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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

Public

**Prosecution's Submissions in Response to Trial Chamber's Oral Request of 17
March 2010**

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Introduction

1. On 15 March 2010, the Lubanga Trial website published an interview with Béatrice Le Fraper du Hellen, Director of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor (OTP). On 17 March, the Chamber requested the OTP to respond, in writing, to several questions concerning the interview. The questions are: (1) does the OTP have information regarding the character and background of its intermediaries that must be disclosed under Rule 77 because it is “material to the preparation of the defence”; (2) is it the position of the OTP that the Chamber should take into consideration the fact that our intermediaries are committed persons who are very supportive of international justice when determining whether their identities should be disclosed; (3) does the OTP take the position that it, and not the Chamber, determines what facts are proven and what sentence should be imposed; and (4) if the OTP is alleging that the Accused has acted in a manner that is “terrifying for the children”, why has the OTP not raised this concern to the Chamber and where is the evidence to support that concern?
2. This submission responds to those questions.

Prosecution’s Submissions

The obligation to provide Rule 77 items that are material to the preparation of the defence

3. The primary defence, as articulated in the most recent opening statement, is that “all the individuals who were presented as child soldiers, as well as their parents, deliberately lied”.¹ All Rule 77 information material to that defence has been produced.

¹ ICC-01/04-01/06-T-236-CONF-ENG ET, 27 January 2010, page 21, lines 16-18.

4. As to the challenge to the integrity of the intermediaries, in the context of seeking a mid-trial dismissal of the case on the grounds of procedural abuse, the Prosecution would question whether this is truly a “defence” to the case. In any event, until the defence opening statement the Prosecution had no reason to assume that the defence required information about the intermediaries’ characters under Rule 77. In addition, prior to trial, in response to the Prosecution request for inspection under Rule 78, counsel affirmatively stated to the Chamber that they were not raising a defence at that stage and, on that basis, opposed the Prosecution’s application for reciprocal disclosure.² The Chamber accepted that assertion and, on that ground, declined to order disclosure.³ Given that counsel declined to identify this as a defence, it is unclear when or on what basis the Prosecution’s information regarding the integrity of the intermediaries now has Rule 77 status.
5. This is particularly so since the defence issue tangentially related to the intermediaries is itself much more narrow than a broad attack on their integrity. As the defence explained, the issue is “whether the Prosecution failed to carry out their duty, their duty to provide proper control and oversight over its intermediaries and, in particular, did the Prosecutor fulfill his statutory obligation to investigate exculpatory evidence, particular from his own witnesses”?⁴ In other words, the claim is that the alleged instances of misconduct of intermediaries in the field tainted the OTP investigation because the OTP ignored misconduct or failed to take adequate steps to control or oversee the process.
6. In this sense, the Prosecution notes that it has duly disclosed evidence in the possession that it has identified of the Prosecution that might bear on alleged

² ICC-01/04-01/06 -1110.

³ ICC-01/04-01/06-1313.

⁴ ICC-01/04-01/06-T-236-CONF-ENG ET, 27 January 2010, page 23, lines 13-15.

misconduct by OTP intermediaries whose actions have specifically been questioned and about which the OTP might have knowledge. Thus, there is no breach of any procedural obligation by the Prosecution.

Consideration by the Chamber of the character of the intermediaries in determining whether their identities should be disclosed.

7. The Chamber asks if the OTP believes that it should take into account “the kind of people who act as intermediaries when reflecting upon the extent to which” their identities should be disclosed to the Defence. Ms. Le Fraper du Hellen did not take that position in the interview, nor may that position reasonably be inferred from her comments.
8. The OTP has opposed disclosure for reasons totally independent of the possibility that the intermediaries are persons of great commitment and dedication to international justice. Its opposition is based instead on the fact that the information sought is not relevant and because disclosure will result in likely and substantial risks and costs in connection with the burdens to protect the intermediaries, their families, their organizations as well as the witnesses known to the intermediaries; the possible need for the intermediaries to disassociate themselves from their organizations; and the possibility that readiness to require disclosure will discourage intermediaries from assisting the Prosecution in the future.

