

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 May 2008

**TRIAL CHAMBER I**

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

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

**Public**

**Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibilities for protective measures and other procedural matters"**

**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**

Ms Paolina Massida

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Vaatainen

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

1. The Trial Chamber issued an under seal *ex parte* (prosecution and Registry only) "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" on 24 April 2008 with 4 Annexes.<sup>1</sup> Judge René Blattmann filed a partly separate and partly dissenting opinion to this Decision on 28 April 2008.<sup>2</sup>
2. As the Decision dealt in part with submissions made *ex parte*, it was first issued *ex parte* (and under seal as it dealt with the protection of specific witnesses) pending consultation of the Office of the Prosecutor ("prosecution") and the Registry on the status of their *ex parte* submissions. The prosecution and the Registry were requested to propose redactions, if any, by 29 April 2008. Subsequently, they were requested to consult and propose consolidated redactions where possible. This was done on 6 and 7 May 2008.
3. The Trial Chamber is satisfied that the submissions made *ex parte* as summarised in the Decision are suitable for release to the defence and the public as appropriate.
4. The Chamber hereby issues a confidential redacted version of the Decision to be notified to the defence only (attached as Annex 1), a public redacted version of the Decision (attached as Annex 2) and a public version of the Opinion (attached as Annex 3).
5. The prosecution filed a "Prosecution's Application for Leave to Appeal the Decision on Disclosure Issues, Responsibilities for Protective Measures and

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<sup>1</sup> ICC-01/04-01/06-1295-US-Exp and Annexes A-D: ICC-01/04-01/06-1295-US-Exp-AnxA, ICC-01/04-01/06-1295-US-Exp-AnxB, ICC-01/04-01/06-1295-US-Exp-AnxC, and ICC-01/04-01/06-1295-US-Exp-AnxD.

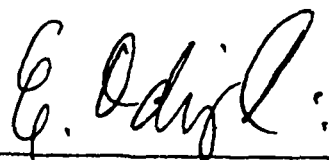
<sup>2</sup> Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and Other Procedural Matters, 28 April 2008, ICC-01/04-01/06-1295-US-Exp-Anx1.

other Procedural Matters" under seal and *ex parte* on 2 May 2008.<sup>3</sup> In order for the defence to be able to respond to the application, the prosecution is hereby ordered to re-file it in appropriate form within 2 days of the notification of the present decision.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 8 May 2008

At The Hague, The Netherlands

<sup>3</sup> ICC-01/04-01/06-1304-US-Exp.

**Cour  
Pénale  
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**International  
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No.: ICC-01/04-01/06

Date: 24 April 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***

**ANNEX 2  
Public Document**

**Decision on Disclosure Issues, Responsibilities for Protective Measures and other  
Procedural Matters**

**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, Deputy Prosecutor  
Mr Ekkerhard Withopf, Senior Trial  
Lawyer

**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**

Ms Paolina Massida

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Vaatainen

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of The Prosecutor v. Thomas Lubanga Dyilo, delivers the following decision (“Decision”):

## I. INTRODUCTION

1. This Decision relates to three principal interrelated issues:

- (i) Disclosure by the Office of the Prosecutor (“prosecution”), particular proposed redactions, the pending interlocutory appeals as regards participation by victims and disclosure and their joint impact on the date of trial;<sup>1</sup>
- (ii) The disclosure of potentially exculpatory material, which may also impact on the date of trial;
- (iii) The respective responsibilities of the prosecution and the Victims and Witnesses Unit as regards protective measures for witnesses.

2. Additionally the Decision addresses:

- (i) The requirement on the parties to give notice of *ex parte* procedures (written filings or hearings);
- (ii) Conducting part of the trial in the Democratic Republic of Congo;
- (iii) Consideration of agreed facts by the parties; and,
- (iv) The Office of Public Counsel for Victims’ oral request for access to material relating to victim applicants represented by the Office, who are also witnesses.<sup>2</sup>

<sup>1</sup> Decision on the Defence and Prosecution requests for leave to appeal the decision on victim’s participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191; Decision on the defence request for leave to appeal the oral decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210; Corrigendum to Decision on the defence request for leave to appeal the oral decision on redactions and disclosure of 18 January 2008, 14 March 2008, ICC-01/04-01/06-1224.

