

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 20 March 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

Decision on disclosure by the defence

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence

Ms Catherine Mabille
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

a/0001/06 to a/0003/06 and a/0105/06

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, following the Status Conference on 9 January 2008, delivers the following decision on the issue of disclosure by the defence:

I) Procedural Background

1. On 13 December 2007, the Trial Chamber issued an "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial," inviting submissions on, *inter alia*, the issue of disclosure by the defence as follows:¹

1) Generally, the interpretation to be given to Rule 79(4).

2) The extent to which the defence should be required to disclose the material listed below, and timing of that disclosure (if any):

- The lines of defence and the details of the facts and issues underpinning the lines of defence;
- The names of witnesses to be called and the statements of those witnesses;
- The identity and the content of any documents the defence intends to rely on;
- Instructions to expert witnesses; the contents of any report to be relied on when the defence is permitted to instruct an expert separately;
- Objections to the admissibility of prosecution evidence, including reasons, in accordance with Rule 64(1), and in particular the point at which the procedure set out in Rule 64(1) is triggered;
- Rule 79(1)(a). whether the defence is required to notify the Trial Chamber of the existence of an alibi;
- Rule 80(1): timing of disclosure of a ground for excluding criminal responsibility.

2. The submissions of the legal representative of Victim a/0105/06,² the legal representatives for Victims a/0001/06 to a/0003/06,³ the Office of the Prosecutor ("prosecution")⁴ and the defence⁵ were filed on 7 January 2008.

¹ ICC-01/04-01/06-1083, paragraph 1 B.

² Conclusion du représentant legal de la victime a/0105/06 sur "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial", ICC-01/04-01/06-1106.

³ Conclusions des Représentants légaux des victimes a/0001/06 à a/0003/06 sur d'autres questions à déterminer avant le procès. ICC-01/04-01/06-1107.

⁴ Prosecution's Submissions for the Status Conference on 9 January 2008, ICC-01/04-01/06-1109.

⁵ Conclusions de la Défense relatives à l' "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial", ICC-01/04-01/06-1110.

3. Oral submissions were made by the parties and participants at the Status Conference on 9 January 2008.⁶

II) Relevant Provisions

4. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions of the Rome Statute framework:

Article 64 of the Statute:

Functions and Powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

[...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

[...]

Article 67:

Rights of the accused

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which

⁶ Transcript of hearing on 9 January 2008, ICC-01/04-01/06-T-67-ENG, pages 25-44.

he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 64 of the Rules of Procedure and Evidence ("Rules"):

Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

[...]

Rule 78 of the Rules:

Inspection of material in possession or control of the defence

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

Rule 79 of the Rules:

Disclosure by the defence

1. The defence shall notify the Prosecutor of its intent to:

(a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or

(b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.

3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.

4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.

Rule 80 of the Rules:

Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3

1. The defence shall give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3. This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.

[...]

Rule 84 of the Rules:

Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Regulation of the Court 54:

Status conferences before the Trial Chamber

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, inter alia, the following issues:

- a) The length and content of legal arguments and the opening and closing statements;
- b) A summary of evidence the participants intend to rely on;
- c) The length of evidence to be relied on;
- d) The length of questioning of the witnesses;
- e) The number and identity [...] of the witnesses to be called;
- f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;

[...]

- h) The issues the participants propose to raise during the trial;

[...]

- l) The disclosure of evidence;

[...]

- p) The defences, if any, to be advanced by the accused.

Regulation of the Registry 52:

Presentation of evidence during a hearing

[...]

2. For the purpose of the presentation, participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing.

III) Submissions

A. Defence

5. The defence submitted that its obligations to make disclosure are of a completely different order from those governing the prosecution. It was suggested that because the accused has the right to remain silent and not to incriminate himself, the defence has, in principle, no obligation to reveal its evidence or lines of defence, except in certain restricted circumstances.⁷
6. The defence argued that Rule 79(4) must be read in the context of the preceding paragraphs of that rule, and as such it only relates to the items of evidence that are relevant to the defence of alibi or to grounds for excluding criminal responsibility. It was suggested the Chamber may not, therefore, require the defence to disclose any other lines of defence or items of evidence that may be advanced to support them.⁸
7. Further, it was submitted that Rule 79(1) outlines the restricted instances in which the defence may be required to disclose in advance the identities of its witnesses. Even as regards these limited circumstances, no additional provision requires prior disclosure of the statements of those witnesses.⁹
8. As regards the obligation of the defence under Rule 78 to facilitate inspection, the Chamber was asked to note that in contrast to the obligations of the prosecution, the defence is only required to afford inspection of the material which it will use in the trial. It was argued in consequence that this obligation only arises at the moment when a final decision is taken to use a particular

⁷ ICC-01/04-01/06-1110, paragraph 10.

⁸ *Ibid*, paragraph 16.

