

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC- 01/04-01/06 A5 A6

Date: 17 June 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

Public document

**Decision on the request of the Defence in relation to investigations conducted
pursuant to article 70 of the Statute**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabile
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims V01
Mr Luc Walley
Mr Franck Mulenda

Legal Representatives of Victims V02
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Judgment pursuant to Article 74 of the Statute” of 14 March 2012 (ICC-01/04-01/06-2842),

In the appeal of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 10 July 2012 (ICC-01/04-01/06-2901),

Having before it the “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” dated 28 February 2014 and registered on 3 March 2014 (ICC-01/04-01/06-3066),

Renders the following

DECISION

The “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” (ICC-01/04-01/06-3066) is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 14 March 2012, the Trial Chamber in the case of *Prosecutor v. Thomas Lubanga Dyilo* rendered the “Judgment pursuant to Article 74 of the Statute”¹ (hereinafter: “Conviction Decision”), in which it, *inter alia*, communicated to the Prosecutor, “pursuant to [a]rticle 70 of the Statute and [r]ule 165 of the Rules, its findings that P-0143, P-0316 and P-0321 may have persuaded, encouraged, or assisted witnesses to give false evidence”,² and concluded that “there is a real possibility that

¹ ICC-01/04-01/06-2842.

² Conviction Decision, para. 1361.

victims a/0229/06 and a/0225/06 (at the instigation or with the encouragement of a/0270/07) stole the identities of Thonifwa Uroci Dieudonné (D-0032) and Jean-Paul Bedijo Tchonga (D-0033) in order to obtain the benefits they expected to receive as victims participating in these proceedings”.³

2. On 3 March 2014, Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) filed the “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”⁴ (hereinafter: “Mr Lubanga’s Request”).

3. On 25 March 2014, the Prosecutor filed the “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’”⁵ (hereinafter: “Prosecutor’s Response”).⁶

4. On 3 April 2014, the Appeals Chamber ordered the Prosecutor to provide, in a confidential and *ex parte* filing, the report prepared by Mr Mark Harmon (hereinafter: “Mr Harmon”) for the purpose of advising the Prosecutor whether any further investigations or prosecutions were warranted against intermediaries P-0143, P-0316 and P-0321,⁷ which the Prosecutor filed on 7 April 2014.⁸

II. SUBMISSION OF THE PARTIES

A. Submissions of Mr Lubanga

5. Mr Lubanga requests that the Appeals Chamber:

- a. order the Prosecutor to indicate the actions she has undertaken pursuant to article 70 of the Statute concerning victims a/0270/07, a/0225/06 and a/0229/06 and intermediaries P-0143, P-0316 and P-0321; and

³ Conviction Decision, para. 502.

⁴ ICC-01/04-01/06-3066, with Confidential Annexes 1, 2 and 4, ICC-01/04-01/06-3066-Conf-Anx1, ICC-01/04-01/06-3066-Conf-Anx2, ICC-01/04-01/06-3066-Conf-Anx4, dated 28 February 2014 and registered on 3 March 2014.

⁵ ICC-01/04-01/06-3069.

⁶ Prosecutor’s Response, para. 1.

⁷ “Order relating to the Prosecutor’s response to Mr Lubanga’s article 70 investigation request”, ICC-01/04-01/06-3076.

⁸ “Provision of report on intermediaries”, ICC-01/04-01/06-3077-Conf-Exp.

- b. order the Prosecutor to disclose to Mr Lubanga all the evidence collected in carrying out investigations pursuant to article 70 of the Statute.⁹

6. In support of these requests, Mr Lubanga recalls the Trial Chamber's conclusions in the Conviction Decision with regards to victims a/0229/06, a/0225/06 and a/0270/07, and its decision to communicate its findings on intermediaries P0143, P-0316 and P-0321, i.e. that they "may have persuaded, encouraged, or assisted witnesses to give false evidence", to the Prosecutor.¹⁰

7. Mr Lubanga asserts that, since 2009, the Prosecutor has known that the core of his defence revolves around the fact that these intermediaries took part in the elaboration of false testimonies against Mr Lubanga, in order to obtain his conviction.¹¹ Mr Lubanga highlights that he learned about the identity of the intermediaries and the possibility that they corruptly influenced witnesses only after the Prosecutor had presented her case, which prevented him from carrying out further investigations.¹² Mr Lubanga argues further that the Trial Chamber formally prohibited him from pursuing its investigations against victims a/0229/06, a/0225/06 and a/0270/07 as these investigations fell under the exclusive power of the Prosecutor.¹³

8. Mr Lubanga contends that further investigations of the Prosecutor's intermediaries would have enabled him to cast serious doubt on the reliability of statements made by all the witnesses presented by the Prosecutor in the present case.¹⁴ Mr Lubanga therefore argues that, given that he was prohibited from conducting further investigations on fundamental aspects of his defence case and that the Trial Chamber communicated its findings with regards to intermediaries P-0143, P-0316 and P-0321 to the Prosecutor, the Prosecutor was under a duty to conduct thorough

⁹ Mr Lubanga's Request, p. 10; *see also* para. 15.

