Mrs. Fatou Bensouda
Deputy Prosecutor of the International Criminal Court

Update on Trials and the Closing of the First Case

OTP-NGO roundtable

Speech

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Ladies and Gentlemen,

As the Prosecutor mentioned, I will now provide you with an update on trials before the Court, staring with the closing of the first case.

The trial of the Prosecutor against Thomas Lubanga Dyilo started on 26 January 2009. The presentation of evidence phase of the trial concluded on 20 May 2011 with final written briefs submitted in the months that followed. Oral closing arguments were heard on 25 and 26 August 2011. To supplement the submissions of the Prosecution team, Mr Ben Ferencz, the sole surviving Prosecutor from the Nuremberg trials, presented concluding remarks on behalf of the Prosecution. He shared his personal observations on the significance of the first trial at the ICC, having survived the horrors of World War II and acted as a liberator of many concentration camps. In his words, "Seizing and training young people to hate and kill presumed adversaries undermines the legal and moral firmament of human society".

As the very first trial at the ICC, the case is monumental in our quest to stop the abuse of children, particularly children who are used as weapons of war. We are proud to have focused the world's attention on this issue and to have asserted that crimes against children are grave and will not be tolerated or ignored.

We were fortunate to have heard during the trial from a variety of witnesses including military insiders who saw child soldiers being trained and used, international and local observers who monitored the issue of child soldiers, and several former child soldiers themselves. They described the horrors of conscription, training and use in hostilities. The former child soldiers expressed how their time in the military continues to affect them. They couldn't finish their studies, they suffered sexual abuse and rape, they were forced to commit violent crimes themselves. Through their accounts, the long-lasting impact of what they went through was vividly portrayed. They spoke on behalf of the hundreds and thousands of children around the world who have suffered in the same way. In total, the Prosecution called 25 fact witnesses and three expert witnesses during its case and in response to the Defence case, we called 7 additional witnesses, including 3 representatives of the Office and two intermediaries.

Prosecuting the Court's first case involved applying the Statute, the Rules of Procedure and Evidence and the Regulations of the Court and of the Registry for the first time at trial. Although the practice and jurisprudence of other international tribunals is informative and was considered in certain instances, it is not binding on this Court.

Let me highlight some key lessons we have garnered from the prosecution of the ICC's first case:

1. Disclosure issues

Both before and during the trial, the Prosecution has an obligation to disclose relevant evidence to the Defence. There are three main categories of evidence that must be disclosed: (i) evidence that is incriminating and that the Prosecution seeks to rely upon; (ii) evidence that is potentially exonerating or may affect the credibility of Prosecution evidence; and (iii) evidence that is material to the preparation of the Defence, and which includes the inspection of tangible objects or material that was obtained from or belonged to the accused.

Prior to trial, the Court was able to settle the tensions between duties of confidentiality and disclosure of exculpatory information. On 21 October 2008, the Appeals Chamber made a seminal decision : the Trial Chamber as well as any other Chamber of the Court will have to respect confidentiality agreements concluded by the Prosecutor under Article 54 (3)(e). In accordance with the decision, no Chamber of the Court can order the disclosure of Article 54(3)(e) materials to the defence without prior consent of the information provider. This is a guarantee for those who cooperate with the Court.

Certain procedures were put in place to ensure that despite confidentiality agreements, the Defence obtains all relevant information. First, the Chamber reviews the confidential documents to ensure that the information warrants disclosure. If so, the Prosecution then approaches the information provider to determine whether full disclosure is possible or whether some form of disclosure can be made. In the latter scenario, the Chamber will consider such counter-balancing measures as full disclosure but limitations on public dissemination, disclosure by way of redacted documents, summaries, alternative evidence or admissions of fact. In this way, the rights of both the Defence and the concerns of the information providers are respected.

2. Witness preparation and protection

(i) Witness preparation

Departing from the practice at the *ad hoc* tribunals, this Court held that the parties and participants cannot meet with their witnesses in advance of their testimony in order to discuss any of the issues related to their anticipated testimony. The practice, commonly referred to as 'witness proofing' is prohibited. In the reasoning of the Chamber, witness proofing could amount to a rehearsal or coaching of the witness's evidence and is contrary to the spirit of spontaneous evidence which lies at the heart of the Chamber's quest to determine the truth.

