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Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **01 February 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

Public redacted version

Decision on the prosecution's "Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015" and contact by the prosecution with Court witnesses

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Ms Catherine Mabille
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

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Victims and Witnesses Unit
Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court") in the case of The Prosecutor v. Thomas Lubanga Dyilo, delivers the following decision ("Decision") on the Prosecution's "Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015"[1] and contact by the Office of the Prosecutor ("prosecution") with Court witnesses.[2]

I. Background and Submissions

Witness 15

Outline of the Request

1. The prosecution's Request follows the Chamber's direction to the prosecution and defence, dated 17 September 2009, to file written submissions on the manner of questioning of Witness 15 should his testimony resume.[3] Witness 15 was called by the prosecution, but having been called, suggested that he had provided a false name to the prosecution, and that his first witness statement was substantially inaccurate.[4] Thereafter, Witness 15's evidence was adjourned by the Court for a new written statement to be taken.[5]

2. The Chamber ordered the prosecution to take this further statement in order for the witness to clarify his evidence, and thereafter, submissions were advanced on whether Witness 15 should be recalled, and, if so, the manner in which his evidence is to be given.[6]

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[1] Prosecution's Request on the Manner of Questioning of Witness DRC-OTP-WWWW-0015, 25 September 2009, ICC-01/04-01/06-2141.
[2] Prosecution's Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution's preparation for the Defence case, 2 October 2009, ICC-01/04-01/06-2144-Conf (public redacted version: ICC-01/04-01/06-2144-Red), paragraphs 39 – 43.
[3] Transcript of hearing on 17 September 2009, ICC-01/04-01/06-T-210-ENG-ET, page 30, line 1 to page 31, line 1.
[4] Transcript of hearing on 16 June 2009, ICC-01/04-01/06-T-192-ENG-WT, page 10, line 15 to page 11, line 7.
[5] ICC-01/04-01/06-T-192-ENG-WT, page 11, lines 8 – 13.
[6] Transcript of hearing on 3 July 2009, ICC-01/04-01/06-T-203-ENG-WT, page 84, line 14 to page 93, line 13; ICC-01/04-01/06-T-210-ENG-ET, page 30, line 1 to page 31, line 1.

3. The prosecution does not wish to recall this witness. Put shortly, the prosecution is influenced, first, by the suggestion of Witness 15 that he gave false evidence to the prosecution, and, second, by the fact that he has "provided multiple versions", leading to the conclusion that he is unreliable, and that none of the versions "would serve the prosecution's interests".[7]

4. If the witness is recalled, the prosecution seeks to use all the techniques available during "cross-examination". As the Chamber has established, these techniques allow a party "[...] to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness. In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate".[8] The prosecution is likely to wish to challenge some or all of the evidence of this witness.[9]

Detail of the Request

5. Prior to his testimony at trial, Witness 15 signed two witness statements. The first was a 30-page statement taken over a number of days in October and November 2005 and the second was taken over two days in May 2006, consisting of nine pages. The witness reviewed his first statement when making the second, and having corrected his father's occupation, indicated that the first statement was accurate.[10]

6. Thereafter, notwithstanding continued contact with the prosecution, the witness did not intimate that his recollection had changed; indeed the

[7] ICC-01/04-01/06-2141, paragraph 4.
[8] Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, ICC-01/04-01/06-2127, paragraph 23.
[9] ICC-01/04-01/06-2141, paragraph 5.
[10] ICC-01/04-01/06-2141, paragraph 9.

suggestion that his first statement was false in a number of important respects first emerged (as far as the prosecution is concerned) on 16 June 2009 when the witness was called to give oral evidence. It is the witness's current position that another person was involved in the fabrication of the evidence he provided to the prosecution when his first statement was recorded.[11]

7. The prosecution has summarised the main changes in the witness's account: his suggestion that he gave a false identity to the investigators and that his account was a blend of fact and fiction (*e.g.* the witness now claims he never trained at Mandro or witnessed activity there, as previously alleged). In addition, the prosecution underlined his present claims that he had not witnessed Bosco Ntaganda reporting to the accused on a daily basis; he was not involved in the move of the UPC headquarters to Bunia; he had never been a soldier in the UPC; he did not participate in UPC training in Rwanda; he had not provided food to the UPC military; and he had not met with certain individuals connected to the UPC.[12]

8. In essence, the prosecution submits that his evidence now has no value for the Prosecutor.[13]

9. The prosecution contends that there is persuasive national and international jurisprudence supporting the contention that the Prosecutor should be allowed to "cross-examine" witness 15.[14] In particular the prosecution relies on the procedure whereby the Court decides the issue on the basis of whether or not the individual concerned should be treated as having demonstrated "hostility" to the party who called him or her. On this basis, the prosecution

