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

Date: **11 March 2010**

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 Response to the "Observations de la défense sur l'entendue des obligations du Procureur en matière d'information et de divulgation "

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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Introduction

1. On 9 March 2010 the Defence for Thomas Lubanga filed observations regarding the scope of the obligations of the Office of the Prosecutor in relation to notification and disclosure (“the Observations”).¹ The Defence requests that the Chamber decides that the Prosecutor has the obligation to disclose to the Defence all information collected by the Office in relation to the evidence presented by the parties, or which – in general terms – is susceptible to interest of the Defence, and to do so as soon as it has come to the knowledge of the Prosecutor.²

2. The Prosecution submits that it has complied with its disclosure obligations under the Rome Statute (the Statute) and in the Rules of Procedure and Evidence (the Rules), and that there is no general obligation to disclose everything that the Prosecution may wish to use for the purposes of cross-examination.

Prosecution Submission

3. In the Observations, the Defence submits that (i) the Prosecutor has the obligation to notify clearly to the Defence the ‘evidence’ it intends to use during cross-examination³; and that (ii) the Prosecutor has the obligation to disclose to the Defence all ‘information’ it intends to use during cross-examination, in particular information regarding defence witnesses.

A. Obligation to notify the Defence of the evidence it intends to use during cross-examination

4. The Prosecution notes that the question of notification of documents that a party intends to use in cross-examination has previously been litigated and

¹ ICC-01/04-01/06-2324 (“Observations”), paras. 1 and 2.

² *Ibid.*, p. 6.

³ *Ibid.*, p. 1.

resolved by this Chamber. In its 'Decision on various issues related to witnesses' testimony during trial' the Chamber held:⁴

The Chamber accepts the prosecution's submission that the disclosure of documents to be used in questioning a witness is governed by Rules 77 and 78 of the Rules: the parties are required to provide for inspection, in advance of trial, those documents which they intend to use for this purpose. Furthermore, by Regulation 52 of the Regulations of the Registry, the parties and participants have the obligation to provide the Registry with the electronic version, whenever possible, of any evidence they intend to use at a hearing at least three full working days in advance. However, the Chamber recognises that the questioning of a witness by a party not calling that witness is to some extent reactionary, and as such could entail on occasion the unanticipated use of documents.

A. Obligation to disclose information used by the Prosecution during cross-examination

5. The Defence considers that the Prosecutor has the obligation to disclose to it all 'information' the Prosecution intends to use during cross-examination, in particular information regarding defence witnesses. The Prosecution submits that its disclosure obligations are clearly set out in the Statute and the Rules, and that it has at all times complied with these obligations.
6. In respect of information used in cross-examination, the Prosecution submits that a clear distinction needs to be made between:
 - (i) the scenario in which a party uses a document or other material to challenge a witness's account on a certain issue (e.g. because there is a reasonable expectation that the issue will be addressed)⁵; and
 - (ii) the scenario in which a party tests the credibility of the witness by putting suggestions to the witness or by questioning his or her evidence without using a document or other material (e.g. because the witness testifies spontaneously about a certain issue or because

⁴ ICC-01/04-01/06-1140, 29 January 2008, para. 34.

⁵ The notification obligation as referred to above applies to the material used in this scenario.

the witness is not in a position to meaningfully comment upon the document or material).

7. Whereas in the first scenario, the Prosecution agrees that in principle the item concerned should be disclosed to the other party⁶, the same does not apply in respect of the second scenario. Here, a party is under no obligation to disclose the information, so long as it has a good faith basis to challenge the witness on the issue concerned.
8. Very often, by its nature, cross-examination will involve a tentative and probing approach to testimony given during examination-in-chief. It is not uncommon for cross-examination to be the only avenue available to a party to prove or test a certain point. Provided a party does not put suggestions to the witness recklessly or suggestions that it knows to be false, a party should be allowed to pursue any hypothesis that is faithfully advanced on the strength of reasonable inference, experience or intuition and there is no requirement of an evidentiary foundation or disclosure for every factual suggestion put to a witness in cross-examination. If in doubt, the Trial Chamber may seek assurance from a party that a good faith basis exists for the question.
9. This approach finds support in the Court's legal regime, since the underlying information used in cross-examination would neither fall under the purview of Article 67 (2) nor under that of Rule 77. It has also been followed by national and international tribunals.⁷