¹⁰ Mr Lubanga's Request, paras 8-10, referring to Conviction Decision, paras 483, 502, 1361; *see also* paras 291, 372-374, 450, 499-501.

¹¹ Mr Lubanga's Request, paras 17-18.

¹² Mr Lubanga's Request, para. 21.

¹³ Mr Lubanga's Request, para. 19, referring to Transcript of 23 June 2009, ICC-01/04-01/06-T-350-Red2-FRA, p. 15, lines 15-21, and p. 16, lines 23-25.

¹⁴ Mr Lubanga's Request, para. 20.

investigations pursuant to article 70 of the Statute to establish the truth as to the alleged fraudulent acts committed by the intermediaries.¹⁵

9. Mr Lubanga submits further that the overall fairness of the proceedings depends on the duty of the Prosecutor pursuant to article 54 (1) (a) of the Statute to impartially and independently investigate incriminating and exonerating circumstances equally and to communicate to Mr Lubanga, if necessary, any evidence that is exonerating or relevant to his defence that may have been collected during the course of her investigations.¹⁶

10. Finally, Mr Lubanga submits that a deliberate choice on the part of the Prosecutor to refrain from carrying out thorough investigations as to the activities of the intermediaries would demonstrate an inability to act independently and impartially in the present case.¹⁷ Mr Lubanga argues that this information is particularly relevant to his arguments as to the duty of fairness and impartiality of the Prosecutor presented in his document in support of the appeal.¹⁸

B. Submissions of the Prosecutor

11. The Prosecutor responds that Mr Lubanga's Request should be rejected.¹⁹

12. First, the Prosecutor argues that the Trial Chamber could not and did not order her to initiate or conduct investigations against intermediaries P-0143, P-0316 and P-0321 under article 70 of the Statute as the power to initiate or conduct such investigations lies solely with the Prosecutor.²⁰ However, the Prosecutor adds that, following the Conviction Decision in May 2012, she hired Mr Harmon as an "independent consultant" in order to "examine information in the possession 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 [a]rticle 70 [of the Statute] were warranted against P-0143, P-0316 and P-0321, [...] and to

¹⁵ Mr Lubanga's Request, paras 22-23.

¹⁶ Mr Lubanga's Request, para. 16.

¹⁷ Mr Lubanga's Request, para. 24.

¹⁸ Mr Lubanga's Request, para. 24, referring to "Mr Thomas Lubanga's appellate brief against the 14 March 2012 *Judgment pursuant to Article 74 of the Statute*", 3 December 2012, ICC-01/04-01/06-2948-Conf-tENG, paras 92, *et seq.*

¹⁹ Prosecutor's Response, para. 5.

²⁰ Prosecutor's Response, para. 6.

recommend what further steps, if any, should be taken”.²¹ The Prosecutor underlines that the “scope of the examination was confined to evidence already collected” and that the Prosecutor and Mr Harmon “conducted no additional investigations in the course of examining the viability of further investigations”.²²

13. The Prosecutor submits that on the basis on Mr Harmon’s report, the conclusions therein and her own assessment of the evidence, she 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” and that she is under no obligation “to take any further steps, much less commence further investigations and/or prosecutions against P-0143, P-0316 and P-0321 [...]”.²³

14. Second, with regard to victims a/0229/06, a/0225/06 and a/0270/07, the Prosecutor argues that the Trial Chamber did not direct the Prosecutor to examine whether their conduct may have constituted potential crimes under article 70 of the Statute, but “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”.²⁴ The Prosecutor underlines that the Trial Chamber had previously ruled in its oral decision of 14 April 2011 that Mr Lubanga should provide the Prosecutor with any relevant material in order for her to make a decision under rule 165 (1) of the Rules of Procedure and Evidence whether to initiate investigations pursuant to article 70 of the Statute.²⁵ The Prosecutor contends that, in the absence of any information being provided by Mr Lubanga and after examination of the available information, she decided not to open investigations under article 70 of the Statute in relation to victims a/0229/06, a/0225/06 and a/0270/07 and that nothing in the Conviction Decision obliged her to do otherwise.²⁶

15. Third, the Prosecutor rejects Mr Lubanga’s claims that, in order to comply with her duty to act independently and impartially in the present case, the Prosecutor was

²¹ Prosecutor’s Response, para. 8.

²² Prosecutor’s Response, para. 10.

²³ Prosecutor’s Response, paras 9-11.

²⁴ Prosecutor’s Response, para. 7.

²⁵ Prosecutor’s Response, para. 7, referring to Transcript of 14 April 2011, ICC-01/04-01/06-T-350-CONF-ENG, p. 16, lines 13-22, pp. 17-18.

