

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

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

Date: 25 March 2014

**THE APPEALS CHAMBER**

**Before:** Judge Erkki Kourula, Presiding Judge  
Judge Sang-Hyun Song  
Judge Sanji Mmasenono Monageng  
Judge Anita Ušacka  
Judge Ekaterina Trendafilova

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF**

**THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

**Confidential**

**Prosecution Response to *“Requête de la Défense de M. Lubanga aux fins de communication d’éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduites en vertu de l’Article 70”***

**Source: Office of the Prosecutor**

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

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**REGISTRY**

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## Introduction

1. The Defence's request that the Appeals Chamber order the Prosecution to state what actions it took pursuant to Article 70 in relation to three intermediaries and three victims in the *Lubanga* case,<sup>1</sup> and to disclose all evidence collected by the Prosecution as a result of its Article 70 investigations, should be rejected.<sup>2</sup> The Trial Chamber neither ordered the Prosecution to conduct an Article 70 investigation nor to report on the status of any such examinations or investigations in the event the Prosecution were to take such actions. Nevertheless, the Prosecution will address in this Response the steps it took in relation to examining this issue.
2. In any event, the Defence has not shown how its present request could assist it in relation to Ground of Appeal 1.4 of its appeal. As set out in the Prosecution's response to the Appellant's appeal against the Trial Judgment, the Prosecution did not violate its duties of fairness and impartiality during the trial.<sup>3</sup> Even if the Prosecution had been obliged to conduct further investigations *vis-à-vis* the three intermediaries, and even if these would have led to Article 70 prosecutions against them, this would not help establish that the "proceedings were unfair in a way that affected the reliability of the decision" or that this would amount to an error that "materially impacts the decision" under Article 83(2).
3. Finally, since the Prosecution has not collected any new evidence in the course of examining this issue, there is nothing further to disclose to the Defence.
4. This response is filed confidentially because it responds to the Defence's confidential motion, and because it refers to parts of the trial proceedings

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<sup>1</sup> P-0143, P-0316 and P-0321 and victims a/0270/07, a/0225/06 and a/0229/06.

<sup>2</sup> ICC-01/04-01/06-3066 ("Request"), para.15 and p.10.

<sup>3</sup> ICC-01/04-01/06-2969-Conf, ICC-01/04-01/06-2969-Red A05.

which were given in closed session. A public redacted version can be filed once a public redacted version of the Defence's motion has been filed.

### Submissions

5. The Defence's request that the Appeals Chamber order the Prosecution to state what actions it took under Article 70 *vis-à-vis* the three intermediaries and the three victims should be rejected.
6. First, the Trial Chamber did not order the Prosecution to conduct such investigations. Rather, in its Article 74 Judgment the Trial Chamber concluded that there was a risk that intermediaries P-0143, P-0316 and P-0321 may have persuaded, encouraged or assisted witnesses to give false testimony and thereby committed violations under Article 70.<sup>4</sup> However the Chamber acknowledged that the responsibility to investigate and conduct Article 70 investigations lay with the Prosecution.<sup>5</sup> In other words, as acknowledged by the Chamber itself, the decision on whether to investigate persons for potential violations pursuant to Article 70 lies within the discretion of the Prosecutor. The Prosecution cannot be ordered to conduct such investigations, and nor was it so ordered to do so in this case.
7. Second, in relation to victims a/0270/07, a/0225/06 and a/0229/06, in its Article 74 Judgment the Trial Chamber merely noted the real possibility that victims a/0229/06 and a/0225/06 had assumed false identities, at the instigation of victim a/0270/07, so as to benefit from participating in the trial as victims.<sup>6</sup> However, unlike the Trial Chamber's remarks in relation to the three intermediaries P-0143, P-0316 and P-0321, the Trial Chamber made no

<sup>4</sup> ICC-01/04-01/06-2842 ("Judgment"), para.483. The Trial Chamber ruled that there were "strong" reasons to believe P-0316 persuaded witnesses to lie; that there was a "risk" that P-0143 did so; and that there was a "real possibility" that P-0321 did so. See also para.1361.

<sup>5</sup> Judgment, para. 483.

<sup>6</sup> Judgment, para.502.

observations about potential Article 70 violations committed by a/0270/07, a/0225/06 and a/0229/06. Nor did it direct the Prosecution to examine their conduct to see if they may have committed crimes under Article 70. In an earlier oral ruling in relation to these three victims, the Trial Chamber had ruled that the Defence should provide the Prosecutor with any relevant material so that he could make a decision under Rule 165(1), namely whether or not to initiate and conduct his own investigations.<sup>7</sup> It had stressed that the Prosecutor alone should take any steps that are necessary in the context of Article 70 proceedings.<sup>8</sup> Having received no such information from the Defence, and having assessed the information available to it, the Prosecution did not open Article 70 investigations into these people. Nothing in the Trial Chamber's Article 74 Judgement required the Prosecution to do otherwise.

