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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

Prosecution's Observations on Article 70 of the Rome Statute

Source: Office of the Prosecutor

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

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Background

1. On 29 March 2011, Trial Chamber I (“Chamber”) asked the parties and participants in the *Lubanga* case to submit observations on the procedures that should be adopted for proceedings under Article 70 of the Rome Statute (“Statute”).¹ In particular, the Chamber asked for the views of the parties and participants on the relationship between Article 70 and Rule 165 of the Rules of Procedure and Evidence (“Rules”), and whether the Prosecution alone may initiate and conduct investigations or whether other investigators (for instance from within the Registry) can (or should) be engaged to deal with one or more of the scenarios described in Article 70(1) of the Statute. The request arose in the context of an inquiry by VWU regarding whether, after they testified, defence witnesses were subjected to pressure or direct or indirect threats by a person recognised as a victim in these proceedings.

The Prosecution’s Observations

2. That the general power to investigate is bestowed expressly upon the Prosecution from among the organs of the Court is set out in Part V of the Statute. Neither the Statute nor the Rules confer any concurrent investigative or judicial functions elsewhere within the Court, and in particular upon the Registry. Rather, Article 42(1) provides that “The Office of the Prosecutor shall act independently as a separate organ of the Court. *It shall be responsible for [...] conducting investigations and prosecutions before the Court.* A member of the Office shall not seek or act on instructions from any external source” (emphasis added). The initiation of an investigation (Article 53), the duties and powers of the Prosecutor with respect to investigations (Article 54) and the rights of persons during an investigation (Article 55) each confer investigative powers *on the Prosecutor* for crimes under the jurisdiction of the Court. Notably, nothing in the Statute and Rules authorises or even permits the separate exercise of prosecutorial power, including the conduct of law enforcement investigations, by other organs or outside entities.

¹ Email sent from the Legal Officer to the Chamber to the parties and participants on 29 March 2011 at 13:31pm.

3. Moreover, while both the Prosecution and the Registry must be headed by persons who are “highly competent” (Articles 42(3) and 43(3)), the Statute requires that the Prosecutor and Deputy Prosecutors – but not the Registrar and the Deputy Registrar -- also “have extensive practical experience in the prosecution or trial of criminal cases” (Article 42(3)). And while both organs must appoint qualified staff, [i]n the case of the Prosecutor, this shall include the appointment of investigators”, (Article 44(1)), a requirement not applicable to the Registry staff.

4. The Registry serves essential administrative functions in the Court but those functions do not and cannot include investigative or judicial aspects. The Statute stipulates that “[t]he Registry shall be responsible for the *non-judicial aspects* of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42” (emphasis added).² As further described in the Rules, the Registry shall “serve as the channel of communication of the Court”;³ be “responsible for the internal security of the Court, in consultation [...]”;⁴ “keep a database containing all the particulars of each case” and “maintain the other records of the Court”;⁵ perform functions relating to victims and witnesses;⁶ and provide support and assistance to the Defence.⁷ It also manages the detention facility.⁸ And it may assist the Presidency, where appropriate, in the enforcement of fines, forfeiture, and reparation orders.⁹ The Statute does not confer an investigative or prosecutorial role on the Registry.

5. In short, the Prosecution is responsible, exclusively and independently, for the investigation and prosecution of crimes before this Court. Consistent with the statutory framework, the Prosecution also has the resources and expertise to investigate alleged offences under the Court’s jurisdiction. Its Investigative Division,

² Article 43(1) of the Statute.

³ Rule 13(1) of the Rules.

⁴ Rule 13(2) of the Rules.

⁵ Rule 15 of the Rules.

⁶ Rules 16-19 of the Rules.

⁷ Rules 20-22 of the Rules.

⁸ Regulation 90 of the Regulations of the Court.

⁹ Regulation 116 of the Regulations of the Court.

filled with trained investigators and attuned particularly to the needs of law enforcement, routinely deals with difficult investigations, including in the field, and is sensitive to and experienced in handling and protecting confidential information, witness security and evidence.

6. In addition to the core crimes within the jurisdiction of the Court, Article 70(1) defines six offences against the administration of justice. Jurisdiction, scope, procedure and sanctions applicable to Article 70 proceedings are further specified in Rules 162 to 169. It is noteworthy that the Statute and Rules comprehensively regulate the offences and the principles and procedures governing the Court's exercise of jurisdiction over them.¹⁰

7. There is no basis under the Statute and Rules to treat differently the investigation and prosecution of offenses under Article 70. To the contrary, the Statute and the Rules, as well as the jurisprudence of the Court, make it clear that the investigation and prosecution of offences under Article 70, like the investigation and prosecution of offences in Articles 5 through 8, are to be conducted by the Prosecutor. Rule 165 provides that “[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source” (emphasis added). The only exception to the Prosecutor having sole authority over the investigation and prosecution of Article 70 offences is expressly provided for in Article 70(4)(b) and Rule 162(4), which allow the Court to request a state party with jurisdiction (i.e. for offences committed in its territory or by its nationals) to prosecute these offences.¹¹

¹⁰ Thereby avoiding any possible discussion on the infringement of the principle of legality – as happened in the ad hoc tribunals: D'Ascoli S., “Sentencing Contempt in International Criminal Justice”, *Journal of International Criminal Justice* 735, July 2007, p.11.

