

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 2 June 2010

**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***

**Confidential**

**Decision on the prosecution request for leave to appeal the "Decision on  
Intermediaries"**

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**REGISTRY**

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**Registrar**

Ms Silvana Arbia

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**Victims and Witnesses Unit**

Ms Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
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**Other  
Trial Chamber II**

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the Prosecution's Application for Leave to Appeal the "Decision on Intermediaries":

## I. Introduction

1. On 19 May 2010,<sup>1</sup> the prosecution sought leave to appeal a single aspect of the Chamber's Decision on Intermediaries ("Decision") issued on 12 May 2010.<sup>2</sup> In essence, it wishes to challenge before the Appeals Chamber the Trial Chamber's approach to intermediary 143.
2. The prosecution has set out extensively its criticism of the approach taken by the Trial Chamber when ordering the prosecution to disclose the identity of intermediary 143 to the defence, and particularly it argues that the test (the "standard") established by the Chamber for disclosure in these circumstances is wrong.<sup>3</sup> Additionally, it is argued that the procedure adopted by the Chamber for disclosure of the identity of intermediary 143 is flawed.<sup>4</sup> At paragraph 23 the prosecution sets out the "issue" as:

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").

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<sup>1</sup> Prosecution's Application for Leave to Appeal the "Decision on Intermediaries", 19 May 2010, ICC-01/04-01/06-2453-Conf-Exp. A confidential redacted version was filed on 25 May 2010: ICC-01/04-01/06-2453-Conf-Red.

<sup>2</sup> Decision on Intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Conf-Exp. A confidential redacted version was issued on 20 May 2010 (ICC-01/04-01/06-2434-Conf-Red). Corrigenda to both versions were issued on 27 May 2010: ICC-01/04-01/06-2434-Conf-Exp-Corr and ICC-01/04-01/06-2434-Conf-Red-Corr. A public redacted version was issued on 31 May 2010: ICC-01/04-01/06-2434-Red2.

<sup>3</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 4.

<sup>4</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 1.

3. In particular, the prosecution complains that 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”.<sup>5</sup> It is argued that the standard set is an inappropriately “low” one.<sup>6</sup>

## II. Relevant provisions

4. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered Article 82(l)(d) of the Statute:

### Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

## III. Submissions and Analysis

### A. General remarks

5. On applications under Article 82(1)(d), the Chamber’s assessment of the merits of the proposed appeal is an irrelevant consideration. Instead, the Chamber must simply focus on whether the Decision as regards intermediary 143 “[...] involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

<sup>5</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 29.

<sup>6</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 34.

6. The Chamber, therefore, has not reviewed the prosecution's submissions on the merits; it has instead focused exclusively on the Article 82(1)(d) test, in accordance with the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.<sup>7</sup>
  
7. Accordingly, it has examined the application for leave to appeal against the following criteria:
  - a) Whether the matter is an "appealable issue";
  
  - b) Whether the issue at hand could significantly affect:
    - i) the fair and expeditious conduct of the proceedings, or
  
    - ii) the outcome of the trial, and
  
  - c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

## **B. The submissions**

### **(i) Is this an appealable issue?**

8. The first consideration is whether this is an appealable issue. The Appeals Chamber has indicated that "an issue" in this context is something the resolution of which is essential for the determination of matters arising in the

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<sup>7</sup> Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraphs 9-14.

judicial cause under examination.<sup>8</sup> It is unnecessary to analyze the submissions of the parties and participants in any detail on this issue, because it is clear that an evaluation of the standard and procedure established by the Trial Chamber is an essential step in determining whether the order for disclosure of intermediary 143's identity is sustainable. Therefore applying the Appeals Chamber approach, this is an appealable issue.

**(ii) Does the issue significantly affect the "fair and expeditious conduct of the proceedings"?**

*The prosecution submissions*

9. As a first issue, the prosecution submits that the Chamber should depart from its previous jurisprudence, to the extent that it should read the words "fair and expeditious" in Article 82(1)(d) of the Statute disjunctively; put otherwise, it is argued that the first part of the test under Article 82(1)(d) is satisfied if the Chamber determines the issue would significantly affect the fair or expeditious conduct of the proceedings.<sup>9</sup> Two decisions of Trial Chamber II are prayed in aid in this regard.<sup>10</sup>
  
10. The prosecution argues that the concept of fairness includes the ability of the Prosecutor to exercise his duties and powers with respect to investigations under Article 54 of the Statute.<sup>11</sup> It is submitted that the Chamber's Decision as regards intermediary 143 could jeopardize or compromise the prosecution's ability to obtain the assistance of intermediaries generally (referring to future investigations, as well as the present case).<sup>12</sup> Focusing expressly on the possible use of intermediary 143 in the present case and in

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<sup>8</sup> Appeals Chamber Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9.