The ban on substantive communications with a party's own witness who will give evidence under oath commences once the witness arrives in the Hague in advance of his or her testimony. The parties are, however, permitted to meet the witnesses briefly in advance of testimony for the sole purpose of a polite greeting, and following testimony are permitted to meet the witness to thank him or her for their

attendance. These "courtesy meetings" are held in the premises of the Victims and Witnesses Unit in the presence of a staff member from that unit.

In the rare case that a witness has, on his or her own initiative, comments on anything of substance that triggers an obligation to disclose the content of the conversation, the Prosecution has promptly informed the Chamber, the Defence and participating legal representatives of the relevant information.

The witnesses are given a Courtroom briefing by the victims and witnesses unit in advance of their testimony.

(ii) Witness protection

It remains the highest priority of the Prosecutor to ensure the security of all witnesses called by his office.

The Statute and Rules provide several mechanisms to ensure the protection of witnesses at the trial stage. For all witnesses who had been admitted into the Court's protection program, the Prosecution successfully applied for the witnesses to give testimony with voice and face distortion and the use of a pseudonym to protect their identity from the public and so as not to undermine their participation in the protection program. The identity of all witnesses was known to the Defence who was able to fully test their evidence.

The Trial Chamber has recognized over the course of the trial that particularly vulnerable witnesses such as former child soldiers may require an even more stringent set of in-court protective measures that fully take into account factors such as their age, their level of exposure to formal judicial proceedings, their level of literacy, their need for in-court psychological support and their preferences for giving evidence in either a narrative style or in a question and answer format. The Chamber has exercised great care in monitoring vulnerable witnesses and ensuring that both their security and psychological well-being are respected.

The flexibility of the Court in adapting to the needs of the witnesses in these ways ensures that the important evidence of vulnerable crime-base witnesses is heard in the best possible manner for the witnesses and greatly improves the quality of the evidence.

Several Prosecution and Defence witnesses gave evidence via video link, remotely from the DRC. In some cases the Chamber permitted this method of giving evidence for practical logistical reasons and in at least one case due to the vulnerability of the particular witness who had never travelled outside of her village in the DRC, and whom it was held may find the travel, the weather and the cultural difference too overwhelming given her age and experience. The delivery of remote testimony was technically smooth and proved to be a useful and efficient alternative to in-court testimony.

3. Use of Intermediaries

The Prosecution relies on intermediaries to facilitate its operations in the field. Intermediaries fulfil a critical role during investigations as they facilitate contact between the Prosecution and a witness or any other source of information. They carry out certain tasks in the field that staff members of the Prosecution cannot carry out without creating suspicion. They have access to remote locations. They know the members of the community and have information, to which Prosecution investigators cannot possibly have access, to assist in identifying potential witnesses.

The intermediaries are not involved in the subject-matter of the investigations and screenings and interviews of potential witnesses are carried out by OTP staff.

As I mentioned earlier, two of our intermediaries testified by request of the Chamber and the identity of a third was disclosed to the Defence without necessitating his appearance. The Prosecution opposed these measures, particularly the disclosure of the identity of an intermediary to the Accused, given the nature of their work which requires them to operate without revealing their association with the Prosecution so as not to put themselves or any witnesses at risk of harm.

Ultimately, however, the Chamber determined that given certain allegations made during the course of Defence evidence it was necessary that the particular intermediary's identity be disclosed in order to enable the Defence to conduct necessary and meaningful investigations and to secure a fair trial for the Accused. The timing of this disclosure subsequently became an issue, with the Chamber ordering disclosure to the Accused, his resource person in the DRC and his defence team, before protective measures had been put in place for the intermediary. The Prosecutor insisted that he could not comply with this order given that the protection of the intermediary was of paramount importance to the Office. The Chamber stayed the proceedings. When the intermediary was adequately protected, disclosure took place and the trial resumed.

Conclusion

The Office awaits final judgement in this case. It was a milestone case, with many legal challenges to overcome along the way. The trial set the marker for future cases and helped give real and practical meaning to the terms of the Statute and the Rules of Procedure and Evidence. Witness protection remained a paramount consideration for the Office throughout the trial and we are proud that, as a result, none of the Prosecution's witnesses were wounded or killed for having cooperated with the Court.

The Office's commitment to the prevention of crimes against children will reverberate strongly as a result of the Lubanga case.

