

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 12 May 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 Document - URGENT**

**Decision on the press interview with Ms Le Fraper du Hellen**

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

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of The Prosecutor v. Thomas Lubanga Dyilo ("*Lubanga case*"), issues the following Decision on the press interview with Ms Le Fraper du Hellen.

## **I. Background**

### *The Interview*

1. On 15 March 2010 Ms Le Fraper du Hellen, the Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor ("prosecution"), participated in an interview with Wairagala Wakabi, who works for an organisation called "Lubangatrial.org". The interview was published on the internet, and the 12 quotations set out hereafter are taken from the record of the interview as it appears on the website of "Lubangatrial.org".<sup>1</sup> The prosecution received the version of the interview prepared by "Lubangatrial.org" for publication, and changes were suggested to the proposed text, all of which were apparently incorporated.<sup>2</sup> The Chamber has indicated by the use of [...] the occasions when seemingly continuous speech was punctuated by gaps, such as other statements.
2. The interview focussed, first, on the phenomenon of intermediaries and their use in the current trial and, second, the gravity of the alleged crimes and "why the Prosecution will ask (the) judges to jail Mr Lubanga for a very long time".
3. Having described the prosecution's perception of the role of the intermediaries, Ms Le Fraper du Hellen stated:

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<sup>1</sup> Interview: ICC Prosecutors will Refute Allegations That Intermediaries Manipulated Evidence in Lubanga Case, <http://www.lubangatrial.org/2010/03/15/interview-icc-prosecutors-will-refute-allegations-that-intermediaries-manipulated-evidence-in-lubanga-case/>, 15 March 2010.

<sup>2</sup> Further Submissions of the Prosecution Regarding the OTP Representative's Press Interview, 1 April 2010, ICC-01/04-01/06-2389, paragraph 11 and ICC-01/04-01/06-2389-Conf-Exp-AnxA.

**Quotation 1**

[...] they are very committed persons, very supportive of international justice. We are very careful about who we choose as intermediaries [...]

**Quotation 2**

[...] their situation is difficult in terms of protection and for that we, the OTP, admire them very much. But it should be very clear that they do not investigate on our behalf; we investigate ourselves.

**Quotation 3**

We pay for expenses. If they travel for the OTP, if they lose a month's work for the OTP, they absolutely deserve to be compensated for that. [...] For them trying to assist international justice is an additional burden on the numerous burdens they have.

4. In response to a question which suggested that the prosecution may have relied overly on intermediaries for gathering evidence and obtaining witnesses, and that there should have been more supervision of their activities, Ms Le Fraper du Hellen said of the intermediaries:

**Quotation 4**

They are fantastic and committed people" [...] "I do not think that we should try to affect the reputation of those intermediaries.

5. When addressing the suggestion, emanating from the Bench, that it may be necessary to reveal the identity of intermediaries, the prosecution representative said:

**Quotation 5**

The intermediaries are the ultimate line of defence for the defence because (it) has no other argument, so they are fishing for arguments and so their ultimate argument is "oh maybe the intermediaries are the problem". They haven't proven that, they have made allegations [...] about committed people who really care about international justice and child soldiers".

6. Having praised the child soldiers called by the prosecution (**Quotation 6**: "very courageous, very brave child soldiers"; **Quotation 7**: "and I think our witnesses were very credible witnesses"), she indicated that the prosecution was not intending to call the intermediaries as witnesses at this stage (**quotation 8**) "since we try and prove to the judges that (the intermediaries) did not corrupt anything and that those are all inaccurate allegations."

7. On the issue of timely disclosure, Ms Béatrice Le Fraper du Hellen stated:

**Quotation 9**

Prosecutor Moreno-Ocampo is an experienced prosecutor. He has disclosed all his exonerating evidence to the defence, and in a very timely manner.

**Quotation 10**

We will survive the fact that the defence has not respected its disclosure obligations entirely.

