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Date: 10 April 2008

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

Public Document

**ANNEX A:
PROPOSED Amicus Curiae Submission Of The International Criminal Bar
Pursuant To Rule 103 Of The Rules Of Procedure And Evidence**

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PROPOSED Amicus Curiae Submission Of The International Criminal Bar Pursuant To Rule 103 Of The Rules Of Procedure And Evidence

Having sought and been granted leave pursuant to Rule 103 of the ICC Rules of Evidence and Procedure (“Rules”), the Executive Committee of the International Criminal Bar (“ICB”) here submits its observations concerning the oral decision and public orders entered on 18 January 2008 by Trial Chamber I insofar as they related to the defence right to inspect tangible objects in the possession of the prosecution under Rule 77.¹

I. BACKGROUND AND ISSUE ON APPEAL RELATING TO RULE 77

It appears from a transcript of a status conference held on 10 January 2008, that the Prosecution mistakenly filed as exculpatory evidence to be included in the case dossier, a large quantity of documents with no direct link to Mr. Lubanga, but containing information concerning the use of child soldiers in Ituri during the time period covered by the charges against Mr. Lubanga.² These papers should have been delivered directly to defence counsel as part of the defence right to inspect tangible evidence in the possession and control of the Prosecutor under Rule 77. If they had been treated in this manner, the Trial Chamber would have been unaware of these materials having been provided to the defence.

The Trial Chamber questioned defence counsel as to why Counsel considered the documents to be material to the preparation of the defence. Defence counsel replied:

“It appeared necessary to us in the preparation of the defence to be able to inspect a maximum amount of information with regards to the phenomenon of the use of child soldiers in Ituri during this period. Before setting a defence line, it's necessary to understand the situation, and it appeared to us that this information was useful to us and even necessary to us to be able to understand the situation in Ituri at that time, and it's this necessary understanding which has made us ask the Prosecutor, on the basis of Rule 77, for this evidence. And that's what I can say to the Chamber at this stage.”³

Even though the prosecution explained their mistake at the hearing and requested no assistance either orally or by written motion,⁴ Trial Chamber I rejected the position of defence counsel⁵ and eight days later issued the oral decision declaring as immaterial any documents

¹ 18 January 2008 transcript of oral decision and public orders, ICC-01/04-01/06-T-71-ENG, at p. 10.

² 10 January 2008 Transcript, ICC-01/04-01/06-T-69, pp. 58-62.

³ Transcript 10 January at 62.

⁴ Transcript 10 January at 59-60.

⁵ Id., pp. 61-62.

relating to the use of child soldiers in Ituri, even if it relates to the time period covered by the charges against Mr. Lubanga.⁶ In explaining the decision, the Trial Chamber stated that:

the Chamber is unpersuaded, on the basis of the material before it, that evidence relating to the use of child soldiers by other individuals or groups is relevant to the charges the accused faces. Any evidence on this subject will not undermine the Prosecution case and on the basis of what has been revealed by the Defence (following an invitation from the Bench for assistance on this issue), it does not support any defence or line of argument to be relied on by the accused. Put otherwise, this area of evidence has not been demonstrated to relate to a live issue in the case and it is not one that could assist the accused. The sole argument of the Defence on this subject - that they wish to be provided with the maximum information on the phenomenon of the use of child soldiers in Ituri - does not sufficiently support the argument that it is necessary for the Prosecution to disclose this material. Nothing has been revealed that tends to indicate that an investigation of this phenomenon will materially assist Mr. Thomas Lubanga Dyilo.⁷

Following the issuance of the oral decision, Mr. Lubanga filed a motion⁸ which on 6 March 2008 was granted, seeking leave to appeal three issues arising from the impugned decision.⁹ This submission relates to the third issue, which asks:

Whether the Chamber interpreted Rule 77 of the Rules of Procedure and Evidence in an excessively restrictive manner in concluding that the prosecution is not under an obligation to provide the defence with the material in its possession relating to the general use of child soldiers in the Democratic Republic of the Congo.¹⁰

The defence filed a document in support of the appeal on 7 March 2008¹¹, and the prosecution filed their response on 28 March 2008, wherein they did not oppose the appeal of the Rule 77 oral decision and public order.¹²

⁶ 18 January 2008 transcript, ICC-01/04-01/06-T-71-ENG, at p. 10.

⁷ Transcript 18 January 2008 at 8:13 – 9:3.

⁸ Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008, ICC-01/04-01/06-1134.

⁹ Decision on the defense request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, ICC-01/04-01/06-1210.

¹⁰ Decision on the defense request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, ICC-01/04-01/06-1210, paras. 2(c) and 21-25.

¹¹ Acte d'appel de la Défense relatif à la Décision relative aux expurgations et à l'obligation de communication rendue oralement le 18 janvier 2008, ICC-01/04-01/06-1227.

