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Date: **19 March 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

Prosecution Proposed Procedure for Dealing with Intermediaries

Source: **Office of the Prosecutor**

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

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Introduction

The Trial Chamber has indicated that it is considering instructing the Prosecution to disclose the identities of some intermediaries.

Intermediaries fulfill a critical role during investigations, they are individuals who facilitate contact between the Prosecution and a witness or any other source of information. The Prosecution maintains its position that disclosure of the intermediaries' identities to the Defence will have grave consequences to the fulfilment of its Statutory functions and to the security of the intermediaries, their families as well as some other persons who were in contact with the Office of the Prosecutor (OTP).

The Prosecution investigates crimes committed by persons in power who heretofore have avoided justice by threats and intimidation and in territories where there are still significant tensions and difficulties to control violence. The assistance of local intermediaries, in all its cases, is critical to fulfil the Prosecution's duties established by article 68 (1).

In this case, the OTP has required the assistance of six intermediaries to reach half of its trial witnesses and the other half of the Prosecution's trial witnesses have been managed without the assistance of an intermediary. There are neither allegations nor evidence against the intermediaries whose identity is not already known to the Defence. The Defence had an opportunity in cross-examination to test the veracity of the accounts of Prosecution witnesses and to test whether they had been coached or induced to lie before the Court, and no evidence of impropriety has emerged. There is no reason to disclose the identity of essential and active intermediaries or to call them as witnesses.

The places in which these intermediaries operate are still dangerous. Witnesses who have testified for the Defence have confirmed the role of UPC and stated "…so there are supporters of the UPC in all 12 neighborhoods".[1] The Chamber has heard evidence that one intermediary assisting the ICC was threatened.

The Prosecution is cognizant of the Chamber's preliminary views and hereby submits an alternative, three-staged proposal to ensure a fair trial for all the parties. The Prosecution considers that this proposal will allow for a proper exploration of the allegations levelled by the Defence, while adequately protecting its rights.

First, an appropriate member of the OTP can be called as a witness in order to hear evidence and test relevant aspects of the OTP's use of intermediaries. Thereafter, and only should the Chamber deem that it is necessary after hearing the evidence of the OTP, those intermediaries affected by allegations can be called by the Chamber for an in camera hearing at which neither party is present. The parties and participants can submit the questions they wish to put to the intermediary. Only as a last resort, after the above options have been exhausted and there are continuing, concrete questions on the role of the intermediaries, should the Chamber consider disclosing the identities of the intermediaries.

Procedural Background

1. On 23 February 2010, the Prosecution filed the "Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010"[2] addressing the Chamber's request for information on the Prosecution's proposed strategy

[1] ICC-01/04-01/06-T-255-CONF-ENG, page 4, lines 14-18
[2] ICC-01/04-01/06-2310-Conf.

as regards the issue of intermediaries.[3] The Defence submitted a response on 2 March 2010.[4]

2. During the hearing on 17 March 2010, the Prosecution requested leave from the Chamber to file a further proposal seeking to address some of the Chamber's concerns.[5] This application was granted and the Prosecution was ordered to do so by 19 March 2010.[6] The Prosecution hereby submits the proposal.

Discussion

3. The assistance of intermediaries is critical to the effective work of the Court and is not confined to the investigations in the DRC. They carry out certain tasks in the field that staff members of the Prosecution cannot carry out without creating suspicion. They have access to remote locations. They know the members of the community and have information, to which Prosecution investigators cannot possibly have access, to assist in identifying potential witnesses.

4. The assistance of intermediaries does not end with the bringing of charges, and the use of threats and intimidation is not ending simply because the trial started. In both the *Lubanga* and *Katanga* cases, intermediaries remain essential in assisting the OTP to investigate allegations made by the Defence against prosecution witnesses or to investigate the Defence's evidence and witnesses. Certain intermediaries also perform essential tasks for other organs of the

[3] ICC-01/04-01/06-T-243-CONF-ENG ET, 10 February 2010, pp. 4-12.
[4] ICC-01/04-01/06-2315-Conf , "Réponse de la Défense à la « Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010 » relative à la divulgation de l'identité des intermédiaires du Bureau du Procureur, déposée le 23 février 2010".
[5] See transcript of the hearing on 17 March 2010, ICC-01/04-01/06-T-264-CONF-ENG ET at page 7, lines 1-16.
[6] See transcript of the hearing on 17 March 2010, ICC-01/04-01/06-T-264-CONF-ENG ET at page 8, lines 5-11

Registry, such as the Victims Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPCV).