8. Addressing the suggestion of a possible application by the defence mid-way through their evidence that the case should be stayed as an abuse of the process of the court, the prosecution representative stated:

**Quotation 11**

There was absolutely no abuse of process. Prosecutor Moreno-Ocampo is a very accurate and fair prosecutor. [...] So this is just talk [...] I understand the defence entirely [...] it's their last chance but nothing is going to happen. Mr Lubanga is going away for a long time.

9. When answering a question on evidence having been given in closed session, the prosecution representative stated:

**Quotation 12**

But Lubanga knows who they are, and frankly I am amazed at the courage of the children. They actually were in the courtroom with Lubanga and you know, Mr Lubanga, he is making signs to the audience, he is smiling, he is doing a lot of body language – it is very terrifying for the children to testify in front of him. So they have been very courageous but we definitely cannot show their identities to the public.

*The Hearing on 17 March 2010*

10. On 17 March 2010 the Chamber highlighted its principal concerns with this interview, as rehearsed below.<sup>3</sup>
11. For quotations 1 – 5, the Chamber observed that strong support for the intermediaries was a theme of the interview, and thus it was presumably

<sup>3</sup> Transcript of hearing on 17 March 2010, ICC-01/04/-01/06-T-264-CONF-ENG ET, page 1, line 13 to page 6, line 9.

founded on firm and substantial evidence. As a result, the Chamber was concerned by the absence of any prosecution evidence in line with this unequivocal and firm indication. The Chamber reminded the prosecution of its duty to disclose to the defence under Rule 77 of the Rules of Procedure and Evidence ("Rules") all material that is relevant to the preparation of the accused's defence, and, given that the integrity of the intermediaries and their role has become a critical ingredient in the trial, it required the prosecution to serve all of the evidence on which the assertions were based by Friday 19 March 2010 at 16.00.<sup>4</sup>

12. Additionally for quotations 1 – 5 the Chamber asked the prosecution whether it accepted the proposition that the clear statement of the Prosecutor, through his representative, in support of the intermediaries was an element that the Chamber could properly consider when deciding on the extent to which the identities of the intermediaries should be disclosed to the defence.<sup>5</sup> The Chamber put the matter thus:

Judge Fulford: If it is being alleged by the Prosecution that these are very committed people who are very supportive of international justice, surely that is a relevant factor for us to bear in mind in this trial and, more importantly, to have that issue properly tested before us to see whether or not that suggestion is justifiable.<sup>6</sup>

13. Addressing quotations 5 and 11, the Chamber asked the prosecution whether it is now the position of the Prosecutor that it is for him to determine, first, whether facts have been proven in the case and, second, the trial's ultimate outcome: that the accused is to be convicted and thereafter sentenced to a long period of imprisonment (particularly given the unqualified statement that Mr Lubanga is going away for a long time).<sup>7</sup>

<sup>4</sup> ICC-01/04/-01/06-T-264-CONF-ENG ET, page 1, line 13 to page 2, line 20.

<sup>5</sup> ICC-01/04/-01/06-T-264-CONF-ENG ET, page 2, line 21 to page 3, line 2.

<sup>6</sup> ICC-01/04/-01/06-T-264-CONF-ENG ET, page 3, lines 3 – 7.

<sup>7</sup> ICC-01/04/-01/06-T-264-CONF-ENG ET, page 3, line 12 to page 4, line 10.

