

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public

With Confidential – Prosecution and Defence Only Annexes 1-23

**Prosecution's submission on undisclosed documents containing potentially
exculpatory information**

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Background

1. In advance of the hearing on 1 and 2 October 2007 and subsequently, the Parties made submissions on the timing and manner of disclosure of evidence provided to the Prosecution pursuant to Article 54(3)(e) of the Statute¹. At the occasion of the 1 October 2007 hearing, the Prosecution informed the Trial Chamber about the disclosure status of evidence obtained by the Prosecution pursuant to Article 54(3)(e).² The Prosecution informed the Trial Chamber that, where the documents contained potentially exculpatory information, the Prosecution was looking for alternative evidence within its evidence collection.³
2. Following these submissions, the Trial Chamber rendered its 9 November 2007 “Decision Regarding the Timing and Manner of Disclosure and the Date of Trial”.⁴ In this decision, the Trial Chamber set a deadline of 14 December 2007 for disclosure of the evidence the Prosecution intended to rely on at trial,⁵ and held that

If the prosecution has in its possession any exculpatory material which it is unable to disclose and which may materially impact on the Court's determination of guilt or innocence, it will be under an obligation to withdraw any charges which the non-disclosed exculpatory material impacts upon. If the prosecution is in doubt as to whether or not the material falls into this category, it should be put before the bench for the Trial Chamber's determination. Finally, it is to be noted that the

¹ ICC-01/04-01/06-951, paras 19-38; ICC-01/04-01/06-960, paras, 22-35 ; ICC-01/04-01/06-957, paras 9-27; ICC-01/04-01/06-T-52-ENG, pp 13-19, 51, 83-88 and 93-94; ICC-01/04-01/06-T-54-ENG, pp 44-51; ICC-01/04-01/06-T-55-CONF-EXP-ENG, pp 1-15.

² ICC-01/04-01/06-T-52-ENG, p 14, lines 3-11.

³ ICC-01/04-01/06-T-52-ENG, p 18, lines 1-10.

⁴ ICC-01/04-01/06-1019.

⁵ ICC-01/04-01/06-1019, para 25.

*prosecution remains under its obligation to disclose potentially exculpatory material as soon as is practicable throughout the trial period, as is required by Article 67(2) of the Statute.*⁶

3. On 10 December 2007 the Prosecution applied⁷ to the Chamber for an extension of the 14 December 2007 deadline in respect of certain categories of evidence. In this filing the Prosecution informed the Trial Chamber of the fact that it had requested the lifting of Article 54(3)(e) restrictions from the providers and was working with them in order to ensure that the disclosure deadline was met.⁸ On 13 December 2007 the Trial Chamber rendered an oral decision requiring the Prosecution to put before the Chamber by way of an application all evidence not served in full by 14 December 2007.⁹ On 24 January and 28 February 2008 the Prosecution made two such applications,¹⁰ to which the Defence responded in due course.¹¹ At the hearing on 12 March 2008 the Trial Chamber heard oral submissions from the parties on these applications.¹² At the occasion of this hearing, the Prosecution informed the Chamber of the fact that three documents for which Article 54(3)(e) restrictions had recently been lifted had been disclosed to the Defence with redactions made at the request of the providers, and that in the Prosecution's view these redactions affected portions of the documents containing potentially exculpatory and/or Rule 77 information. The Prosecution also informed the Chamber that it was going back to the providers to seek the lifting of these redactions.¹³

⁶ ICC-01/04-01/06-1019, para 28.

⁷ ICC-01/04-01/06-1019.

⁸ ICC-01/04-01/06-1072, para 43.

⁹ ICC-01/04-01/06-T-65-ENG ET WT, page 16, lines 18-22. See also page 19, line 22 to page 20, line 16.

¹⁰ ICC-01/04-01/06-1129 and ICC-01/04-01/06-1195.

