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

Date: 15 April 2008

**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**

**Prosecution's additional information on the Undisclosed Evidence**

**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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**REGISTRY**

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Background

1. The Prosecution recalls and refers to the procedural history set out in the “Prosecution’s submission on undisclosed documents containing potentially exculpatory information” of 28 March 2008 (“28 March 2008 Submission”).<sup>1</sup>
  
2. In its 28 March 2008 Submission, the Prosecution informed the Trial Chamber that a number of items of evidence in its possession which contain potentially exculpatory information and/or information falling within the scope of Rule 77 have not been disclosed to the Defence because they were obtained pursuant to Article 54(3)(e) confidentiality agreements and the providers of the information have not consented to their disclosure (“Undisclosed Evidence”).<sup>2</sup> The Prosecution informed the Trial Chamber that in its view the Undisclosed Evidence does not materially impact on the Court’s determination of the guilt of innocence of the accused.<sup>3</sup>
  
3. On 3 April 2008 the Trial Chamber issued its “Order on the ‘Prosecution’s submission on undisclosed documents containing potentially exculpatory information’” (“Order”).<sup>4</sup> The Order required the Prosecution to file by 14 April 2008 the Undisclosed Evidence *“together with a document indicating for each document why it is said that it does not show or tend to show the innocence of the accused or mitigate the guilt of the accused, or affect the credibility of prosecution evidence”*.<sup>5</sup> The Order also required the Prosecution to furnish the Chamber by

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<sup>1</sup> ICC-01/04-01/06-1248, paras 1-4.

<sup>2</sup> ICC-01/04-01/06-1248, para 7 and ICC-01/04-01/06-1267, para 5.

<sup>3</sup> ICC-01/04-01/06-1248, para 31.

<sup>4</sup> ICC-01/04-01/06-1259.

<sup>5</sup> ICC-01/04-01/06-1259, para 3.

7 April 2008 with any agreements and undertakings which purport to prevent the Prosecution from providing to the Chamber the Undisclosed Evidence.<sup>6</sup>

4. In compliance with this Order, the Prosecution filed the "Prosecution's submission on Article 54(3)(e) confidentiality agreements"<sup>7</sup> on 7 April 2008, confirming the existence of agreements which prevent the Prosecution from providing the Undisclosed Evidence to the Trial Chamber.<sup>8</sup>
  
5. As announced in the Trial Chamber's Order,<sup>9</sup> the issue of the existence of agreements and undertakings which prevent the Prosecution from providing to the Chamber the Undisclosed Evidence was listed for an *ex parte* hearing on 9 April 2008. At the occasion of that hearing, the Prosecution informed the Trial Chamber that, in light of the fact that it cannot provide the Undisclosed Evidence to the Chamber, it would also not be able to provide it by 14 April 2008 "*with a document indicating for each document why it is said that it does not show or tend to show the innocence of the accused or mitigate the guilt of the accused, or affect the credibility of prosecution evidence*", as had been requested in the Order.<sup>10</sup> In order to further assist the Chamber, however, the Prosecution offered to provide further information on the categories of potentially exculpatory information and/or information falling within the scope of Rule 77 which can be found in the Undisclosed Evidence. The Trial Chamber gave the Prosecution until 15 April 2008 to provide this additional information.<sup>11</sup>

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<sup>6</sup> ICC-01/04-01/06-1259, para 3.

<sup>7</sup> ICC-01/04-01/06-1267.

<sup>8</sup> ICC-01/04-01/06-1267, paras 6 and 7.

<sup>9</sup> ICC-01/04-01/06-1259, para 3.

<sup>10</sup> Draft transcript of the *ex parte* hearing on 9 April 2008, page 27, lines 6-10.

<sup>11</sup> Draft transcript of the *ex parte* hearing on 9 April 2008, page 26, lines 2-3.

## **Additional information on the Undisclosed Evidence**

6. The Prosecution recalls its reference, in its 28 March 2008 Submission, to the four categories of evidence which at least *in principle* could materially impact on the Court's determination of the guilt or innocence of the accused,<sup>12</sup> that is, the grounds excluding criminal responsibility; efforts to demobilise child soldiers; insufficient command and control; and the role of Uganda and Rwanda. The Prosecution also recalls its submission that none of the items included in the Undisclosed Evidence which were captured by the Prosecution with those four categories *in fact* materially impact on the Court's determination of the guilt or innocence of the accused.<sup>13</sup>
  
7. The Prosecution reaffirms its submissions that none of the items included in the Undisclosed Evidence which were classified by the Prosecution as potentially indicating the existence of grounds excluding Thomas LUBANGA DYILO's criminal responsibility actually led the Prosecution to believe that a ground for excluding Thomas LUBANGA DYILO's criminal responsibility exists.<sup>14</sup> The Prosecution now expands on the reasons why, in the Prosecution's view, the items included in the Undisclosed Evidence which it classified as falling within the three other categories of evidence do not in fact materially impact on the Court's determination on the guilt or innocence of the accused.

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<sup>12</sup> ICC-01/04-01/06-1248, para 18.

