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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 Version

Prosecution's Application for Leave to Appeal the "Decision on Intermediaries"

Source: Office of the Prosecutor

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Trial Chamber II

Introduction

1. On 12 May 2010, the Trial Chamber issued the “Decision on Intermediaries” (“Decision”),¹ defining that “[t]he threshold for disclosure [of the identity of an intermediary] 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”.² The Prosecution hereby seeks leave to appeal the Decision on the standard and procedure by which the Trial Chamber determined that the identity of an intermediary must be disclosed. This includes the manner in which the Trial Chamber weighed all competing interests, assessed the adequacy of alternative measures and ultimately ordered disclosure without exhausting such measures.
2. Intermediary 143 is not a percipient witness to the crimes charged. He liaised with [REDACTED] witnesses whom the Prosecution called to testify in its case against Thomas Lubanga Dyilo (“Accused”). There are some contradictions in the evidence of some of these witnesses and their testimony has been challenged by Defence witnesses. But there is no evidence that the testimony given is false; that, indeed, is to be determined by the Chamber at the end of the case. Nor is there evidence, or even substantiated allegations, that Intermediary 143 acted improperly or tried to suborn false evidence. The Prosecution has not opposed the disclosure of the names of two other intermediaries under suspicion of affecting the testimony of the witnesses. The requirement of disclosure in the absence of any supported allegations of wrongdoing contrasts sharply with the Trial Chamber’s related order that the Prosecution call two other intermediaries to testify,³ based on its finding that “[t]here is evidence that [Intermediaries 316 and 321] may have misused their position in varying ways”.⁴
3. Despite the fact that Intermediary 143 has been in contact with witnesses whose evidence was contradicted in some respects by others, including defence witnesses, the Trial Chamber held that it was “strictly necessary” for the Defence to know the intermediary’s identity in order to conduct necessary and meaningful investigations.⁵ Notwithstanding the serious consequences of disclosure, the Chamber set a standard that affects the Prosecution’s rights and fails to adequately balance all interests at stake. The Chamber

¹ ICC-01/04-01/06-2434-Conf-Exp, Prosecution and VWU only.

² Decision, para. 139(b) (emphasis added).

³ Decision, paras. 141 and 150(iii).

⁴ Decision, para. 140 (emphasis added). The Prosecution disclosed the identities and additional details of these intermediaries as soon as concrete information supporting the allegations of wrongdoing arose during trial. The Prosecution does not herein seek to appeal the portion of the Decision ordering that the two intermediaries be called as witnesses.

⁵ Decision, para. 143.

also rejected out-of-hand the possibility of a lesser solution, including specifically that it first hear evidence on the process by which the Prosecution retains intermediaries and screens and investigates witnesses referred to it by those intermediaries.⁶

4. The issue relates to the standard and the process which must be applied to determine when the conduct of an intermediary with respect to non-witnesses is “material to the preparation of the defence” and requires disclosure of his or her identity without exhausting alternative remedies. The balance of the Defence’s right to access information and prepare its case against the Court’s protective obligations has been recognised as fulfilling the criteria for leave to appeal in the past, in this case and in others.⁷ The issue arises here as well and satisfies the criteria for leave to appeal under Article 82(1)(d).
5. The Prosecution will argue opportunely that in any criminal case – with or without the participation of intermediaries -- there will be inconsistencies and contradictions among prosecution witnesses, and between prosecution and defence witnesses. These inconsistencies and contradictions are routinely explored and probed, primarily through the cross-examination of the witnesses. The fact finder ultimately must determine from their own credibility assessments which witnesses are more truthful in whole or part.
6. There is nothing peculiar about this case in that regard. Unlike the usual domestic criminal case, however, the initial approaches to these witnesses were facilitated by intermediaries, a necessary intervention because of the inherent difficulties in investigating war crimes in a foreign setting during a time of conflict. The intermediaries are not themselves witnesses, nor do they choose or investigate witnesses for the Prosecution. But because of their minimal, though essential, role in the process, they will be at substantial and foreseeable risk if their identities are made public. These circumstances are not forcing the Prosecutor to provide to the defence the name of intermediaries, persons that facilitate contacts between the Prosecution and witnesses and other sources of information. This is normal practice in any national investigation and is particularly relevant in investigation during ongoing conflicts, where there is need to keep the anonymity of those who facilitate the investigation.
7. The Decision thus has a direct impact on a number of relevant areas: first, it jeopardizes affect the right and ability of the Prosecution to conduct its investigations in a safe and efficient manner; and second, it jeopardizes the security and well-being of a person who has cooperated with the Court as well as the security of others who are or may be similarly

⁶ Decision, para. 143.

⁷ See e.g. ICC-01/04-01/06-1210-Corr-Anx (granting leave to appeal the issue of the interpretation of Rule 77); ICC-01/04-01/07-365; ICC-01/04-01/07-108; ICC-01/04-01/07-116; ICC-01/04-01/06-165-Conf-Exp, (referred to in ICC-01/04-01/06-489); ICC-01/04-01/06-489.

situated. The wrong standard adopted and the manner in which these interests are reconciled necessarily impacts on the fair and expeditious conduct of the proceedings, and therefore warrants leave to appeal.