[11] ICC-01/04-01/06-2141, paragraphs 10 – 12.
[12] ICC-01/04-01/06-2141, paragraphs 13 – 16.
[13] ICC-01/04-01/06-2141, paragraph 17.
[14] ICC-01/04-01/06-2141, paragraph 18.

submits that there are clear indicators that Witness 15 is now hostile to the Prosecutor, having departed significantly from his anticipated evidence.[15]

10. The prosecution submits that the Chamber has a wide discretion under the Rome Statute framework to determine the manner in which any future evidence by Witness 15 will be given.[16] In particular under Article 64(2) of the Rome Statute ("Statute"), the Chamber can give such directions as are necessary to ensure the proceedings are fair and expeditious.[17] Moreover, Rule 140 of the Rules of Procedure and Evidence ("Rules") – in the absence of an Article 64 direction – enables the Chamber to issue directions on the order and the manner in which evidence is to be submitted, if the parties have failed to reach agreement. Finally, under Regulation 43 of the Regulations of the Court, the Court shall determine the mode of questioning witnesses, to ensure fairness and to determine the truth effectively.[18]

11. The defence reminds the Chamber that during his evidence, Witness 15 asserted that an "intermediary" had suggested that he supply the investigators from the prosecution with false information in order to manipulate the Prosecutor's investigation, and that currently the defence has not had an opportunity to question the witness about these matters, contrary to the provisions of Article 67(1)(e) of the Statute and Rule 140(2)(d) of the Rules.[19]

12. The defence maintains that it has the right to cross-examine Witness 15, and submits that either the witness is called by the prosecution, who can apply to

[15] ICC-01/04-01/06-2141, paragraphs 19 – 21.
[16] ICC-01/04-01/06-2141, paragraph 6.
[17] ICC-01/04-01/06-2141, paragraph 7; the prosecution also referred to Article 64(6)(f) and (8)(b).
[18] ICC-01/04-01/06-2141, paragraph 7.
[19] Réponse de la Défense à la "Prosecution's Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015", datée du 25 septembre 2009, 2 October 2009, ICC-01/04-01/06-2146-Conf (public redacted version: ICC-01/04-01/06-2146-Red), paragraphs 5 – 6.

treat him as a hostile witness so as to test his credibility,[20] or he is called by the Court under Articles 64(6)(b) and 69(3) of the Statute.[21] It is submitted that it is necessary, in this case, for the witness to be called so that there can be proper investigation as to the reasons for the changes in his evidence, and the defence resists being placed in the position of having to call this individual as a witness for the accused.[22]

Contact by the prosecution with Court witnesses

13. In the "Prosecution's Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution's preparation for the defence case", the prosecution sought leave to contact Witnesses 0003, 0005 and 0020 from the list of potential Court witnesses in furtherance of its preparation for cross-examination and to meet the defence case generally.[23] The Chamber is reminded that these witnesses were originally listed as prosecution witnesses, but they elected not to testify. Their statements were disclosed to the defence, since they contain potentially exculpatory evidence.[24] The Chamber instructed the Registry to discover whether they are willing to give evidence as neutral witnesses of the Court, and they each consented to disclosure of their identities to the accused, and they indicated their willingness to cooperate if required.[25] The prosecution considers that further interviews are necessary to prepare for the defence case.[26]

14. Further, the prosecution seeks to interview Witnesses 0005, 0020 and 0021 in relation to the evidence of [REDACTED]. Witness 0021 remains unwilling to

[20] ICC-01/04-01/06-2146-Conf, paragraphs 7 – 9.
[21] ICC-01/04-01/06-2146-Conf, paragraph 10.
[22] ICC-01/04-01/06-2146-Conf, paragraphs 11 – 12.
[23] ICC-01/04-01/06-2144-Conf, paragraph 39.
[24] ICC-01/04-01/06-2144-Conf, paragraph 41.
[25] ICC-01/04-01/06-2144-Conf, paragraph 41.
[26] ICC-01/04-01/06-2144-Conf, paragraph 42.

appear as a witness, although it is suggested that he has previously been accessible through the Registry.[27]

15. The defence opposes this application, suggesting these proposed meetings are unjustified and potentially prejudicial, particularly since the prosecution has already had the opportunity of meeting several times with these witnesses. Further, it is suggested that the prosecution may unwittingly influence the testimony of these witnesses, or it may dissuade them from giving evidence.[28]

II. Analysis and Conclusions

Witness 15

16. Although the defence and the prosecution both resist any suggestion that they should respectively be required to call Witness 15 to give evidence, the defence urges the court to allow the accused's counsel to question the witness, whilst the prosecution wishes to have the opportunity of "cross examining" him as a "hostile" witness if he is called to give evidence.