¹¹ ICC-01/04-01/06-1169 and ICC-01/04-01/06-1215.

¹² ICC-01/04-01/06-T-78-CONF-FRA RT, page 56, line 10 to p 58, line 5.

¹³ ICC-01/04-01/06-T-78-CONF-FRA RT, page 57, lines 13-16.

4. At the hearing on 13 March 2008, the Trial Chamber held that the issue of redactions imposed by the providers on potentially exculpatory materials would need to be addressed in principle.¹⁴ The Prosecution informed the Trial Chamber that in such cases, the Prosecution reverts to the information providers and seeks the making of more discreet redactions and that, where the providers are unable to lift the restrictions, the Prosecution seeks alternative evidence which contains the same potentially exculpatory elements, and discloses it to the Defence.¹⁵ The Trial Chamber requested the Prosecution to identify the areas of evidence which are potentially exculpatory and which the Prosecution is unable to disclose because of the response of information providers and, at the same time, to identify the alternative evidence which the Prosecution has been able to disclose. In this regard, the Prosecution was requested to inform the Chamber by 28 March 2008 whether any such items materially impact on the Prosecution's case ("Trial Chamber's Request").¹⁶

Update of status of materials collected pursuant to Article 54(3)(e) which contain potentially exculpatory information

5. The Prosecution notes that the Trial Chamber's Request only refers to potentially exculpatory evidence. The Prosecution has interpreted the Trial Chamber's Request to require it to inform the Chamber of the status of materials which the Prosecution must disclose pursuant to Article 67(2) of the Statute as well as of materials which the Prosecution must provide for inspection by the Defence pursuant to Rule 77. The Prosecution has followed this approach in view of the fact that Rule 77 creates an obligation for the Prosecution to make materials available for inspection by the Defence, much in the same way that Article 67(2) requires it to disclose potentially exculpatory materials. In both cases the

¹⁴ ICC-01/04-01/06-T-79-ENG ET WT, page 6, lines 18-22.

¹⁵ ICC-01/04-01/06-T-79-ENG ET WT, page 7, lines 10-24.

¹⁶ ICC-01/04-01/06-T-79-ENG ET WT, page 8, line 6 to page 9, line 12.

Prosecution is under an obligation to make the materials available to the Defence. Additionally, the Prosecution notes that there is a reference, in Rule 77, to Rule 81, which subjects disclosure to the requirements of confidentiality contained *inter alia* in Article 54, as well as to Rule 82 which similarly operates as a restriction on disclosure that is applicable in the context of Rule 77.

6. The Prosecution informs the Trial Chamber that as of 25 March 2008, it has disclosed or provided for pre-inspection 76 documents containing potentially exculpatory information and / or information falling within the scope of Rule 77.¹⁷ The majority of these documents were provided to the Prosecution by the United Nations. The United Nations required that all those documents be provided under condition of confidentiality in accordance with the provisions of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.¹⁸ The United Nations was not otherwise willing to provide those documents to the Prosecution. Of these 76 documents, 44 were disclosed or provided for pre-inspection in fully unredacted form and 32 were disclosed with redactions made by the providers. The redactions made to 27 of

¹⁷ These 76 documents were formerly subject to Article 54(3)(e) restrictions.

¹⁸ Article 18(3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations ("Relationship Agreement") states that "The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence". The Relationship Agreement was adopted by the Assembly of States Parties at its Third Session (ICC-ASP-3-Res1) while, at its Fifth Session, the ASP adopted Resolution ICC-ASP/5/Res.3, in which it "Calls upon the Court to promote the full implementation of the Relationship Agreement between the International Criminal Court and the United Nations". The Prosecution submits that the Relationship Agreement is applicable law pursuant to Articles 2, 4 and 21(1)(b) of the Statute ("applicable treaties"). Reference is made to the transcript of the 2 October 2007 hearing, ICC-01/04-01/06-T-54-ENG, p 45, line 13 to p 51, line 2. See also Bergsmo and Kruger, "Article 54" in Triffterer et al (eds) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden:1999), p 724, § 28.