8. The Prosecution files this application for leave to appeal confidential, *ex parte*, Prosecution and VWU only, as the Decision and matters referenced in this application are currently classified under the same level of confidentiality. The Prosecution will file a redacted version of this application for leave to appeal once a redacted version of the Decision is available.⁸

Statement of Relevant Facts

9. The Prosecution used seven intermediaries⁹ in this case to contact approximately half of its trial witnesses.¹⁰ Intermediary 143 liaised with [REDACTED] Prosecution witnesses.¹¹ He also contacted [REDACTED] other individuals whose evidence has been disclosed under Article 67(2) or Rule 77, and helped others apply for victim status. The Defence is aware of the identities and the roles of three of these intermediaries,¹² but not of the identity of Intermediary 143.
10. On 18 January 2008, the Trial Chamber authorized the redaction of the name of Intermediary 143 because “his name is irrelevant to the known issues in the case”.¹³ In a written decision on 31 January 2008, the Trial Chamber elaborated on its reasoning for permitting this redaction:

At present, there is no known issue that relates to the intermediary, [143], in his role as an intermediary of the Office of the Prosecutor, regulating and facilitating contact between witnesses and that office or as regards the assistance he provided with the application form to participate as a victim.¹⁴
11. On 13 March 2009, the Trial Chamber examined whether the identity of Intermediary 143 should be disclosed since he allegedly helped [REDACTED] fill out his application to participate as a victim in the proceedings. The Defence had alleged that Intermediary 143

⁸ The Prosecution notes, however, that due to the nature of the issue and the proceedings which led up to it, it is possible that some information may need to remain *ex parte*.

⁹ The defence is aware of the identities and the roles of three of these intermediaries (Intermediaries 316, 321 and 31), but not the identity of Intermediary 143, (see Decision, para. 2).

¹⁰ Intermediaries 31, 81, 143, 254, 290, 316 and 321.

¹¹ [REDACTED]

¹² Intermediaries, 316, 321 and 31 (see Decision, para. 2).

¹³ ICC-01/04-01/06-T-72-Conf-Exp-ENG, p.2 lns.8-17.

¹⁴ ICC-01/04-01/06-1146-Conf-Exp, para. 8.

helped the witness “invent a false story or a false identity, or both”.¹⁵ The Trial Chamber concluded:

In all the circumstances, no evidential basis has been put before the court to support the suggestion or a line of questioning that [Intermediary 143] had set out about securing false evidence from children which, self-evidently, could be Article 67(2) exculpatory material. On the material given to the Chamber during counsel’s submissions, this remain an insufficiently founded allegation which the Defence has indicated it wished to explore further having been given this person’s identity. [...] [T]he Bench would need to be provided with a sustainable basis justifying this line of questioning before contemplating issuing an order that the Prosecution is to reveal the identity of someone who may be exposed to risk once their name is revealed. A desire to pursue a speculative line of questioning is insufficient. Instead, the Chamber needs to be shown that the questions have a proper foundation. Therefore, the rights of the accused are not infringed if disclosure is withheld of material that would put [Intermediary 143] at risk of harm if the information is sought solely for the purposes of developing a line of questions that are based on mere supposition.¹⁶

12. On 18 November 2009, following a joint application from defence teams in the Katanga and Ngudjolo trial before Trial Chamber II for disclosure of the identity of Intermediary 143, who acted also as intermediary for several Prosecution witnesses in that case,¹⁷ this Trial Chamber ruled that “[f]or the purpose of the Lubanga trial it is not necessary to disclose [the identity of Intermediary 143] at present”.¹⁸ In particular, the Trial Chamber found that

no basis has been identified for concluding that his identity is relevant to any issue in the case, and, moreover, disclosure will prejudice the prosecution’s further and ongoing investigations.¹⁹

13. Both defence teams in the Katanga and Ngudjolo trial then sought an order from Trial Chamber II for disclosure of the identity of Intermediary 143, in order to investigate whether he influenced witnesses. In an oral ruling of 24 March 2010, Trial Chamber II rejected the request, finding that:

[REDACTED].²⁰

14. On 27 January 2010, during the opening of its case, the Defence indicated its intention to prove that many of the Prosecution witnesses gave false evidence, that some of this false testimony was fabricated with the assistance of intermediaries, and on this basis they would challenge the credibility of all testimony presented by the Prosecution. Based on

¹⁵ ICC-01/04-01/06-T-146-Conf-Exp-ENG, p.3 lns.11-18.

¹⁶ ICC-01/04-01/06-T-146-Conf-Exp-ENG, p.6 ln.19 – p.7 ln.13; see also Decision, para. 16.

¹⁷ ICC-01/04-01/06-2149 and ICC-01/04-01/06-2150.

¹⁸ ICC-01/04-01/06-2190-Conf-Exp, para. 31; see also Decision, para. 40.

¹⁹ ICC-01/04-01/06-2190-Conf-Exp, para. 31.

