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Date: **17 November 2010**

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 Redacted Version
With Confidential Annexes A and B and Public Annex 1

Prosecution Submissions on Disclosure pursuant to Trial Chamber's I Order of 5 November 2010

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 5 November 2010, Trial Chamber I enquired why a particular paragraph of an investigator's internal memorandum dated 23 February 2006, and disclosed to the Defence for Thomas Lubanga ("the Accused") on 1 November 2010, had been previously redacted.[1] The Prosecution explained that it had considered the opinion reflected in that paragraph – the contemporaneous assessment by two investigators that questioned a person's credibility and intentions to assist the Prosecution because the person failed to provide certain documents -- as "internal work product". The opinion, the Prosecution explained, changed following the person's production of the materials and after subsequent interviews and a thorough assessment of his credibility. Having determined that the person was credible, the Prosecution thereafter decided to call him, and the person testified (as Witness 31) at trial.[2]
2. Pursuant to an order of this Trial Chamber on 5 November, the Prosecution submitted a report on 9 November 2010 explaining in detail the circumstances surrounding the investigator's memorandum.[3]
3. Also on 5 November 2010, the Chamber ordered the Prosecution to file "a document which summarizes the principles and the approach that has been applied by the OTP to disclosure, so that [the Trial Chamber] can make up [its] mind as to whether or not [the Prosecution] ha[s] been applying appropriate principles and appropriate approach during the course of this case" ("the Order").[4]

[1] T-326, p.2, lns. 5-20.
[2] T-326, p.2, lns.21-25; p.3, lns.1-18.
[3] E-mail from the Office of the Prosecutor to the Legal Officer of the Chamber on 9 November 2010 at 15:59. Pursuant to Trial Chamber's Order: T-326, p.4, lns. 19-25.
[4] T-326, p.9, lns. 3-8.

4. The Prosecution hereby responds to the Trial Chamber's Order and submits that its approach and practice has been and is consistent with the relevant provisions of the basic texts of the Court, the Chamber's orders, and the applicable jurisprudence.[5] With respect to the particular issue that has triggered this inquiry, the failure to disclose an internal early opinion by two investigators regarding credibility that was based on an incorrect factual assumption, the Prosecution asserts that it was not obligated to disclose its internal (and subsequently revised) assessment before the witness himself testified. The fact that the Prosecutor later disclosed the assessment despite the fact that it was purely internal work product – and thereby protected against disclosure by the express terms of Rule 81(1) – does not demonstrate any malfeasance in its original disclosure determination,

5. More broadly, to the extent that the Prosecution did not disclose information that the Accused now claims would have been "material to the preparation of the defence" of abuse of process, it did so because it had no reason to believe the information was conceivably material since the Accused did not provide notice of the affirmative abuse of process defence or otherwise assist in identifying the material information. Despite the Prosecution's requests, the Accused declined to provide any input on the Prosecution's keyword list to enable focused and expeditious searches for material information not captured in the existing keyword list.[6] Nor did the Accused even hint during the cross-examination of the Prosecution witnesses that it would rely on a defence of abuse of process. Because the Accused failed to put its case to the

[5] Pursuant to Regulation 23bis(2) of the Regulations of the Court ("RoC"), the Prosecution files this document confidentially due to references to information that is contained in confidential portions of the record of this case. In particular, the Prosecution quotes and refers to extracts of confidential decisions and internal work product.
[6] See for instance ICC-01/04-01/06-951, paras.30-31.

witnesses, despite the Trial Chamber's orders in that regard,[7] or to otherwise alert the Prosecution or the Chamber that it intended to raise this defence, the Prosecution was not on notice of the affirmative defence and thus unable to identify in advance information in its database that might be "material" to it. In fact, the Prosecution had no inkling before 27 January 2010, one year after the trial proceedings started,[8] that an abuse of process claim would be raised as a challenge to the criminal charges.

