

FABRICIO GUARIGLIA: My name is Fabricio Guariglia. I'm appeals counsel in the ICTY office of the prosecutor and currently visiting scholar in the London School of Economics. And, as a number of other previous speakers, I'm speaking in my personal capacity.

Mr. Prosecutor, let me start by joining the others in congratulating you for your appointment, and to thank your staff for all the extensive preparatory work that has been done so far, the outcome being these excellent documents.

I will very briefly address one discrete issue, that is, the principle of objective investigations as incorporated by Regulation 10(b) requiring that "both incriminating and exonerating circumstances (be investigated) as a matter of equal priority and with equal diligence."

This particular duty is the outcome of extensive negotiations during the ICC process, and the outcome seems to reflect mainly the civil law tradition, where duties of this type are common. Important to note is that this is the novelty in the context of international criminal tribunals. Similar duties are known to the ICTY and ICTR prosecutor who is only obliged to identify and disclose exculpatory material in her possession, a duty that is also shared by you and your staff, and that has demonstrated to be an extremely taxing duty.

The benefits of the principle of objectivity for the purposes of ensuring focussed investigations are multiple, starting with the possibility of the timely identifying of individuals and events that should simply not form part of the prosecutor's case. But the dangers of a defective construction of this principle are also apparent. The duty and scope, it must be noted, are neither refined in the Statute, nor in the Rules, and the draft Regulation provides only limited guidance.

Now, without proper guidance, your officers may end up unnecessarily expanding the scope of their investigation, losing focus,

and engaging in unnecessary time- and resource-consuming investigative efforts. And further, it has to be borne in mind that an overly broad construction of this principle whereby every conceivable defence hypothesis has to be investigated is very likely to be simply unworkable in cases of this scale, and can even lead to prosecutorial investigative paralysis.

Now, the damaging consequences of not complying with this duty can also be devastating, and I can very easily foresee claims before the ICC Trial and Appeals Chambers bracing the issue that the Prosecutor did not investigate the case objectively. Now, I note that footnote 43 to Regulation 10 suggests that no individual rights can be derived from this duty of objectivity. I'm afraid that this is an open question that ultimately will have to be decided by the ICC judges. And I note that in a number of civil law jurisdictions, this principle is linked, rightly or wrongly, to the principle of due process of law.

This will be even more complicated if the principle is somehow construed as a surrogate for an independent defence investigation, and it's something that I'd respectfully submit the ICC Prosecutor should not favour. The ICC Prosecutor should, at all times, make clear that it is the duty of the Defence, leaving aside of the principle of objectivity, to conduct their own independent investigation.

My recommendation is that before the first ICC investigation commences, you develop supplementary guidelines informing your staff as to how this duty is expected to operate in practice.

As in the case to identify and disclose exculpatory information, the absence of a clear and comprehensive policy, binding on all members of your Office, can be extremely damaging and can even jeopardise the initial investigative and prosecutorial achievements that your Office, as I'm sure will very soon achieve.

Thank you so much.