⁶ The Prosecution submits that, as indicated in the Chambers decision ICC-01/04-01/06-1140, cross-examination is to some extent reactionary. In addition, it should be reiterated that the summaries provided by the defence on the expected testimony of their witnesses are so succinct that it is more difficult for the Prosecution to foresee in advance which material it intends to put to the defence witnesses in cross-examination. Therefore, it cannot be excluded that the Prosecution will request the Chamber to put material to defence witness that was not disclosed in advance.

⁷ For International Tribunals see: *Prosecutor v. Théoneste BAGOSORA, Gratién KABILIGI, Aloys NTABAKUZE, Anatole NSENGIYUMVA*, ICTR-98-41-T, Oral decision, 9 May 2005, pp. 27-29:

10. Article 67(2)⁸ of the Statute only obliges the Prosecution to disclose information related to the credibility of Prosecution evidence, not to the credibility of defence witnesses.
11. In turn, Rule 77⁹ obliges the Prosecution to disclose information relevant to the preparation of the Defence. It cannot be extended to include every piece of information that the Prosecution may want to base its questions and suggestions on during (*often unpredictable*)¹⁰ cross-examination. Should the Prosecution only be allowed to put questions and suggestions to defence witness on the basis of disclosed material, this would significantly impair the full and proper cross-examination of defence witnesses. Such a system would be unfair to the Prosecution and detrimental to the establishment of the truth. In this regard, it is noted that during the Prosecution case, the Defence routinely put suggestions to Prosecution witnesses during their cross-examination without any prior disclosure to the Prosecution.

<http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/090505.htm>; *Prosecutor v. Elizaphan NTAKIRUTIMANA, Gérard NTAKIRUTIMANA*, ICTR-96-10-T and ICTR-96-17-T, Decision on the Defence's motion on Prosecutorial Misconduct and on the Prosecutor's counterclaim, 12 September 2002 <http://www.ictr.org/ENGLISH/cases/NtakirutimanaE/decisions/120902.htm>. This principle has also been recognised in national jurisdictions: for example in the United States and Canada. Please note that some of the links below are not direct links: they need to be copied to the internet address bar. *State v. Lowe*, 164 Ohio App.3d 726, 2005-Ohio-6614: www.supremecourt.ohio.gov/rod/docs/pdf/10/2005/2005-Ohio-6614.pdf ; *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5: csc.lexum.umontreal.ca/en/2004/2004scc5/2004scc5.pdf ; *United States v Lin*, 101 F3d 760, 768 (DC Cir 1996): <http://openjurist.org/101/f3d/760> ; *The Supreme Court of the State of Oregon, In Re Complaint as to the Conduct of Carroll L. TICHENOR*, (OSB 03-33; SC S52239) <http://www.publications.ojd.state.or.us/S52239.htm>; citing Laird C. Kirkpatrick, *Oregon Evidence* § 405.04, Art IV-104 (4th ed 2002); *Troutman v. Erlandson*, 279 Or 595, 602-03, 569 P2d 575 (1977).

⁸ Which provides: '*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*' (emphasis added).

⁹ Which provides: '*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*' (emphasis added).

¹⁰ As already advanced, the scarcity of information in the summaries provided by the Defence is such that it makes it impossible for the Prosecution to foresee in advance which information may be relevant for asking questions and putting suggestions to the defence witness during their cross-examination.

Relief sought

12. For the reasons set out above, the Prosecution request that the Trial Chamber rejects the Defence's Observations and considers the Prosecution's submissions as set out herein.



Luis Moreno-Ocampo
Prosecutor

Dated this 11th day of March, 2010

At The Hague, The Netherlands