6. Moreover, even since 27 January the Accused has continued to refuse to provide keyword assistance to facilitate searches for disclosable information that might be material to the preparation of this persistently evolving and not yet articulated defence. At the same time, however, it has engaged in piece-meal but far-reaching fishing expeditions to explore multiple and ever-changing aspects of the Prosecution's investigation strategy and trial decisions, continually altering the focus and triggering rounds of internal review for information that newly appears to be material to the ever-expanding defence. Because the parameters of the defence regularly shift and the Accused declines to provide keyword assistance, the Prosecution is in the difficult position of repeatedly initiating new searches to provide disclosure that is responsive to the ever-changing defence allegations, and to answer complaints that its failure to anticipate those new allegations and provide the disclosure in advance of them is itself proof of prosecutorial abuse.

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[7] ICC-01/04-01/06-1140, para.32, where this Trial Chamber referred and developed the concept of "other relevant matters" under Rule 140(2)(b), and stated that "[t]he parties are under an *obligation* to put [the part of their case regarding credibility or reliability of the evidence] inter alia […]" when questioning witnesses not called by them.

[8] T-236, p.20, lns.16-23: "to prove to the Chamber that many of the Prosecution's witnesses came before the Court and testified knowing that they would be giving inaccurate information to the Court" and that "this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor". The Defence has consistently maintained that it was under no obligation to reveal its evidence or lines of defence, except in certain restricted circumstances. See for instance ICC-01/04-1/06-1110, para. 10.

7. For these reasons, the Prosecution rejects the implication that it is failing to apply appropriate principles or an appropriate approach to disclosure of evidence material to the preparation of the abuse of process defence. Rather, at all times the Prosecution has attempted to comply with the requirements of Article 67(2) and Rule 77 and the Court's orders. If the Court determines that the Prosecution has been slow in discharging its obligations, the explanation lies in the indefiniteness and ever-shifting boundaries of the theory of defence and not in a prosecutorial determination to disobey the Court's core texts or judicial orders.

PROSECUTION SUBMISSIONS

The Prosecution's principles and approach to disclosure generally

8. As the Chambers of this Court have indicated, it is for the Prosecution to assess and exercise its judgment to determine whether it possesses any information that "[it]…believes" is disclosable under Article 67(2) and Rule 77.[9] Regulation 55 of the Regulations of the Office of the Prosecutor ("ROP") also provides that the Prosecution "shall establish standardized internal procedures to ensure prompt, reliable and efficient disclosure".[10] Accordingly, the Office of the Prosecutor has developed internal guidelines on evidence review and disclosure which seek to encompass the principles of diligence, efficiency and transparency.[11] In conducting its review, the

[9] ICC-01/05-01/08-632, para. 20. Note that Trial Chamber III stated in this regard that the twin duties of disclosure (under Article 67(2)) and permitting inspection (Rule 77) rest with the Prosecution, "and the Chamber will not routinely oversee or review the decisions taken by the Office of the Prosecutor in fulfillment of them" […] "The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled" (para. 22).
[10] Regulation 55(1) of ROP.
[11] These guidelines have been incorporated in the Prosecution's Operational Manual ("OM"), an internal working tool of the Office of the Prosecutor which regulates, inter alia, the collection, review and

Prosecution will also consider whether this information is subject to restrictions on disclosure, in particular, those covered under Rules 81 and 82. Finally, in instances where disclosable material is included within internal work product – protected without any exception under Rule 81(1) – the Prosecution will isolate information that ought to be disclosed from that which constitutes non-disclosable internal work product and will disclose the former.

9. In addition, and in the context of this trial, the Prosecution complied with orders issued by this Chamber instructing disclosure of material that *per se* would not fall within the scope of Rule 77 but that the Chamber deemed relevant in light of the yet to be filed abuse of process application by the Accused.