²⁶ Prosecutor’s Response, paras 7, 12.

obliged to conduct further investigations.²⁷ She submits that she “was only obliged to proceed with further investigations if, acting with reasonable diligence, [she] opined that such was warranted” and argues that Mr Lubanga’s allegations of a lack of fairness and impartiality on the part of the Prosecutor at trial lack merit.²⁸

16. Furthermore, the Prosecutor argues that, assuming that she had been bound to conduct further investigations against the three intermediaries and that this would have led to prosecutions, Mr Lubanga fails to demonstrate 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 [a]rticle 83(2) of the [...] Statute”.²⁹ Specifically, the Prosecutor argues that the Trial Chamber convicted Mr Lubanga on evidence other than that provided by witnesses who had been in contact with intermediaries P-0143, P-0316 and P-0321, with the exception of witnesses P-0038 and P-0010, and thus the lack of further investigations into the aforementioned intermediaries has no effect on the reliability of the Conviction Decision.³⁰ The Prosecutor concludes that Mr Lubanga fails to establish how the present Request could support his ground of appeal as to the duty of fairness and impartiality of the Prosecutor.³¹

17. The Prosecutor further contends that she has no obligation to report to the Court or Mr Lubanga on the status of any examination or investigation she may conduct pursuant to article 70 of the Statute and that Mr Harmon’s report should be regarded as a confidential internal document covered by rule 81 (1) of the Rules of Procedure and Evidence which is not subject to disclosure.³²

18. Finally, the Prosecutor submits that Mr Lubanga’s request that the Prosecutor disclose all the evidence collected in carrying out investigations pursuant to article 70 of the Statute is moot given that “there is no new evidence” to disclose to Mr Lubanga arising from the examination of the evidence already available to the Prosecutor and

²⁷ Prosecutor’s Response, para. 13.

²⁸ Prosecutor’s Response, paras 13-15.

²⁹ Prosecutor’s Response, para. 16.

³⁰ Prosecutor’s Response, paras 16-18.

³¹ Prosecutor’s Response, para. 18.

³² Prosecutor’s Response, para. 19.

that, in relation to that evidence, the Prosecutor has already complied with her disclosure obligations under the Statute and the Rules of Procedure and Evidence.³³

III. MERITS

19. The Appeals Chamber recalls that, pursuant to rule 165 (1) of the Rules of Procedure and Evidence, the Prosecutor “may initiate and conduct investigations with respect to the offences defined in article 70 [of the Statute] on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source”. It follows that the decision whether to initiate or conduct investigations on alleged offenses as provided by article 70 of the Statute lies within the purview of the Prosecutor.

20. The Appeals Chamber observes that the Trial Chamber communicated to the Prosecutor “pursuant to [a]rticle 70 of the Statute and [r]ule 165 of the Rules [of Procedure and Evidence], its findings that P-0143, P-0316 and P-0321 may have persuaded, encouraged, or assisted witnesses to give false evidence”.³⁴

21. The Appeals Chamber notes the submissions in the Prosecutor’s Response that, following the communication by the Trial Chamber of the information on intermediaries P-0143, P-0316 and P-0321, the Prosecutor hired Mr Harmon in May 2012 as an independent consultant in order to examine the information available to the Prosecutor and to advise as to whether further investigations or prosecutions against these individuals were warranted under article 70 of the Statute.³⁵ In her Response, the Prosecutor indicates that on the basis of the report written by Mr Harmon and her own assessment of the available evidence, she decided that no further investigations against intermediaries P-0143, P-0316 and P-0321 under article 70 of the Statute were warranted.³⁶ The Appeals Chamber similarly notes the Prosecutor’s statement that she did not open investigations under article 70 of the Statute in relation to victims a/0229/06, a/0225/06 and a/0270/07.³⁷ Without ruling on whether Mr Lubanga was entitled to receive such information, it follows that the Prosecutor’s Response satisfies the first part of Mr Lubanga’s Request in that the Prosecutor has

³³ Prosecutor’s Response, para. 20.

³⁴ Conviction Decision, para. 1361.

³⁵ Prosecutor’s Response, paras 8-9.

³⁶ Prosecutor’s Response, para. 11.


³⁷ Prosecutor’s Response, para. 12.

clearly indicated to Mr Lubanga what actions the Prosecutor has undertaken pursuant to article 70 of the Statute with regards to victims a/0270/07, a/0225/06 and a/0229/06 and intermediaries P-0143, P-0316 and P-0321.

22. The Appeals Chamber notes furthermore the submissions in the Prosecutor's Response that no additional investigations were carried out in the process leading to the decision of the Prosecutor not to carry out further investigations and that no additional evidence has been collected for that purpose.³⁸ Accordingly, based on the Prosecutor's Response, the Appeals Chamber is satisfied that there is no additional evidence to be disclosed to Mr Lubanga.

23. For the aforementioned reasons, Mr Lubanga's Request is rejected.

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



Judge Erkki Kourula
Presiding Judge

Dated this 17th day of June 2014

At The Hague, The Netherlands

³⁸ Prosecutor's Response, para. 20.