¹¹ Piragoff DK in Triffterer, “Commentary on the Rome Statute of the International Criminal Court” Article 70, [2], p.1338. Note that the term “Court” includes the Prosecution and the Chamber, and therefore, the Chamber could request a State to investigate and prosecute the matter; but also the Prosecution could arguably consider that domestic prosecution is more appropriate and request the Chamber to refer the matter to the domestic authorities.

8. The role entrusted to the Prosecutor over the investigation and prosecution of offences under Article 70 was confirmed by Trial Chamber II in refusing an application by Mathieu Ngudjolo to initiate proceedings against a prosecution witness for perjury.¹² Trial Chamber II held that “Rule 165 of the Rules [...] gives *only the Prosecutor* the authority to begin an investigation on the offences defined in Article 70 [...] whether he acts proprio motu or on the basis of information communicated to him by the Chamber or any other reliable source” (emphasis added).¹³

9. More recently, the same Chamber, referring to its earlier oral decision, stated that it would consider referring the matter to the DRC authorities if the Prosecution decided not to act.¹⁴ Again, this later decision confirms the sole authority of the Prosecution within the Court to investigate and prosecute offences under Article 70. The decision further accepts that a State Party may be engaged *if* the Prosecutor decides not to act, thereby affirming the primacy of the Prosecutor’s role.

10. It is noteworthy that when this Chamber determined that the Prosecution should be responsible for taking prosecution witness 15’s out-of-court statement, following his testimony that he had previously provided false information to the Prosecution, it did so on the basis that the Prosecution is more familiar than Registry staff with taking witness statements.¹⁵

11. In its ruling that the Prosecution is the sole investigative and prosecutorial authority within the Court and that the Defence could not initiate such proceedings, Trial Chamber II, in *obiter*, raised the issue of whether a conflict of interest could exist where the decision by the Prosecution to investigate or prosecute alleged Article 70 offences were committed by a Prosecution witness.¹⁶ The Prosecution accepts that a conflict of interest could influence some of its staff, involved in the same case, but this conflict does not affect the Office itself. The Prosecutor can decide (or the

¹² Oral Decision of 22 September 2010, ICC-01/04-01/07-T-190-RED-ENG WT, pp.1-5,

¹³ *Ibid.*, p.3, lines 14-22,

¹⁴ ICC-01/04-01/07-2731, para.18.

¹⁵ ICC-01/04-01/06-T-192-CONF-ENG-CT, page 11, lines 20-24.

¹⁶ ICC-01/04-01/07-T-190-RED-ENG WT, p.4, lines 1-5.

Chamber could request the Office) to appoint a staff member who was not involved in the case to conduct the investigation. Alternatively, the Office could contract with a totally independent counsel to conduct the investigations. The Prosecutor is bound by obligations of fairness and impartiality in the execution of his mandate, as prescribed in Article 54(1). These obligations extend to the Prosecutor in the context of the investigation and prosecution of offences under Article 70, just as in the investigation and prosecution of any other crime within the jurisdiction of the Court.

12. Indeed, when similar situations have arisen the Prosecution has acted in accordance with its statutory obligations. When allegations in this case were raised against Prosecution intermediary 316, the Prosecution proceeded to interview the intermediary and, consistent with the rights of the intermediary under Article 55(2) and its obligations under the Statute, the Prosecution informed the intermediary that there were allegations that he had committed Article 70 offences and that he had certain rights in respect of the interview.¹⁷ The Prosecution proceeded in the same way when allegations were made against Prosecution intermediary 321.¹⁸ This demonstrates that the Prosecution fully respected its duties and responsibilities in a situation where the allegations of an Article 70 offence were made against its own intermediaries.

13. The Prosecution submits that, considering the clear parameters of the role ascribed to it under the Statute and Rules, it is neither envisaged nor appropriate for the Registry to conduct the investigation or prosecution of an Article 70 offence. Even in circumstances where the Prosecutor decides, in his or her discretion (see Rule 165), to decline to pursue an investigation or prosecution, the Chamber cannot request the Registrar to take over the prosecutorial function or appoint an *amicus curiae* to investigate the matter.¹⁹

¹⁷ DRC-OTP-0216-0367 (starting from page DRC-OTP-0216-0374).

¹⁸ DRC-OTP-0231-0080 (starting from page DRC-OTP-0231-0084).

¹⁹ In this regard, the provisions of the Rome Statute differ from the procedures of other international tribunals: Rules 54 and 77(D)(ii) of the ICTY Rules of Procedure and Evidence allow the Chamber to direct the Registry to appoint an *amicus curiae* and to order the *amicus curiae* to prosecute offences

Conclusion

14. In light of the foregoing, save for the Court requesting a state party to prosecute such offences, the Prosecution submits that it alone is vested with the authority to conduct investigations and prosecutions under Article 70. The Registrar cannot, and should not, be engaged to undertake the investigative or prosecutorial responsibilities that are assigned to the Prosecutor.



Luis Moreno-Ocampo, Prosecutor

Dated this 1st day of April 2011
At The Hague, The Netherlands

against the administration of justice; see *Prosecutor v Brdanin*, Order Instigating Proceedings against Milka Maglov, IT-99-36/R77, 8 May 2003.