Over 70 of the documents referred to in this paragraph were provided by the United Nations pursuant to Article 54(3)(e). The United Nations has since consented to the lifting of the restriction on disclosure.

these 32 documents do not affect the substance of the potentially exculpatory information and / or information falling within the scope of Rule 77.¹⁹ The redactions made to the remaining 5 documents, however, do in the Prosecution's view diminish the potentially exculpatory or Rule 77 value of the documents.

7. A total of 216 items containing potentially exculpatory information and / or information falling within the scope of Rule 77 have not been disclosed to the Defence. The majority of these items were provided to the Prosecution by the United Nations.²⁰ For 35 of these 216 items, the Prosecution is awaiting responses from the providers to its requests for lifting of Article 54(3)(e) restrictions.²¹ With respect to the additional 181 items, the providers did not agree to lift the Article 54(3)(e) restrictions.

Types of information contained in Undisclosed Evidence

8. The present filing concerns materials which the Prosecution is presently unable to disclose to the Defence because either the providers did not agree to lift the Article 54(3)(e) restrictions or they imposed redactions as a condition to disclosure. All of these materials ("the Undisclosed Evidence") contain information which was preliminarily characterized by the Prosecution as potentially exculpatory or information falling within the scope of Rule 77. The Undisclosed Evidence can be divided into, on the one hand, categories of evidence which cannot, in light of their nature, materially impact on the Court's determination of the guilt or innocence of the accused and, on the other,

¹⁹ For example, in certain documents containing *tu quoque* information, redactions may have been applied to the names of persons or organizations, but not to the fact that there were child soldiers in all armed groups in Ituri.

²⁰ Over 170 of these items were provided by the United Nations pursuant to Article 54(3)(e).

²¹ The provider of almost all of these documents is the United Nations.

categories of evidence which at least in principle could have the potential to do so.

Categories of evidence which do not materially impact on the Court's determination of the guilt or innocence of the accused

9. The Prosecution submits that, by their nature, the six categories of evidence addressed at paragraphs 10-17 below do not have the potential to materially impact on the Court's determination of the guilt or innocence of the accused and that, while the Prosecution has disclosed this type of information in implementation of its very broad reading of Article 67(2) of the Statute. The Prosecution has also disclosed evidence falling within these six categories to the Defence, bearing in mind that at least some of those categories may be relevant for the establishment of mitigating factors. In any case, the Defence has already received a significant amount of this type of evidence, and is thus already in a position to rely on them as an alternative to the Undisclosed Evidence containing this type of information.²²

i. Voluntariness

10. This category of information relates to children who joined the UPC/FPLC voluntarily or were sent to the UPC/FPLC by their parents because they were hungry, orphans, destitute, or because they desired revenge for killed relatives, etc.²³ The Prosecution submits that voluntary enlistment in the UPC/FPLC is

²² The Prosecution refers to the examples of each category of evidence provided in the footnotes below and submits that these examples constitute alternative evidence already available to the Defence.

²³ An example of this type of potentially exculpatory information which has been disclosed to the Defence is DRC-OTP-0140-0152, which is provided as Confidential Annex 1. Reference is made to page 5 of this document, which bears the ERN DRC-OTP-0140-0156. Another example is contained in DRC-OTP-0152-0072 at page DRC-OTP-0152-0089, final sentences of para 72. This document is provided as Confidential Annex 2. In both documents, the Prosecution has used

legally irrelevant to the charges and that children under the age of 15 years cannot consent to enlistment or participation in hostilities and that voluntariness is thus not a valid defence.²⁴

ii. *Tu quoque evidence*

11. This category captures information relating to the recruitment and use of child soldiers by the Lendu or other armed groups in Ituri.