14. As regards quotation 12, the Bench observed that during the trial it has never been suggested by counsel appearing in court that the accused has conducted himself improperly, particularly as alleged by terrifying the former child soldiers appearing as witnesses. Moreover, the Bench suggested that this remark involved a clear imputation against the judges for failing to protect witnesses from the alleged terrifying behaviour of the accused.<sup>8</sup>

15. The Court reminded the prosecution that on an earlier occasion it had cautioned against inappropriate press reports generated by the parties:

Judge Fulford: Generally speaking, and finally, Ms Samson, you might like to remind Ms Beatrice Le Fraper Du Hellen that a very considerable time ago, when we were considering the whole issue of witness summaries and what was to be published in the press, I gave a very firm indication that the Judges did not expect to see satellite litigation in the press with the issues which we are considering being the subject of some kind of debate, with commentators on one or both sides seeking to litigate the issues in this trial in a different forum. It was expressed by us then that this is an inappropriate activity, particularly for the Prosecutor to undertake, and you may like to remind this individual of our views on that subject.<sup>9</sup>

## II. Submissions

### *The prosecution's first response*

16. The prosecution sought, and the Chamber granted, time for a written response to the Chamber's concerns.<sup>10</sup>

17. On 19 March 2010, the "Prosecution's Submissions in Response to Trial Chamber's Oral Request of 17 March 2010" was filed.<sup>11</sup> The prosecution suggested that it is unclear as to whether information relating to the integrity of its intermediaries is disclosable material under Rule 77 of the Rules,<sup>12</sup> and

<sup>8</sup> ICC-01/04-01/06-T-264-CONF-ENG ET, pages 4, line 15 to page 5, line 7.

<sup>9</sup> ICC-01/04-01/06-T-264-CONF-ENG ET, page 5, lines 11 – 21, see, e. g., ICC-01/04-01/06-T-126-CONF-ENG CT, page 46, line 22 to page 48, line 11.

<sup>10</sup> ICC-01/04-01/06-T-264-CONF-ENG ET, page 5, line 22 to page 6, line 9.

<sup>11</sup> Prosecution's Submissions in Response to Trial Chamber's Oral Request of 17 March 2010, 19 March 2010, ICC-01/04-01/06-2363.

<sup>12</sup> ICC-01/04-01/06-2363, paragraph 4.

otherwise the prosecution interprets the issue concerning intermediaries as a narrow one:

[...] the claim is that the alleged instances of misconduct in the field tainted the OTP investigation because the OTP ignored misconduct or failed to take adequate steps to control or oversee the process.<sup>13</sup>

18. On that interpretation of the issue, the prosecution contends that it has disclosed all the relevant evidence that touches on misconduct by the intermediaries used by the prosecution “whose actions have specifically been questioned and about which the OTP might have knowledge [...]”.<sup>14</sup>

19. The prosecution suggests that Ms Le Fraper du Hellen, during the interview, did not raise any issue as to the kind of people who act as intermediaries as something that the Chamber should take into account on the issue of disclosure. Indeed, it is argued that the prosecution representative’s remarks do not lend themselves to this interpretation. The prosecution submits that this material is irrelevant and that disclosure will lead to dangers for the intermediaries and their families, as well as the organisations for which they work, which will be costly to manage and will inhibit their work and that of the relevant organisations.<sup>15</sup>

20. The prosecution denies that Ms Le Fraper du Hellen’s remarks were intended to prejudge the outcome of the trial or any sentence of the Court, and it is argued that her observations did not tend to diminish the role of the Court.<sup>16</sup> The prosecution suggests that a party may “assert in a public statement that it believes in the position it asserts in court”.<sup>17</sup> It is asserted that the Rome

<sup>13</sup> ICC-01/04-01/06-2363, paragraph 5.

<sup>14</sup> ICC-01/04-01/06-2363, paragraph 6.

<sup>15</sup> ICC-01/04-01/06-2363, paragraphs 7 – 8.

<sup>16</sup> ICC-01/04-01/06-2363, paragraph 10.

<sup>17</sup> ICC-01/04-01/06-2363, paragraph 11.