¹² Prosecution's Response to Defence Document in Support of Appeal against Oral Decision of Trial Chamber I rendered on 18 January 2008, ICC-01/04-01/06-1243, paras. 33 and 36.

In addition to their non-opposition in the Rule 77 issue on appeal, the prosecution has continued throughout these proceedings to provide copies of those materials in its possession which relate to the use of child soldiers in Ituri during the time period covered by the Lubanga charges.¹³ Thus it would seem the Prosecutor, who has a duty to uphold the rights of the defence pursuant to Article 54(1)(c), accepts that the documents at issue come within the realm of tangible objects which may reasonably be considered as material to the preparation of a defence.

Two issues are here addressed in relation to the Trial Chamber's oral decision and public order imposing *proprio motu* its definition of what is material to the preparation of the defence:

- a. The lack of legal basis for the oral decision insofar as it seeks to *proprio motu* define what is material to the preparation of the defence; and
- b. The need to prepare a sentencing case in the event the accused is convicted, which will necessarily include an investigation of the general circumstances existing at the time of the crimes.

II. APPLICABLE LAW

Rome Statute

Article 54(1)(a) and (c)

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

....

(c) Fully respect the rights of persons arising under this Statute.

Article 64(1) and (9)

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

....

¹³ Defence submissions, ICC-01/04-01/06-1227, para. 33. Prosecution response, ICC-01/04-01/06-1243, paras. 36. Rule 77 guarantees only the right to inspect. It has been normal practice, continuing from the *ad hoc* Tribunals, that the prosecution elects to provide copies of materials in lieu of providing facilities for defence team to inspect prosecution archives.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

- (a) Rule on the admissibility or relevance of evidence; and
- (b) Take all necessary steps to maintain order in the course of a hearing.

Article 67 (1)(b) and (2)

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

....

- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

....

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 69(3) to (5)

Evidence

....

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Article 78(1)

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

....

Rules of Evidence and Procedures

Rule 77

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 81

Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.
2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.
5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

Rule 82

Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce

such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.

2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance. 3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.

4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.

5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.

Rule 103

***Amicus curiae* and other forms of submission**

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

Rule 134

Motions relating to the trial proceedings

1. Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party. For all requests other than those submitted for an *ex parte* procedure, the other party shall have the opportunity to file a response.

2. At the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

3. After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

Rule 145

Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

- (b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;
- (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

III. LEGAL ARGUMENTS

a. TRIAL CHAMBER I ACTED *ULTRA VIRES* WHEN IT INTERVENED *PROPRIO MOTU* WITH DEFENCE INSPECTION OF TANGIBLE OBJECTS UNDER RULE 77.

Rule 77 states:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

The Trial Chamber is given broad powers under the Statute and Rules to control the proceedings under Article 64 (Functions and powers of the Trial Chamber), Article 69 (Evidence) and Rule 134 (Motions relating to the trial proceedings). Articles 64 and 69 grant the Trial Chamber powers, *inter alia*, to issue decisions *proprio motu* on the admissibility or relevance of evidence and on steps which are necessary to maintain order in the course of a hearing.

Rule 134 provides that “[p]rior to the commencement of the trial, the Trial Chamber on its own motion ... may rule on any issue concerning the conduct of the proceedings.” And in certain circumstances set out in Rules 81 and 82, the Trial Chamber has the power to issue decisions which restrict disclosure of information or evidence. However, the circumstances for non-disclosure which are set out in Rule 81 (restrictions on disclosure for the security of witnesses and victims) and Rule 82 (restrictions on disclosure related to confidentiality agreements) do not arise in relation to the Rule 77 issue now on appeal.

The ICB submits that the term “proceedings” used in Article 134 does not include the process of an independent Defence Counsel preparing a defence case for trial. Similarly, defence preparations in advance of a trial do not relate to either the admissibility of evidence at the actual trial or the course of a hearing under Articles 64 or 69. Nor does the meaning of “material to the preparation of the defence” under Rule 77 have anything to do with the security of witnesses and victims nor prior confidentiality agreements under Rules 81 or 82. Therefore, it is respectfully submitted that because these provisions may not be relied upon as the legal basis for the oral decision or public orders entered *proprio motu* insofar as they relate to the preparation of the defence, there is no legal basis for the Trial Chamber’s decision without a written motion having been filed by one of the parties.

Defence Counsel is both an officer of the Court and an independent agent responsible for representing the best interests of the client at trial. Article 67 sets out the rights of the accused, including the right to “a fair hearing conducted impartially” and to certain minimum guarantees, “in full equality”, including “adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.” Implicit in the right to Counsel is the right to have one’s Counsel exercise independent judgement in determining the investigative needs of a case. Defence counsel’s independence is one of the bedrocks to a fair trial.