12. The Prosecution notes that the Trial Chamber has found that evidence relating to the use of child soldiers by other armed groups is not relevant to the charges, would not undermine the Prosecution's case, would not support any defence line of argument, does not relate to any live issue in the case and would not materially assist the defence.²⁵ The Prosecution also notes that while the relevance of *tu quoque* information for the Defence pursuant to Rule 77 is pending determination by the Appeals Chamber,²⁶ the Defence has not sought to have such materials disclosed as potentially exculpatory evidence.²⁷ The Prosecution submits that the materials falling within this category are not subject to the disclosure obligation of Article 67(2) and that the Defence has already been given access to a volume of *tu quoque* materials – including statements taken from children who were soldiers in armed groups other than the UPC/FPLC.²⁸

highlights over the relevant portions. These highlights are also made on materials disclosed to the Defence as potentially exculpatory evidence.

²⁴ The Prosecution refers to the submissions made by the Special Representative of the Secretary General of the United Nations for Children in Armed Conflict, ICC-01/04-01/06-1229-AnxA, in particular paras 14 and 16.

²⁵ ICC-01/04-01/06-T-71-ENG.

²⁶ ICC-01/04-01/06-1210 and ICC-01/04-01/06-1227. The Prosecution is due to file its appeal brief by 28 March 2008.

²⁷ ICC-01/04-01/06-1234, paras 23-28.

²⁸ Over 100 items disclosed to the Defence (spanning over 2,000 pages) contain *tu quoque* information. As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0150-0144, at para 8 and to DRC-OTP-0150-0272, at para 6. These documents, both of which are witness statements, in one case

iii. *Child soldiers*

13. This category captures information relating to information on the recruitment or use of child soldiers that does not fall under more specific categories (such as categories *i.* and *viii.* (above and below), *eg* information about soldiers in the UPC being 15 years old or older, and information about the use of child soldiers being common or culturally accepted, including cases of recruitment or use of child soldiers in the Kivus.²⁹

iv. *Benevolent acts by Thomas LUBANGA DYILO*

14. This category captures information relating to benevolent acts carried out by Thomas LUBANGA DYILO or the UPC/FPLC, *eg* information about Thomas LUBANGA DYILO's provision of security guarantees for NGOs working in the Ituri region.³⁰

v. *Other potentially exculpatory information*

15. This category captures information characterizing the UPC/FPLC as a political group which aimed to pacify Ituri, or references to the UPC's nature as an "all inclusive" organisation, *ie* an organisation which was open to and included all ethnic groups.³¹

taken from a witness who was previously a child soldier in an armed group other than the UPC/FPLC, are provided as Confidential Annexes 3 and 4, respectively.

²⁹ As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0172-0237, specifically to the paragraph under the heading "II.4. Recruitment and Use of Child Soldiers" at page DRC-OTP-0172-0239; DRC-OTP-1010-0150, first full question and answer at page DRC-OTP-1010-0153. These documents are provided as Confidential Annexes 5 and 6, respectively.

³⁰ As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0091-0065, fourth bullet point in the "5^{ème} periode" section at page DRC-OTP-0065-0072 and to DRC-OTP-0155-0143. These documents are provided as Confidential Annexes 7 and 8, respectively.

³¹ As an example of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0092-0436 and its various references to the UPC/FPLC's peaceful aims. This document is provided as Confidential Annex 9.

vi. Information falling within the scope of Rule 77

16. The information currently being provided for pre-inspection as “material” to the Defence is that which relates to the support lent by the governments of Uganda and Rwanda and by political actors in Kinshasa to the Ituri armed groups, including the provision of financial or operational support, of training and of weapons;³² and information concerning the role of the governments of Uganda and Rwanda and of political actors in Kinshasa in the exploitation of Ituri’s natural resources.³³ In addition to these materials, the Prosecution has been providing for pre-inspection documents that appear to “belong” to Thomas LUBANGA DYILO, that is, materials in which he appears by name or title as the author, addressee or recipient.