Whether the Chamber or the OTP ultimately will determine what facts are proven and what sentence should be imposed.

9. Ms Le Fraper du Hellen stated, inter alia, that “we still have a strong case” and that the OTP does not foresee that the Chamber will dismiss the case on the basis of abuse of process. In response to a direct question as to “how long do

you reckon he will be going away for?”, she also answered, “we are going to ask for severe punishment” because the crime of recruiting child soldiers is serious. The Chamber now asks whether the Prosecution believes that (a) it is the responsibility of the Prosecutor to determine the result of the trial or (b) it is appropriate for an OTP representative to predict the conclusion of the trial.

10. Clearly, the Prosecution does not contend, and has never contended, that the OTP decides the outcome of the trial. Nor did Ms. Le Fraper du Hellen assume the role, on behalf of the OTP, of prejudging the outcome of the trial or the ultimate sentence. And her comments did not deliberately or inadvertently diminish the essential role of the Court as fact-finder, adjudicator of guilt or innocence, and, should it find the Accused guilty, the sole determinant of the sentence. Her statement that “we are going to ask for severe punishment” is virtually identical to the prosecution’s opening statement, in which in fact the Prosecutor stated that, if the Accused was convicted, the Prosecution would ask for a significant penalty.⁵
11. On the second question, in the Prosecution’s view it is appropriate for a party to a proceeding before this Court to assert in a public statement that it believes in the position it asserts in court. The Prosecution would not have brought this case had it not been persuaded that it would be able to prove the Accused’s guilt beyond reasonable doubt. Indeed, one might strenuously argue that it would be unethical to subject a person to the ordeal of a trial on these most serious charges without believing both in the guilt of the Accused and that the outcome of the trial would be a conviction.
12. That said, the Prosecution also recognizes that in some legal cultures there are strict limitations on the ability of a party to comment outside the court on the

⁵ ICC-01/04-01/06-T-107, page 34 and 35.

pending proceedings. In this Court, the Statute, Rules, and Code of Professional Conduct do not address the issue of extrajudicial media contacts. Thus, no provision in the core texts of the Court bars the sorts of comments made by Ms. Le Fraper du Hellen in this instance.

13. Moreover, both parties have commented in statements and in response to questions about the pending case. In the Prosecution's view, neither has Ms. Le Fraper du Hellen overstepped the line by misconstruing the evidence as it has been presented or asserting facts as proven that have not been introduced at trial. Nor is it likely that comments by either party made outside the court will influence the Chamber's deliberations. Rules designed to protect the integrity of the jury's deliberations, for example, by barring extrajudicial statements that would prejudice a lay jury are thus less pressing in this Court.

The OTP's failure to bring concerns that the Accused has acted in a manner that is "terrifying for the children" to the attention of the Chamber.

14. The Chamber asks if the OTP believes that the Chamber has "been allowing the accused through his actions to terrify Prosecution witnesses" and thereby to "have not been discharging [its] functions properly".
15. Ms. Le Fraper du Hellen stated: "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 [...]". That statement did not assert that the Accused took actions deliberately to terrify them, it states that they were courageous in testifying notwithstanding that they had to testify in his presence. It also did not state, or imply, that the Chamber failed to discharge its protective obligations.

16. 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.
17. Observers both in and out of the courtroom have, however, noted the Accused's behavior in court.⁶ The Prosecution did not complain to the Chamber about it because it is not an issue that need be judicially resolved. The Accused has the right to express through facial or body expressions either agreement or disagreement with the evidence.
18. The Chamber further asks that videos be produced or identified that reflect his facial expressions or body language or signs to the audience. We are not aware of any, nor is such a search likely to provide any meaningful results. For the most part the cameras are not trained on the Accused, they focus on the witness or the bench or the lawyers.



Luis Moreno-Ocampo
Prosecutor

Dated this 19th day of March 2010
At The Hague, The Netherlands

⁶ See for example, www.aegitrust.org/Lubanga-Trial, chronicles 5, 17 and 35.