10. Though the Operational Manual had not been adopted at the time this case was initiated, at an early stage of the pre-trial proceedings in the present case the Prosecution developed similar evidence review guidelines to govern the review of the evidence collected in the DRC situation. In particular, its guidelines governed the determination whether information collected was "INCRIM" (i.e. information that suggests the guilt of the accused or goes to prove an aggravating circumstance), "PEXO" (information that shows or tends to show the innocence or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence) or "Rule 77 material" (items which are material to the preparation of the defence or were obtained from or belonged to the suspect or the accused).

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disclosure of evidence by the Office of the Prosecutor. The OM (still a draft preliminarily implemented since February 2010) shall be read subject to the Statute, the Rules, the Regulations of the Court, and in conjunction with the Regulations of the Registry and the Staff Rules and Regulations, and the relevant jurisprudence. The Prosecution attaches as Annex A the relevant section dealing with review and disclosure of evidence: [REDACTED].

11. The Prosecution relies extensively, and relied at the time, on keywords for the purpose of identifying materials in its database which may fall within the scope of Article 67(2) or Rule 77. It shared its keywords with the Accused and invited additions. Accordingly, the Accused was in a position to determine from early in the disclosure process whether the Prosecution's searches reached the full universe of potentially disclosable information. If the Accused was concerned that the search may not capture relevant information it could have requested – and can now request -- additional keywords to be employed. The Prosecution has never, and would not, unilaterally decline to search based on keywords proposed by the Accused.
12. The Prosecution also repeats searches during the proceedings to ensure that any potentially relevant information contained in newly registered evidence is reviewed and - if deemed relevant - disclosed. And it will repeat searches based on new developments at the pre-trial or trial stages.
13. That approach was applied in the instant case. In the interests of making its keyword searching as expeditious and meaningful as possible, the Prosecution extended repeated invitations to the Accused to provide input on the Prosecution's keyword list.[12] The Accused never availed itself of the opportunity to do this.
14. The search and disclosure regime does not require disclosure of all information, however. Rule 81(1) states that "[r]eports, memoranda or other internal documents prepared by a party, its assistants or repesentatives in connection with the investigation or preparation of the case *are not subject to disclosure*" (emphasis added). Its terms are unambiguous and definitive. In addition, the Chambers of this Court have further provided guidance on what can be considered internal work product and not subject to disclosure.

[12] See for instance ICC-01/04-01/06-951, paras.30-31.

In particular, this Trial Chamber explained that internal work product under Rule 81(1) "includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation"; accordingly, it authorized redactions to protect work product.[13] Also, in the Decision for Disclosure of Screening Notes dated 13 October 2010, the same Chamber added that "names and locations of protected witnesses and victims, *internal assessment on various individuals and work processes* […] clearly falls within the scope of non-disclosable material pursuant to Rule 81(1) and Rule 81(3)".[14]

15. Pre-Trial Chamber I has indicated that "information relating to Prosecution's screening objectives and techniques of investigation" is "to be considered as an internal information prepared by the Prosecution in connection with its investigation in the present case".[15] Similarly, "the *conclusions and the recommendations made by the investigators* of the Office of the Prosecutor at the end of the interviews with the relevant witnesses" are also protected under Rule 81(1).[16]

16. Other international criminal courts not only have similar provisions to Rule 81(1)[17] but also have adopted a consistent practice of restricting disclosure to the Accused of material such as investigator's notes of an internal nature not

[13] See ICC-01/04-01/06-1924-Anx2, para. 31. This decision has been followed (and paragraph 31 quoted) in subsequent decisions of the same Chamber: ICC-01/04-01/06-2206, para. 19; ICC-01/04-01/06-2208, para.17; ICC-01/04-01/06-2283, para.10. See also Trial Chamber III's decision ICC-01/05-01/08-632, para.34, which indicated that "[…] by Rule 81(1) of the Rules, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure […]".
[14] Accordingly, the Chamber only ordered disclosure – under Rule 77 - of information related to "intermediaries 143, 316 and 321 and their dealings with witnesses and the prosecution in the context of the current abuse of process application."ICC-01/04-01/06-2585-Conf, para. 21 (emphasis added) and para. 19.
[15] ICC-01/04-01/07-568, paras. 31-37.
[16] ICC-01/04-01/07-249, paras. 46-49; ICC-01/04-01/07-361, paras. 50-53 (emphasis added).
[17] See Rule 70(A) at ICTY, ICTR and SCSL Rules of Procedure and Evidence.