²⁰ ICC-01/04-01/07-T-122-CONF-ENG ET, p.7 ln.16 – p. 9 ln.13.

this evidence the defence would call the Chamber to determine whether the proceedings should be dismissed for abuse of process.²¹

15. On 10 February 2010, the Chamber requested the Prosecution to provide information on its proposed strategy as regards to the issue of intermediaries, including on whether the identity of intermediaries should continue to be kept confidential in light of allegations and direction of the defence case.²² The Prosecution informed the Trial Chamber that it had already disclosed to the Defence the identities of some intermediaries where it considered that such disclosure was required under Article 67(2) and Rules 76 and 77.²³ However, the Prosecution objected to a blanket disclosure of the identity of intermediaries in general and argued that disclosure should only be ordered “when there are allegations of impropriety in relation to a particular intermediary’s role”.²⁴
16. On 15 March 2010, the Trial Chamber indicated that given the history since 18 November 2009,²⁵ the Defence was entitled to know the names of certain intermediaries, including that of Intermediary 143.²⁶
17. On 19 March 2010, reiterating its concerns about the severe risks to safety of intermediaries should their identities be revealed and noting that disclosure in this case would chill the willingness of intermediaries to assist in future cases, the Prosecution proposed an alternative three-stage procedure for inquiring into the procedures involved with the use of intermediaries here. It did so in light of the fact that the identities of all intermediaries against whom there was any evidence of misconduct were already known to the Defence, and that there was no evidence against any of the other intermediaries (including Intermediary 143) whose identity had not already been disclosed.²⁷ First, the Prosecution proposed that an appropriate member of the Prosecution testify about the Prosecution’s use of intermediaries. Thereafter, those intermediaries whose identity the Defence was seeking to obtain could be called by the Chamber for an *in camera* hearing: while neither party would be present, the parties and participants would be allowed to submit to the Chamber any questions that they wished to put to the intermediary. The

²¹ ICC-01/04-01/06-T-236-CONF-ENG ET, p. 20 ln. 19 – p. 24 ln.5.

²² ICC-01/04-01/06-T-243-Conf-ENG, pp.4-12.

²³ ICC-01/04-01/06-2310-Conf-Corr, para. 29. In particular, the Prosecution has disclosed to the Defence the identities and the interviews relevant to intermediaries 316 and 321. In addition, the Defence is aware of the identity of Intermediary 31 (see Decision, para. 2).

²⁴ ICC-01/04-01/06-2310-Conf-Corr, para. 22.

²⁵ Decision, para. 41.

²⁶ ICC-01/04-01/06-T-261-Conf-ENG, p.34 ln.16 – p.35 ln.13.

²⁷ ICC-01/04-01/06-2362, p.1.

Prosecution further submitted that only as a matter of last resort should the Trial Chamber consider disclosing the identities of intermediaries.²⁸

18. On 12 May 2010, the Trial Chamber issued the Decision, ordering the Prosecution, *inter alia*, to disclose confidentially to the defence the name, and other necessary identifying information of Intermediary 143.²⁹ The Decision sets out in detail the evidence which the Chamber considered relevant to found the Decision,³⁰ which had emerged “since 18 November 2009”.³¹ None of it relates to the role assigned to Intermediary 143 or the functions performed by him:

Prosecution witness 07 [...] and prosecution witness 08 [...] were both called by the prosecution as former child soldiers in February and March 2009; their evidence contains discrepancies and is, at least to an extent, contradicted by [REDACTED] [defence witness 12], who testified in February 2010. [...] The defence has indicated that in re-interviews conducted by the prosecution in January 2010, further discrepancies came to light – for instance, [REDACTED]

[Prosecution witness 10] was also called by the prosecution as an alleged former child soldier. Critically, she maintains that she was recruited as a soldier for the first time when [REDACTED], whereas [defence witness 05] and [defence witness 06] [REDACTED] [...] The defence relies on further discrepancies, and notes that prosecution witness 10 [...] provided information to the prosecution in re-interviews conducted after the conclusion of her testimony that contradicts part of her testimony before the Court. [...]

[REDACTED]

Prosecution witness 11 [...] referred in evidence to [REDACTED] intermediary 31 [...], although he did not make any adverse suggestions about him; [REDACTED]. As with some of the other witnesses mentioned above, the defence submitted that information provided by [prosecution witnesses 07, 08 and 10 during re-interviews conducted by the prosecution after completion of their testimony contradicts their testimony before the Court, for example in relation to prosecution witnesses 11’s [...] school history, the places where he lived and the relatives with whom he lived.

[Prosecution witness 213] gave evidence [...] that he was enlisted by the UPC en route home from school [...] [Defence witness 02], who maintained he was [REDACTED], testified that [REDACTED] did not leave home during the entire period between 1995 and 2003. Defence witness 02 [...] set out that in 2007, [REDACTED].³²

19. In its analysis, the Trial Chamber found that:

there is now a real basis for concern as to the system employed by the prosecution for identifying potential witnesses. On the evidence, there was extensive opportunity for intermediaries, if they wished, to influence the witnesses as regards the statements they provided to the prosecution, and, as just set out, *there is evidence that this may have occurred*. In the circumstances it would be unfair to deny the defence the opportunity to research this possibility with all of the intermediaries used by the prosecution for the relevant witnesses in this trial, *where the evidence justifies that course*.³³

²⁸ ICC-01/04-01/06-2362.