5. Disclosure of the identities of the intermediaries will affect their capacity to assist the Prosecution activities. It is clear for the Chamber that disclosure presents very serious security concerns that will require intrusive protective measures - chiefly relocation - affecting the life and well-being of the intermediaries and members of their families. VWU will have to include the intermediaries in the ICCPP and cater for their relocation, adding to the Unit's existing burden, in order not to risk exposing the intermediaries to grave dangers to their life and well-being and that of their families.

6. Disclosure of the identities of intermediaries will have consequences beyond this case and even this situation. If intermediaries are likely to face disclosure of their identities, relocation and disruption of their lives, as a consequence of volunteering to assist OTP's investigative activities in the field, this is likely to chill the willingness of persons to offer assistance in the future, and OTP's ability to conduct investigations in difficult areas such as the ones where the Court operates will be impaired.

7. In this sense, the Prosecution considers that disclosure of the identities of intermediaries must always be a measure of last resort, and must be confined to those limited and exceptional circumstances where no alternative measures would be adequate to guarantee the fairness of the proceedings. This is not the case in the present situation.

8. The Prosecution recognizes that the Chamber must guarantee a fair trial and has a statutory obligation to explore those areas that the Chamber considers are necessary for the establishment of the truth. While continuing to oppose the general allegations levelled by the defence against OTP intermediaries in

this case, the Prosecution understands that the Chamber seeks all the necessary information to make a proper determination on the issues at bar. However, the Prosecution considers that this can be done in a manner that does not entail disclosure of the intermediaries' identities. The Prosecution's proposal, as described below, is designed to provide the Chamber with the information it needs without exposing the intermediaries and endangering OTP's investigative activities.

9. The procedure suggested by the Prosecution is simple and workable. The first step should be calling an appropriate OTP representative to give evidence on the use of intermediaries in this case. The evidence of the OTP representative can be fully tested by the Defence in order to provide a clear picture of the use and role of intermediaries in this case.

10. A Prosecution representative is the person best placed to provide comprehensive and detailed information about the way in which the Office contacted, selected and managed the individuals interviewed during the investigation. Additionally, the Prosecution representative could explain the precise role of the intermediaries, how they were selected and the tasks they performed.

11. At a second stage, and only should the Chamber thereafter decide that it must hear from the intermediaries themselves, the Prosecution will take whatever steps possible to bring those intermediaries whom the Chamber has deemed are sufficiently tainted by specific allegations to The Hague to appear before the Chamber as court witnesses, ex parte, without disclosing their identities to the defence.[7] The Chamber can proceed to question them in camera. Neither

[7] Should it become too difficult or too dangerous to bring the intermediaries to The Hague, the possibility of the Chamber hearing the evidence via video link could be explored. For W-316 and W-321 whose identities are

party will attend, but each will be able to provide the Chamber with a list of questions they would want the Chamber to ask.[8] Appropriately redacted transcripts can be provided to the parties, on the basis of which they may request supplemental questions to be asked. Both parties can then make submissions to the Chamber as to what they consider has been established by the evidence. Needless to say, the Chamber, if it deems it necessary, can explore the possibility of additional measures.

12. The Prosecution considers that the Chamber has the authority to develop a procedure of this kind. Pursuant to Article 54(3)(f), the Prosecutor may request that necessary measures be taken to ensure the protection of "any person". The Prosecution recalls that according to Article 68(1) and Appeals Chamber's seminal rulings on protective measures, the Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of "persons at risk on account of the activities of the Court".[9] The Prosecution submits that the intermediaries amply qualify as such persons. The Appeals Chamber based this broad interpretation of the Court's duty of protection on a series of provisions which are "indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court".[10]

13. Moreover, the Chamber has powers under Article 64(6)(c) and (f) and 64(7) to protect confidential information and derogate from public trial in special circumstances. Rule 88 also allows the Chamber to order special measures to facilitate the testimony of sensitive witnesses.

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known to the Defence, the Prosecution continues to assess the allegations made against them as the Defence case unfolds in terms of calling them as rebuttal witnesses.

[8] Either party is free to raise objections in advance to the questions on the list of the other party for a determination by the Chamber.