<sup>13</sup> ICC-01/04-01/06-1248, para 18.

<sup>14</sup> ICC-01/04-01/06-1248, paras 20-21.

*Efforts to demobilise*

8. In its review of the evidence in the DRC collection, the category of evidence *efforts to demobilise* was used by the Prosecution to capture all information indicating that Thomas LUBANGA DYILO or his subordinates or the UPC/FPLC generally made efforts to demobilise child soldiers. The Prosecution has disclosed to Thomas LUBANGA DYILO all materials relating to such efforts to demobilise, except where it has been prevented from doing so by confidentiality agreements.
  
9. The Prosecution notes, however, that not all materials disclosed under this category of evidence *in fact* have the potential to impact on the Court's determination of the guilt or innocence of the accused.
  
10. The items included in the Undisclosed Evidence which were classified by the Prosecution as falling within the category of evidence *efforts to demobilise* do not materially impact on the guilt or innocence of the accused. While the Prosecution is unable, in light of its confidentiality agreements, to provide the Chamber with an individualised account for each of the items, it can inform the Chamber that the information contained in them relates to:
  - a. demobilisation generally or to the removal of soldiers from certain areas;
  - b. general undertakings by armed groups to cease the enlistment, conscription and use of child soldiers;
  - c. efforts to demobilise children from the ranks of the UPC/FPLC;
  - d. alleged demobilisations that took place in November 2003; or
  - e. isolated cases of demobilisations.

11. The Prosecution notes that the items included in the Undisclosed Evidence which were captured by the Prosecution in the category of evidence *efforts to demobilise* either do not relate to the demobilisation of children;<sup>15</sup> or relate to undertakings made by groups other than the UPC/FPLC;<sup>16</sup> or relate to efforts to demobilise children from the UPC/FPLC made by non-UPC/FPLC members;<sup>17</sup> or fall outside the temporal scope of the charges as confirmed;<sup>18</sup> or relate to the demobilisation of small groups of child soldiers.<sup>19</sup>

12. The Prosecution informs the Trial Chamber that it is in possession of a number of materials relating to Thomas LUBANGA DYILO's demobilisation efforts, including materials that relate to the announcement of the demobilisation of a group of 70 UPC/FPLC child soldiers in June 2003, which it has disclosed to the Defence.<sup>20</sup>

*Insufficient command and control*

13. In its review of the evidence in the DRC collection, the category of evidence *insufficient command and control* was used by the Prosecution to capture all information indicating that Thomas LUBANGA DYILO had insufficient command and control over the UPC/FPLC in general or over specific individuals or groups of individuals who were committing the crimes with which Thomas LUBANGA DYILO is charged. The Prosecution has disclosed to Thomas LUBANGA DYILO all materials containing allegations that he

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<sup>15</sup> Para 10 (a).

<sup>16</sup> Para 10 (b).

<sup>17</sup> Para 10 (c).

<sup>18</sup> Para 10 (d).

<sup>19</sup> Para 10 (e).

<sup>20</sup> On the basis of the statements they have provided to the Prosecution, and which have been disclosed to the Defence, the Prosecution anticipates that a number of its witnesses will be able to address the question of Thomas LUBANGA DYILO's demobilisation efforts, in particular with respect to this group of 70 UPC/FPLC child soldiers.

lacked sufficient command or control, except where it has been prevented from doing so by confidentiality agreements.

14. In order to have the potential to impact on the Court's determination of the guilt or innocence of the accused, in the Prosecution's submission, the information must indicate that Thomas LUBANGA DYILO's alleged lack of command and control prevented him from making the contribution to the common plan with which he has been charged.<sup>21</sup>
15. The items included in the Undisclosed Evidence which were classified by the Prosecution as falling within the category of evidence *insufficient command and control* fail to satisfy these requirements. While the Prosecution is unable, in light of its confidentiality agreements, to provide the Chamber with an individualised account for each of the items, it can inform the Chamber that the information contained in them is too general and is disconnected from the issue of the enlistment, conscription and use of child soldiers. The information contained in them concerns:
- a. allegations of splits within the UPC/FPLC over three specific time periods;<sup>22</sup>
  - b. allegations that persons other than Thomas LUBANGA DYILO obtained weapons from Rwanda for the UPC/FPLC;
  - c. in one case, the contradiction of Thomas LUBANGA DYILO's orders by his direct subordinates in the UPC/FPLC;<sup>23</sup>

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<sup>21</sup> The Prosecution notes that the potential for impacting on the Court's determination of the guilt or innocence of the accused that this category of evidence could have must be considered in light of the theory of co-perpetration which underlies the charges against Thomas LUBANGA DYILO, as developed in ICC-01/04-01/06-356-Anx2 and in ICC-01/04-01/06-1099-Anx.

<sup>22</sup> November 2002, March 2003 and December 2003.

<sup>23</sup> This relates to the UPC attack on the UPDF in Bunia in March 2003.



- d. allegations of the UPC/FPLC's lack of control over unidentified ethnic militias.