For the Trial Chamber, who will act as the finder of fact in the trial, to impose an order which declares off-limits to the defence information which relates to the time and the place covered by the charges being defended against, is to invade the realm of confidentiality and discretion which belongs to defence counsel. The Trial Chamber’s decision in this case confuses “relevance” for purposes of the trial, which is certainly within the Trial Chamber’s competence, with the much broader concept of what is “material to the preparation of the defence”, which will necessarily include information and evidence which will eventually be determined to be irrelevant in terms of trial evidence. However, in the context of a fair and impartial trial, the process of investigating and preparing a defence case cannot be limited by a Trial Chamber’s premature determinations as to what will be admissible during the actual trial. Indeed, any request under Article 77 which is centered on events occurring at the same time and place as the charges being investigated should be presumed to come within the realm of materiality which is preserved for the defence, without interference from the Trial Chamber.

In this case, the prosecutor's non-opposition to the appeal and his decision to continue providing the relevant materials to the defense should be viewed as his recognition of the reasonableness of the defence requests under Rule 77. In light of the Prosecutor's duty, under Article 57(c) to fully respect the rights of persons under the Statute, his decision not surprising. Without a written motion by one of the parties, the Trial Chamber had no legal basis for imposing its own discretion as to what is material to the preparation of the defence case.

It has been suggested that the Rome Statute creates a system which promotes a comprehensive strategy of cooperation between the prosecution and the Defence.¹⁴ This suggestion is a reference to the Prosecutor's duties to "investigate incriminating and exonerating circumstances equally" (Art. 54.1.a) and then "as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." (Art. 67) Alongside these articles, Rule 77 can be seen to be an important part of the comprehensive system of cooperation which is necessary in order to provide more equal investigative arms. The Trial Chambers oral decision had no legal basis and its effect is to frustrate the comprehensive system of cooperation which is created in the Statute and Rules, undermining a basic means for helping to achieve equality of arms.

b. MATERIAL TO THE PREPARATION OF THE DEFENCE INCLUDES INVESTIGATION INTO MATTERS WHICH MIGHT ARISE AT SENTENCING

It is difficult for any Defence Counsel to speak about sentencing issues at an early point in trial proceedings because of the need to publicly support the presumption of innocence. Nonetheless, if it comes to pass that Mr. Lubanga is convicted, his counsel will benefit from knowledge of the overall structure and functioning of groups operating in Ituri during the same time as the charges against Mr. Lubanga, even if that evidence may be irrelevant in terms of defending against the prosecution's case as to guilt.

Article 76 (Sentencing) requires that following the guilt phase of trial proceedings, "the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the

¹⁴ Jacobs, *A Samson at the International Criminal Court : the Powers of the Prosecutor at the Pre-Trial Phase*, *The Law and Practice of International Courts and Tribunals* (2007)317, 331.

accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence” Article 78 (Determination of sentence) requires the Trial Chamber to “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.” Rule 145 also requires the Trial Chamber to “balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime”, (sub-section b, emphasis added), and “the circumstances of manner, time and location”. (Sub-section c, emphasis added).

One example of the relevance of such evidence can be seen in the *Celibici* Sentencing Decision, entered by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia. In that case, the Trial Chamber held that “there are certain features of [the accused person’s] case that must be taken into account in his favour when deciding upon the measure of sentence to be imposed upon him”, including “the harsh environment of the armed conflict as a whole, and the events in the Konjic municipality in particular, must also be considered.”¹⁵

Defence Counsel’s investigation into events involving the recruiting and use of child soldiers during the time period covered by the charges might reveal circumstances which will shed light on Mr. Lubanga’s role and his level of responsibility in the context of Ituri. On the other hand, the information may alert them to aggravating evidence which must be explained. Indeed, there are many ways in which such tangible evidence might be of interest when preparing Mr. Lubanga’s case for trial. Clues for further investigation may not be apparent to anyone but Defence Counsel, because she is the one in possession of confidential information which gives meaning to the material being inspected. To fail to inspect such evidence is to take the risk of being unprepared when it comes to laying the groundwork for an effective presentation of sentencing issues, which can be developed at any point during the trial.

¹⁵ *Celibici* Trial Judgement, 16 November 1998, para. 1283.

CONCLUSION

For the foregoing reasons, the ICB respectfully submits that,

(1) The oral decision should be vacated as *ultra vires* insofar as it relates to Rule 77,

or

(2) In the alternative, the ICB respectfully submits that the appeal of the Lubanga defence team be granted and the oral decision and public orders should be remanded to the Trial Chamber with instructions to grant a broader degree of discretion to defence counsel in determining whether tangible documents within the possession of the prosecution are material to the preparation of the defence, including full consideration of how the documents may relate to preparations for a possible sentencing phase defence case.

Respectfully submitted,

Virginia C. Lindsay
Legal Counsel
Executive Committee of the International Criminal Bar

Dated this

At