[9] ICC-01/04-01/07-475 OA, para. 1, 43-44, 53-55.

[10] ICC-01/04-01/07-475 OA, para. 54.

14. The Prosecution stresses that this is not a situation of the Prosecution seeking to rely on anonymous witnesses to establish the guilt of the accused. These are not witnesses for the Prosecution, and their evidence will not deal with the guilt or innocence of the accused, but rather with a wholly independent issue raised by the Defence and related to allegations against some of the intermediaries. In this specific context, maintaining the anonymity of the other intermediaries vis-à-vis the Defence, and restricting examination in the manner suggested by the Prosecution – done equally for both sides -- would not diminish the fairness of the proceedings in any manner. Rather, the procedure envisioned here will give the Chamber the power to inquire fully into the factual allegations while protecting the interests of the parties and the intermediaries. The proposal will also avert any dangers to OTP's investigative activities in this and other situations. In this context, any added advantage that the Defence could conceivably obtain through the disclosure of the identities would, it is submitted, be marginal in nature and in any event outweighed by the prejudice that such disclosure would cause to the intermediaries and their families, as well as to OTP's further or ongoing investigations.

15. The Prosecution finally notes that its proposal is consistent with national practice pertaining to similar situations. In The Netherlands, the examination of an anonymous witness – who as a rule will not be present at trial – is conducted by the examining magistrate, who may decide that the defence not be present during the examination (in which case the public prosecutor may not attend the examination either). The magistrate informs the Public Prosecutor, the defendant or his counsel of the contents of the witness's statement and gives them the opportunity to list questions they wish to have

answered.[11] The European Court of Human Rights has also recognized that such procedure is not inconsistent with the accused's right to a fair trial provided adequate safeguards are in place to counter-balance the resulting unfairness to the defence.[12] In a US case, where this procedure would be generally barred by constitutional requirements, a conviction was affirmed where the witness – albeit, not anonymous -- was questioned by a French magistrate, outside the presence of the prosecutor and counsel for the accused, but counsel had the opportunity to offer questions, review the witness's answers, and then propose follow-up questions.[13] The Prosecution notes that these safeguards are deemed adequate even to deal with witnesses that refer to the guilt or innocence of the accused, which, the Prosecution reiterates, is not the situation here.

16. As a last stage and only if truly necessary after the first two stages have been completed, the Chamber may evaluate again and eventually decide in favour of disclosure of the intermediaries' identities to the Defence, after carefully considering the very considerable burden and impact this will have on the intermediaries and on the work of the OTP.

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[11] See . Beijer and A.M. van Hoorn, Report on Anonymous Witnesses in The Netherlands, included in the NETHERLANDS REPORTS TO THE FIFTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (1998), and published at http://www.library.uu.nl/publarchief/jb/congres/01809180/15/b25.pdf. In some cases very radical protective measures are taken, in which the police usually play an important role. Examination of the witness may take place at a secret location and at a time that is kept secret from the defence until the last minute. In exceptional cases even the examining magistrate is kept in the dark about the location. The witness, and sometimes also the examining magistrate, is brought to the location in question by the police, which may be a hotel or a police station.

[12] ECHR, *Doorson v. the Netherlands*, 26 March 1996, 22 EHRR 330 and *Van Mechelen et al. v The Netherlands*, 23 April 1997, 25 EHRR 647. See also UN Human Rights Committee, *Concluding Observations on The Netherlands*, CCPR/CO/72/NET, 27 August 2001, para. 12.

[13] *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988). In that case, French authorities granted a US request to take the deposition of a person in France but barred the presence of defence counsel and required that a French magistrate undertake the questioning. The prosecutor accordingly agreed to not be present. Both parties proposed questions to the magistrate. The deposition was admitted in the US criminal prosecution. The court explained, in part, that the process compensated for the defense counsel's inability to "develop a spontaneous line of inquiry" through his own examination, because he could offer new follow-up questions after reviewing the witness's responses.

Conclusion

17. For the above mentioned reasons, the Prosecution requests the trial Chamber to refrain from ordering the Prosecution to disclose the identities of the intermediaries to the defence and to implement the three-staged procedure proposed in this filing instead.

Luis Moreno-Ocampo
Prosecutor

Dated this 19th day of March 2010
At The Hague, The Netherlands