⁹ *Ibid*, paragraphs 19-20.

item.¹⁰ It was contended that any other interpretation would render Rule 79, which describes specific instances in which evidence must be communicated in advance, devoid of purpose. The defence suggested in oral submission that it is only after the presentation of the prosecution's evidence that the defence will know for certain the items of evidence it will rely on.¹¹

9. In the submission of the defence, if a party is permitted to instruct an expert witness separately, its instructions to the expert as well as the report itself are documents that need not be disclosed, unless that party decides to rely upon the report.¹²
10. Advancing a literal interpretation of Rule 64 of the Rules, it was submitted that the moment at which an objection to the admissibility of evidence must be raised is when the evidence is presented. As a result, it was argued the defence should not be obliged to disclose their admissibility objections in advance.¹³
11. The defence argued that, pursuant to Rule 79, it is not under an obligation to inform the Chamber of the existence of an alibi, but instead it must give notice to the prosecution.¹⁴ However, if requested, it has no objection to providing this information to the Chamber.¹⁵
12. The defence acknowledged its obligation under Rule 80(1) to notify the prosecution of its intention to raise a ground for excluding criminal responsibility sufficiently early to allow the latter to prepare adequately, and it indicated this will be provided at least two weeks before the beginning of the trial.¹⁶

¹⁰ *Ibid*, paragraph 25.

¹¹ ICC-01/04-01/06-T-67-ENG, page 29, lines 11-17.

¹² ICC-01/04-01/06-1110, paragraphs 29-30.

¹³ *Ibid*, paragraphs 31-33.

¹⁴ *Ibid*, paragraph 34.

¹⁵ ICC-01/04-01/06-T-67-ENG, page 31, lines 5-10.

¹⁶ ICC-01/04-01/06-1110, paragraph 37.

B. Prosecution

13. The prosecution submitted that Rule 79(4) gives the Chamber authority to order the defence to disclose evidence to the prosecution in addition to the other circumstances covered by Rule 79. This approach, it was contended, is supported by the fact that unlike Rule 79(1), which provides for communication of an intention to rely on particular lines of defence and the disclosure of associated evidence, Rule 79(4) contemplates the Chamber ordering disclosure of any other *evidence*, and not the intention of the defence with respect to that evidence.¹⁷
14. It argued that a purposive reading of Rule 79, in conjunction with Rules 78 and 84, supports a reciprocal approach to disclosure so as to require the defence to disclose to the prosecution all evidence upon which the accused intends to rely at trial. Furthermore, the Chamber should ensure that disclosure pursuant to Rule 79(4) occurs materially in advance of any defence evidence to enable the prosecution to prepare adequately.
15. Furthermore, it was submitted that the interests of justice as well as judicial economy require that the main lines of defence should be disclosed sufficiently early to allow the prosecution to address them during the presentation of its case. As a result, they should be disclosed before the beginning of the trial.¹⁸
16. The prosecution argued that in principle the defence should be required to disclose the identities of its witness and their statements at a stage that will enable the prosecution to prepare for their cross-examination and to investigate their credibility. The prosecution recognised that the defence may only be in a position to provide this information towards the end of the

¹⁷ ICC-01/04-01/06-1109, paragraph 10.

¹⁸ ICC-01/04-01/06-T-67-ENG, page 36, lines 3-11.

prosecution's evidence, but emphasised that it must be afforded adequate time to prepare for the defence evidence.¹⁹

17. As regards Rule 78 inspections, the prosecution proposed a two-stage timetable. At the first stage, any objects the defence intends to introduce during the prosecution's evidence should be provided for inspection sufficiently in advance of the start of the trial. For the second stage, it was accepted that any items the defence intends to introduce during its case can be provided for inspection following the close of the prosecution's evidence, but sufficient time should be allowed before the defence evidence to enable adequate preparation.²⁰

18. The prosecution submitted that advance notification by the accused that he intends to raise a defence pursuant to Rule 79(1) must be given as soon as he has decided to rely on it.²¹

19. The prosecution agreed with the defence that instructions to, and a report written by, an expert witness upon whose testimony the parties do not intend to rely need not be disclosed to the other party.²²

20. The Chamber was urged to set a timetable for the defence to raise objections, before the trial, as regards the admissibility or relevance of prosecution evidence, so as to facilitate efficient preparation and to assist trial-management. The prosecution further submitted that any challenge to the admissibility of evidence should be by way of written filing, outlining the grounds of objection.²³

¹⁹ *Ibid*, page 36, line 21 to page 37, line 12.

²⁰ ICC-01/04-01/06-1109, paragraph 12.

²¹ *Ibid*, paragraph 13.

²² ICC-01/04-01/06-T-67-ENG, page 37, lines 19-25.

²³ ICC-01/04-01/06-1109, paragraphs 14-15.

C. Victims

21. In the submission of the legal representatives of victims a/0001/06 to a/0003/06, Rule 79(4) reflects Article 64(3)(c), which indicates that the Chamber may provide for disclosure of documents or information not previously disclosed. In the premises, it was argued the Chamber may direct the prosecution and the defence to make disclosure.²⁴
22. The legal representatives contended that the Chamber may, therefore, order the defence to disclose to the Chamber and the participants its intention to invoke an alibi, as well as disclosing to the participants such documents or information which they have a legitimate interest in receiving, or generally to further the interests of justice.²⁵
23. Since advancing an alibi or a ground for excluding criminal responsibility may result in an acquittal, thereby affecting any entitlement to reparations, it was argued that the personal interests of victims are engaged by these defences. The representatives therefore requested that they are notified at the same time as the prosecution if the accused intends to rely on either of them.²⁶ Additionally, given that victims may have been witnesses to the events in question or otherwise may have relevant knowledge, it was argued that the representatives should be permitted to advance any relevant submissions. The representatives therefore seek disclosure of all items of evidence that will enable the participants to prepare properly for trial.²⁷
24. The legal representatives similarly requested information regarding the lines of defence to be advanced, the names of witnesses to be called, the documents

²⁴ ICC-01/04-01/06-1107, paragraph 6.