<sup>9</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 38.

<sup>10</sup> Decision on the "Defence Application for Leave to Appeal the Trial Chamber's Décision relative aux modalités de participation des victimes au stade des débats sur le fond", 19 April 2010, ICC-01/04-01/07-2032, paragraph 28; Decision on the "Defence Application for Leave to Appeal the Trial Chamber's Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure", 11 February 2010, ICC-01/04-01/07-1859, paragraph 18.

<sup>11</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 28.

<sup>12</sup> ICC-01/04-01/06-2453-Conf-Red, paragraphs 29, 31, 32.

other cases to come, the prosecution particularly notes he will be unable to assist in the investigations and preparation for “[...] the Defence’s abuse of process motion or the remainder of its case ... [and] any Prosecution case in rebuttal”.<sup>13</sup> It is additionally pointed out that intermediary 143 may have been assisting the Registry.<sup>14</sup>

11. It is argued that because the Court in its widest sense has a duty to protect those at risk on account of its activities, with the prosecution having particular obligations under Article 68(1) of the Statute during the investigation and prosecution of crimes, the “issue” “[...] critically impacts on the Prosecution’s ability to fulfil obligations with regard to protection”.<sup>15</sup>
12. Given the suggested risks for intermediaries, and the disruption to their lives, it is suggested that the “issue” “[...] impacts on the fairness owed to the intermediaries themselves”.<sup>16</sup>
13. The prosecution complains that the integrity of intermediary 143 is to be questioned without any sufficient evidential basis.<sup>17</sup> It is suggested that in the absence of any evidence that intermediary 143 had influenced witnesses, the Chamber should not have ordered disclosure of his name without first adopting the prosecution’s proposal to adopt other means by which the Chamber could investigate his selection, role and conduct.<sup>18</sup>
14. As to expeditiousness, the prosecution submits that decisions ordering disclosure of intermediaries affect the ways in which investigations are conducted and witnesses are selected. It is said that this could impact on the

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<sup>13</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 30.

<sup>14</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 30.

<sup>15</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 33.

<sup>16</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 34.

<sup>17</sup> ICC-01/04-01/06-2453-Conf-Red, paragraphs 34 and 36.

<sup>18</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 35.

expeditious conduct of the proceedings.<sup>19</sup> In this regard, it is argued the “loss” of intermediary 143 will hamper the prosecution’s ability to carry out its investigation duties in this case, not least because a replacement will need to be found.<sup>20</sup> Additionally, it is argued that this will hamper the prosecution’s ability to recruit intermediaries in the future.<sup>21</sup>

15. It is suggested that the Chamber’s Decision adversely affects the expeditiousness of the proceedings because of possible delays attendant on implementing protective measures.<sup>22</sup>

### *The defence submissions*

16. The defence submits that the prosecution has not shown how the disclosure of the identity of intermediary 143 will seriously affect the fairness of the proceedings in terms of the recognised rights of the prosecution.<sup>23</sup>

17. The defence argues that it needs to know the identity of those working as intermediaries, in order to gain information regarding how witnesses for the prosecution were contacted and spoken to.<sup>24</sup> It is suggested that unlike victims and witnesses, those working for the prosecution do not have any right to temporary anonymity vis-à-vis the defence.<sup>25</sup> Anonymity granted to intermediaries should be considered as an exception to the rights which are regarded as necessary to ensure the fairness of the proceedings, and if anonymity is granted it should be subject to strict conditions.<sup>26</sup>

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<sup>19</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 39.

<sup>20</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 40.

<sup>21</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 41.

<sup>22</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 42.

<sup>23</sup> Réponse de la Défense à la “Prosecution’s Application for Leave to Appeal the “Decision on Intermediaries””, déposée le 25 mai 2010, 27 May 2010, ICC-01/04-01/06-2461-Conf.

<sup>24</sup> ICC-01/04-01/06-2461-Conf, paragraph 8.

<sup>25</sup> ICC-01/04-01/06-2461-Conf, paragraph 7.

<sup>26</sup> ICC-01/04-01/06-2461-Conf, paragraph 9.