Statute framework does not prevent either party from making the kind of comments in issue.<sup>18</sup>

21. The prosecution denies that its representative “overstepped the line” by misconstruing the evidence that has been presented or asserting that facts have been proven which have not been introduced at trial. It is argued that the Bench, unlike a jury, is unlikely to be influenced by remarks of the kind that were made.<sup>19</sup>

22. It is averred that Ms Le Fraper du Hellen did not suggest that the accused had deliberately taken steps to terrify the witnesses, but instead she merely observed that they had been courageous notwithstanding having to testify in his presence.<sup>20</sup> Additionally, it was set out:

Nor would Ms Le Fraper du Hellen suggest that the Accused’s physical appearance, gestures, or expressions were designed to or in fact did intimidate the witnesses. Such would not be possible. Through deliberate design, during in-court testimony the children were shielded from the Accused and he was outside their line of sight. In addition, the witnesses entered and exited the Courtroom in the absence of the accused.<sup>21</sup>

23. The prosecution accepted in its written submissions that the accused had not behaved in a way that called for judicial censure; indeed, the prosecution averred that the accused had merely been exercising his rights.<sup>22</sup>

*The submissions of the defence*

24. On 23 March 2010, the defence advanced criticisms of this interview.<sup>23</sup> It argued that the dignity of the accused had been unfairly called into account and that the facts of the case had been misrepresented, as part of a deliberate

<sup>18</sup> ICC-01/04-01/06-2363, paragraph 12.

<sup>19</sup> ICC-01/04-01/06-2363, paragraph 13.

<sup>20</sup> ICC-01/04-01/06-2363, paragraph 15.

<sup>21</sup> ICC-01/04-01/06-2363, paragraph 16.

<sup>22</sup> ICC-01/04-01/06-2363, paragraph 17.

<sup>23</sup> Transcript of hearing on 23 March 2010, ICC-01/04-01/06-T-268-ENG ET, page 43, line 10 to page 45, line 14.

policy on the part of the prosecution, amounting to interference with justice. The prosecution was accused of resorting to propaganda.<sup>24</sup>

*The prosecution's second response*

25. Notwithstanding the Chamber's indication on 23 March 2010 in open court that it intended to deal with the issue in the near future, the prosecution filed an unsolicited additional filing on the issue on 1 April 2010 entitled "Further submissions of the Prosecution Regarding the OTP Representative's Press Interview".<sup>25</sup> *Inter alia*, a transcript of this "confidential interview" is attached to the filing, that it is suggested should not be used without prior approval, certainly as far as the unpublished parts of the interview are concerned.<sup>26</sup> Having rehearsed the contention that it had not acted inappropriately, the prosecution set out that the interview had occurred because the Prosecutor "considered that it was important to clarify its policy on intermediaries".<sup>27</sup>

26. There was then set out the following series of assertions:

- a. Intermediaries are needed in many instances to protect the confidentiality of the investigations and the witnesses;
- b. The use of intermediaries cannot in any way be properly regarded as affecting the integrity of the prosecution;
- c. The prosecution's reputation is key to its ability to perform its function, to call witnesses and receive cooperation;<sup>28</sup>
- d. The media and various organisations have a right to information regarding the prosecution's performance of its responsibilities;
- e. It serves the public interest for the prosecution to clarify its methods of investigation, including how it overcomes the difficulties presented by

<sup>24</sup> ICC-01/04-01/06-T-268-ENG ET, page 45, line 8.

<sup>25</sup> ICC-01/04-01/06-2389.

<sup>26</sup> ICC-01/04-01/06-2389, paragraph 1.

<sup>27</sup> ICC-01/04-01/06-2389, paragraph 4.

<sup>28</sup> ICC-01/04-01/06-2389, paragraph 4.

an insecure environment and to confirm that its policy is to prosecute only those that it genuinely believes are guilty, without commenting on issues such as the credibility of witnesses or the evidence, the correctness of judicial decisions or other matters under consideration by the Chamber;<sup>29</sup>

- f. The defence “continues to include in the trial itself issues that are not the object of the trial and to distract the judicial process from the matters that the trial is designed to resolve, namely the criminal charges against Thomas Lubanga.”<sup>30</sup>

27. The prosecution thereafter canvassed the possibility of a further “Chambers conference” to “discuss” the issue, with all the parties present.<sup>31</sup> It is suggested that this will mitigate the loss of trial hearings.

