTED] with the OTP, revealing the identities of the intermediaries can [REDACTED] .
27. Third, certain intermediaries are still operational and assist in the ongoing investigative work done by the OTP. Revealing their identities effectively means that they cease to be operational. The OTP relies on the assistance of local intermediaries who operate in the field to conduct its investigations, particularly in areas of ongoing conflict where certain political and military groups are active.

28. Fourth, revealing their identity publicly could undermine their professional credibility in the region on the basis of serious but as yet only general and unsubstantiated allegations of misconduct.

The Prosecution's approach to disclosure

29. The Prosecution has complied with all relevant disclosure obligations. As part of its ongoing obligation of disclosure, if specific issues arise during the presentation of the Defence case (such as allegations regarding the conduct of a particular individual) then the Prosecution does review its materials to check whether this new issue requires that any further disclosure be made. Accordingly, the Prosecution has disclosed to the Defence the interviews relevant to intermediaries [REDACTED] and 321. In addition, if and when the Prosecution interviews (or re-interviews) persons in connection with the allegations made by the defence witnesses, then consistent with its past practice it will disclose any statements taken as a result of those interviews where they fall within the scope of its obligations under Article 67(2) and Rules 76 and 77.²²



Luis Moreno-Ocampo
Prosecutor

Dated this 25th day of February 2010
At The Hague, The Netherlands

²² i.e. where the Prosecution intends to call the person to testify, or where the statement of the witness contains information which is either potentially exculpatory or material to the preparation of the defence.