17. The Prosecution submits that information falling within the scope of Rule 77 as referred to in the preceding paragraph may assist the Defence in its preparation, but does not amount to potentially exculpatory evidence. All information falling within the scope of Rule 77 which also appear to be of a potentially exculpatory nature has been handled by the Prosecution as potentially exculpatory evidence. In any case, the Prosecution submits that it has already made it possible for the Defence to inspect evidence falling within the scope of Rule 77, which should suffice in terms of the Defence’s preparation for trial and should serve as an alternative to the Undisclosed Evidence.

³² As examples of this type of information which has been provided for pre-inspection by to the Defence the Prosecution refers to DRC-OTP-0105-0213 and DRC-OTP-0038-0258, at page DRC-OTP-0038-0260. These documents are provided as Confidential Annexes 10 and 11, respectively.

³³ As an example of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0049-0634, specifically to the fourth bullet point under para 5, at pages DRC-OTP-0049-0635 to DRC-OTP-0049-0636. This document is provided as Confidential Annex 12.

Categories of evidence which could materially impact on the Court's determination of the guilt or innocence of the accused

18. The Prosecution submits that, by their nature, the four categories of potentially exculpatory evidence addressed at paragraphs 19-26 below could have the potential to materially impact on the Court's determination of the guilt or innocence of the accused *in principle*. The Prosecution describes below the types of information it sought to find amid its evidence collection and which it has treated as potentially exculpatory evidence. In the Prosecution's view, however, none of the materials actually captured in these four categories materially impact on the guilt or innocence of the accused *in fact*. The Prosecution confirms that, as it indicated at the 13 March 2008 hearing,³⁴ there is no doubt³⁵ that the Undisclosed Evidence does not materially impact on the guilt or innocence of the accused. In any case, the Defence has already received a significant amount of evidence falling under each of these four categories, and is thus already in a position to rely on them as an alternative to the Undisclosed Evidence containing this type of potentially exculpatory information.³⁶

vii. Grounds excluding criminal responsibility

19. This category of potentially exculpatory information relates to the grounds for excluding criminal responsibility, *ie* allegations that Thomas LUBANGA DYILO suffered from a mental disease or defect or was in a state of intoxication which destroyed his capacity to appreciate the unlawfulness or nature of his conduct, or

³⁴ ICC-01/04-01/06-T-79-ENG ET WT, p 8. line 17 to p 9, line 2.

³⁵ Reference is made to the 9 November 2007 decision, ICC-01/04-01/06-1019, and to para 28 in particular.

³⁶ The Prosecution refers to the examples of each category of evidence provided in the footnotes below and submits that these examples constitute alternative evidence already available to the Defence.

his capacity to control his conduct;³⁷ or that Thomas LUBANGA DYILO committed the crimes with which he is charged under duress;³⁸ or that Thomas LUBANGA DYILO or the UPC/FPLC acted to defend themselves or their property from force used by others, *ie* the UPC/FPLC was forced to recruit and use children to defend the Hema population against attacks in which they would otherwise have been outnumbered by enemy armed groups.³⁹

20. The Prosecution informs the Chamber that none of the documents it classified under this category led it to believe that there is a ground for excluding the criminal responsibility of Thomas LUBANGA DYILO with respect to the charges brought against him. While the materials do make reference to *elements* of the grounds for excluding criminal responsibility (for example, to the fact that Thomas LUBANGA DYILO was at times intoxicated with alcohol or consumed *chanvre*), they do not indicate the existence of *other essential* elements of the Article 31 grounds (for example, that the state of intoxication destroyed Thomas LUBANGA DYILO's capacity to appreciate the unlawfulness of his actions).