28. Following the assertions set out above, the prosecution then made a series of submissions:

- a. The prosecution has not done anything that could properly be construed as disrespectful to the Chamber or the judicial process, nor did the prosecution representative prejudice the case or otherwise intrude into judicial functions;<sup>32</sup>
- b. It is suggested that the interview was “off-the-record” and “private”;<sup>33</sup>
- c. The public has the right to receive information regarding the “function and legitimacy of the Court and the Office of the Prosecutor”, which should only be restricted by compelling public interest, such as the security of witnesses;<sup>34</sup>

<sup>29</sup> ICC-01/04-01/06-2389, paragraph 5.

<sup>30</sup> ICC-01/04-01/06-2389, paragraph 6.

<sup>31</sup> ICC-01/04-01/06-2389, paragraph 7.

<sup>32</sup> ICC-01/04-01/06-2389, paragraph 12.

<sup>33</sup> ICC-01/04-01/06-2389, paragraph 13.

<sup>34</sup> ICC-01/04-01/06-2389, paragraph 14.

- d. It would be unacceptable “to hamper the Office of the Prosecutor’s ability to affirm publicly its moral authority to perform its role [...]” and “there are no legal reasons to require silence by the Prosecution in the face of public attacks against its reputation”;<sup>35</sup>
- e. When the prosecution’s integrity is publicly attacked (*i.e.* prosecutorial misconduct amounts to an abuse of process), the prosecution is entitled to address public accusations of abuse, so long as it a) fully respects the other participants and the process, b) abstains from comment on the credibility of witnesses or evidence, or other matters under consideration by the Chamber;<sup>36</sup>
- f. In any event, the interview did not undermine the rule of law or offend justice.<sup>37</sup>

29. The defence and the participants were instructed to file any response to the prosecution’s further submissions by 13 April 2010.<sup>38</sup>

30. In its response,<sup>39</sup> the defence submits that it does not intend to set out the numerous inaccuracies reported by the representative of the prosecution in the press article. It submits that the Chamber is potentially in a better position to determine the discrepancies in what has been reported. The defence, therefore, leaves the matter to the Chamber.<sup>40</sup>

31. The defence requests service of Annexes A, B and C of the prosecution’s further submission. It submits the conversations between the representative and a journalist, even if “private”, are not privileged. As soon as they become

<sup>35</sup> ICC-01/04-01/06-2389, paragraph 15.

<sup>36</sup> ICC-01/04-01/06-2389, paragraph 15.

<sup>37</sup> ICC-01/04-01/06-2389, paragraph 18.

<sup>38</sup> Email communication from the Legal Adviser to the Trial Division, 7 April 2010.

<sup>39</sup> Réponse de la Défense à la « *Further Submissions of the Prosecution Regarding the OTP Representative’s Press Interview* », déposée le 1<sup>er</sup> avril 2010, 13 April 2010, ICC-01/04-01/06-2391.

<sup>40</sup> ICC-01/04-01/06-2391, paragraph 3.

the object of in-court investigation, they should be provided to the defence, especially as they have already been communicated to the Chamber.<sup>41</sup>

32. The defence argues that the “internal guidelines for public statements” of the prosecution should also be served, given their relevance.<sup>42</sup>

33. Moreover, the defence strongly objects to the prosecution’s proposal for a “Chambers conference”. It is submitted that this issue should be resolved during the normal course of Court hearings, and that the public should not be excluded.<sup>43</sup>

### III. Analysis and conclusions

34. None of the provisions of the Rome Statute framework address the relationship between the parties and the press, and public statements outside the courtroom are in this sense unregulated. The Registry has created a Public Affairs Unit which is responsible for media relations and the provision of services to facilitate accurate media coverage of the activities of the Court. The Unit distributes various materials, and it issues press releases from time to time.