Update on other cases

Trials

In the second case to come to the trial stage, the case of ***the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,*** the trial proceedings began on 24 November 2009. A total of 24 witnesses testified for the Prosecution, which closed its case on 8 December 2010. After two victims testified in February 2011, the Katanga Defence case started on 24 March 2011, during which 17 witnesses were called. On 15 August 2011, the Ngudjolo Defence started its case and called 8 witnesses in addition to the 3 witnesses they had in common with the Katanga Defence. On 27 September 2011, Germain Katanga started giving testimony in court, to be followed by the testimony of Mathieu Ndudjolo.

The trial proceedings in the case of ***the Prosecutor v. Jean-Pierre Bemba Gombo*** started on 22 November 2010. The Prosecution intends to call a total of 40 witnesses (36 witnesses, including crime-based witnesses, insiders and overview witnesses, as well as 4 expert witnesses). As of 30 September 2011, it has called 29 witnesses.

There have been several requests by the Defence for provisional release of the accused in this case, none of which has thus far been successful. On 27 June 2011, Trial Chamber III dismissed the Defence request for provisional release. While the Appeals Chamber partially granted the Defence appeal against this decision on 19 August 2011 and remanded the matter to Trial Chamber III, on 26 September 2011 Trial Chamber III again decided to dismiss the defence request in light of the continued risk of the accused absconding and witness interference.

On 30 August 2011, Trial Chamber III also dismissed the Defence request for provisional release of the accused to the DRC so that he could obtain a voting card and file his candidacy for the upcoming presidential and parliamentary elections. The Defence appeal against this decision is currently pending before the Appeals Chamber.

In the case of ***the Prosecutor v. Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus***, on 6 March 2011, Pre-Trial Chamber I confirmed all of the charges against the two accused concerning the 2007 attack against African Union Mission in Sudan (AMIS) stationed at Haskanita Military Group Site (MGS Haskanita) in Darfur. On 16 May 2011, in order to facilitate the fair and expeditious conduct of the proceedings, the Prosecution and the defence jointly filed an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence and submitted that the accused persons will contest only three issues: i) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; ii) if the attack is deemed unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and iii) whether AMIS was a peacekeeping mission in accordance with the UN Charter. The Parties suggested that they will not present evidence or make submissions on other issues

unless the Chamber deems it necessary to have additional evidence and/or submissions. On 28 September 2011, Trial Chamber IV agreed with the Parties' proposal and decided that the trial will proceed on the basis of the three contested issues. The date for the commencement of the trial has not been set.

Confirmation hearings

The confirmation of charges hearing in the case of ***the Prosecutor v. Callixte Mbarushimana***, the third case arising out of the DRC situation, took place before Pre-Trial Chamber I on 16-21 September 2011. The Prosecution presented evidence establishing substantial grounds to be believe that Mr. Mbarushimana, Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), is criminally responsible for five counts of crimes against humanity (murder, torture, rape, inhumane acts and persecution) and six counts of war crimes (attacks against the civilian population, destruction of property, murder, torture, rape and inhuman treatment) allegedly committed in the context of an armed conflict in the Kivu Provinces of the DRC in 2009. Neither the Prosecution nor the Defence called any witness to testify at the hearing. The Prosecution will submit its final written observations on 6 October 2011.

Following *proprio motu* opening of an investigation into the Kenya situation, the Prosecution opened two cases against six suspects concerning alleged crimes against humanity committed in Kenya in the context of the 2007-2008 post-election violence, Case One concerning **William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang** and Case Two concerning **Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali**.

In April 2011, the six suspects made their initial appearance before the judges in response to summonses to appear issued by Pre-Trial Chamber II in March. While the Government of Kenya filed an application challenging the admissibility of the cases before the Court on the grounds that it was conducting domestic investigations into the post-election violence, on 30 May 2011, Pre-Trial Chamber II found that the cases were admissible because there was no sufficient indication that Kenya was investigating the six suspects. On 30 August 2011, the Appeals Chamber dismissed the Government of Kenya's appeal against the Pre-Trial Chamber's decision, confirming that national investigations only render a case inadmissible before the ICC where they cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.

Following the Appeals Chamber judgment, the confirmation of charges hearing in the case of *Ruto et al*. was held from 1 to 8 September 2011 and in the case of *Muthaura et al*., from 21 September to 5 October 2011. In both cases, the Prosecution did not call any witnesses to testify at the hearings due to concerns regarding their security. Except for the Defence for Mr. Kosgey which withdrew the only witness it intended to call, the Defence teams respectively called two witnesses each. This included suspect Uhuru Kenyatta, who testified under oath for his defence. The

Prosecution submitted its final written submissions in the *Ruto et al.* case on 30 September 2011.