²⁵ *Ibid*, paragraphs 7-8.

²⁶ *Ibid*, paragraphs 9-10.

²⁷ *Ibid*, paragraphs 11-12.

to be produced, and the instructions given to expert witnesses, unless the Chamber concludes there are good reasons for non-disclosure.²⁸

25. The legal representatives submitted that they may also have an interest in challenging the relevance or admissibility of evidence, for instance if the proposed evidence is from a victim they represent or if it is likely to affect directly a victim they represent.²⁹

26. The legal representative of victim a/0105/06 sought an order that the defence make available to the legal representatives any items of evidence provided to the prosecution for inspection under Rule 78 which may be of relevance to them, in advance of the trial.³⁰

IV) Analysis and Conclusions

27. The starting-point for consideration of this issue is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way. The Chamber has a critical duty to uphold these protections, which are enshrined in the Statute. Article 55(1)(a) provides that a person under investigation shall not be compelled to incriminate himself or herself or to confess guilt. At the Confirmation of Charges, the accused does not have to participate actively: the provisions of Article 61(6), which permit him to object to the charges, challenge evidence or present evidence are permissive rather than mandatory. For the purposes of the trial, by Article 66(1), he is presumed innocent until proven guilty; by Article 66(2) the onus of proof rests with the prosecution; and by Article 67(1)(i) he is not to bear a reverse burden of proof or an onus of rebuttal. Finally, by Article 67(1)(g), he may not be compelled to testify or to confess guilt, and he is entitled to remain silent without that latter

²⁸ *Ibid*, paragraph 11.

²⁹ *Ibid*, paragraph 12.

³⁰ ICC-01/04-01/06-1106, paragraph 9.

stance having any impact on the court's determination of his guilt or innocence. These rights are inviolable.

28. However, there are important provisions contained in the Rome Statute framework which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial³¹ and to assist the Chamber in its determination of the truth.³² These obligations, summarised hereafter, do not infringe the rights of the accused.

29. The Chamber may order disclosure of evidence which tends to exonerate the accused of his criminal responsibility:

- a) By Rule 79(1)(a) of the Rules, the defence is obliged to reveal to the prosecutor the existence of a defence of alibi, as well as the particulars of time and place, the details of the witnesses who allegedly support the alibi and any other relevant evidence (and if this defence is raised, by Rule 79(2) the Prosecutor shall be notified sufficiently in advance of the trial to enable the prosecution to prepare adequately);
- b) By Rule 79(1)(b) of the Rules, the defence are obliged to reveal the existence of a defence that criminal responsibility is excluded under Article 31(1), as well as the particulars of the witnesses who support the defence and any other relevant evidence (and if this defence is raised, by Rules 79(2) and 80(1) the Trial Chamber and the Prosecutor shall be notified sufficiently in advance of the trial to enable the prosecution to prepare adequately);³³ and

³¹ Article 64(2).

³² Article 69(3).

³³ By Rule 79(3), the opportunity for the defence to rely on these two defences (alibi and excluding criminal responsibility) and to call evidence in support thereof is preserved, notwithstanding the lack of notice (because this can be addressed by way of an adjournment).

- c) By Regulation 54(p) of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice during a status conference concerning the defences, if any, to be raised by the accused.

30. The following provisions envisage that disclosure by the defence may go beyond the scope of the defences:

- a) By Rule 78 of the Rules, the defence shall permit the prosecution to inspect any documents or other tangible materials which are intended for use by the defence during the trial;
- b) Rule 79(4) of the Rules expressly includes, as a separate provision, the power of the Chamber to “(order) disclosure of any other evidence” (emphasis added);
- c) By Regulation 54 of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice during a status conference concerning a summary of evidence the accused is to rely on (54(b)), the length of questioning (54(d)), the number and identity of witnesses (54(e)), the production and disclosure of the statements of the witnesses the accused intends to call (54(f)), the issues the accused intends to raise (54(h)) and the disclosure of evidence (54(l));
- d) By Regulation 52 of the Regulations of the Registry, the parties and participants shall provide the court officer, at least three working days before the hearing, the evidence they intend to use (in an electronic form if possible).