containing statements made by a witness;[18] information related to the internal preparation of a case, including legal theories, strategies and investigations;[19] or internal memoranda, correspondence, handwritten questionnaires and notes of meetings.[20] Domestic jurisdictions have similarly qualified as non-disclosable such internal work product as notes made by a prosecutor or investigators in preparation for trial.[21]

17. Hence, and in line with the above mentioned jurisprudence, the Prosecution considers as internal work product: (a) all preliminary examination reports; (b) information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies; (c) information related to the Prosecution's objectives and techniques of investigation; (d) analyses and conclusions derived from evidence collected by the OTP; (e) investigators' interview notes that are reflected in the witness statement or audio-video recording of the statement; (f) investigator's subjective opinions or conclusions that are recorded in the investigator's interview notes; (g) internal correspondence.[22]

18. If internal work product contains information disclosable under Article 67(2) and Rule 77, or pursuant to a Chamber's order, the Prosecution will disclose

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[18] Brima et al., Decision on joint Defence motion on disclosure of all original witness statements, interview notes and investigators notes pursuant to Rules 66 and/or 68, SCSL-04-16-T, 4 May 2005, para.16.

[19] Prosecutor v Blagojevic, Decision on Vidoje Blagojevic's Expedited Motion to compel the Prosecution to Disclose its notes from pleas discussions with the accused Nikolic& request for an expedited open session hearing, IT-02-60-T, 13 June 2003, p. 4

[20] Prosecutor v Nahimana, Decision on the Prosecutor's Ex Parte Application to exclude certain documents from Defence inspection of Microfiche Material, ICTR-99-52-T, 25 October 2002, p.3.

[21] See in the United States of America: Commonwealth v. Borans, 379 Mass. 117, 151-152, 393 N.E.2d 911 (1979); United States v. Nobles, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947), whereby the US Supreme Court stated that "Proper preparation of a case demands that [prosecutors] assemble information, sift what [they] consider […] to be the relevant from the irrelevant facts, prepare [their] legal theories, and plan [their] strategy without undue and needless interference. This work is reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs". And in Canada: R.v. Stewart, (1997) O.J. No. 924 (Q.L.).

[22] See OM's [REDACTED], attached as Annex B.

such information either in a separate document or will redact the original internal document. This practice has been adopted by other international criminal tribunals[23] and endorsed by the Chambers of this Court. In particular, Trial Chamber I has indicated that internal work product shall be disclosed in a redacted form, requiring production only of information that must be disclosed under the Statute.[24] Trial Chamber II also requested the Prosecution to distinguish the disclosable information from the internal work product.[25]

Disclosure following revelation of the proposed abuse of process defence

19. In this case, following the expressed intent by the Accused to make an abuse of process application, the Trial Chamber ordered disclosure of material that did not previously appear to be disclosable, such as the identity of intermediaries.[26] The Chamber's orders have progressively identified and instructed disclosure of material and information, granting requests from the Accused for information that it deems relevant to its upcoming abuse of process application. [REDACTED][27] Since the abuse of process defence is both undefined and continually evolving and expanding and the Accused has been allowed to conduct a broad-ranging inquiry into multiple aspects of the