21. With respect to the ground for excluding criminal responsibility enshrined in Article 31(c) of the Statute (self-defence), for example, the Prosecution looked for but did not find materials that, in the Prosecution's view, indicate that the recruitment and use of child soldiers by the UPC/FPLC was a measure of self-defence, as is required by Article 31(c)⁴⁰. The documents disclosed to the Defence

³⁷ As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0151-0669, para 21. This document is provided as Confidential Annex 13.

³⁸ In its review of the evidence, the Prosecution looked for but did not find any materials indicating that Thomas LUBANGA DYILO acted under duress.

³⁹ As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0102-0071, in particular to the final paragraphs of page DRC-OTP-0102-0074. This document is provided as Confidential Annex 14.

⁴⁰ The Prosecution disclosed to the Defence the witness statement DRC-OTP-0071-0058 and its translation into French, DRC-OTP-0160-0749. Reference is made to the final portion of paragraph

as containing this type of potentially exculpatory evidence thus relate to the allegation that the UPC/FPLC participated in the armed conflict in Ituri as a measure of self-defence but do not relate to the recruitment or use of child soldiers by the UPC/FPLC. The Prosecution submits in this regard that the materials it has captured under this category are thus, as a general rule, incapable of materially impacting on the guilt or innocence of the accused.

viii. Efforts to demobilise

22. This category of potentially exculpatory evidence captures information relating to Thomas LUBANGA DYILO's or the UPC/FPLC's efforts to demobilise child soldiers, including information indicating willingness to enter into discussions with *inter alia* MONUC or non-governmental organizations about demobilization initiatives.⁴¹

ix. Insufficient command and control

23. This category of potentially exculpatory evidence captures allegations 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.⁴²

24 –highlighted in the English version of the witness statement, which is attached as Confidential Annex 15. In the Prosecution's view, the information contained in that portion of the statement does not satisfy the requirements of Article 31(1)(c).

⁴¹ As an example of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to DRC-OTP-0152-0072, which is provided as Confidential Annex 2. Reference is made to para 65 of this document, which bears the ERN DRC-OTP-0152-0087. In light of the obvious incriminating value of materials relating to efforts to demobilise child soldiers from the UPC/FPCL, the Prosecution has also disclosed these materials as incriminating evidence,

⁴² As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to witness statement DRC-OTP-0105-0085, para 150 at page DRC-OTP-0105-0112, para 177 at page DRC-OTP-0105-0118 and para 182 at page DRC-OTP-0105-0119; to witness statement DRC-OTP-0126-0422, para 131 at page DRC-OTP-0126-0446; to DRC-OTP-0185-0866, which is a UPC document signed by Floribert KISEMBO as President of the UPC/RP in December 2003; to DRC-OTP-0038-0629, at page DRC-OTP-0038-0633 of which Jerome

24. The Prosecution submits with regard to this type of potentially exculpatory evidence that it does have the potential to materially impact on the guilt or innocence of the accused. However, the Prosecution informs the Chamber that none of the documents classified by the Prosecution under this category, in the Prosecution's assessment, materially impact on the allegation that Thomas LUBANGA DYILO had an overall coordinating role in the UPC/FPLC, lent his authority to the common goal and controlled the execution of the common plan.

x. Role of Uganda and Rwanda

25. This category of potentially exculpatory evidence captures information relating to the exercise by Uganda and Rwanda (and eventually by other countries) of 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 and use of child soldiers, but in general.⁴³

26. The Prosecution informs the Chamber that none of the documents classified by the Prosecution under this category reveal control by foreign countries regarding

KAKWAVU is reported to have been in control of the area of Aru in early 2003; to DRC-OTP-0091-0218, in particular the first bullet point under 2.2. a) at page DRC-OTP-0091-0221, and to the first paragraph in page DRC-OTP-0091-0244; and to DRC-OTP-0074-0261, para 24 at page DRC-OTP-0074-0266. These documents are provided as Confidential Annexes 16, 17, 18, 19, 20 and 21, respectively. Reference is also made to DRC-OTP-0151-0669, provided as Confidential Annex 13, fourth paragraph on the first page.