<sup>2</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 2, line 8 to page 5, line 17.

## II. RELEVANT PROVISIONS AND SUBMISSIONS

### A. PRINCIPAL ISSUES

#### (1) Disclosure and date for trial

##### (i) The relevant provisions

**Article 54** of the Rome Statute (“Statute”), “Duties and powers of the Prosecutor with respect to investigations”:

[...]

(3) The Prosecutor may:

[...]

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

**Article 67** of the Statute, “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 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 the case of doubt as to the application of this paragraph, the Court shall decide.

**Article 73** of the Statute, “Third-party information or documents”:

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organisation or international organisation, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to



the originator.

**Rule 82 of the Rules of Procedure and Evidence (“Rules”), “Restrictions on disclosure of material and information protected under article 54, paragraph 3(e)”:**

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
  2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
  3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.
  4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.
- [...]

**Rule 83 of the Rules, “Ruling on exculpatory evidence under article 67, paragraph 2”:**

The Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2

**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.

**(ii) Procedural history and submissions**

3. On 5 September 2007, the Trial Chamber set out a timetable for the filing of submissions on, *inter alia*, the date of the trial of Thomas Lubanga Dyilo and

the timing and manner of disclosure of the prosecution's evidence in advance of a Status Conference to determine those issues on 1 October 2007.<sup>3</sup>

4. In its written submissions, the prosecution undertook to "support and further contribute to the efforts made by the Court, in particular with respect to witness protection and to start the trial as early as possible in 2007",<sup>4</sup> and it anticipated "having disclosed or provided for inspection, or having sought to lift any restrictions on disclosure of the materials currently in its possession or control from their providers by end of October 2007, provided that all required protective measures are in place."<sup>5</sup>
5. At the Status Conference on 1 October 2007, the prosecution informed the Chamber that it had yet to receive permission from information-providers in respect of 562 documents and therefore at this stage was unable to disclose them to the defence.<sup>6</sup> The prosecution further indicated it was unable to make full disclosure as regards certain witnesses because this was contingent upon protective measures being put in place by the Victims and Witnesses Unit which were beyond its control.<sup>7</sup>
6. The defence submitted that in order to prepare properly for trial, it required a period of at least 3 months between full and final disclosure of the prosecution evidence and the commencement of the trial.<sup>8</sup> Similarly, the legal representatives of victims a/0001/06 – a/0003/06 sought a period of at least one month, and preferably two, following final disclosure of the relevant

<sup>3</sup> Order setting out schedule for submissions and hearings regarding the subjects that require early determination, 5 September 2007, ICC-01/04-01/06-947, paragraph 2.

<sup>4</sup> Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, 11 September 2007, ICC-01/04-01/06-951, paragraph 12.

<sup>5</sup> 11 September 2007, ICC-01/04-01/06-951, paragraph 24.

<sup>6</sup> ICC-01/04-01/06-T-52-ENG, page 14, lines 7-11.

<sup>7</sup> ICC-01/04-01/06-T-52-ENG, page 26, line 18 to page 30, line 6; page 32, lines 12-21; and page 43, lines 1-19.

<sup>8</sup> Defence Submission on the Subjects that Require Early Determination: Trial Date, Languages to be Used in the Proceedings, Disclosure and E-court Protocol, 24 September 2007, ICC-01/04-01/06-960-tEN, paragraphs 7-9.

evidence.<sup>9</sup>

7. In its “Decision Regarding the Timing and Manner of Disclosure and the Date of Trial” of 9 November 2007, the Chamber indicated that the prosecution had made certain late requests to information providers in respect of the evidence it was seeking to disclose,<sup>10</sup> and it noted that 24 of the prosecution’s witnesses had been referred to the Victims and Witnesses Unit “significantly and unjustifiably late”.<sup>11</sup> In order to enable the prosecution to finalise its review of the materials in its possession, and to facilitate the implementation of necessary protective measures, the Chamber imposed a deadline of 14 December 2007 for the prosecution to serve the entirety of its evidence, in an unredacted form.<sup>12</sup> The Chamber accepted the defence submission that a period of 12 weeks for preparation was necessary between the full and final disclosure of the prosecution evidence and the commencement of the trial, and having imposed the deadline of 14 December for full disclosure of the prosecution evidence, the 31 March 2008 was identified as the trial date.<sup>13</sup>
  