35. The Office of the Prosecutor, however, seems to have established its own discrete media department. Indeed, in its “Further submissions of the Prosecution Regarding the OTP Representative’s Press Interview”, the prosecution states that it has and applies “internal guidelines for public statements to the media”.<sup>44</sup> In the same filing, the prosecution also referred to certain functions of its “Public Information Unit”.<sup>45</sup>

<sup>41</sup> ICC-01/04-01/06-2391, paragraph 4.

<sup>42</sup> ICC-01/04-01/06-2391, paragraph 5.

<sup>43</sup> ICC-01/04-01/06-2391, paragraph 6.

<sup>44</sup> ICC-01/04-01/06-2389, paragraph 5.

<sup>45</sup> ICC-01/04-01/06-2389, paragraph 10c.

36. It is not the role of the Chamber to comment on the arrangements that are, or should be, in place as regards the relationship between the Court (*i.e.* its various organs and counsel appearing in its cases) and the media. The Chamber's concern is instead focussed on the course of the present trial, and the need to ensure that the interests of justice are upheld: by Article 64(2) of the Rome Statute ("Statute") "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". The presumption is that the trial will be held in public: Article 64(7) of the Statute; and by Article 64(6)(f) of the Statute the Chamber may rule on any relevant matters.

37. The requirement of public justice and the reasons underlying that requirement are essentially determinative of this issue. A first principle of the criminal law, largely recognised throughout the world, is that justice is administered in public, for all to see and hear. In order for the trial process to be respected, including the verdict and any sentence, anyone who is interested in the case must be able, to the greatest extent possible, to access a fair and accurate record of the proceedings. In this trial, for reasons of security, a very considerable part of the proceedings have taken place *in camera*.

38. This has increased the need for responsible and balanced comments and reporting of the case, an obligation which extends to all those involved in the trial. Given that members of the public have been excluded from a significant part of the trial, and including much of the evidence that has related to the child soldiers and the use of intermediaries, anyone interested in the case is significantly hampered in understanding "first-hand" what has occurred during these lengthy proceedings. Accordingly, the numerous closed-session

hearings have increased the responsibility of the parties to be scrupulously accurate and balanced in public interviews.

39. Most particularly in these circumstances, the public needs to be able to trust the published statements of those involved in the case, as reflecting, in a suitably balanced way, the evidence that has been heard and the decisions that have been made. It is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still unresolved. Most importantly, and as a matter of professional ethics a party to proceedings is expected not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber, or to suggest or imply without proper foundation that anyone in the case, including the accused, has misbehaved.

40. In essence, the prosecution has accepted that it should abide by these principles. Whilst maintaining its suggested general right to speak publicly about the case, the prosecution recognises it should not comment on issues such as the credibility of witnesses or the evidence; whether or not judicial decisions are correct; or other matters that are under consideration by the Chamber.<sup>46</sup> The prosecution acknowledges that it must respect the other participants and the process,<sup>47</sup> and it seemingly accepts that it should not intrude into judicial functions or act in a way that is disrespectful of the judicial process or the Chamber.<sup>48</sup> In our judgment, respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine.

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<sup>46</sup> ICC-01/04-01/06-2389, paragraphs 5 and 18.

<sup>47</sup> ICC-01/04-01/06-2389, paragraph 15.

<sup>48</sup> ICC-01/04-01/06-2389, paragraph 12.