⁴³ As examples of this type of potentially exculpatory information which has been disclosed to the Defence the Prosecution refers to witness statement DRC-OTP-0105-0085, para 150 at page DRC-OTP-0105-0112, para 177 at page DRC-OTP-0105-0118, para 259 at page DRC-OTP-0105-0133 and para 260 at pages DRC-OTP-0105-0133 to DRC-OTP-0105-0134; to DRC-OTP-0181-0499, first bullet point on the first page, at which it is stated that key leadership positions in the UPC were held by Rwandans and that UPC leaders reported to RDC Chief of Staff; and to DRC-OTP-0181-0502, information provided on first page under 3), according to which the UPC command structure was under Rwandan control. These documents are provided as Confidential Annexes 16, 22 and 23, respectively.

Thomas LUBANGA DYILO's or the UPC/FPLC's recruitment and use of child soldiers.

Prosecution's efforts to obtain providers' consent to disclosure and Prosecution's assessment of the Undisclosed Evidence

27. As indicated at paragraph 7 above, the Prosecution is awaiting responses from the providers to its requests for lifting of Article 54(3)(e) restrictions. The Prosecution has asked the providers to give urgent consideration to all of its outstanding requests.

28. With respect to the 5 documents which were disclosed to the Defence with redactions required by the providers, the Prosecution is endeavoring to go back to the providers to request that more discreet redactions be made to these documents, in order to maximise the use that the Defence might give to them.

29. The Prosecution informs the Trial Chamber that, in its assessment, none of the items which make up the Undisclosed Evidence materially impact on the guilt or innocence of the accused.

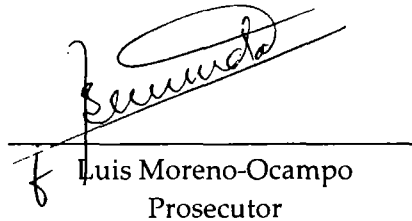
30. The Prosecution notes that, as the Trial Chamber is aware,⁴⁴ Article 54(3)(e) of the Statute and Rule 82 of the Rules of Procedure and Evidence, as well as Article 67(2) which enshrines the Prosecution's obligation to disclosure potentially exculpatory evidence, have a parallel in Rules 70 and 68, respectively, of the ICTY Rules of Procedure and Evidence, and which were themselves of significant influence during the drafting of the relevant provisions in the Rome

⁴⁴ ICC-01/04-01/06-T-55-CONF-EXP-ENG, p 9, line 3 to p 10, line 1.

Statute and ICC Rules of Procedure and Evidence.⁴⁵ The Chamber may wish to consult the considerable case law⁴⁶ from the ICTY concerning the application of these rules, as well as subsequent legislative amendments to them, as an aid to its interpretation of Article 54(3)(e) of the Rome Statute and Rule 82.

Submission

31. The Prosecution submits that the Undisclosed Evidence does not materially impact on the Court's determination of the guilt or innocence of the accused. In addition, the Prosecution submits that the categories of evidence referred to at paragraphs 9-17 above do not have the potential to materially impact on the Court's determination of the guilt or innocence of the accused.



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of March 2008
At The Hague, The Netherlands

⁴⁵ See Brady, "Disclosure of Evidence", Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 420-421.

⁴⁶ The Prosecution refers, *inter alia*, to *Prosecutor v Slobodan Milosevic*, Case No. IT-02-54-AR108bis & AR73.3, "Public version of the confidential decision on the interpretation and application of Rule 70", 23 October 2002, especially para 19; *Prosecutor v. Brdjanin & Talic*, IT-99-36-T, "Public Version of the Confidential Decision on the Alleged Illegality of Rule 70, 6 May 2002", 23 May 2002, paras 17-19; and *Prosecutor v. Blaškic*, IT-95-14-T, "Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures", 13 November 1997, para 10.