31. Thus, it seems clear that under the Rome Statute framework it is envisaged that an accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.
32. The question is the extent of this obligation to give advance notification and the circumstances in which it is appropriate. Regulation 54 permits the Chamber to order advance disclosure of summaries of evidence, copies of witness statements from the witnesses who the defence intends to call, the number and the identities of those witnesses, the issues it is intended are to be raised and the defences the accused intends to advance.
33. The critical issue is the appropriate use of these powers. It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case. At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.
34. There is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other. At present the prosecution has revealed the identity and statements (some with redactions) of approximately two thirds of the 33 witnesses it is proposing to rely on and there is a body of potentially exculpatory material which has yet to be resolved by the Bench. The final date for disclosure has been set for 28 March 2008.³⁴ Furthermore, the six charges as confirmed by the Pre-Trial Chamber – which essentially define

³⁴ Transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79-FRA (real time), page 6.

the ambit of this case – are confined to issues concerning child soldiers and, therefore, to a significant extent the issues in this trial have been delineated by the evidence to be presented on these charges. In order to ensure the trial process is fair, only proportionate disclosure obligations should be imposed on the accused in relation to the evidence he intends to advance. In the circumstances, the Chamber will reflect in any order it makes on defence disclosure that a material element of the prosecution's evidence is still outstanding (along, potentially, with evidence that is helpful to the accused); the trial date has been set for 23 June 2008;³⁵ and the charges are of limited ambit. The Chamber is of the view that the obligations of disclosure on the accused, for these reasons, should be of an appropriately restricted nature.

35. The Chamber considers the interpretation of Rule 79(4), advanced by the defence, is untenable and that an order may be made for the disclosure of evidence that is unrelated to either an alleged alibi or a defence based on lack of criminal responsibility. In Rule 79(1)(a) and (b), the expression "any other evidence" is used when imposing the obligation on the accused to give advance notice of those two defences and it would have been wholly superfluous for the drafters of the Statute thereafter to include a further provision empowering the court to order the disclosure of "any other evidence" relating to the same defences. It follows that Rule 79(4) reveals the Chamber has the power to order advance disclosure of any evidence outwith those defences that the accused intends to rely on. This interpretation is supported by the provisions of Regulation 54.

36. As regards timing when an issue concerns relevance or admissibility, Rule 64 of the Rules stipulates it "must be raised at the time when the evidence is submitted to a Chamber" and, unless otherwise ordered, it is to be set out in writing. Given this requirement for written notice and the need for the court

³⁵ Transcript of hearing on 12 March 2008, ICC-01/04-01/06-T-78-FRA (real time), pages 3-4.

to set a timetable that will secure a fair and expeditious trial, the Chamber is unpersuaded that issues relating to relevance or admissibility shall only be raised at the moment the evidence is presented. This is the last moment at which these points should be raised, but the Chamber is entitled to set a timetable requiring earlier identification of any contentious matters.

37. Addressing certain discrete issues, first, depending on the circumstances of any of the alleged former child soldiers, the Chamber may, on an exceptional basis, order advance disclosure of the questions or the lines of questioning to be advanced by the defence so as to fulfil its obligations under Article 68(1).
38. Second, the Chamber accepts the contention of the prosecution and the defence that instructions to, and reports written by, expert witnesses upon whose testimony the defence does intend to rely need not be disclosed to the other party or the Chamber, save exceptionally following a specific order.
39. Third, the entitlement of participating victims to advance information has been dealt with in the Decision on victims' participation.³⁶ In essence, to the extent that the interests of a participating victim are affected at a particular stage in the proceedings, he or she should receive information in the same way as the Chamber and the prosecution.
40. Fourth and finally, some of the submissions of the legal representatives are related to issues which are now the subject of interlocutory appeals in that it was argued that the victims should be allowed to make submissions on the defences advanced and evidence presented by the accused and on the admissibility of evidence.³⁷ Accordingly, the Chamber has not addressed these arguments in this Decision.

³⁶ ICC-01/04-01/06-1119, paragraphs 101–118.

³⁷ Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 54 c).

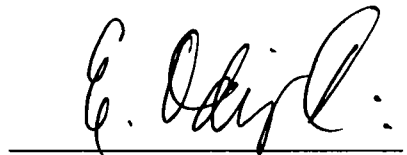
V) Orders of the Chamber

41. On the basis of the analysis and conclusions set out above, the accused shall:

- a) Inform the Chamber at the same time as the prosecution if the accused intends to raise an alibi under Rule 79(1)(a) of the Rules or a ground for excluding criminal responsibility under Rule 79(1)(b) of the Rules;
- b) Furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules);
- c) Provide the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications he intends to advance as regards admissibility or relevance, or other substantive points of law that need to be resolved before the commencement of the trial;
- d) Furnish the prosecution and the Chamber after the presentation of the evidence of the prosecution is completed with the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries;

- e) Provide the Chamber, the prosecution and the participants with any evidence intended for use by the defence, other than the oral testimony of a witness, three days in advance of its presentation.³⁸

Done in both English and French, the English version being authoritative.


Judge Adrian Fulford
Judge Elizabeth Odio Benito
Judge René Blattmann

Dated this 20 March 2008

At The Hague, The Netherlands

³⁸ See also Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 34.

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Pénale
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**International
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Original: English

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Date: 11 June 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

Corrigendum to “Decision on disclosure by the defence”

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Catherine Bapita Buyangandu

Legal Representatives of the 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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. The Trial Chamber issued a "Decision on disclosure by the defence" on 20 March 2008 ("Decision").¹ It has come to the attention of the Chamber that the decision contains a clerical error which needs to be corrected as follows:

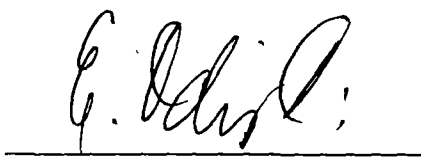
- In paragraph 38, "expert witnesses upon whose testimony the defence does intend to rely" should read "expert witnesses upon whose testimony the defence does not intend to rely".