8. On 10 December 2007, the prosecution submitted its “Application for Extension of Time Limit for Disclosure”<sup>14</sup> in which it requested an extension beyond 14 December 2007 in relation to certain items of evidence including “the evidence which the Prosecution intends to disclose in redacted form by 14 December 2007; the evidence which will not be collected prior to the 14 December 2007 deadline; the evidence the collection of which is being finalised; the evidence subject to Article 54(3)(e) restrictions; and the evidence

<sup>9</sup> Submissions on Preliminary Issues, 24 September 2007, ICC-01/04-01/06-957-tEN, paragraph 26.

<sup>10</sup> Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 19.

<sup>11</sup> Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 20.

<sup>12</sup> Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 25.

<sup>13</sup> Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 29.

<sup>14</sup> 10 December 2007, ICC-01/04-01/06-1072-Conf-Exp and Prosecution application for extension of time limit for disclosure, Public redacted version, 10 December 2007, ICC-01/04-01/06-1073.

to be taken from expert witnesses".<sup>15</sup>

9. At the Status Conference on 13 December 2007, the Chamber permitted the prosecution to delay disclosure of certain material, as identified in its 10 December 2007 application.<sup>16</sup> The Chamber allowed the prosecution to serve redacted or summary versions of statements provided by witnesses in respect of whom a decision by the Victims and Witnesses Unit of the Court was outstanding as of 14 December 2007, with service of full non-redacted statements to be effected by 31 January 2008. The Chamber expressed the view that the limited extension of the deadline until 31 January 2008 should facilitate the process of determining the applications and implementing the necessary witness protective measures.<sup>17</sup> The time limit for the disclosure of expert witness evidence and of the transcripts of re-interviews with witnesses was extended until 29 February 2008 (with video/audio recordings of the re-interviews to be disclosed by 31 January 2008).<sup>18</sup> For other categories of evidence, the 14 December 2007 deadline was not altered.

10. On 14 December 2007, the prosecution submitted an application,<sup>19</sup> which was granted by the Chamber,<sup>20</sup> to extend the 14 December 2007 deadline to 17 December 2007.

11. In its part public, part confidential oral decision on 18 January 2008,<sup>21</sup> the Chamber analysed six filings of the prosecution seeking to lift, impose and retain redactions.<sup>22</sup>

<sup>15</sup> Prosecution application for extension of time limit for disclosure, 10 December 2007, ICC-01/04-01/06-1073, paragraph 6.

<sup>16</sup> ICC-01/04-01/06-T-65-ENG, page 12, lines 10-24.

<sup>17</sup> ICC-01/04-01/06-T-65-ENG, page 10, lines 19-25.

<sup>18</sup> ICC-01/04-01/06-T-65-ENG, page 15, lines 11-14.

<sup>19</sup> Prosecution's request to extend the time limit for disclosure, 14 December 2007, ICC-01/04-01/06-1093.

<sup>20</sup> Order on "Prosecution's request to extend the time limit for disclosure", 17 December 2007, ICC-01/04-01/06-1095.

<sup>21</sup> ICC-01/04-01/06-T-71-ENG; ICC-01/04-01/06-T-72-Conf-Exp-ENG, page 1, line 8 to page 10, line 23.