17. However, the prosecution's indication that it does not wish to recall Witness 15 to continue his evidence does not alter the underlying position, which is that he was called by, and has testified for, the prosecution. Indeed, when the Chamber last considered the issue on 16 June 2009 the position of the witness was described as follows:

> PRESIDING JUDGE FULFORD: So the position is clear for the public, Witness 15 shortly after he was called to give evidence indicated that he had provided the Office of the Prosecutor with a false name and that the statement that he had provided was in important respects inaccurate. And I'm going to read out the last relevant question

[27] ICC-01/04-01/06-2144-Conf, paragraph 43.
[28] Réponse de la Défense à la "Prosecution's Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution's preparation of the Defence case", datée du 2 octobre 2009, 14 October 2009, ICC-01/04-01/06-2160, paragraphs 26 – 29.

> and answer on what he said the true position was, and I take this from page 6, line 16, of the English transcript. The question from the Bench was:
> "I'm going to interrupt you again. Now, is it, therefore, your account now that your witness statement does not reflect the truth of what happened because you were persuaded to say things that were not true and accurate?"
> To which the witness said:
> "Yes, that is the case."
> The following question was as follows:
> "So your statement, therefore, the one you provided to the Office of the Prosecutor, is substantially inaccurate; is that correct?"
> Answer: "That's the case. It's a false statement."
> We, after hearing short submissions from the Prosecution and the Defence, **then adjourned the witness's evidence** so that a further witness statement can be taken from this witness, setting out what he now says is the truth, and we have reconvened so that the parties can make submissions on the process to be adopted for taking from him a fresh witness statement (emphasis added).[29]

18. It follows that Witness 15 currently remains a prosecution witness whose evidence was adjourned by the Court in order for a further written statement to be taken. In the view of the Chamber, it would be undesirable if the parties and the participants were to be permitted to discontinue the testimony of any of their witnesses during the process of giving evidence, following a change in the account of a witness or for other similar reasons, because this may impede the determination of the truth. Once a party has called a witness, he or she cannot be withdrawn before their testimony is complete, without the leave of the Court. Any other result would create a situation in which the other party, the participants or the Court (the latter under Article 69(3)) may be compelled to recall the witness. This, in turn, could have unfair or undesirable ramifications as regards the manner of the continued questioning of the witness. For instance, in the present situation if the accused felt obliged to recall Witness 15, following the approach to testimony established by the Chamber, it is possible his counsel would only be permitted to ask questions in a neutral manner. Similarly, difficulties may arise in other circumstances if a witness was recalled as a Court witness, at least to the extent that the Chamber has indicated that for participating victims there is a presumption in favour of a neutral approach to questioning, given the power of the Chamber

[29] ICC-01/04-01/06-T-192-ENG-WT, page 10, line 15 to page 11, line 13.

under Article 69(3) "to request the submission of all evidence that it considers necessary for the determination of the truth".[30]

19. The reality of the current position is that the defence has an undoubted and valid interest in exploring the discrepancy between Witness 15's original statement and his present account, along with the suggested role of the intermediary. The extent of his rejection of his earlier evidence and the circumstances of the change may prove to be important to the defence case. In those circumstances, it would be unfair on the accused to refuse to permit the witness to continue his evidence or to force the defence to make him one of the accused's witnesses (since the latter requirement may well unreasonably restrict the kind of questions that counsel for the defence could ask). Additionally, given the wholesale change of account, it would be unfair to the prosecution, and it would potentially impede the Chamber in its pursuit of the truth, if the Prosecutor is at this stage restricted by the limits that are traditionally imposed on "examination-in-chief". As the Chamber has already observed, "[...] the manner of such questioning is neutral and [...] leading questions (*i.e.* questions framed in a manner suggestive of the answers required) are not appropriate".[31] In these particular circumstances, it is undoubtedly appropriate for the prosecution to ask "closed, leading or challenging questions",[32] as necessary. If the Prosecutor is restricted to neutral questions, he would be unable to explore adequately the circumstances of the change of account and the reasons for it.