8. Third, far from taking no steps in relation to this matter as the Defence suggests<sup>9</sup> following issuance of the Trial Chamber's Judgment, in May 2012 the Prosecution engaged an independent consultant to conduct an independent examination into the issue. The independent consultant was retained to examine information in the possession of the Office of the Prosecutor (including judgments and decisions, evidence, transcripts of testimonies, trial exhibits, and internal reports, memos and emails), and to advise the Prosecutor whether any further investigations and/or prosecutions pursuant to Article 70 were warranted against P-0143, P-0316 and P-0321, the three intermediaries identified in the Judgment as having possibly persuaded, encouraged or assisted witnesses to give false evidence and thereby having committed Article 70 violations, and to recommend what further steps, if any, should be taken.

9. In May 2012 the Prosecution engaged Mr. Mark Harmon, a retired Senior Trial Attorney from the ICTY with 38 years' experience as a senior prosecutor and a

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<sup>7</sup> ICC-01/04-01/06-T-350-CONF-ENG CT3, pages 17 and 18, 14 April 2011.

<sup>8</sup> ICC-01/04-01/06-T-350-CONF-ENG CT3, page 16, lines 13 to 22. 14 April 2011.

<sup>9</sup> Request, paras.23, 24.

defence attorney in the USA, to conduct this independent examination. On the basis of his report and conclusions, and its own assessment of the evidence, the Prosecution decided not to pursue further investigations and/or prosecutions against any of the three named intermediaries, P-0143, P-0316 and P-0321, for any alleged violations of Article 70.

10. Mr. Harmon and the Prosecution conducted no additional investigations in the course of examining the viability of further investigations and/or prosecutions pursuant to Article 70 against the three named intermediaries. As stated, the scope of the examination was confined to evidence already collected by the Office of the Prosecutor; evidence tendered as exhibits at trial; transcripts of witness testimony at trial; decisions and Judgments in the case; and internal reports, correspondence and emails.
11. Based on Mr. Harmon's assessments and conclusions, the Prosecution's own assessment of the evidence, and in light of the Trial Chamber's acknowledgement that the responsibility to investigate and/or prosecute for Article 70 violations lies with the Prosecution, neither Mr. Harmon nor the Office of the Prosecutor was obliged to take any further steps, much less commence further investigations and/or prosecutions against P-0143, P-0316 and P-0321 for alleged Article 70 violations.
12. Furthermore, the Defence's submission that the Prosecution was obliged to investigate victims a/0270/07, a/0225/06 and a/0229/06 for possible Article 70 violations<sup>10</sup> lacks merit. In its Article 74 Judgement, the Trial Chamber made no observations directing the Office of the Prosecutor to examine potential Article 70 violations committed by a/0270/07, a/0225/06 and a/0229/06. The Trial Chamber's earlier oral ruling had left it up to the Prosecutor to decide whether or not to initiate and conduct his own Article 70 investigations into these

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<sup>10</sup> Request, paras.15, 19, p.10.

people.<sup>11</sup> Having assessed the information available to it, the Prosecution did not open such Article 70 investigations. Nothing in the Trial Chamber's Article 74 Judgement required the Prosecution to do otherwise. Accordingly, the scope of the examination conducted by the independent consultant engaged by the Prosecution did not include any alleged Article 70 violations which may have been committed by these three persons.

13. Fourth, the Defence's submissions that the Prosecution was obliged to conduct further investigations in order to discharge its duties to act independently and impartially and to carry out its responsibilities pursuant to Article 54(1)(a),<sup>12</sup> must be dismissed. Based on the report and analysis provided by the independent consultant following his review of the relevant information, the Prosecution was only obliged to proceed with further investigations if, acting with reasonable diligence, it opined that such was warranted. Since this was not the case, the Prosecution was obliged to do no more.

14. For similar reasons, the Defence's submission that its present request relates to Appeal Ground 1.4 on the alleged lack of fairness and impartiality by the Prosecution at trial<sup>13</sup> also lacks merit. As elaborated in the Prosecution's response to the Appellant's appeal against the Trial Judgment, the Prosecution did not violate its duties of fairness and impartiality during the trial.<sup>14</sup>

15. Furthermore, and as stated above, based on the advice received from the independent consultant and its own assessment of the matter, the Prosecution was not obliged to further investigate and/or prosecute the three named intermediaries for alleged Article 70 violations. Accordingly no issue of the Prosecution's lack of fairness or impartiality arises. The Defence's attempt to

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<sup>11</sup> ICC-01/04-01/06-T-350-CONF-ENG CT3, page 16, lines 13 to 22, 17 and 18, 14 April 2011.

<sup>12</sup> Request, paras.16-24.

<sup>13</sup> Request, para.24.

