

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 7 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
With public annexes 1 and 2**

Prosecution's submission on Article 54(3)(e) confidentiality agreements

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Bruno Cathala

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").¹
2. On 3 April 2008 the Trial Chamber issued its "Order on the 'Prosecution's submission on undisclosed documents containing potentially exculpatory information'" ("Order").² The Order required the Prosecution to furnish the Chamber by 7 April 2008 with any agreements and undertakings which purport to prevent the Prosecution from providing to the Chamber the items containing potentially exculpatory information and/or information falling within the scope of Rule 77 which have not been disclosed to the Defence.³

Submissions on two issues arising out of the 28 March 2008 Submission and the Order

3. The Prosecution wishes to clarify two issues that arise out of the 28 March 2008 Submission and of the Order.
4. First, the Prosecution draws the Trial Chamber's attention to the fact that in its 28 March 2008 Submission the Prosecution did not say⁴ that the evidence which it has not disclosed to the Defence in light of existing Article 54(3)(e) restrictions imposed by the providers ("Undisclosed Evidence") "*does not show or tend to show the innocence of the accused or mitigate the guilt of the accused, or*

¹ ICC-01/04-01/06-1248, paras 1-4.

² ICC-01/04-01/06-1259.

³ ICC-01/04-01/06-1259, para 3.

⁴ ICC-01/04-01/06-1259, para 3.

affect the credibility of prosecution evidence". The Prosecution draws the Chamber's attention, in particular, to its submission that all of the Undisclosed Evidence *"was preliminarily characterized by the prosecution as potentially exculpatory or information falling within the scope of Rule 77"*.⁵ It also draws the Chamber's attention to the Prosecution's submission that while six categories of evidence do not have the potential to materially impact on the Court's determination of the guilt or innocence of the accused, they *"may be relevant for the establishment of mitigating factors"*.⁶ Finally, the Prosecution draws the Chamber's attention to the Prosecution's statement⁷ that the remaining four categories of evidence could materially impact on the Court's determination of the guilt or innocence of the accused,⁸ although upon close review, the Prosecution had found that *"none of the materials actually captured in these four categories materially impact on the guilt or innocence of the accused in fact"*.⁹

5. Secondly, the Prosecution informs the Trial Chamber that the Undisclosed Evidence is in fact comprised of 212 items rather than of 216 items as was stated in the 28 March 2008 Submission.¹⁰

⁵ ICC-01/04-01/06-1248, para 8.

⁶ ICC-01/04-01/06-1248, para 9.

⁷ The Prosecution made these submissions in light of the Trial Chamber's 9 November 2007 "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial", ICC-01/04-01/06-1019, para 28, and of the Trial Chamber's request at the hearing on 13 March 2008 that the Prosecution inform the Trial Chamber whether the evidence not yet disclosed to the Defence materially impacts on the Prosecution's case, ICC-01/04-01/06-T-79-ENG ET WT, page 8, line 6 to page 9, line 12.

⁸ ICC-01/04-01/06-1248, para 18.

⁹ ICC-01/04-01/06-1248, para 18.

¹⁰ ICC-01/04-01/06-1248, para 7. The Prosecution informs the Chamber that there is an overlap of four items which had been listed more than once in the materials making up the Undisclosed Evidence because they were characterised as containing more than one type of relevant information. This overlap, which had not been identified at the time the 28 March Submission was filed, resulted in this minor inflation of the total number of items making up the Undisclosed Evidence.

Submissions on the Article 54(3)(e) confidentiality agreements which prevent the Prosecution from disclosing the Undisclosed Evidence to the Defence

6. The Prosecution submits that Article 54(3)(e) and Rule 82 govern the provision to the Defence, third parties and all organs of the Court, including the Chambers, of all information obtained by the Prosecution pursuant to such agreements on confidentiality. This reading of Article 54(3)(e) and Rule 82 was retained by the terms of the Relationship Agreement between the United Nations and the International Criminal Court, as endorsed by ICC State Parties and the UN General Assembly, and by the Memorandum of Understanding between the ICC and the UN with respect to assistance from MONUC, both of which explicitly list disclosure to third parties and other organs of the Court as requiring the explicit consent of the United Nations.¹¹ This reading is also confirmed by the views conveyed to the Prosecution by the information providers other than the UN when concluding Article 54(3)(e) agreements.