<sup>22</sup> Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081 and confidential *ex parte* Annexes 1-75; Prosecution's

12. In its filing of 25 January 2008, entitled "Prosecution's submission of information on certain individuals pursuant to the *ex parte* Order of the Trial Chamber of 18 January 2008", the prosecution set out the personal circumstances of a number of witnesses and the risks it was asserted they faced.<sup>23</sup> This was updated on 4 February 2008.<sup>24</sup>
13. On 30 January 2008, the prosecution filed a confidential, *ex parte* prosecution and Registry only application, entitled "Prosecution's Application for Non-Disclosure of Information Provided by Witness [REDACTED]".<sup>25</sup> This was granted on 31 January 2008 in a confidential *ex parte* prosecution and Registry only order.<sup>26</sup>
14. On 30 January 2008, in light of the prosecution's applications to the Chamber for non-disclosure of information, disclosure of evidence in summary form, redactions and the lifting of redactions,<sup>27</sup> the Chamber suspended the 31

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application for non-disclosure of information on the basis of Article 54(3)(f), 13 December 2007, ICC-01/04-01/06-1085-Conf-Exp; Prosecution's application for lifting of redactions and non-disclosure of information, 13 December 2007, ICC-01/04-01/06-1087 and confidential *ex parte* Annexes 1-74; Prosecution's provision of witness statements and request to disclose summary evidence further to the "Prosecution's Request for lifting of redactions, non-disclosure of information and disclosure of summary evidence", filed 12 December 2007, 19 December 2007, ICC-01/04-01/06-1098 and confidential *ex parte* Annexes 1-5; Prosecution's application for non-disclosure of information on the basis of Article 54(3)(f), 21 December 2007, ICC-01/04-01/06-1102, confidential prosecution and defence Annexes and confidential *ex parte* prosecution only Annexes; Prosecution's submission of statements pursuant to *ex parte* hearing on 10 January 2008, 14 January 2008, ICC-01/04-01/06-1115-Conf-Exp and confidential *ex parte* Annexes 1-35.

<sup>23</sup> 25 January 2008, ICC-01/04-01/06-1132-Conf-Exp.

<sup>24</sup> Prosecution's updated submission of information on certain individuals pursuant to the *ex parte* order of the Trial Chamber of 18 January 2008, 4 February 2008, ICC-01/04-01/06-1155-Conf-Exp.

<sup>25</sup> Prosecution's application for non-disclosure of information provided by witness [REDACTED], 30 January 2008, ICC-01/04-01/06-1143-Conf-Exp.

<sup>26</sup> Order granting prosecution's application for non-disclosure of information provided by a witness, 31 January 2008, ICC-01/04-01/06-1146-Conf-Exp.

<sup>27</sup> Prosecution's Application for direction on the lifting of redactions and for non-disclosure of information, 31 October 2007, ICC-01/04-01/06-1008 with confidential *ex parte* prosecution only annexes; Prosecution's Application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 7 December 2007, ICC-01/04-01/06-1067 with confidential *ex parte* prosecution only Attachment A and Annexes; Prosecution's request to schedule a hearing on disclosure, 10 December 2007, ICC-01/04-01/06-1068; Prosecution's Application for extension of time-limit for disclosure, 10 December 2007, ICC-01/04-01/06-1072-Conf-Exp and ICC-01/04-01/06-1073 and defence response filed on 11 December 2007 (notified on 12 December 2007), ICC-01/04-01/06-1076; Prosecution's Application for non-disclosure of information on the basis of Article 54(3)(f), 13 December 2007, ICC-01/04-01/06-1085-Conf-Exp and ICC-01/04-01/06-1086; Prosecution's Application for lifting of redactions and non-disclosure of information, 13 December 2007 (notified on 14 December 2007), ICC-01/04-01/06-1087 with confidential *ex parte* prosecution only annexes;

January 2008 deadline and scheduled a Status Conference on 12 and 13 February 2008 for further consideration of the deadline for disclosure and its impact on the date of the commencement of the trial.<sup>28</sup>

15. On 6 February 2008, the prosecution filed a confidential, *ex parte* prosecution and Registry only application entitled “Prosecution’s further application for non-disclosure of information provided by witness [REDACTED]”<sup>29</sup> requesting additional redactions to the evidence of this particular witness. The redactions sought were granted on a temporary basis pending a full consideration of the issue which was listed for an *ex parte* oral Status Conference on 12 and 13 February 2008.<sup>30</sup> The defence filed a response to the application on 21 February 2008.<sup>31</sup> This application is discussed in Annex B to this Decision.

