

Public

Annex III

The Prosecution opposes the Defence's application for the disclosure of the identity of Intermediary P-0154 because: (1) the Defence has failed to demonstrate that the evidence of the witnesses concerned had been materially called into question due to their interaction with Intermediary P-0154; (2) the Defence is also able to explore the role and actions of the intermediary without knowing his identity; and (3) security implications warrant the non-disclosure of Intermediary P-0154's identity to the Defence.

1. THE DEFENCE HAS FAILED TO MEET THE THRESHOLD FOR DISCLOSURE OF IDENTITY OF INTERMEDIARY P-0154

A. Threshold set in the Lubanga Case in relation to the disclosure of intermediaries' identities

The Defence Request fails to meet the standard set by Trial Chamber I in its 12 May 2010 Decision in *Lubanga* (ICC-01/04-01/06-2434-Conf-Red-Corr, "12 May 2010 Decision") for the disclosure of the identity of an intermediary.

This decision related to several intermediaries, [REDACTED]. TC I held that to warrant disclosure of Intermediary P-0154's identity, the Defence must identify *prima facie* grounds for suspecting that Intermediary P-0154 has 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 (see 12 May 2010 Decision, para.139 (b)). In reaching its decision, Trial Chamber I noted that it "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" (para.139 (b)).

As argued below, the Defence Request fails to identify *prima facie* grounds for suspecting that Intermediary P-0154 has been in contact with one or more witnesses whose incriminating evidence has been materially called into question. In *Lubanga*, the Chamber had before it "evidence... 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" and, as such found it necessary to order the disclosure of three intermediaries' identities (12 May 2010 Decision, para.139 (b)). This is not the situation in these proceedings.

The Defence's reference to the circumstances surrounding Trial Chamber I's order for the disclosure of Intermediary P-0143's identity in *Lubanga* (Defence Request, para.5) is inapposite in view of the fact that that Chamber itself stated that disclosure of the identity of intermediaries was to be done on a case-by-case basis (see 12 May 2010 Decision, para.139 (a)). Nevertheless, the circumstances surrounding Trial Chamber I's order for the disclosure of Intermediary P-0143's identity in *Lubanga* are markedly different to the Defence's contentions in relation to Intermediary P-0154 in this case.

Trial Chamber I ordered the disclosure of Intermediary P-0143's identity in the *Lubanga* proceedings because of "the cumulative effect of the relevant evidence" in his regard which showed that "he liaised with [REDACTED] witnesses whose evidence (for [REDACTED] of them) is contradicted by family members or others called by the defence; who (for [REDACTED] of them) know each other; and who (in [REDACTED]) is himself an intermediary" (12 May 2010 Decision, para.143, see also paras.43-48). In reaching its decision in relation to Intermediary P-0143, Trial Chamber I noted that it was "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" and that "[w]ithout his identity, this will not be possible." (12 May 2010 Decision, para.143)

On the other hand, Trial Chamber I considered that Intermediary [REDACTED] was among the intermediaries in relation to whom the criteria which that Chamber set out for disclosure of an intermediary's identity or to be called to give evidence had not been met (12 May 2010 Decision, para.145).¹ Trial Chamber VI should reach the same conclusion in the instant case.

B. The Defence has not provided information which casts doubt on the truthfulness of the evidence of the witnesses

The Defence's request for the disclosure of the identity of Intermediary P-0154 relies on the following assertions: (i) that Witness P-0018 appeared to deny that P-0154 exists and denied participating in group-meetings organized by P-0154 with other witnesses (Defence Request, paras.1, 9); (ii) that P-0154 may have sought financial advantages from his cooperation with the Prosecution (Defence Request, para.7); (iii) that P-0154 brought witnesses into contact with one another (Defence Request, para.8) and (iv) that Witnesses P-0018, P-0019 and P-0113 added [REDACTED] subsequent to their first interviews with the Prosecution (Defence Request, para.10).

The above factors, taken alone or together, do not constitute a sufficient basis for disclosure of Intermediary P-0154's identity; the Defence has not demonstrated that the witnesses' evidence has been brought into question:

- (i) P-0018 did not deny that P-0154 facilitated her introduction to the OTP but explained that she "could not establish the difference between all the different people" working with the Court, when asked an imprecise question which could have referred to several individuals over the years. (T-0112, RT, p.21, ll.15-24). Similarly, Witness P-0018 did not deny participating in group meetings but indicated that she did not remember it (T-0112, RT, p.26, l.8; p.30, ll.11-12 and 16, p.31, ll.23-24, p.32, ll.2-3).
- (ii) The *perception* that P-0154 may have sought financial advantages from his cooperation with the Prosecution is not an established fact but was mere speculation [REDACTED] and has not been linked to the integrity of the evidence provided by the witnesses. The Defence has not clearly alleged that if P-0154 sought financial advantages, this included colluding witnesses to lie to the Court, nor did it submit any evidence in support of such a link.
- (iii) The mere fact that witnesses may have been brought in contact with one another does not demonstrate contamination or collusion. It may provide a fair basis to question the witnesses on the nature of their interactions with other witnesses or to ask them if they discussed their victimisation together; but in itself, it does not cast doubt as to the truthfulness of the evidence. As an example, witnesses from the same family are not considered unreliable on the basis that they are related or live together.
- (iv) Similarly, the fact that Witnesses P-0018, P-0019, and P-0113, [REDACTED] during the same attack, disclosed [REDACTED] late is neither indicative of untruthfulness of their account, nor can it be linked to Intermediary P-0154. [REDACTED]. Witness P-0018 further indicated that it was [REDACTED]. Moreover, she confirmed that it was due to the more extensive questioning during her second interview that she felt unable to withhold the fact [REDACTED] to the Prosecution any longer (T-111, RT, p.34, ll.19-30). The first interviews with those witnesses were conducted in [REDACTED], and Intermediary P-0154 was no longer a Prosecution intermediary as of [REDACTED]. The witnesses revealed [REDACTED]. Therefore, the Prosecution is unclear as to what influence Intermediary P-0154 is meant to have applied to these witnesses: the Defence's position appears to be either that P-0154 influenced the witnesses not to reveal [REDACTED] at the time of the first interview, or to influenced them to hold off and then reveal [REDACTED] nearly [REDACTED] years later on