16. The Prosecution notes that this information either falls outside the scope of the charges as confirmed or has no bearing on Thomas LUBANGA DYILO's *de facto* authority to ensure effective implementation of the UPC/FPLC practice of enlisting, conscripting and using child soldiers.

17. The Prosecution informs the Trial Chamber that it is in possession of a number of materials relating to Thomas LUBANGA DYILO's alleged insufficient command and control, and that it has disclosed these materials, or alternative evidence,<sup>24</sup> to the Defence.

#### *Role of Uganda and Rwanda*

18. In its review of the evidence in the DRC collection, the category of evidence *role of Uganda and Rwanda* was used by the Prosecution to capture all information indicating that Uganda or Rwanda had control over the UPC/FPLC and in particular over Thomas LUBANGA DYILO and/or his subordinate officers, not just in the context of child recruitment, but generally. The Prosecution has disclosed to Thomas LUBANGA DYILO all materials containing allegations that Uganda and Rwanda exercised such control, except where it has been prevented from doing so by confidentiality agreements.

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<sup>24</sup> On the basis of the statements they have provided to the Prosecution, and which have been disclosed to the Defence, the Prosecution anticipates that a number of its witnesses will be able to address the question of Thomas LUBANGA DYILO's command and control, including with respect to the issues listed in para 15.

19. In order to have the potential to impact on the Court's determination of the guilt or innocence of the accused, in the Prosecution's submission, the information must indicate that the control allegedly exercised by Uganda and Rwanda had a bearing on Thomas LUBANGA DYILO's *de facto* authority to ensure effective implementation of the UPC/FPLC practice of enlisting, conscripting and using child soldiers.
20. The items included in the Undisclosed Evidence which were classified by the Prosecution as falling within the category of evidence *role of Uganda and Rwanda* fail to satisfy this requirement. While the Prosecution is unable, in light of its confidentiality agreements, to provide the Chamber with an individualised account for each of the items, it can inform the Chamber that the information contained in them is of a general nature and is disconnected from the issue of the enlistment, conscription and use of child soldiers by the UPC/FPLC. The information contained in them includes:
- a. general allegations that Uganda had the power to foment dissent within the UPC/FPLC, supported the UPC/FPLC or had an alliance with the UPC/FPLC;
  - b. references to Uganda's presence in Ituri;
  - c. indications that the UPC/FPLC was created by Uganda or was brought to power in Bunia by the UPDF;
  - d. allegations that the UPDF "supported" the UPC/FPLC in specific military operations or that a "foreign force" fought alongside the UPC/FPLC when the latter ousted the UPDF from Bunia in March 2003;
  - e. indications that Rwanda controlled the UPC/FPLC in the July – August 2002 period;
  - f. indications that some members of the UPC/FPLC received orders from Rwanda;

- g. references to support lent to groups other than the UPC/FPLC;
- h. indications that suggest that the UPC/FPLC could not use the weapons that were in Mandro without an order from Rwanda;
- i. indications that at a certain point in time – in about November 2002 – Rwanda controlled the UPC/FPLC through its military officers;
- j. allegations that Thomas LUBANGA DYILO himself was under the control of others.

21. The Prosecution notes that this information either does not rise to the level of control over the armed group;<sup>25</sup> falls outside the temporal scope of the charges as confirmed<sup>26</sup> or extends only to a limited period thereof<sup>27</sup>; does not relate to the UPC/FPLC or to Thomas LUBANGA DYILO at all;<sup>28</sup> does not address the developments that followed the UPC/FPLC's arrival in power;<sup>29</sup> is provided by Prosecution witnesses who will appear at trial and are anticipated to address these matters;<sup>30</sup> or, most importantly, relates to the UPC/FPLC's military operations only<sup>31</sup> and is disconnected from the enlistment, conscription and use of child soldiers by the UPC/FPLC.<sup>32</sup>

22. The Prosecution informs the Trial Chamber that it is in possession of a number of materials relating to role of Uganda and Rwanda, including with regards to

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<sup>25</sup> Para 20 (a), (c) and (d).

<sup>26</sup> Para 20 (a) and (e).

<sup>27</sup> Para 20 (i).

<sup>28</sup> Para 20 (c) and (g).

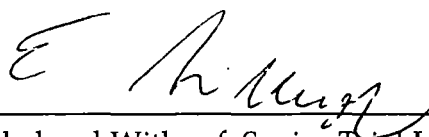
<sup>29</sup> Para 20 (c).

<sup>30</sup> Para 20 (h).

<sup>31</sup> Para 20 (i).

<sup>32</sup> Para 20 (a) through (j).

the issues set out at paragraph 20 above, and that it has disclosed these materials, or alternative evidence,<sup>33</sup> to the Defence.



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Ekkehard Withopf, Senior Trial Lawyer,  
on behalf of  
Luis Moreno-Ocampo, Prosecutor

Dated this 15 April 2008  
At The Hague, The Netherlands

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<sup>33</sup> On the basis of the statements they have provided to the Prosecution, and which have been disclosed to the Defence, the Prosecution anticipates that a number of its witnesses will be able to address the role played by Uganda and Rwanda, and in particular the level of control, if any, that they exercised over Thomas LUBANGA DYILO.