16. On 14 February 2008, the prosecution filed a “Prosecution’s application for redactions pursuant to Rule 81(2)” which sought the redaction of the name of a [REDACTED] in the statement of Witness 24 [REDACTED].<sup>32</sup> As the deadline for the disclosure of the material was 15 February 2008, the Chamber

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Prosecution's Request to extend the time-limit for disclosure, 14 December 2007, ICC-01/04-01/06-1093; Prosecution's Provision of witness statements and request to disclose summary evidence further to the 'Prosecution's request for Application for lifting of redactions, non-disclosure of information' filed 12 December 2007, 19 December 2007, ICC-01/04-01/06-1098 with confidential *ex parte* prosecution only Annexes; Prosecution's explanatory note to the defence vis-à-vis four videos, 18 January 2008, ICC-01/04-01/06-1120-Conf and ICC-01/04-01/06-1121-Conf-Exp. See also defence response filed on 4 January 2008, ICC-01/04-01/06-1104. See also Registrar's observations on the disclosure of evidence, 12 December 2007, ICC-01/04-01/06-1082-Conf, and Defence response to the Registrar's submission filed on 3 January 2008, ICC-01/04-06/06-1103-Conf-Corr.

<sup>28</sup> Decision suspending deadline for final disclosure, 30 January 2008, ICC-01/04-01/06-1141, paragraph 4.

<sup>29</sup> 6 February 2007, ICC-01/04-01/06-1157-Conf-Exp; a confidential redacted version of this application was filed on the same day: ICC-01/04-01/06-1158-Conf.

<sup>30</sup> Order on prosecution’s further application for non-disclosure of information provided by a witness, 7 February 2008, ICC-01/04-01/06-1159-Conf-Exp; Further Order on prosecution’s application for non-disclosure of information provided by a witness dated 6 February 2008, 28 February 2008, ICC-01/04-01/06-1196-Conf. A confidential redacted version of these orders was issued on 11 March 2008: Decision issuing a redacted version of “Order granting prosecution’s application for non-disclosure of information provided by a witness” filed on 31 January 2008 and of “Order on prosecution’s further application for non-disclosure of information provided by a witness” filed on 7 February 2008, ICC-01/04-01/06-1221-Conf, ICC-01/04-01/06-1221-Conf-Anx1, ICC-01/04-01/06-1221-Conf-Anx2, and Corrigendum, 13 March 2008, ICC-01/04-01/06-1221-Conf-Corr

<sup>31</sup> Réponse de la Défense à la “Redacted version of prosecution’s application for non-disclosure of information provided by witness [REDACTED]” du 30 janvier 2008, ainsi qu’à la “Redacted version of prosecution’s further application for non-disclosure of information provided by witness [REDACTED]” du 6 février 2008, 21 February 2008, ICC-01/04-01/06-1283-Conf.

<sup>32</sup> 14 February 2008, ICC-01/04-01/06-1165.

granted the redactions sought on a temporary basis on 15 February and listed the issue for full consideration at the Status Conference on 12 March 2008.<sup>33</sup> The defence filed a response to the application on 29 February 2008.<sup>34</sup> This application is dealt with in Annex D.

17. On 29 February 2008, the prosecution filed a confidential, prosecution and defence only filing (with a confidential, *ex parte*, prosecution only Attachment and Annexes) entitled "Prosecution's Application to Rely on Two Witnesses, for Non-Disclosure of Information and for Disclosure of Summary Evidence".<sup>35</sup> This application concerns the statements, the transcripts and ten documents relating to two witnesses (WWWW-0298 and WWWW-0299) the prosecution placed on its trial witness list on 31 January 2008. The prosecution requested the temporary non-disclosure of information pursuant to Rule 81(4) and leave to disclose summary evidence under Article 68(5) until such time as the witnesses are adequately protected "but certainly in advance of trial".<sup>36</sup> These witnesses were discussed during the Status Conference on 13 February 2008 and a further *ex parte* confidential Status Conference took place on 13 March 2008 at which the Victims and Witnesses Unit and the prosecution made submissions.<sup>37</sup> Although the overall approach of the Chamber to these matters is set out below, an oral ruling was delivered on 13 March 2008 concerning these two witnesses.<sup>38</sup>

18. On 29 February 2008, the prosecution filed a confidential "Prosecution's submission of information on the status of one witness and request for non-

<sup>33</sup> Order on prosecution's application for redactions pursuant to Rule 81(2) filed on 14 February 2008, 15 February 2008, ICC-01/04-01/06-1172.