18. The defence further submits that, although revealing the identity of an intermediary may cause the prosecution to alter its approach and procedures, it is unsustainable to argue that this would prevent the prosecution from conducting effective investigations.<sup>27</sup> The suggestion that other intermediaries will refuse to cooperate if the anonymity of intermediary 143 is lifted is without established foundation.<sup>28</sup> Similarly, the defence argues that the personal position of individual intermediaries is irrelevant to the fairness of the proceedings.<sup>29</sup> In any event, if there are proper concerns, the defence submits that the Chamber can consider protective measures.<sup>30</sup>

19. Turning to whether lifting the anonymity of intermediary 143 would affect the expeditiousness of the proceedings, the defence submits that the prosecution's argument – that it will need to find a replacement to complete its investigations – is inadequate.<sup>31</sup> Particularly, the prosecution has not specified the outstanding investigations, and since the prosecution case has concluded, there is a reduced need for intermediaries to contact potential witnesses. Further, the defence rehearses that protective measures were considered by the Chamber on 15 March 2010, and their implementation is not likely to delay the proceedings.<sup>32</sup>

**(iii) Does the issue significantly affect the outcome of the trial?**

***The prosecution submissions***

20. The prosecution argues that because the Decision negates the usefulness of intermediary 143, and because it will have consequences on the recruitment of other intermediaries, this will impair the prosecution's ability to call relevant

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<sup>27</sup> ICC-01/04-01/06-2461-Conf, paragraph 10.

<sup>28</sup> ICC-01/04-01/06-2461-Conf, paragraph 10.

<sup>29</sup> ICC-01/04-01/06-2461-Conf, paragraph 11.

<sup>30</sup> ICC-01/04-01/06-2461-Conf, paragraph 11.

<sup>31</sup> ICC-01/04-01/06-2461-Conf, paragraphs 12 and 13.

<sup>32</sup> ICC-01/04-01/06-2461-Conf, paragraph 14.

evidence, and as a result it will have a direct impact on the outcome of the trial.<sup>33</sup>

*The defence submissions*

21. The defence submits that the prosecution has merely repeated its earlier arguments, and that the assertion that this issue will affect the outcome of the trial is unfounded.<sup>34</sup>

**(iv) Will the immediate resolution of the issue materially advance the proceedings?**

*The prosecution submissions*

22. It is said that because the standard identified by the Chamber will be applied to other intermediaries whose identities may become the subject of disclosure orders, resolving this proposed appeal will materially advance the proceedings.<sup>35</sup>
23. The prosecution argues that because the consequences for intermediary 143 will be irrevocable, it is necessary to resolve this issue immediately, and that it is important to establish generally the standard and process for disclosure of intermediaries' identities.<sup>36</sup>

*The defence submissions*

24. The defence submits that the prosecution has not demonstrated that revealing the identity of intermediary 143 would cause irreparable harm and damage.<sup>37</sup> It is argued that no information has been provided to suggest that revealing the identities of three intermediaries (31, 321 and 316) has caused harm or

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<sup>33</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 44.

<sup>34</sup> ICC-01/04-01/06-2461-Conf, paragraphs 15 and 16.

<sup>35</sup> ICC-01/04-01/06-2453-Conf-Red, paragraph 46.

<sup>36</sup> ICC-01/04-01/06-2453-Conf-Red, paragraphs 47 and 48.

<sup>37</sup> ICC-01/04-01/06-2461-Conf, paragraph 19.

damage, and therefore the identification of a fourth intermediary is not likely to lead to a different result.<sup>38</sup>

25. The defence notes that the Chamber's Decision only provided for limited disclosure, rather than the disclosure of the identities of all intermediaries, as requested by the defence. Since the defence has chosen not to appeal, and in the absence of new evidence, the defence submits that the issue of disclosure regarding the identities of all the other intermediaries is settled. Therefore, the defence submits that the prosecution's argument that it is necessary to establish future criteria regarding the disclosure of the identities of other intermediaries is irrelevant.<sup>39</sup>

### C. Analysis

26. As set out above, the Chamber has already determined that the "issue" identified by the prosecution is an appealable issue, for the purposes of Article 82(1)(d) of the Statute.

27. As to whether the Chamber should read the words "fair and expeditious" in Article 82(1)(d) of the Statute disjunctively, the meaning and effect of this provision are clear on a plain reading of the text. The statutory drafters drew a clear distinction between the words "and" and "or", as follows: "A decision that involves an issue that would significantly affect the fair **and** expeditious conduct of the proceedings **or** the outcome of the trial [...]". If the prosecution is correct in its interpretation of the section, the provision would have read: "A decision that involves an issue that would significantly affect the fair **or** expeditious conduct of the proceedings **or** the outcome of the trial [...]" (emphasis in each instance added). Given the seemingly deliberate use of the

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<sup>38</sup> ICC-01/04-01/06-2461-Conf, paragraph 19.