2. For ease of reference, the correct version of the Decision is attached as Annex I.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 11 June 2008

At The Hague, The Netherlands

¹ ICC-01/04-01/06-1235

**Cour
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**International
Criminal
Court**

Original : English

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

Date: 20 March 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
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IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public
Annex I**

Decision on disclosure by the defence

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

a/0001/06 to a/0003/06 and a/0105/06

Mr Luc Walley
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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, following the Status Conference on 9 January 2008, delivers the following decision on the issue of disclosure by the defence:

I) Procedural Background

1. On 13 December 2007, the Trial Chamber issued an “Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial,” inviting submissions on, *inter alia*, the issue of disclosure by the defence as follows:¹

- 1) Generally, the interpretation to be given to Rule 79(4).
- 2) The extent to which the defence should be required to disclose the material listed below, and timing of that disclosure (if any):
 - The lines of defence and the details of the facts and issues underpinning the lines of defence;
 - The names of witnesses to be called and the statements of those witnesses;
 - The identity and the content of any documents the defence intends to rely on;
 - Instructions to expert witnesses; the contents of any report to be relied on when the defence is permitted to instruct an expert separately;
 - Objections to the admissibility of prosecution evidence, including reasons, in accordance with Rule 64(1), and in particular the point at which the procedure set out in Rule 64(1) is triggered;
 - Rule 79(1)(a): whether the defence is required to notify the Trial Chamber of the existence of an alibi;
 - Rule 80(1): timing of disclosure of a ground for excluding criminal responsibility.

2. The submissions of the legal representative of Victim a/0105/06,² the legal representatives for Victims a/0001/06 to a/0003/06,³ the Office of the Prosecutor (“prosecution”)⁴ and the defence⁵ were filed on 7 January 2008.

¹ ICC-01/04-01/06-1083, paragraph 1 B

² Conclusion du représentant legal de la victime a/0105/06 sur “Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial”, ICC-01/04-01/06-1106.

³ Conclusions des Représentants légaux des victimes a/0001/06 à a/0003/06 sur d’autres questions à déterminer avant le procès, ICC-01/04-01/06-1107.

⁴ Prosecution’s Submissions for the Status Conference on 9 January 2008, ICC-01/04-01/06-1109

⁵ Conclusions de la Défense relatives à l’ “Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial”, ICC-01/04-01/06-1110.

3. Oral submissions were made by the parties and participants at the Status Conference on 9 January 2008.⁶

II) Relevant Provisions

4. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions of the Rome Statute framework:

Article 64 of the Statute:

Functions and Powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

[...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

[. .]

Article 67:

Rights of the accused

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which

⁶ Transcript of hearing on 9 January 2008, ICC-01/04-01/06-T-67-ENG, pages 25-44.

he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 64 of the Rules of Procedure and Evidence (“Rules”):

Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

[. .]

Rule 78 of the Rules:

Inspection of material in possession or control of the defence

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

Rule 79 of the Rules:

Disclosure by the defence

1. The defence shall notify the Prosecutor of its intent to:

(a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or

(b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.

3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.

4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.

Rule 80 of the Rules:

Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3

1. The defence shall give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3. This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.

[. .]

Rule 84 of the Rules:

Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Regulation of the Court 54:

Status conferences before the Trial Chamber

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, inter alia, the following issues:

- a) The length and content of legal arguments and the opening and closing statements;
- b) A summary of evidence the participants intend to rely on;
- c) The length of evidence to be relied on;
- d) The length of questioning of the witnesses;
- e) The number and identity [...] of the witnesses to be called;
- f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;

[. .]

- h) The issues the participants propose to raise during the trial;

[...]

- i) The disclosure of evidence;

[...]

- p) The defences, if any, to be advanced by the accused.

Regulation of the Registry 52:

Presentation of evidence during a hearing

[. .]

2. For the purpose of the presentation, participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing.

III) Submissions

A. Defence

5. The defence submitted that its obligations to make disclosure are of a completely different order from those governing the prosecution. It was suggested that because the accused has the right to remain silent and not to incriminate himself, the defence has, in principle, no obligation to reveal its evidence or lines of defence, except in certain restricted circumstances.⁷
6. The defence argued that Rule 79(4) must be read in the context of the preceding paragraphs of that rule, and as such it only relates to the items of evidence that are relevant to the defence of alibi or to grounds for excluding criminal responsibility. It was suggested the Chamber may not, therefore, require the defence to disclose any other lines of defence or items of evidence that may be advanced to support them.⁸
7. Further, it was submitted that Rule 79(1) outlines the restricted instances in which the defence may be required to disclose in advance the identities of its witnesses. Even as regards these limited circumstances, no additional provision requires prior disclosure of the statements of those witnesses.⁹
8. As regards the obligation of the defence under Rule 78 to facilitate inspection, the Chamber was asked to note that in contrast to the obligations of the prosecution, the defence is only required to afford inspection of the material which it will use in the trial. It was argued in consequence that this obligation only arises at the moment when a final decision is taken to use a particular

⁷ ICC-01/04-01/06-1110, paragraph 10.