²⁹ Decision, para. 150(i).

³⁰ Decision, paras. 43-47 and 143.

³¹ Decision, para. 41.

³² Decision, paras. 43-47.

³³ Decision, para. 138 (emphasis added).

20. The Trial Chamber further ruled that disclosure of the identities of intermediaries to the defence is to be decided on an individual-by-individual basis,³⁴ and set the following threshold for disclosure:

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 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 [...].³⁵

21. Based on the above, the Trial Chamber noted, regarding Intermediary 143, that "the cumulative effect of the relevant evidence of [REDACTED] witnesses with whom 143 had liaised with] is contradicted by family members or other [witnesses] called by the defence" and therefore "the threshold for disclosure of his identity to the defence is clearly crossed, under Rule 77 of the Rules."³⁶ It went on that:

[T]he defence is entitled to research whether the allegedly untrue testimony that has been given was influenced by untoward behaviour on his part. For these reasons, his identity is now evidence which is '[...] material to the preparation of the defence'".³⁷

22. The Chamber had been previously informed by both the Prosecution and the VWU that any disclosure of his identity would cause substantial risks to the safety of Intermediary 143, and that managing these risks would have a grave impact on his and his family's life and well-being, as well as his professional situation.³⁸ Nevertheless, having determined that the identity of Intermediary 143 falls within the scope of Rule 77, and after examining whether any less intrusive measures were available, the Chamber ordered that the Prosecution disclose the identity of Intermediary 143 to the defence:

The Chamber stresses that it has taken into account the consequences of this Decision for Intermediary 143 [...], [REDACTED], and it has considered whether any lesser solution [...] would suffice. [T]he Chamber is sure that in order to enable the defence to conduct necessary and meaningful investigations and to secure a fair trial for the accused, it is strictly necessary for his identity to be disclosed"³⁹

³⁴ Decision, para. 139(a).

³⁵ Decision, para. 139(b).

³⁶ Decision, para. 143.

³⁷ Decision, para. 143.

³⁸ ICC-01/04-01/06-2422-Conf-Exp-Anx; ICC-01/04-01/06-2362; ICC-01/04-01/06-2423-Conf-Exp.

³⁹ Decision, para. 143.

The issues for which leave to appeal is sought fulfils the criteria in Article 82(1) (d)

23. This application seeks leave to appeal the following issues arising from the Decision:

The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77 (“the Issue”).

24. The Prosecution submits that all requirements under Article 82(1)(d) for granting leave to appeal are met in the present case.

25. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.⁴⁰

(a) The Issue arises from the Decision

26. As set out above, the Trial Chamber established a standard for determining whether the identity of an intermediary is material to the preparation of the defence⁴¹ and developed a procedure for applying that standard to order disclosure.⁴² The standard and procedure which the Decision establishes are neither abstract nor isolated: they lie at the core of the Decision, and thus constitute “an identifiable subject or topic requiring a decision for its resolution”,⁴³ the resolution of which is “essential for the determination of matters arising under the judicial cause under examination”.⁴⁴ The Issue thus arises out of the Decision.

27. The issue presented is not simply a disagreement over the assessment of particular facts. Rather, it relates to a determination of a standard of critical and ongoing importance for this and other cases before the Court, namely under which circumstances Rule 77 mandates that the identity of an intermediary be disclosed to the defence, and in particular without first exhausting alternatives measures.

⁴⁰ ICC-02/04-01/05-20-US-Exp, para. 22.

⁴¹ Decision, para. 139(b).

⁴² Decision, para. 143.

⁴³ ICC-01/04-168 OA3, para. 9.

⁴⁴ ICC-01/04-168 OA3, para. 9.

(b) The Issue affects the fair conduct of the proceedings

28. “Fairness” within the terms of Article 82(1) (d) incorporates fairness towards the accused, the victims and the Prosecution. “Fairness” includes “that the Prosecutor must be able to exercise the powers and fulfill the duties listed in Article 54”.⁴⁵
29. The Chamber justified its decision on the ground that disclosure is necessary to preserve the fair trial rights of the Accused.⁴⁶ Inferentially, it considered that it would be futile to consider alternative measures such as inquiring into the process by which intermediaries are retained or questioning this particular intermediary in camera. Thus, according to the Chamber itself, the Issue indisputably impacts on the fairness of the proceedings.⁴⁷ Additionally, the Issue impacts on the Prosecution’s ability to fulfill its statutory obligations, in particular the obligation under Article 54(1)(a) and (b) to ensure the effective prosecution of crimes within the jurisdiction of the Court. This duty could well be jeopardized if the Prosecution’s ability to obtain the assistance of intermediaries is compromised. The standard adopted by the Chamber results in the disclosure of intermediaries’ identities even when there is no evidence suggesting that they have interfered with witnesses’ testimony.
30. The Trial Chamber acknowledged the risks that intermediaries face generally if their identities are disclosed to the Defence.⁴⁸ [REDACTED].⁴⁹ The Prosecution will no longer be able to rely on his assistance to continue to investigate and prepare for the Defence’s abuse of process motion or the remainder of its case, nor to prepare any Prosecution case in rebuttal. And this impact is not limited to the present case. As the Chamber is aware, Intermediary 143 is assisting the Prosecution in other cases, and that assistance will now necessarily also cease. [REDACTED].
31. This disclosure may also impact on the Prosecution’s ability to rely on other existing intermediaries in the present case and other cases, as they are likely to be less willing to continue to assist the Prosecution fulfil its mandate once they realise that they can be put

⁴⁵ ICC-01/04-135-tEN, paras. 38-39.

