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

Date: **15 April 2011**

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

**Prosecution's Notification of Information Pursuant to Trial Chamber I's
Instructions of 12 April 2011**

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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**Unrepresented Applicants for
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Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. In response to the Trial Chamber's questions addressed to the Prosecution in court on Thursday 7 April 2011,¹ the Prosecution provided the following information by way of email to the Trial Chamber and the Defence on 11 April 2011²:

What happened in relation to the UPC archive in the period of 2003 to 2005? Was it seized by MONUC and was it then made available to the Prosecution either in its entirety or in part?

The Prosecution notes that this issue was also raised by Defence Counsel Me Flamme in late 2006. At that time, the Prosecution provided the following information to Me Flamme, which was also provided to the Chamber through Filing 723 (Confidential Annex 1): During its first missions to the DRC, the OTP asked MONUC officials whether it would be possible to get more information about the seized materials. According to the investigators who made the enquiries at the time, MONUC was unable to provide more detailed information and mentioned that the staff involved in that operation had left and therefore it would be very hard to obtain more information about it.

Further, whilst the Prosecution understands that UPC materials were seized by MONUC when entering UPC camps, to the Prosecution's knowledge at the time there was no central archiving facility within MONUC which stored all such collected materials, but rather they were retained by various relevant MONUC (now MONUSCO) departments or individuals.

As the Chamber and Defence are aware, the OTP received a considerable amount of materials from MONUC, and cannot rule out that some of them were part of materials seized by MONUC, but this was not specified by MONUC at the time of collection. In response to Me Flamme's enquiry, the Office conducted a review of the Pre-Registration Forms (which record details of collection) but found no indication that any items had been retrieved as part of MONUC's seizure of UPC archive materials.

The Prosecution did not retain possession of an entire collection such as "the UPC archive" in bulk. Rather, the investigators who were deployed at the time (2004 and 2005) requested material on the basis of what was thought to be relevant at the time for an investigation on crimes committed in Ituri.

¹ T-346-ENG ET page 7, lines 1-22.

² Email from the Prosecution to the Legal Officer to the Trial Chamber at 15:33PM on 11 April 2011.

The Prosecution submits that, in addition to the efforts it had undertaken outlined above, if the Defence had a particular concern about MONUC's possession of the archives, and/or wished to gain access to the materials contained therein (T-346-ENG ET at page 3, line 22 to page 4, line 3), it could have availed itself of the opportunity to raise this matter with MONUC (either directly or through the Registry). As the Prosecution has expressed previously in court (T-86-ENG ET at page 6, line 20 to page 7, line 15), Article 10(18) of the Memorandum of Understanding between the ICC and the United Nations extends access to documents and information held by MONUC to the Defence by stating "The provisions of this article shall also apply mutatis mutandis with respect to requests submitted by the Registrar for the purpose of facilitating investigations pursuant to an order from a Pre-Trial Chamber or a Trial Chamber." The Prosecution submits that, pursuant to this provision, the Defence could also have requested an order from this Trial Chamber for the Registry to seek to obtain materials from the UN on its behalf.

In this regard, the Prosecution also notes that the Defence has recently provided UPC documents to the Prosecution in connection with its witnesses which the Prosecution has not been aware of, demonstrating that access to such documents is not exclusive.

What has been the basis of the Prosecution's access to any UPC archive materials seized by MONUC and collected by the OTP?

To the extent that any UPC archive materials may have formed part of what the Office received from MONUC, these items were treated in the same way as all others materials collected and registered from the UN/MONUC, that is, as having been received pursuant to Article 54(3)(e), and subsequently requests for lifting of restrictions were sought pursuant to relevance, in particular in cases where the materials in question triggered the Prosecution's obligations pursuant to Article 67(2) and Rule 77.

Has Article 54(3)(e) been invoked?

As above, yes.

What has the Prosecution's attitude been as regards disclosure to the Defence of items within that record?

As with any other materials in the Prosecutor's possession and in adherence to the Prosecution's disclosure obligations under the Statute – including materials received pursuant to Article 54(3)(e) whomever the source – searches were conducted across all materials received from MONUC,

pursuant to the determination of focused search criteria, and they were reviewed for information that may be considered potentially exculpatory or 'material to the defence' (Rule 77). If any materials were then determined to be disclosable pursuant to the Prosecution's obligations, the Office requested permission to disclose the information from the UN and effected disclosure to the Defence once authorisation was received. Ultimately if agreement to disclose was not provided, the Prosecution endeavoured to find an alternative way to ensure the Defence received the relevant information (whether this be through a redacted version, summary or admission, or providing the materials to the Chamber so that it could safeguard the rights of the Accused if merited).

As a side note on this point, the Prosecution's position is to disclose materials wherever Mr Lubanga's name (or title) appears in the evidentiary materials as an author or addressee, or wherever he is copied, as well as those obtained through a search and seizure operation of Mr Lubanga's office or living quarters (pursuant to the Rule 77 obligation to allow pre-inspection of materials which "were obtained from or belonged to the person"). As mentioned briefly in court on Thursday 7 April 2011, the Prosecution's position is to disclose material that falls under Rule 77 and Article 67(2), and it avers that it has interpreted that obligation broadly. In respect of materials that emanate from the UPC, if there are materials in the Prosecutor's possession relevant to issues in this case, the Prosecution would have disclosed those to the Defence, but it is not the Prosecution's position that every single document irrespective of its content is automatically disclosable (T-346-ENG ET page 9, lines 7-18). This applies whether the 'UPC' documents were received from the UN / MONUC, or from any other source (the Prosecution has received, and disclosed, UPC documents from a number of other sources where relevant information triggered its disclosure obligations).

Why it is at this stage only that disclosure has been effected in relation to these three documents (related to DW-0019)?

The Prosecution initially reviewed these 3 documents in 2007 and determined that they did not contain any information of a potentially exonerating or Rule 77 value. As the Prosecution mentioned briefly in court on Thursday 7 April 2011 (T-346-ENG ET page 8, line 20 to page 9, line 1), it was only in the more recent searches conducted for materials relevant to defence witnesses that they were retrieved and deemed disclosable on that basis. Reviews were also conducted once the position on disclosure related to Defence witnesses had been ruled upon (See Chamber Decision of 12 November 2011, ICC-01/04-01/06-2624).

2. In compliance with the Trial Chamber's instructions of 12 April 2011, these submissions are herewith filed on the record.³



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of April 2011
At The Hague, The Netherlands

³ Email from the Legal Officer to the Trial Chamber to the Prosecution at 10:35AM on 12 April 2011