7. Furthermore, the guarantee of confidentiality afforded by Article 54(3)(e) and Rule 82 encompasses also the guarantee that the existence of confidentiality agreements will not be revealed to the Defence, third parties or other organs of the Court, including the Chambers, without the consent of the providers. For a number of information providers, the fact of their cooperation under Article 54(3)(e) should not be revealed at all in judicial proceedings. Those are the terms of confidentiality undertakings and agreements made and entered into by the Prosecution pursuant to Article 54(3)(e), as well as by the views expressed by the providers to the Office of the Prosecutor during the course of its investigations.

¹¹ Reference is made to Article 18(3) of the Relationship Agreement and to Articles 10(8)(6) and 10(9) of the Memorandum of Understanding.

8. In the case of the United Nations, the existence and content of agreements that govern cooperation with the Court and with the Office of the Prosecutor are publicly known, and for that reason the Prosecution is in a position to furnish the Chamber with copies thereof.¹²

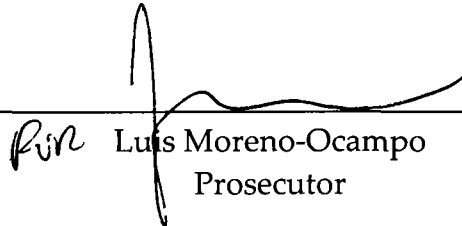
9. With respect to undertakings and agreements made and entered into by the Prosecutor and other providers, however, the Prosecution cannot provide them to the Chamber without the prior consent of the information providers. The Prosecutor submits that it can seek the consent of these providers to the lifting of the Article 54(3)(e) restrictions vis-à-vis the Trial Chamber insofar as the existence of these agreements is concerned, but that the short deadline imposed by the Order has to date not allowed the Prosecution to fully do so. With respect to at least some of the providers concerned, the Prosecution expects to have some responses to its requests by Wednesday 9 April 2008.

10. The Prosecution wishes to note that, in any event, with respect of the providers of the Undisclosed Evidence other than the United Nations, the Office of the Prosecutor endeavours not to conclude general agreements; the

¹² The "Negotiated Draft Relationship Agreement Between the International Criminal Court and the United Nations" ("Relationship Agreement"), concluded by Chef de Cabinet of the Presidency on behalf of the Court and by the Acting Legal Counsel of the Office of Legal Affairs of the United Nations on behalf of the United Nations on 7 June 2004, is provided as Annex 1. The Prosecution informs the Chamber that the title of the Relationship Agreement begins with the words "Negotiated Draft" because, upon reaching agreement on the text, the ICC and the UN were required to submit the text for adoption by the Assembly of States Parties of the ICC and by the General Assembly of the United Nations. The Prosecution draws the Chamber's attention to Article 18 of the Relationship Agreement, which governs the cooperation between the Prosecutor and the United Nations, and in particular to sub-paragraph 3. The Prosecution furthermore refers to ICC-01/04-01/06-1248, footnote 18.

The "Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation Between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court" ("Memorandum of Understanding"), concluded by the Prosecutor and the Registrar on behalf of the Court and by the Under-Secretary General for Peacekeeping Operations on behalf of the United Nations on 8 November 2005, is provided as Annex 2.

Prosecution has concluded these agreements on a case-by-case basis in relation to specific documents, rather than in the form of generalized agreements with such information providers on issues of confidentiality .¹³



Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of April 2008

At The Hague, The Netherlands

¹³ With respect to those other providers, therefore, the confidentiality undertakings and agreements made and entered into by the Prosecutor are contained in Pre-Registration Forms used by the Prosecution in the evidence registration process, and in the Prosecution's correspondence with the providers. The Prosecution submits that, while it is able to seek the providers' consent to disclosing these materials to the Trial Chamber, it is bound to obtain such consent prior to any disclosure to the Chamber taking place.