⁴⁶ Decision, paras. 137, 143.

⁴⁷ Decision, paras. 137, 143.

⁴⁸ The Trial Chamber acknowledged this fact in its Decision, paras. 6 and 16 (referring to oral ruling of 13 March 2009, ICC-01/04-01/06-T-146-CONF-EXP-ENG ET, page 7, lines 6-7). Trial Chamber I has also stated that “[t]he Chamber had a clear duty to protect those at risk on account of the activities of the Court (Article 68(1))”.

⁴⁹ See assessment of the VWU (ICC-01/04-01/06-Conf-Exp-Anx), which is based on a recommendation of the OTP (see ICC-01/04-01/06-Conf-Exp-Anx, p. 5, item d).

at serious risk and have their lives uprooted even in the absence of any evidence that they acted inappropriately.⁵⁰

32. As a result, the Issue affects the Prosecution's ability to investigate and fulfill its Prosecutorial duty under in Article 54,⁵¹ and to identify and present relevant and probative evidence. Consistent with this Court's interpretation of "fairness" in Article 82(1)(d), the issue identified herein will seriously affect the Prosecution's ability to present its case.⁵²
33. This Court as a whole has an obligation to protect all those at risk on account of the activities of the Court. This obligation lies on the Prosecution in particular during the investigation and prosecution of crimes, under Article 68 (1). The Issue thus also critically impacts on the Prosecution's ability to fulfill obligations with regard to protection.⁵³
34. The Decision also impacts on the fairness owed to the intermediaries themselves. First, disclosure of intermediaries' identities will put them at risk and will require protective measures that will substantially disrupt their lives and the lives of their families, [REDACTED]. [REDACTED]. This major intrusion into their lives is the direct result of the definition and application of the Chamber's low standard, that determines when the disclosure of the intermediaries' identity is material to the preparation of the defence,⁵⁴ and of its subsequent assessment of the competing interests.⁵⁵ In addition, this standard has led to Intermediary 143's integrity being questioned without any evidentiary basis indicative that he has tampered with evidence or otherwise engaged in inappropriate

⁵⁰ This Trial Chamber has recognized that "if [the identities of intermediaries] are disclosed, ongoing investigations may be prejudiced, not least because the prosecution may have difficulty securing qualified personnel to assist in these various ways in the future, and it may experience problems identifying and contacting potential and current witnesses." (ICC-01/04-01/06-1814-conf, para. 34; see also ICC-01/04-01/06-2190-Conf-Exp, para. 31). The impact of the issue on other cases can be a relevant factor for whether the criteria for leave to appeal are met: see e.g. *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4.

⁵¹ The Chamber acknowledged that the disclosure of 143's identity "will prejudice the prosecution's further and ongoing investigations". See ICC-01/04-01/06-2190-Conf-Exp, 18 November 2009, para. 31, quoted in Decision, para. 40.

⁵² ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

⁵³ See ICC-01/04-01/07-776 OA7, para. 80: "the Prosecutor undoubtedly is responsible under the Statute to ensure that appropriate measures are taken to protect the safety of victims and witnesses." See also para. 98: "[...] the Prosecutor has a more general mandate in relation to protection matters under articles 54 (3) (f) and 68 (1) of the Statute. The Appeals Chamber interprets those provisions as ensuring that the Prosecutor takes general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses."

⁵⁴ Decision, para. 139(b). The standard set out by the Chamber merely requires that evidence of witnesses - with whom the intermediaries have been in contact - is contradicted by other witnesses. In those cases the disclosure of the identity of the intermediaries will be material for the preparation of the defence.

⁵⁵ Decision, para. 143.

conduct.⁵⁶ This will also happen to other intermediaries as well if the Chamber's low standard is maintained.

35. The manner in which the Chamber arrived at its conclusion reveals a further aspect of unfairness in the Decision. The standard set by the Chamber rests on an assumption that the Prosecution's system for the recruitment of intermediaries is inadequate and/or lacks sufficient safeguards. According to the Chamber, "*there was extensive opportunity for intermediaries, if they wished, to influence the witnesses as regards the statements they provided to the prosecution.*"⁵⁷ This conclusion, which theoretically is equally true with respect to defence investigators or intermediaries, is inadequate to justify the measure ordered. There is no evidence that wrongdoing in fact occurred⁵⁸. There is also the possibility to first pursuing less dangerous means for inquiring into the selection, role, and conduct of the intermediaries.⁵⁹ The Chamber did not consider the Prosecution's actions towards unveiling any truth on the allegations which have been leveled against particular intermediaries;⁶⁰ nor did it fully explore the Prosecution's proposed alternatives before reaching its Decision.⁶¹
36. The manner in which the Chamber approached the evidentiary foundation for disclosure also affects the fairness of the proceedings: the Trial Chamber effectively assumed a link between Intermediary 143 and other intermediaries in relation to whom there is evidence that they may have influenced witnesses.⁶² It did so in the absence of any evidence that Intermediary 143 attempted to do so.⁶³

⁵⁶ There is no evidence that Intermediary 143 has attempted to influence witnesses' evidence (Decision, paras. 43-47).