[23] Although the rule still remains that internal work product need not be disclosed, if an internal document contains some disclosable information, such as extracts that suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence, that portion must be disclosed. See Prosecutor v Haradinaj, Order on Disclosure of Memorandum and on interviews with a Prosecution source and witness, IT-04-84-PT, 13 December 2006, pp.4,8; where only three paragraphs were disclosed while the remaining of the memorandum was not disclosed.
[24] See ICC-01/04-01/06-1924-Anx2, para. 31.
[25] ICC-01/04-01/07-1034, para.14; ICC-01/04-01/07-1096, para.14; ICC-01/04-01/07-1098, para.7; ICC-01/04-01/07-1100, para.11; ICC-01/04-01/07-1101, para.14; ICC-01/04-01/07-1396, para.11.
[26] See ICC-01/04-01/06-2434-Conf-Red-Corr ("Decision on Intermediaries"), para. 6, and Public Annex A.
[27] T-329, p.11, ln.12 to p.12, ln.2.

prosecutorial process, the definition of "relevance" also keeps expanding and requiring new searches and delaying the process.

20. For instance, on 12 May 2010 Trial Chamber ordered disclosure of the identity and other identifying information of Intermediary 143 as "the threshold for disclosure of his identity to the defence is clearly crossed, under Rule 77 of the Rules." In that same decision the Chamber also ordered disclosure of additional information.[28] These disclosure orders were issued because Intermediary 143 liaised with four witnesses whose testimony had been contradicted by witnesses called by the Accused -- despite the fact that conflicting witness testimony is common in criminal cases and that there was no evidence of misconduct by the intermediary himself.[29]

21. Subsequently, in a decision dated 13 October 2010, Trial Chamber I referred to Rule 77 and stated that "[a]ny information in possession of the prosecution that relates to the knowledge of the prosecution about, or its actions or involvement with, intermediary 143, 316 and 321 in the context of any alleged irregular behaviour is disclosable" under the Rule.[30] It further ordered the Prosecution to disclose under this provision and "in the context of the current abuse of process application" information related to intermediaries 143, 316 and 321 and their dealings with witnesses and the Prosecution, to be extracted from the Prosecution's "situation contacts management system". The Chamber required disclosure while noting that his database – as a whole - is exempt from disclosure under Rule 81(1) and that some information contained therein is not protected from disclosure under Rule 81(3).[31]

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[28] Ibid., paras.140-142;150. In addition, the Trial Chamber ordered the Prosecution to provide a confidential schedule setting out the known contacts between the 23 intermediaries, and between the latter and the witnesses and between the witnesses.
[29] ICC-01/04-01/06-2434-Conf-Red-Corr ("Decision on Intermediaries"), para. 143.
[30] ICC-01/04-01/06-2585-Conf ("Decision for disclosure of Screening Notes"), para. 19.
[31] Ibid., paras. 21-22.

22. The Prosecution complied with the terms of such order and disclosed tables containing extracts from the "situation contacts management system" for intermediaries 143 and 321, and for intermediary 316, on 22 and 27 October 2010, respectively.[32] Numerous documents have also been disclosed in this context, including material which, although considered to be internal work product by the Prosecution, fell within the scope of the Chamber's order.

23. Recently and by way of e-mail, the Accused requested disclosure of the contacts between Witness 555 and the Prosecution. Witness 555, who was initially scheduled to testify for the Prosecution, was subsequently dropped due to professional commitments that made his testimony before the Court impossible. However, the Accused argued that the evidence that would have been given by Witness 555 was contradicted by material that the Accused highlighted in its email. In spite of the Prosecution's objections, the Trial Chamber granted the Accused's request as [REDACTED][33] The Prosecution complied with this order and disclosed this information on Monday 8 November 2010.[34]

24. As noted previously, Rule 81 provides that internal work product is "not subject to disclosure." With respect to internal work product, the Prosecution initially followed its consistent approach: first, and as a general rule, information that falls within the scope of Article 67(2) and Rule 77 is disclosed, even if it is enclosed in memoranda or reports qualified as internal work product; the disclosure is effected by either providing the document in redacted form or extracting the relevant information. Likewise, if

[32] Copies of the tables for intermediaries 143 and 321, and intermediary 316, were emailed to the Defence on these dates. The tables were then formally registered in the Prosecution's evidence management system, and disclosed on 25 and 29 October 2010, respectively. An updated table for intermediary 321 was also disclosed on 29 October 2010,

[33] T-325, p. 26, lns. 6-9.