<sup>34</sup> Réponse de la Défense à la "Prosecution's application for redactions pursuant to Rule 81(2)" datée du 14 février 2008, 29 February 2008, ICC-01/04-01/06-1201.

<sup>35</sup> Prosecution's application to rely on two witnesses, for non-disclosure of information and for disclosure of summary evidence, 29 February 2008, ICC-01/04-01/06-1202-Conf, and confidential *ex parte* prosecution only Attachment A and Annexes 1-18.

<sup>36</sup> Prosecution's application to rely on two witnesses, for non-disclosure of information and for disclosure of summary evidence, 29 February 2008, ICC-01/04-01/06-1202-Conf, paragraph 3.

<sup>37</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 19, line 22; ICC-01/04-01/06-T-80-Conf-Exp-ENG.

<sup>38</sup> ICC-01/04-01/06-T-80-Conf-Exp-ENG, page 38, line 12 to page 41, line 16.

disclosure of information” which informed the Chamber of the withdrawal of one witness (WWWW-110) from its trial witness list and, *inter alia*, requested the temporary redaction of his name in one document pursuant to Rule 81(4), pending a decision on the disclosure of his statements which contain potentially exculpatory material.<sup>39</sup> The defence responded to the submission on 20 March 2008.<sup>40</sup> This application is discussed in Annex C to this Decision.

19. Finally, on 29 February 2008, the day the deadline for the disclosure of expert evidence expired, the prosecution filed an application for the variation of the time limits for the disclosure of the evidence of expert witnesses until one month prior to the commencement of the trial.<sup>41</sup> The Trial Chamber’s agenda issued on 5 March 2008 listed the issue of the joint instruction of experts, referring to the prosecution’s application, for oral submissions on 12 March 2008.<sup>42</sup>

20. As regards the extent of disclosure of the prosecution’s evidence, particular redactions, the consequences of interlocutory appeals and the date of trial, the prosecution, in part, founded its arguments on the proposition that the Chamber had imposed a revised deadline of 31 January 2008 for the full disclosure of the prosecution’s evidence (i.e. without redactions) on the basis that this would allow the Victims and Witnesses Unit sufficient time to put in place any protective measures or for the prosecution to secure alternative protection arrangements.<sup>43</sup> The prosecution submitted that it had fulfilled its obligations pursuant to the order for disclosure by 31 January 2008 and that it was waiting for protective measures to be put in place, on its

<sup>39</sup> 29 February 2008, ICC-01/04-01/06-1203-Conf with confidential *ex parte* prosecution only Attachment A and Annexes

<sup>40</sup> Réponse de la Défense à la “Prosecution’s submission of information on the status of one witness and request for non-disclosure of information”, 20 March 2008, ICC-01/04-01/06-1238-Conf.

<sup>41</sup> Prosecution’s application for variation of time-limits for disclosure of expert witnesses’ evidence, 29 February 2008, ICC-01/04-01/06-1204 (the application was notified on 3 March 2008).

<sup>42</sup> The Trial Chamber’s agenda for the Status Conference on 12 March 2008 and scheduling order, 5 March 2008, ICC-01/04-01/06-1209.