⁵⁷ Decision, para. 138 (emphasis added).

⁵⁸ Throughout the Decision there is no reference to evidence from witnesses stating that intermediary 143 had attempted to alter their evidence. The fact that the Chamber finds that there is evidence that other intermediaries may have done so, it does not imply that the remaining intermediaries have pursued the same alleged conducts.

⁵⁹ ICC-01/04-01/06-2362 ("Prosecution's proposal"), paras. 9-10 – referred to in Decision para. 91. The Chamber noted that the Prosecution did not provide information or a statement on the evidence from the proposed Prosecution's representative (para. 136). However, the Prosecution's proposal was a first step that, if accepted by the Chamber, the Prosecution would have provided with more detailed information on the person and his/her evidence. The Decision also disregarded explanations provided for the Prosecution as to the recruitment of intermediaries. As submitted by the Prosecution in its proposal, it continuously monitors and evaluates their productivity, loyalty, accuracy, security, reliability and honesty (see ICC-01/04-01/06-2310-Conf-Corr, para. 15). The Chamber decided that it would eventually call a Prosecution witness to testify on these matters, but only after the identity of Intermediary 143 (at least) has been disclosed (Decision, para. 146).

⁶⁰ In particular, it communicated relevant and identifying information of intermediaries 321 and 316. See ICC-01/04-01/06-2310-Conf-Corr, para. 10 – referred to in Decision, para. 59.

⁶¹ See ICC-01/04-01/06-2363, paras. 10-15. See the Chamber's examination of the Prosecution's proposal in paras. 136-137 of the Decision. According to the Chamber, the rights of the accused to a fair trial outweigh the Chamber's duty to protect *inter alia* the safety, physical and psychological well-being of persons at risk on account of the activities of the Court.

⁶² Decision, para. 138.

⁶³ While the Trial Chamber considered that "there is evidence that this behaviour may have extended beyond those two intermediaries", this was based on the fact that one witness had "testified that there were a number of intermediaries who were in touch with witnesses, and that the intermediaries knew each other and collaborated"

37. Finally, the Chamber did not take into account the failure of the defence to put its case to the Prosecution witnesses.⁶⁴ A key finding in ordering disclosure was that no measure other than disclosure of Intermediary 143's identity would suffice to establish whether the intermediary interfered with the witnesses' testimony. But of course, the key way of establishing the intermediary's wrongful influence on a witness would be to ask the witness. That, however, was not adequately done.

(c) The Issue affects the expeditious conduct of the proceedings

38. Although this Chamber has previously required that a party demonstrate an impact on *both* fairness and expeditiousness, Trial Chamber II recently granted leave to appeal after finding that an issue "may significantly affect" or "clearly has a bearing on" the fairness of the proceedings, and that on that basis alone "the first requirement of Article 82(1)(d) of the Statute is met".⁶⁵ That said, this Issue also separately affects the expeditious conduct of the proceedings.⁶⁶

39. The question of whether and under what circumstances the Prosecution must disclose the identity of an intermediary affects the ways in which both the Prosecution and the Defence go about conducting investigations and selecting witnesses for trial. These factors have previously been recognized as impacting on the expeditious conduct of the proceedings.⁶⁷

40. Specifically, the Prosecution's ongoing investigations, including those pursuant its duties under Article 54(1) (a) as well as for the upcoming defence motion on abuse of process, will be hampered by the prospective loss of Intermediary 143. [REDACTED], he will not be able to perform additional tasks in continuing assistance of the Prosecution during the

(Decision, para. 140). The Prosecution emphasises that none of this provides any evidence of wrongdoing by Intermediary 143.

⁶⁴ See ICC-01/04-01/06-1140, para. 32, where this Trial Chamber stated: "The concept of 'other relevant matters' under Rule 140(2) (b) of the Rules, includes, *inter alia*, trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence) [...]. The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily" (underline added).

⁶⁵ ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18.

⁶⁶ The expeditious conduct means timely and efficient conduct of proceedings (on the connection of expeditiousness and the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, paras. 6, 25). A decision which compromises the efficient conduct of the proceedings, or which delays the investigation and prompt determination of responsibility for the crimes under investigation, affects the expeditious conduct of the proceedings. The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *ibid*, para. 8; and Terrier, "Powers of the Trial Chamber" in Cassese, Gaeta and Jones (ed) *Commentary on the Rome Statute of the International Criminal Court* (2002) 1259 at 1264-65.