⁸ *Ibid*, paragraph 16

⁹ *Ibid*, paragraphs 19-20.

item.¹⁰ It was contended that any other interpretation would render Rule 79, which describes specific instances in which evidence must be communicated in advance, devoid of purpose. The defence suggested in oral submission that it is only after the presentation of the prosecution's evidence that the defence will know for certain the items of evidence it will rely on.¹¹

9. In the submission of the defence, if a party is permitted to instruct an expert witness separately, its instructions to the expert as well as the report itself are documents that need not be disclosed, unless that party decides to rely upon the report.¹²
10. Advancing a literal interpretation of Rule 64 of the Rules, it was submitted that the moment at which an objection to the admissibility of evidence must be raised is when the evidence is presented. As a result, it was argued the defence should not be obliged to disclose their admissibility objections in advance.¹³
11. The defence argued that, pursuant to Rule 79, it is not under an obligation to inform the Chamber of the existence of an alibi, but instead it must give notice to the prosecution.¹⁴ However, if requested, it has no objection to providing this information to the Chamber.¹⁵
12. The defence acknowledged its obligation under Rule 80(1) to notify the prosecution of its intention to raise a ground for excluding criminal responsibility sufficiently early to allow the latter to prepare adequately, and it indicated this will be provided at least two weeks before the beginning of the trial.¹⁶

¹⁰ *Ibid*, paragraph 25.

¹¹ ICC-01/04-01/06-T-67-ENG, page 29, lines 11-17.

¹² ICC-01/04-01/06-1110, paragraphs 29-30.

¹³ *Ibid*, paragraphs 31-33.

¹⁴ *Ibid*, paragraph 34.

¹⁵ ICC-01/04-01/06-T-67-ENG, page 31, lines 5-10

¹⁶ ICC-01/04-01/06-1110, paragraph 37.

B. Prosecution

13. The prosecution submitted that Rule 79(4) gives the Chamber authority to order the defence to disclose evidence to the prosecution in addition to the other circumstances covered by Rule 79. This approach, it was contended, is supported by the fact that unlike Rule 79(1), which provides for communication of an intention to rely on particular lines of defence and the disclosure of associated evidence, Rule 79(4) contemplates the Chamber ordering disclosure of any other *evidence*, and not the intention of the defence with respect to that evidence.¹⁷
14. It argued that a purposive reading of Rule 79, in conjunction with Rules 78 and 84, supports a reciprocal approach to disclosure so as to require the defence to disclose to the prosecution all evidence upon which the accused intends to rely at trial. Furthermore, the Chamber should ensure that disclosure pursuant to Rule 79(4) occurs materially in advance of any defence evidence to enable the prosecution to prepare adequately.
15. Furthermore, it was submitted that the interests of justice as well as judicial economy require that the main lines of defence should be disclosed sufficiently early to allow the prosecution to address them during the presentation of its case. As a result, they should be disclosed before the beginning of the trial.¹⁸
16. The prosecution argued that in principle the defence should be required to disclose the identities of its witness and their statements at a stage that will enable the prosecution to prepare for their cross-examination and to investigate their credibility. The prosecution recognised that the defence may only be in a position to provide this information towards the end of the

¹⁷ ICC-01/04-01/06-1109, paragraph 10.

¹⁸ ICC-01/04-01/06-T-67-ENG, page 36, lines 3-11.

prosecution's evidence, but emphasised that it must be afforded adequate time to prepare for the defence evidence.¹⁹

17. As regards Rule 78 inspections, the prosecution proposed a two-stage timetable. At the first stage, any objects the defence intends to introduce during the prosecution's evidence should be provided for inspection sufficiently in advance of the start of the trial. For the second stage, it was accepted that any items the defence intends to introduce during its case can be provided for inspection following the close of the prosecution's evidence, but sufficient time should be allowed before the defence evidence to enable adequate preparation.²⁰
18. The prosecution submitted that advance notification by the accused that he intends to raise a defence pursuant to Rule 79(1) must be given as soon as he has decided to rely on it.²¹
19. The prosecution agreed with the defence that instructions to, and a report written by, an expert witness upon whose testimony the parties do not intend to rely need not be disclosed to the other party.²²
20. The Chamber was urged to set a timetable for the defence to raise objections, before the trial, as regards the admissibility or relevance of prosecution evidence, so as to facilitate efficient preparation and to assist trial-management. The prosecution further submitted that any challenge to the admissibility of evidence should be by way of written filing, outlining the grounds of objection.²³

¹⁹ *Ibid*, page 36, line 21 to page 37, line 12.

²⁰ ICC-01/04-01/06-1109, paragraph 12

²¹ *Ibid*, paragraph 13.

²² ICC-01/04-01/06-T-67-ENG, page 37, lines 19-25.

²³ ICC-01/04-01/06-1109, paragraphs 14-15.