<sup>43</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 35, lines 7-11.



recommendation, by the Victims and Witnesses Unit in respect of [REDACTED] witnesses (see Annex A).<sup>44</sup> In these circumstances, the prosecution requested the Chamber to order the Victims and Witnesses Unit to implement protective measures in respect of these [REDACTED] witnesses, but it withdrew an earlier written submission that the Chamber, *proprio motu*, should protect those witnesses (see paragraph 53 below).<sup>45</sup> On 13 February 2008 the prosecution indicated that of its trial witnesses, 16 had been disclosed in full to the defence in a non-redacted form.<sup>46</sup> In fact, as the prosecution set out in its filing of 15 February 2008,<sup>47</sup> only the statements of 8 witnesses had been disclosed in a wholly non-redacted form because for 8 witnesses the Chamber has approved limited redactions. Notwithstanding the history set out above of incomplete disclosure, during the Status Conference on 12 February 2008, the prosecution submitted that it was “committed to commencing the trial” on 31 March 2008<sup>48</sup> which it suggested continued to be achievable,<sup>49</sup> arguing that – having sought variation of the relevant deadlines just before their expiry – it had complied with the Court’s orders and it had disclosed all the incriminating evidence it was obliged to serve 3 months prior to 31 March, pursuant to the Chamber’s decision of 13 December 2007. The prosecution informed the Chamber that it intended to call 35 witnesses and not the 44 of which the defence had been notified.<sup>50</sup>

21. As regards the evidence it had received, the defence submitted that prior to the Status Conference the accused had been informed that 44 witnesses were to be called by the prosecution to give evidence during the trial, of which the

<sup>44</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 35, lines 13-17. These witnesses are the first [REDACTED] witnesses in Annex A to the Prosecution’s response to the victims and witnesses unit report on the status of referrals, 29 January 2008, ICC-01/04-01/06-1138-Conf-Exp (see ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 37, line 19).

<sup>45</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 38, lines 13-23.

<sup>46</sup> ICC-01/04-01/06-T-75-ENG, page 1, line 20

<sup>47</sup> Prosecution’s information on the status of disclosure, 15 February 2008, ICC-01/04-01/06-1170-Conf-Exp, paragraph 7.

<sup>48</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 33, line 22.

<sup>49</sup> ICC-01/04-01/06-T-75-ENG, page 14, lines 7-9.

<sup>50</sup> ICC-01/04-01/06-T-75-ENG, page 16, line 21.

identities of 17 had been revealed and full witness statements had been provided in respect of only 9.<sup>51</sup> It was suggested by defence counsel that since 14 December 2007 very little additional material had been disclosed to the defence by the prosecution.<sup>52</sup> Additionally, the defence submitted because of the late indication that certain witnesses would no longer be relied on by the prosecution, it had wasted time and resources in investigating evidence which is no longer part of the prosecution's evidence.<sup>53</sup>

22. As of 28 March 2008, the defence and the Chamber have been informed by the prosecution that 31 witnesses are to be called to give evidence during the trial and that their statements, without redactions as to the identity of the witnesses, have all been disclosed to the defence.<sup>54</sup> Two expert witnesses on age determination were added to the prosecution's witness list on 17 March 2008<sup>55</sup> and two further expert witnesses in the same field were added to the list on 28 March 2008.<sup>56</sup> The report of one of those experts was disclosed to the defence on 2 April 2008 and the prosecution thereafter filed a "Prosecution's application for authorisation to add a further expert report on age determination to the evidence to be relied on at trial" on 3 April 2008.<sup>57</sup> The defence indicated that it accepted the late disclosure of the report on an exceptional basis.<sup>58</sup>

23. On 10 and 21 April 2008, the prosecution filed two applications seeking to add to the evidence to be relied on at trial the unredacted version of an expert report on age determination and a number of further items disclosed after 28

<sup>51</sup> ICC-01/04-01/06-T-75-ENG, page 4, lines 23-25.

<sup>52</sup> ICC-01/04-01/06-T-75-ENG, page 5, lines 3-4.

<sup>53</sup> ICC-01/04-01/06-T-75-ENG, page 6, lines 8-9.

<sup>54</sup> Prosecution's communication of original versions of incriminatory evidence disclosed to the Defence on 28 March 2008, 1 April 2008, ICC-01/04-01/06-1254-Conf-Anx4.

<sup>55</sup> Prosecution's communication of original versions of incriminatory evidence disclosed to the defence on 17 March 2008, 19 March 2008, ICC-01/04-01/06-1231-Conf-Anx2.