41. Ms Béatrice Le Fraper du Hellen's remarks during this press interview breached these restrictions in a manner that is prejudicial to the ongoing proceedings (in the sense that they tend to prejudice the public's understanding of the trial), which tends to bring the Court into disrepute. For the reasons set out in the Chamber's Decision on Intermediaries,<sup>49</sup> since at least the time of the speech by defence counsel made immediately prior to calling evidence for the accused, the role of the prosecution's intermediaries, or some of them, has been revealed as one of the "live" issues in the case. Whether or not they behaved in a way that was designed to further the interests of justice, as opposed to more suspect ends, is an issue that the Chamber will need to resolve. The evidence supporting the suggestion that this is a "live" issue has been set out *in extenso* in the Decision on Intermediaries, and it is an issue that the Chamber will resolve in due course. Therefore, it was inappropriate for the prosecution representative to state in unequivocal terms that they are fantastic, committed people, who support international justice, and that they are admired by the prosecution (particularly given that none of these assessments are supported by evidence that has been given in the trial). Further, given this has been raised on the evidence and in counsel's submissions, it was not for the prosecution representative to suggest that criticisms should not be made that might affect the reputations of the intermediaries. It is defence counsel's positive duty to advance criticisms on any relevant issue that have a proper evidential foundation, as exists in this instance.

42. From the outset of the case, there has been an issue as to whether some or all of the alleged child soldiers have told the truth about their identities and their histories. In those circumstances, it was additionally inappropriate for the prosecution representative to describe the witnesses unequivocally as very courageous and brave child soldiers, who were, in her view, very credible.

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<sup>49</sup> Decision on Intermediaries, 12 May 2010.



These are all “live” issues that await the Chamber’s determination, once the evidence is closed and counsel have made their closing speeches.

43. In addition, the remark by the prosecution representative that the Prosecutor had disclosed all the exonerating evidence to the defence in a very timely manner was incorrect and misleading. Put shortly, the delays in service of the prosecution’s exculpatory material and that covered by Rule 77 of the Rules were considerable and they have been extensively documented.

44. In reality, the prosecution’s delay in the disclosure of potentially exculpatory material led to the stay in the proceedings on 13 June 2008. On that occasion the Chamber concluded the following when staying the proceedings against the accused:

ii) The prosecution has incorrectly used Article 54(3) (e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence.<sup>50</sup>

45. In this regard the Appeals Chamber also concluded:

The Appeals Chamber is particularly concerned that when accepting large amounts of material from the United Nations, the relevance of which for future cases he could not appreciate at that time, the Prosecutor agreed that he would not disclose the material even to the Chambers of the Court without the consent of the information providers. By doing so, the Prosecutor effectively prevented the Chambers from assessing whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents, a role that the Chamber has to fulfil pursuant to the last sentence of article 67 (2) of the Statute.<sup>51</sup>

<sup>50</sup> Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, paragraph 92; see also Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, paragraph 45.

<sup>51</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486 , paragraph 45.

46. Repeatedly, the Trial Chamber has reminded the prosecution of its duty to disclose potentially exculpatory material, due to inexcusable delays in fulfilling its obligations.<sup>52</sup>

47. The criticism in the press interview suggesting that the defence has failed to respect its disclosure obligations was equally incorrect. The Chamber has described the extent of these obligations in various Decisions,<sup>53</sup> and the defence has abided by those rulings. In fact, when the prosecution raised the supposed violation by the defence of its disclosure obligations, particularly as regards their summaries of the anticipated evidence of the defence witnesses, the Presiding Judge emphasised to the prosecution that the defence has limited disclosure obligations in comparison with those of the prosecution.<sup>54</sup>

48. In the circumstances it was inappropriate for the prosecution representative to suggest that the defence has breached these disclosure orders.

49. Ms Béatrice Le Fraper du Hellen seriously intruded on the role of the Chamber in her unequivocally expressed conclusions – before the end of the evidence, the submissions of counsel and any decisions on the part of the Bench – that there has been no abuse of the process by the prosecution; that the defence argument is “just talk”; that the Chamber will reject the defence submissions (“nothing is going to happen”); and that the accused will be convicted, and this will be followed by a long sentence (“Mr Lubanga is going away for a long time”).

