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

Date: **15 October 2009**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
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 Document

Prosecution's Submission on the Production of Medical Records

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**

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1. On 1 October 2009, the Trial Chamber ordered the Prosecution, the Registry (VWU) and legal representatives to file written submissions by 15 October 2009 and the Defence by 22 October 2009 on “whether there are circumstances when a Chamber can order the communication of a medical report of any kind without the consent / informed consent of the individual concerned (by individual, the Chamber is referring to a witness or participating victim)”.¹ Absent particulars regarding the case at hand, the Prosecution response addresses only general parameters of the issue.
2. Article 69 together with Rule 73 set out the powers of the Chamber in relation to the disclosure of communications made in the course of a class of professional or other confidential relationships. Article 69(5), dealing with the Chamber’s powers in relation to evidence, mandates that the Court « shall respect and observe privileges on confidentiality » as provided for in the Rules. Rule 73 governs the disclosure of privileged communications and information.
3. According to Rule 73(1), communications made in the course of a solicitor-client relationship «shall be regarded as privileged, and consequently not subject to disclosure » unless the individual consents in writing to such disclosure or voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.
4. The Rules do not definitively declare that any other specified professional or confidential relationships create privileges

¹ Email from the Legal Advisor to the Trial Division, 1 October 2009, 18 :10.

against disclosure. Instead, pursuant to Rule 73(2), the Chamber must consider three factors in determining whether privilege attaches to communications made in the context of a class of professional or other confidential relationships: (a) whether the communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure ; (b) confidentiality is essential to the nature and type of relationship between the person and the confidant ; and (c) recognition of the privilege would further the objectives of the Statute and the Rules.

5. If the Chamber decides in the affirmative to all three areas of inquiry, a communication made in the course of that class of relationship «shall be regarded as privileged, and consequently not subject to disclosure» unless the individual has consented in writing to the disclosure or has voluntarily disclosed the content of the communication to a third party and that third party then gives evidence of that disclosure. The Statute does not distinguish between consent and informed consent.
6. Rule 73(3) adds that «[i]n making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims. »
7. Against this statutory framework, and with regard to the latitude granted the Court by Rule 73, the Prosecution submits

that ordinarily the communications made between a victim and his or her doctor, psychiatrist, psychologist or counsellor should be presumptively regarded as privileged.

8. The mere fact that a report is produced in the context or as a consequence of such a professional relationship, however, need not require that the report be deemed privileged. The privilege does not shield all aspects of or facts derived from that relationship. It is conceivable that a report does not, directly or indirectly, contain privileged communications, or that parts of a report are sufficiently independent of the privileged communications that they can be disclosed. That determination obviously will depend on the facts and circumstances peculiar to the case.
9. Additionally, even if the contents of a report reflect privileged communications not ordinarily subject to disclosure, the Court in every instance will also determine if the person voluntarily also disclosed the content of the communication to a third party who gives evidence of the disclosure. Rule 73(1)(b). The voluntary disclosure to a third party need not constitute informed consent that the third party pass the information along. Voluntary disclosure instead simply signifies that the person chose to waive the confidentiality of the communication by informing a third party of the confidential information. Whether the person has voluntarily disclosed to a third party is also a case-specific factor.
10. In conclusion, if the contents of a report represent communications in the context of a professional relationship that the Chamber agrees to regard as privileged, the

Prosecution submits that the Appeals Chamber's reasoning with respect to the disclosure of Article 54(3)(e) materials would apply. In that case, the Appeals Chamber affirmed that the Court cannot order disclosure of material subject to a confidentiality agreement without the prior consent of the information provider.²



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of October 2009
At The Hague, The Netherlands

² Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06-1486 OA 13, 21 October 2008, at paragraphs 3 and 48.