20. Whilst it is instructive to review the approach taken by other courts and tribunals to the problem presented by witnesses who substantially alter their

[30] See ICC-01/04-01/06-2127, paragraphs 27 and 28, where it is stated that "[u]nder the scheme of the Statute, questioning by the victims' legal representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth. [...] In the judgment of the Trial Chamber, this link (as approved by the Appeals Chamber) between the questioning of witnesses by the victims participating in proceedings and the power of the Chamber to determine the truth tends to support a presumption in favour of a neutral approach to questioning on behalf of victims".
[31] ICC-01/04-01/06-2127, paragraph 23.
[32] ICC-01/04-01/06-2127, paragraph 23.

testimony or who seek to change their written testimony, it is important that the Chamber does not create unnecessary "rules of evidence" which may prove in the long term to be unhelpfully inflexible, or artificial. Nonetheless, under the rule applied in other jurisdictions that a witness must have demonstrated hostility to the party calling him or her before that party can impeach the witness's credit or contradict him or her by other evidence,[33] there can be no doubt that Witness 15 has shown "hostility" towards, or is adverse to, the prosecution. The change in his account is fundamental, since he has seemingly resiled from some of the central elements of his first witness statement.[34]

21. Therefore, notwithstanding the prosecution's desire to abandon Witness 15, he will be recalled to continue giving evidence as a prosecution witness, but the nature of his questioning may change: once Witness 15's evidence resumes, the prosecution may apply the approach set out above, to the extent appropriate. Otherwise, questioning by the defence and the participants will follow its usual course.

Contact by the prosecution with Court witnesses

22. The Chamber has already considered this issue in depth in its "Second Decision on disclosure by the defence and Decision on whether the

[33] *Archbold: Criminal Pleading, Practice and Evidence 2010* (Sweet and Maxwell, 2009), paragraph 8-94a.
[34] The ICTY established in the case *Prosecutor v. Halilović* that a hostile witness is one who "testif[ies] in contradiction with his previous statements.", ICTY, *Prosecutor v. Sefer Halilović, Case No. IT-01-48-T*, Trial Chamber I, Decision on Admission into Evidence of a Prior Statement of a Witness, 5 July 2005, pages 4 – 5. See also the statement by the Trial Chamber in *Prosecutor v. Radoslav Brdanin* that a hostile witness is one who is called by a party under the assumption that the witness will give testimony favourable to that party, but in fact that witness "becomes a hostile witness, [...] say[ing] exactly the opposite, or [...] refus[ing] to answer questions to which [the calling party] knows he or she has got a very straightforward answer." ICTY, *Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-T*, Transcript of hearing on 24 January 2002, page 806, lines 7 – 13.

prosecution may contact defence witnesses",[35] in which the following was set out:

> 49. Although there may be important practical differences that the Chamber must take into account between the positions of the prosecution and the defence in the implementation of this rule (as discussed below), there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes: neither party "owns" the witnesses it intends to call, and there are many reasons why a discussion with some individuals in advance of their testimony may assist in the efficient management of the proceedings, and assist the Chamber in its determination of the truth. For instance, irrelevant lines of questioning may be identified and discarded; lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence; and the opposing party may decide that the witness's evidence is not in dispute and, in consequence, it may be possible to agree his or her statement, along with any relevant documents (thereby obviating the need to bring the witness to court). Important considerations of this kind apply whoever is calling the witness, such as to justify, in principle, discussions in advance of a witness's evidence, so long as the latter consents. Additionally, it is open to the party calling the witness to raise any discrete objections with the Chamber.
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> 50. Although the position "in principle" is, therefore, relatively easy to explain, its application "in practice" will be infinitely various. Whenever a request of this kind is made, and if the witness consents to the meeting, the party calling him or her will have to consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the individual witness's mental or emotional stability; and it will need to assess the resource implications of the proposal. It follows there must be close liaison between the party calling the witness, the party seeking the meeting and the VWU, and, on occasion, it may be necessary to ask the Chamber to rule on specific requests, or aspects of them.
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> 51. In the present circumstances, the prosecution must identify each of the witnesses it seeks to meet; it must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from the prosecution and which the defence is obliged to meet.
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> 52. Particular difficulties that cannot be resolved through sensible discussions, along with any objections to proposed meetings with particular witnesses, are to be raised with the Chamber (save in situations of emergency) by way of written applications.

[35] Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, ICC-01/04-01/06-2192-Conf, paragraphs 49 – 52.

23. There is no reason in principle why this approach should not be applied to individuals who have been identified as potential Court witnesses, as well as those who have refused to participate further with the Court. The overriding consideration is the consent of the individual. However, given the Court, rather than one of the parties or the participants, may be calling the individual, or he or she has refused to cooperate, the VWU will need to "[...] consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the individual witness's mental or emotional stability; and it will need to assess the resource implications of the proposal" (see paragraph 22 above). Furthermore, "[...] the prosecution [...] must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise)" (see paragraph 22 above).

24. Particular sensitivity will need to be applied to 0021 who has declined to cooperate with the Court by testifying, and the safety of all of the relevant individuals must not be materially compromised.

25. Finally, any particular difficulties that cannot be solved through sensible discussions are to be raised with the Chamber (save in situations of emergency) by way of written applications.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 01 February 2010

At The Hague, The Netherlands