⁶⁷ See e.g. ICC-01/04-01/07-365, p. 7; ICC-01/04-01/07-108, p. 6; ICC-01/04-01/07-116, p. 6; ICC-01/04-01/06-165-Conf-Exp, (referred to in ICC-01/04-01/06-489); ICC-01/04-01/06-489, p. 12.

cross-examination and possible rebuttal case. The Prosecution will need time to find a suitable replacement and to conduct a proper evaluation before the person becomes active. It will take additional time for this new intermediary to familiarise himself or herself with 143's previous tasks and personal contacts - if this is possible at all. This may cause a delay in the time needed for the Prosecution to prepare and conduct its cross-examinations, prepare its response to the upcoming abuse of process motion and locate and provide rebuttal evidence related to witnesses who liaised with that intermediary.

41. These concerns are multiplied by the prospect of disclosure of the identity of further intermediaries under the principles set out in the Decision. The expeditious conduct of this case will also be affected by the impact that the Decision will have on the willingness of those intermediaries whose identities have not been disclosed to continue assisting the Court.
42. Finally, the Issue further impacts on the expeditiousness of the proceedings due to the risk assessment and protective measures that will need to be put into place (with Intermediary 143 in the instant Decision and potentially, other intermediaries): a time intensive process which has been recognized to impact on the expeditious conduct of proceedings.⁶⁸ Issues relating to the protection of those at risk on account of their cooperation with the Court (which includes intermediaries),⁶⁹ have been recognised as affecting, amongst other things, the expeditious conduct of the proceedings.⁷⁰

(d) The Issue affects the outcome of the trial

43. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.⁷¹ Nevertheless, the Prosecution stresses that the Issue does also affect the outcome of the trial. According to the Appeals Chamber, under this limb the Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence."⁷²

⁶⁸ "The issue raised by the Defence would also significantly affect the expeditious conduct of the proceedings in two ways in that (i) [...] (ii) if the names are disclosed, additional actions by the Prosecution and Victims and Witnesses Unit to ensure their safety may be required" - ICC-01/04-01/07-365, 4 April 2008, p. 7.

⁶⁹ Trial Chamber I has stated that "[t]he Chamber had a clear duty to protect those at risk on account of the activities of the Court (Article 68(1))". See oral ruling of 13 March 2009, ICC-01/04-01/06-T-146-CONF-EXP-ENG ET, page 6, line 19 to page 7, line 13, quoted in Decision, para. 16.

⁷⁰ See e.g. ICC-01/04-01/07-365, p. 7; ICC-01/04-01/07-108, p. 6; ICC-01/04-01/07-116, p. 6; ICC-01/04-01/06-165-Conf-Exp, (referred to in ICC-01/04-01/06-489); ICC-01/04-01/06-489, p. 12.

⁷¹ ICC-01/05-01/08-75, para. 8; ICC-02/04-112, para. 17; ICC-01/04-01/06-1417, paras. 17-18; ICC-01/04-01/06-1473, paras. 21-22.

⁷² ICC-01/04-168 OA3, para.13. See also ICC-01/04-01/06-2404, para. 30.

44. Considering the essential role that intermediaries have during all stages of this and other proceedings before the Court, the Issue, and in particular the disclosure of Intermediary 143's identity will immediately impact on the manner that the Prosecution carries out its statutory obligations where this particular intermediary was involved. In addition and as already noted, the Issue may negatively impact on the further collaboration of other intermediaries and the Prosecution's ability to recruit new intermediaries.⁷³ In both instances the Prosecution's capability to efficiently perform its statutory obligations and bring relevant evidence before the Court will be seriously impaired. Therefore, the Issue has a direct impact on the outcome of the trial as it has a direct impact on determining the truth.

(e) Immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings

45. Immediate resolution of this Issue will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will ensure that "the proceedings follow the right course."⁷⁴

46. The Issue which the Prosecution seeks leave to appeal is systemic. The Decision is not limited to deciding on one particular application; rather, it establishes the principles which will govern the disclosure of the intermediaries used by the Prosecution for the remainder of the case.⁷⁵ This is also not a question where the chances of the issue arising again are purely hypothetical:⁷⁶ the Defence has clearly stated that they are challenging the credibility of all intermediaries;⁷⁷ and while the Chamber has already ordered the disclosure of 143's identity, there are many intermediaries whose identities have not yet been disclosed.⁷⁸

⁷³ It is essential that intermediaries know that the Court is effectively complying with its obligations of protection. If intermediaries know that their professional integrity will be questioned and their identity disclosed to the defence whenever witnesses' evidence is challenged without any evidentiary foundation, they have no reason to trust the Court's protective services and may be dissuaded from cooperating.

⁷⁴ ICC-01/04-168, paras. 14-15, 18.

⁷⁵ Decision, paras. 138-139.

⁷⁶ Contrast ICC-01/04-01/07-1958; ICC-01/04-01/06-2404.

⁷⁷ See ICC-01/04-01/06-2364-Conf, para. 5: where the Defence stated its intention to demonstrate that intermediaries and other collaborators of the Prosecution deliberately contributed to the presentation of false testimony before the Court.

⁷⁸ Decision, para. 145.