C. Victims

21. In the submission of the legal representatives of victims a/0001/06 to a/0003/06, Rule 79(4) reflects Article 64(3)(c), which indicates that the Chamber may provide for disclosure of documents or information not previously disclosed. In the premises, it was argued the Chamber may direct the prosecution and the defence to make disclosure.²⁴
22. The legal representatives contended that the Chamber may, therefore, order the defence to disclose to the Chamber and the participants its intention to invoke an alibi, as well as disclosing to the participants such documents or information which they have a legitimate interest in receiving, or generally to further the interests of justice.²⁵
23. Since advancing an alibi or a ground for excluding criminal responsibility may result in an acquittal, thereby affecting any entitlement to reparations, it was argued that the personal interests of victims are engaged by these defences. The representatives therefore requested that they are notified at the same time as the prosecution if the accused intends to rely on either of them.²⁶ Additionally, given that victims may have been witnesses to the events in question or otherwise may have relevant knowledge, it was argued that the representatives should be permitted to advance any relevant submissions. The representatives therefore seek disclosure of all items of evidence that will enable the participants to prepare properly for trial.²⁷
24. The legal representatives similarly requested information regarding the lines of defence to be advanced, the names of witnesses to be called, the documents

²⁴ ICC-01/04-01/06-1107, paragraph 6

²⁵ *Ibid*, paragraphs 7-8.

²⁶ *Ibid*, paragraphs 9-10.

²⁷ *Ibid*, paragraphs 11-12.

to be produced, and the instructions given to expert witnesses, unless the Chamber concludes there are good reasons for non-disclosure.²⁸

25. The legal representatives submitted that they may also have an interest in challenging the relevance or admissibility of evidence, for instance if the proposed evidence is from a victim they represent or if it is likely to affect directly a victim they represent.²⁹

26. The legal representative of victim a/0105/06 sought an order that the defence make available to the legal representatives any items of evidence provided to the prosecution for inspection under Rule 78 which may be of relevance to them, in advance of the trial.³⁰

IV) Analysis and Conclusions

27. The starting-point for consideration of this issue is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way. The Chamber has a critical duty to uphold these protections, which are enshrined in the Statute. Article 55(1)(a) provides that a person under investigation shall not be compelled to incriminate himself or herself or to confess guilt. At the Confirmation of Charges, the accused does not have to participate actively: the provisions of Article 61(6), which permit him to object to the charges, challenge evidence or present evidence are permissive rather than mandatory. For the purposes of the trial, by Article 66(1), he is presumed innocent until proven guilty; by Article 66(2) the onus of proof rests with the prosecution; and by Article 67(1)(i) he is not to bear a reverse burden of proof or an onus of rebuttal. Finally, by Article 67(1)(g), he may not be compelled to testify or to confess guilt, and he is entitled to remain silent without that latter

²⁸ *Ibid*, paragraph 11.

²⁹ *Ibid*, paragraph 12.

³⁰ ICC-01/04-01/06-1106, paragraph 9.

stance having any impact on the court's determination of his guilt or innocence. These rights are inviolable.

28. However, there are important provisions contained in the Rome Statute framework which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial³¹ and to assist the Chamber in its determination of the truth.³² These obligations, summarised hereafter, do not infringe the rights of the accused.

29. The Chamber may order disclosure of evidence which tends to exonerate the accused of his criminal responsibility:

- a) By Rule 79(1)(a) of the Rules, the defence is obliged to reveal to the prosecutor the existence of a defence of alibi, as well as the particulars of time and place, the details of the witnesses who allegedly support the alibi and any other relevant evidence (and if this defence is raised, by Rule 79(2) the Prosecutor shall be notified sufficiently in advance of the trial to enable the prosecution to prepare adequately);
- b) By Rule 79(1)(b) of the Rules, the defence are obliged to reveal the existence of a defence that criminal responsibility is excluded under Article 31(1), as well as the particulars of the witnesses who support the defence and any other relevant evidence (and if this defence is raised, by Rules 79(2) and 80(1) the Trial Chamber and the Prosecutor shall be notified sufficiently in advance of the trial to enable the prosecution to prepare adequately);³³ and

³¹ Article 64(2).

³² Article 69(3).

³³ By Rule 79(3), the opportunity for the defence to rely on these two defences (alibi and excluding criminal responsibility) and to call evidence in support thereof is preserved, notwithstanding the lack of notice (because this can be addressed by way of an adjournment).

- c) By Regulation 54(p) of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice during a status conference concerning the defences, if any, to be raised by the accused.

30. The following provisions envisage that disclosure by the defence may go beyond the scope of the defences:

- a) By Rule 78 of the Rules, the defence shall permit the prosecution to inspect any documents or other tangible materials which are intended for use by the defence during the trial;
- b) Rule 79(4) of the Rules expressly includes, as a separate provision, the power of the Chamber to “(order) disclosure of any other evidence” (emphasis added);
- c) By Regulation 54 of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice during a status conference concerning a summary of evidence the accused is to rely on (54(b)), the length of questioning (54(d)), the number and identity of witnesses (54(e)), the production and disclosure of the statements of the witnesses the accused intends to call (54(f)), the issues the accused intends to raise (54(h)) and the disclosure of evidence (54(l));
- d) By Regulation 52 of the Regulations of the Registry, the parties and participants shall provide the court officer, at least three working days before the hearing, the evidence they intend to use (in an electronic form if possible).