¹ [REDACTED].

the off-chance that the Prosecution would conduct another interview and expand the charges against the Accused. Again, the Defence has not elicited any information which would put in question the truthfulness of these accounts or the role of P-0154 in relation to the [REDACTED] the witnesses. As regards the Defence allegation that there is information in the witnesses' accounts that are "uncanningly coincidental" (T-111-RT, p.53, l.10 – p.54, l.21) similarities in the accounts and *modus operandi* of the perpetrators is not surprising in view of the witnesses being the victims of the same offensive. Moreover, the Chamber is well-placed to assess the prior statements of the witnesses, as well as their eventual testimonies, to determine whether there has been any such evidence contamination. However, the Prosecution submits that on the face of the prior statements there is no such evidence of any collusion or evidence contamination amongst these witnesses.

2. THE DEFENCE IS ABLE TO CROSS-EXAMINE WITNESSES ON THE ROLE AND BEHAVIOUR OF INTERMEDIARY P-0154

The disclosure of the identity of Intermediary P-0154 is not warranted because the Defence can – and has – cross-examined witnesses on the role of the intermediary and on his behaviour without knowing his identity.

The Defence pursued this line of inquiry with Witness P-0018. In addition to the references provided above, the witness was asked where she stayed during the [REDACTED] interview, who else was there and if they discussed the events. Witness P-0018 answered that [REDACTED] that they did not discuss their experiences during the war (T-112, RT, p.18, l.11 to p.20, l.13). She was asked if she heard discussions concerning an entitlement for money and was confronted with a note in which Intermediary P-0154 reported being the subject of false allegations. In response, Witness P-0018 replied that she did not hear of these discussions and that she was never given money in exchange for her collaboration (T-112, p.23, l.5 to p.24, l.7).

The Prosecution further notes that the Defence did not put any suggestion – as part of their case – to Witness P-0018 that she was lying, that her testimony was contaminated by other witnesses' evidence, nor was it put to her that her evidence was influenced by an intermediary.

3. THE IDENTITY OF P-0154 SHOULD NOT BE DISCLOSED AT THIS STAGE

A. Intermediaries are particularly vulnerable and their identity should be protected

Intermediaries fulfil a critical role during investigations by facilitating contact between the Prosecution and witnesses or other sources of information. Disclosure of their identity to the Defence has grave consequences to the security of the intermediaries and their families, as well as other persons in contact with the Prosecution. Intermediaries, who have access to remote locations and know members of the community, are critical to the effective work of the Court.

Disclosure of their identity presents serious security concerns and has consequences beyond one individual: 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 will be impaired. For that reason, disclosure of an intermediary's identity must always be a measure of last resort, and must be confined to those limited

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. It is these particular difficulties faced by intermediaries that justifies the redaction of their identities as standard redactions, pursuant to paragraphs 36 and 37 of the Redactions Protocol.²

B. Intermediary P -0154 [REDACTED]

i. Background

Information regarding Intermediary P-0154 and [REDACTED] is detailed in the attached Annex A to this email. Intermediary P-0154 [REDACTED]. [REDACTED].³ [REDACTED].⁴ [REDACTED]. [REDACTED].⁵ [REDACTED].⁶

Intermediary P-0154 was used as an intermediary by the Prosecution [REDACTED].⁷ [REDACTED].⁸

ii. Intermediary P-0154 [REDACTED]

[REDACTED].⁹

[REDACTED].

[REDACTED].¹⁰

[REDACTED].¹¹

[REDACTED].¹² [REDACTED].

[REDACTED].¹³

[REDACTED].¹⁴ [REDACTED].¹⁵ [REDACTED]. [REDACTED].

[REDACTED]. [REDACTED].¹⁶

² See ICC-01/04-02/06-411-AnxA, paras. 36-37 (Category D.4 Redactions).

³ See Annex A.

⁴ See Annex A.

⁵ See Annex A.

⁶ See Annex A.

⁷ [REDACTED].

⁸ [REDACTED].

⁹ See Annex B.

¹⁰ See [REDACTED]

¹¹ See [REDACTED] attached as Annex C.

¹² See [REDACTED] (Annex D).

¹³ See Annex A.

¹⁴ See Annex A.

¹⁵ [REDACTED].

¹⁶ See Annex A.

[REDACTED]. [REDACTED]¹⁷ [REDACTED].

iii. [REDACTED]

[REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

The Prosecution notes that the Chamber has found reasonable grounds to believe that the Accused, through his interlocutor, “intended to engage in a serious form of witness interference,”¹⁸ [REDACTED]. [REDACTED].

Kind regards,

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¹⁷ See Annex A.

¹⁸ ICC-01/04-02/06-785-Red, para.55.