47. Further, the Issue impacts on the protection which the Court provides to persons at risk on account of the activities of the Court.⁷⁹ The disclosure of the identity of a person in a position such as Intermediary 143 will have severe consequences for the individual, his family, [REDACTED] – as the Chamber accepted. Once the identity of an intermediary is disclosed, those consequences follow immediately and are irreparable (as are the consequences for the Prosecution’s ability to maintain and recruit intermediaries to cooperate).⁸⁰ This is therefore not a question that can effectively be resolved as part of a final appeal against judgment, but must be resolved immediately.
48. Conversely, steps can be taken to minimize any delay which might be caused by an appeal. The identity of Intermediary 143 will not be disclosed until protective measures are in place in any event; and the preparation of these measures could continue so that they could be implemented immediately if the Decision is upheld. An appeal also need not delay the implementation of the various other measures that the Chamber had ordered.⁸¹
49. The Trial Chamber accepted that intermediaries are at risk, and the risk may increase if their identity is disclosed to the defence.⁸² It is imperative that decisions with such a serious impact and wide-ranging consequences are issued consistently and based on the right standard, founded on correct grounds and properly pondering all competing interests and factors. Prompt resolution by the Appeals Chamber is needed to clarify the applicable standard and process to disclose intermediaries’ identity to the defence, especially in light of the different criteria set out by this Trial Chamber throughout the trial, and by other Chambers.⁸³ The Prosecution recalls that the issue of intermediaries has also been raised in the *Katanga* case,⁸⁴ and the immediate resolution of this issue will therefore advance not only this case but other cases before the Court as well.

⁷⁹ Trial Chamber I also has stated that “[t]he Chamber had a clear duty to protect those at risk on account of the activities of the Court (Article 68(1))”. See oral ruling of 13 March 2009, ICC-01/04-01/06-T-146-CONF-EXP-ENG ET, page 6, line 19 to page 7, line 13, quoted in Decision, para. 16.

⁸⁰ Resolving questions of the proper procedures for ensuring the safety of persons at risk on account of their contact with the Court cannot be left until they are put at risk or even harmed.

⁸¹ Decision, paras. 141, 146.

⁸² See above footnote 48, above.

⁸³ See Trial Chamber’s I oral ruling rendered on 13 March 2009 and Decision ICC-01/04-01/06-2190-Conf-Exp, para. 31, 18 November 2009 quoted in paragraphs 16 and 40 of the Decision and Statement of Facts above (paras. 11 - 12). See also oral ruling of Trial Chamber II: ICC-01/04-01/07-T-122-CONF-ENG ET, p.7 ln.16 – p.9 ln.13, also quoted in Statement of Facts above para. 13..

⁸⁴ See above Statement of Facts para. 13. While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

50. The resolution of this issue is essential to ensure that this critical question of protection is resolved in a coherent manner and in time to have a meaningful impact on the remaining of this and ongoing trials. It is required to “map [...] a course of action along the right lines” and thus to “provide [...] a safety net for the integrity of proceedings.”⁸⁵ Granting leave to appeal will enable the Appeals Chamber to establish an unambiguous standard in line with the applicable statutory provisions.

Urgent Request for a Stay of the Decision

51. The only operative aspect of the Decision which is affected by the Prosecution’s application for leave to appeal is the order for the disclosure of the identity and any identifying information of Intermediary 143.⁸⁶ The immediate implementation of these aspects of the Decision would render the Issue which is the subject of this application for leave to appeal moot. It would cause irreparable harm to Intermediary 143 and his family: [REDACTED].

52. Therefore, without prejudice to the Trial Chamber’s decision on this application for leave to appeal or any future order of the Appeals Chamber if leave to appeal is granted, the Prosecution separately requests that the Chamber stay that part of its order requiring the disclosure of the identity (and any identifying information) of Intermediary 143 to the defence until either: a) the Trial Chamber issues a decision denying the present application for leave to appeal; or b) in case leave to appeal is granted, the Appeals Chamber has ruled on a separate request from the Prosecution for suspensive effect.⁸⁷

53. The Prosecution submits this request on an urgent basis. The Chamber has ordered that the Prosecution proceed with disclosing the identity of Intermediary 143 “once the necessary protective measures have been implemented”.⁸⁸ [REDACTED].⁸⁹ An urgent consideration of this separate motion will ensure that the subject of this application for leave to appeal is not rendered moot.

Relief sought

54. For the reasons set out above, the Prosecution requests that the Trial Chamber

⁸⁵ ICC-01/04-168, paras. 14-15, 18.

⁸⁶ Decision, para. 50 (i) and (ii) with regard to the professional background of Intermediary 143.

⁸⁷ The Trial Chamber could set out the terms of any further extension in the decision on the application for leave to appeal, including any requirement that the Prosecution seek suspensive effect from the Appeals Chamber under Article 83(3).

⁸⁸ Decision, para. 150(i).

⁸⁹ Decision, para. 42.

- (a) grant leave to appeal pursuant to Article 82(1)(d); and
- (b) urgently authorize the Prosecution to withhold disclosure of the identity of Intermediary 143 and any identifying information, pending the Trial Chamber's decision on leave to appeal and, if granted, any decision of the Appeals Chamber on a separate request for suspensive effect of a discrete portion of the Decision relating to the disclosure of the identity of Intermediary 143.



Luis Moreno-Ocampo
Prosecutor

Dated this 8th day of June 2010

At The Hague, The Netherlands