<sup>14</sup> ICC-01/04-01/06-2969-Conf A05, ICC-01/04-01/06-2969-Red A05.

raise this matter now in a tardy attempt to buttress their first appeal ground should be rejected.<sup>15</sup>

16. But even assuming *arguendo* that the Prosecution had been bound to conduct further investigations *vis-à-vis* the three named intermediaries, and even assuming *arguendo* that these would have led to prosecutions against the three intermediaries for potential Article 70 violations, the Defence fails to show how this would establish that the “proceedings were unfair in a way that affected the reliability of the decision” or that this would amount to an error that “materially impacts the decision” under Article 83(2) of the Rome Statute. With the exception of two witnesses, P-0038 and P-0010, the Trial Chamber reached its conclusions as to Lubanga’s criminal responsibility for enlisting, conscripting and using child soldiers on evidence *other than* the testimonies of witnesses who had had contact with the three named intermediaries P-0143, P-0316 and P-0321.

17. In relation to P-0038, an adult at the relevant time, the Trial Chamber described his account as “wholly credible”<sup>16</sup> and found that notwithstanding he had been contacted by P-0316, he was a “reliable witness whose evidence is truthful and accurate.”<sup>17</sup> Moreover, it was precisely because of the allegations relating to his contact with P-0316 that the Prosecution re-called him in its rebuttal case, so that he could answer the allegations and be cross-examined by the Defence about these.<sup>18</sup> As for P-0010, who had been contacted by P-0143, the Trial Chamber was not satisfied beyond reasonable doubt that she was under 15 years old at the relevant time (and thus did not rely on her evidence for this critical point in the case), but did find that she may have been in the army since

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<sup>15</sup> The Defence filed its Appeal Brief in December 2012. It was not until July 2013, some seven months later, that it asked the Prosecution to provide it with information regarding its actions pursuant to Article 70. Four months later, in December 2013, it made another request to the Prosecution (see Annexes to the Request), before filing the present Request in February 2014.

<sup>16</sup> Judgment, para. 348.

<sup>17</sup> Judgment, para. 348.

<sup>18</sup> See para. 348 of Judgement citing to T-336-Red2-ENG, page 78.



she was in a UPC video with Lubanga, in uniform and armed. The Chamber noted that the Defence did not dispute that P-0010 was a soldier in the UPC<sup>19</sup> and found that the video evidence and her comments on it “remain essentially unaffected”<sup>20</sup> by its criticisms in relation to her evidence.

18. Accordingly, even if it were to be shown that the Prosecution had breached its duties to act independently and impartially and in accordance with Article 54(1)(a) stemming from its alleged failure to properly investigate and/or prosecute the intermediaries, this could have no effect on the convictions rendered by the Trial Chamber against Lubanga because, apart from witnesses P-0038 and P0010, the Chamber did not rely on evidence given by witnesses who had been contacted by the three intermediaries. In relation to P-0038, the Trial Chamber believed his evidence and found it reliable despite such contact; in relation to P-0010, the evidence which the Trial Chamber relied on (namely, the video evidence and her comments on it) was “unaffected” by the Chamber’s other criticisms of P-0010’s evidence (and which led it not to rely on P-0010’s evidence that she served as a soldier in the UPC when she was under 15 years old). Since the Defence has not shown how its present request could support Ground of Appeal 1.4 of its appeal, it should be rejected.

19. Sixth, contrary to the Defence’s request,<sup>21</sup> the Trial Chamber did not order the Prosecution to report to the Court or to the Defence on the status of any examination and/or investigation it may conduct pursuant to Article 70, and the Prosecution is not obliged to do so. Mr. Harmon’s report must be considered a confidential internal document covered by Rule 81(1), even though it was prepared by an independent consultant so as to avoid any possible conflict of interest that could have arisen had the examination been

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<sup>19</sup> Judgment, para. 267.

<sup>20</sup> Judgment, para. 268. See also para. 257.

<sup>21</sup> Request, para.15.

conducted by staff members of the Office of the Prosecutor.<sup>22</sup> Accordingly it is not subject to disclosure pursuant to Rule 81(1). Notwithstanding the status of this document, the Prosecution could provide this report to the Appeals Chamber on an *ex parte* and confidential basis if the Appeals Chamber wished to see it.

20. Finally, in relation to the Defence's request that the Prosecution disclose all evidence discovered as a result of its Article 70 investigations,<sup>23</sup> the Prosecution reiterates that there is no "new" evidence to disclose to the Defence arising from its examination of whether to conduct further investigations and/or prosecutions under Article 70 against the three named intermediaries. As for the information reviewed by Mr. Harmon during his examination, the Prosecution has already disclosed any information in its possession or control that it was obliged to disclose in accordance with its obligations under the Rome Statute and Rules of Procedure and Evidence. Accordingly, the Defence's request for further disclosure is moot.

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<sup>22</sup> The Prosecution engaged Mr. Harmon in view of para. 483 of the Judgement.

<sup>23</sup> Request, p.10.

### Conclusion

21. The Defence's requests for orders to the Prosecution to state what actions it took pursuant to Article 70 in relation to victims a/0270/07, a/0225/06 and a/0229/06 and intermediaries P-0143, P-0316 and P-0321, and to disclose all evidence collected as a result of its Article 70 investigations should be rejected. The motion should be dismissed.



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Fatou Bensouda, Prosecutor

Dated this 25<sup>th</sup> day of March 2014

At The Hague, The Netherlands