31. Thus, it seems clear that under the Rome Statute framework it is envisaged that an accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.
32. The question is the extent of this obligation to give advance notification and the circumstances in which it is appropriate. Regulation 54 permits the Chamber to order advance disclosure of summaries of evidence, copies of witness statements from the witnesses who the defence intends to call, the number and the identities of those witnesses, the issues it is intended are to be raised and the defences the accused intends to advance.
33. The critical issue is the appropriate use of these powers. It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case. At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.
34. There is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other. At present the prosecution has revealed the identity and statements (some with redactions) of approximately two thirds of the 33 witnesses it is proposing to rely on and there is a body of potentially exculpatory material which has yet to be resolved by the Bench. The final date for disclosure has been set for 28 March 2008.³⁴ Furthermore, the six charges as confirmed by the Pre-Trial Chamber – which essentially define

³⁴ Transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79-FRA (real time), page 6.

the ambit of this case – are confined to issues concerning child soldiers and, therefore, to a significant extent the issues in this trial have been delineated by the evidence to be presented on these charges. In order to ensure the trial process is fair, only proportionate disclosure obligations should be imposed on the accused in relation to the evidence he intends to advance. In the circumstances, the Chamber will reflect in any order it makes on defence disclosure that a material element of the prosecution's evidence is still outstanding (along, potentially, with evidence that is helpful to the accused); the trial date has been set for 23 June 2008;³⁵ and the charges are of limited ambit. The Chamber is of the view that the obligations of disclosure on the accused, for these reasons, should be of an appropriately restricted nature.

35. The Chamber considers the interpretation of Rule 79(4), advanced by the defence, is untenable and that an order may be made for the disclosure of evidence that is unrelated to either an alleged alibi or a defence based on lack of criminal responsibility. In Rule 79(1)(a) and (b), the expression “any other evidence” is used when imposing the obligation on the accused to give advance notice of those two defences and it would have been wholly superfluous for the drafters of the Statute thereafter to include a further provision empowering the court to order the disclosure of “any other evidence” relating to the same defences. It follows that Rule 79(4) reveals the Chamber has the power to order advance disclosure of any evidence outwith those defences that the accused intends to rely on. This interpretation is supported by the provisions of Regulation 54.

36. As regards timing when an issue concerns relevance or admissibility, Rule 64 of the Rules stipulates it “must be raised at the time when the evidence is submitted to a Chamber” and, unless otherwise ordered, it is to be set out in writing. Given this requirement for written notice and the need for the court

³⁵ Transcript of hearing on 12 March 2008, ICC-01/04-01/06-T-78-FRA (real time), pages 3-4.

to set a timetable that will secure a fair and expeditious trial, the Chamber is unpersuaded that issues relating to relevance or admissibility shall only be raised at the moment the evidence is presented. This is the last moment at which these points should be raised, but the Chamber is entitled to set a timetable requiring earlier identification of any contentious matters.

37. Addressing certain discrete issues, first, depending on the circumstances of any of the alleged former child soldiers, the Chamber may, on an exceptional basis, order advance disclosure of the questions or the lines of questioning to be advanced by the defence so as to fulfil its obligations under Article 68(1).
38. Second, the Chamber accepts the contention of the prosecution and the defence that instructions to, and reports written by, expert witnesses upon whose testimony the defence does not intend to rely need not be disclosed to the other party or the Chamber, save exceptionally following a specific order.
39. Third, the entitlement of participating victims to advance information has been dealt with in the Decision on victims' participation.³⁶ In essence, to the extent that the interests of a participating victim are affected at a particular stage in the proceedings, he or she should receive information in the same way as the Chamber and the prosecution.
40. Fourth and finally, some of the submissions of the legal representatives are related to issues which are now the subject of interlocutory appeals in that it was argued that the victims should be allowed to make submissions on the defences advanced and evidence presented by the accused and on the admissibility of evidence.³⁷ Accordingly, the Chamber has not addressed these arguments in this Decision.

³⁶ ICC-01/04-01/06-1119, paragraphs 101–118.

³⁷ Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 54 c).

V) Orders of the Chamber

41. On the basis of the analysis and conclusions set out above, the accused shall:

- a) Inform the Chamber at the same time as the prosecution if the accused intends to raise an alibi under Rule 79(1)(a) of the Rules or a ground for excluding criminal responsibility under Rule 79(1)(b) of the Rules;
- b) Furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules);
- c) Provide the Chamber, the prosecution and the participants three weeks in advance of the trial with details of any applications he intends to advance as regards admissibility or relevance, or other substantive points of law that need to be resolved before the commencement of the trial;
- d) Furnish the prosecution and the Chamber after the presentation of the evidence of the prosecution is completed with the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries;

- e) Provide the Chamber, the prosecution and the participants with any evidence intended for use by the defence, other than the oral testimony of a witness, three days in advance of its presentation.³⁸

Done in both English and French, the English version being authoritative.

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 20 March 2008

At The Hague, The Netherlands

³⁸ See also Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 34.