<sup>52</sup> See *e.g.*, transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG ET, page 12, lines 14 – 20; Transcript of hearing on 2 February 2010, ICC-01/04-01/06-T-239-Red-ENG WT, page 5, line 24 to page 6, line 4.

<sup>53</sup> Decision on Disclosure by the Defence, 10 March 2008, ICC-01/04-01/06-1235-Corr-Anx1; 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.

<sup>54</sup> Transcript of hearing on 5 March 2010, ICC-01/04-01/06-T-254-Red-ENG WT, page 68, lines 3 – 16.

50. The Chamber further expresses its concern regarding the incorrect statements of the prosecution representative, alleging misbehaviour by the accused, without justification. In the representative's statement set out at quotation 12, the wholly false impression was created that the alleged former child soldiers had given evidence whilst confronted by Mr Lubanga who was making signs and using body language, thereby frightening them ("it is very terrifying for the children to testify in front of him"). By failing to refer to any of the protective measures (most particularly the Chamber's express order that the witnesses were in each instance to be wholly shielded from the accused, with the result they did not see him at any stage during their evidence) and by juxtaposing the fear of the witnesses and the presence of Mr Lubanga when he was allegedly "making signs", smiling and using body language, the prosecution representative's remarks invited, deliberately or otherwise, the clear conclusion that the witnesses could see the accused and that they were being intimidated by him. This was a seriously misleading statement on the part of Ms Béatrice Le Fraper du Hellen.

51. As an additional consideration, investigations, including particularly by way of case preparation, are still ongoing in the DRC in this and the other DRC trial currently before Trial Chamber II; furthermore, an arrest warrant remains outstanding. In consequence, it should not be suggested to the public, incorrectly, that cases at the ICC are decided prior to the Chamber's Article 74 Decision. Equally, it is critical that potential witnesses and participating victims are reassured that they will receive proper protection before the Court. Creating the false impression that an accused is intimidating witnesses could well serve to discourage others from participating in the Court's cases, thereby damaging the legitimacy of the institution, and its ability to function.

52. The Chamber is wholly uninfluenced by these misleading and inaccurate remarks, but it deprecates the prosecution's use of a public interview, first, to

misrepresent the evidence and to comment on its merits and weight, and including by way of remarks on the credibility of its own witnesses in the context of a trial where much of the evidence has been heard in closed session with the public excluded; second, to express views on matters that are awaiting resolution by the Chamber, thereby intruding on the latter's role; third, to criticise the accused without foundation; and, finally, to purport to announce how the Chamber will resolve the submissions on the abuse of process application, and, moreover, that the accused will be convicted in due course and sentenced to lengthy imprisonment at the end of the case.

53. Although on this occasion the Chamber does not intend to take any action beyond expressing the strongest disapproval of the content of this interview, if objectionable public statements of this kind are repeated the Chamber will not hesitate to take appropriate action against the party responsible.

#### **IV. Postscript**

54. The Chamber has dealt with the impact of this interview on the issue of the disclosure of the identities of the intermediaries in its Decision on Intermediaries.
55. The parties are reminded that it is impermissible to file additional submissions, as the prosecution did in this instance, without the express leave of the Chamber.
56. The Chamber does not accept the prosecution's assertion that the verbatim transcript can only be used by the Chamber with the prosecution's consent. The Chamber requested and the prosecution properly provided this document, which was relevant to the Court's investigation of these issues. The transcript of an interview between a representative of the prosecution and a

journalist, particularly when the discussion was to be reproduced, in whole or in part, in a published article, is not a document which the Chamber should be required to recognise as being protected by the concept of confidentiality. The Chamber is not bound by any agreement between the prosecution and the journalist, and it is not in the public interest for the Court to recognise conversations in this category as being subject to privilege. However, in the event the Chamber has only referred to the parts of the interview, as amended, that were published. In all the circumstances, disclosure to the defence of the unpublished material is unnecessary.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 12 May 2010

At The Hague, The Netherlands