[34] E-mail from the Office of the Prosecutor to the Legal Officer of the Chamber on 8 November 2010 at 15:52.

information that ought to be disclosed pursuant to the Chamber's orders in the backdrop of the abuse of process application is enclosed in a document qualified as internal work product, the Prosecution honoured the Chamber's orders and disclosed such information, notwithstanding its own view that disclosure cannot be required under Rule 81(1).[35]

25. With respect specifically to the Investigator's Note of 23 February 2006, as explained in the report submitted on 9 November 2010,[36] the comment regarding the credibility of Witness 31 made by two Prosecution investigators was reflected in an internal memorandum produced after a mission in the context of the Prosecution's investigation in the DRC. The document, including the investigators' internal assessment at that time, was internal work product not subject to disclosure.

26. As noted previously, the fact that the document is internal work production does not, of course, mean that all information contained therein is protected against disclosure. Nor was that the Prosecution's position. But the fact that information can be disclosed even if the document itself is protected work product does not mean that information would necessarily have been deemed relevant and thus disclosable. The Prosecution did not and does not believe that an investigator's early assessment of credibility of a person – particularly based on factual assumptions that are later disproved – is in and of itself captured either by the terms of Rule 77 or Article 67 (2) and, if relevant, need be disclosed. But after the Chamber's Decision for Disclosure of Screening Notes dated 13 October 2010, it complied with the direction to disclose information regarding intermediaries 143 and 316 enclosed in that

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[35] [REDACTED] Other types of internal documents that have been disclosed include emails, mission reports and internal memoranda.

[36] E-mail from the Prosecution to the Chamber dated 9 November 2010 at 15:59.

report.[37] Hence, the Prosecution disclosed the document on 1 November 2010, maintaining some redactions of information that was not subject to disclosure pursuant to the Chamber's order; it lifted a redaction to the paragraph related to Witness 31 out of an abundance of caution, as this information did not fall within the terms of the Chamber's order.

27. The concerns expressed in the report with respect to Witness 31, which were confined to his reliability as a potential source of the documents and not to his overall credibility as a witness, were grounded solely on his failure to provide those documents during that particular mission.[38] The Prosecution followed up on that matter in compliance with its obligations under Article 54(1)(a) to equally investigate incriminatory and exculpatory evidence. Accordingly, it met again with the witness, who later provided the documentation, gave a statement and fully collaborated with the Prosecution. As a result of the totality of these facts the Prosecution considered the witness credible and called him to give evidence.

28. The Prosecution stresses that it should be beyond any dispute that the particular analysis or personal opinion advanced by a Prosecution investigator and based on the information available to him or her at the time does not constitute evidence. Rather, that category of information squarely falls within the category of analytical product covered by Rule 81(1) absent a clear basis for disclosure under the Statute or the Rules. Had the Prosecution, after further investigating the witness and against the backdrop of the totality of facts, concluded that the credibility of this witness was at issue but still

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[37] ICC-01/04-01/06-2585-Conf, para.19.

[38] The Prosecution has elaborated on this matter in the report submitted to the Chamber on 9 November 2010. If the Chamber requires additional assurance the Prosecution is willing to provide further evidence with respect to the opinion expressed by the investigators and the facts informing it.

determined to call the witness at trial, it would have disclosed the factual information that supported its doubts under Article 67(2).

29. In this particular instance, the Prosecution fully honored its statutory obligations, in particular its duty to investigate objectively all facts and circumstances relevant to the investigation, and concluded that there was no issue pertaining to the witness' credibility. Nothing in the paragraph questioned by the Chamber can be properly construed as falling under Article 67(2) or Rule 77 or even an Order of the Chamber, and was at all relevant times covered by the bar against compelled disclosure under Rule 81(1).

Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of November 2010

At The Hague, The Netherlands