<sup>39</sup> ICC-01/04-01/06-2461-Conf, paragraph 20.

word "or" in the relevant sentence it is illogical to suggest that when the drafters introduced "and" six words earlier they meant it should be interpreted as meaning "or".

28. The Appeals Chamber in its "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006 set out that an issue "must be one apt to 'significantly affect' i.e. in a material way, either a) 'the fair **and** expeditious conduct of the proceedings' **or** b) 'the outcome of the trial' [emphasis added], which wholly supports the interpretation set out above.<sup>40</sup>

29. Addressing the additional requirement of Article 82(1)(d) of the Statute, namely a finding that "[...] an immediate resolution by the Appeals Chamber may materially advance the proceedings", the Appeals Chamber has indicated that the word 'advance' should not be associated with the 'expeditiousness of the proceedings'. It additionally observed that "[...] the meaning conveyed by 'advance' in the latter part of sub-paragraph (d) is to 'move forward'; by ensuring that the proceedings follow the right course", thereby avoiding a setback to the proceedings.<sup>41</sup> Therefore, the Chamber must be satisfied that the resolution of the issue by the Appeals Chamber will benefit the substantive progress of the case.

30. Turning to the application of the test to the "issue" before the Chamber, the prosecution has raised a number of arguments that clearly fall outside the parameters of the test laid down in Article 82 (1)(d) of the Statute, which is case-specific ("the proceedings" in (d)). First, the prosecution's general investigative obligations under Article 54 of the Statute (or otherwise) outwith the ambit of the present case, whilst no doubt important, are irrelevant to the

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<sup>40</sup> ICC-01/04-168, paragraph 10.

<sup>41</sup> ICC-01/04-168, paragraph 15.

decision on the application. Accordingly, the suggested risk that the Decision will deter intermediaries from assisting in other cases is not a factor properly to be taken into account; similarly, whilst a court will strive not to treat individuals who are affected by the work of the Court unfairly (as demonstrated by the Chamber's insistence that the necessary protective measures are implemented prior to disclosure of intermediary 143's identity) the fairness test in Article 82(1)(d) of the Statute is directed at the fair conduct of the proceedings, rather than ensuring fairness to particular individuals whose work is in some way linked to the proceedings. By way of example, the suggestion that the integrity of intermediary 143 has unfairly been called into question is not a valid consideration for the purposes of the test. Nonetheless, the Chamber recognises that in certain circumstances, the treatment of particular individuals (e.g. the accused, victims or witnesses) may have a significant impact on the overall fairness of the proceedings.

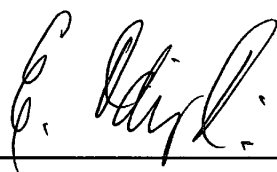
31. Given on the evidence there is no present prospect of further orders for disclosure of the identities of intermediaries, the central issue is whether the loss of intermediary 143 to the prosecution – at this stage in the case – significantly affects the fairness and expeditiousness of the proceedings. Although in a wholly general sense the prosecution suggests that it will be hampered in its relevant investigations for the remainder of the case, no details of this complaint are provided. Given the Chamber is close to the conclusion of the evidence on the abuse of process application the prosecution should now be in a position to furnish the Chamber with details of the difficulties that it apprehends. This has not occurred, and instead a purely general complaint is advanced. In the absence of any supporting particulars, the Chamber is unpersuaded that there will be insurmountable difficulties in identifying, within a reasonable period of time, another individual to carry out any outstanding investigations.

32. In the circumstances, the Chamber is unpersuaded that the Decision involves an issue that affects the fair and expeditious conduct of the proceedings.
33. As regards the outcome of the trial, given, as set out above, on the evidence there is no present prospect of further orders for disclosure of the identities of intermediaries, the argument is without substance that the Decision may affect adversely the result of the proceedings.
34. Given the conclusions set out above, and the cumulative nature of the test under Article 82(1)(d) of the Statute, it is unnecessary to consider whether “[...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”.
35. In all the circumstances, the application for leave to appeal is refused.
36. Finally, we note that the prosecution applied for an order of suspensive effect, pending the outcome of any appeal. In the circumstances this is clearly moot.

Done in both English and French, the English version being authoritative.



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 2 June 2010

At The Hague, The Netherlands