<sup>56</sup> Prosecution's communication of original versions of incriminatory evidence disclosed to the defence on 28 March 2008, 2 April 2008, ICC-01/04-01/06-1254-Conf-Anx4.

<sup>57</sup> 3 April 2008, ICC-01/04-01/06-1258.

<sup>58</sup> Email communications to the Chamber through the Legal Adviser to the Trial Division on 2 and 4 April 2008.

March 2008, in some cases due to oversight.<sup>59</sup> Defence responses to these applications are pending and the applications will be addressed separately by the Trial Chamber in due course.

24. During the Status Conference on 13 February 2008, submissions were invited on whether the problems over protecting witnesses and disclosing the prosecution evidence in full would delay the trial date of 31 March 2008.<sup>60</sup> Alternative dates in June 2008 were canvassed in order to allow the defence 12 weeks to prepare for trial.<sup>61</sup> In the submission of the defence, a trial date in June was achievable only if proper disclosure was provided sufficiently in advance.<sup>62</sup> In addition, the defence suggested that interlocutory appeals and the addition of further witnesses requiring protection may affect the trial date.<sup>63</sup>

25. The issue of continued trial preparation whilst an appeal is ongoing, including consideration of the applications to participate by victims who allegedly suffered direct harm as a result of the crimes charged against the accused, was canvassed with the parties and participants on 13 February 2008. The parties and the participants did not contradict the Chamber's proposal that it should proceed to determine the applications of alleged direct victims of the crimes confirmed against the accused while an appeal on victims' issues is considered by the Appeals Chamber.<sup>64</sup>

<sup>59</sup> Prosecution's application for authorization to add the unredacted version of an expert report on age determination to the evidence to be relied on at the trial, 10 April 2008, ICC-01/04-01/06-1274; Prosecution's communication of original versions of 37 items disclosed to the Defence on 15 April 2008 and application for authorisation to add 19 further items of disclosed evidence to be relied on at trial, 21 April 2008, ICC-01/04-01/06-1287.

<sup>60</sup> ICC-01/04-01/06-T-75-ENG, page 2, line 10.

<sup>61</sup> ICC-01/04-01/06-T-75-ENG, page 4, line 13

<sup>62</sup> ICC-01/04-01/06-T-75-ENG, page 9, lines 2-3.

<sup>63</sup> ICC-01/04-01/06-T-75-ENG, page 5, lines 19-25; page 8, lines 18-21.

<sup>64</sup> ICC-01/04-01/06-T-75-ENG, page 22, line 19 to page 29, line 17.

**(2) Disclosure of potentially exculpatory material****(i) The relevant provisions**

26. The relevant law pertaining to this issue is contained under the relevant provisions section for sub-paragraph (1) above (pages 4-5 of this Decision).

**(ii) Procedural history and submissions**

27. In the confidential part of its oral decision of 18 January 2008,<sup>65</sup> the Chamber addressed the need for the prosecution to disclose potentially exculpatory material in its possession, bearing in mind the concerns over the safety of the relevant witnesses. A particular issue addressed by the Chamber was the prosecution's proposal that the defence should be furnished with anonymous and extensively edited potentially exculpatory statements and documents. The Chamber indicated that before arriving at a conclusion on this material, it needed to investigate the nature of the suggested risk to the witnesses and whether the material, in a real sense, assists the accused. In order to undertake that task the Bench was provided with the underlying documentation for each witness and the details of any proposed protective measures.<sup>66</sup> The Chamber ordered the prosecution to explore all the options for the individuals in this potentially exculpatory category, to enable full service of any relevant material as ordered by the Chamber.<sup>67</sup>

28. During the confidential part of the Status Conference on 13 February 2008, the prosecution advanced submissions on the approach to be taken to potentially exculpatory evidence where the witnesses are possibly at risk of harm.<sup>68</sup> The

<sup>65</sup> ICC-01/04-01/06-T-72-Conf-Exp-ENG, page 1, line 8 to page 10, line 23.

<sup>66</sup> ICC-01/04-01/06-T-72-Conf-Exp-ENG, page 8, line 25; page 9, lines 1-11.

<sup>67</sup> ICC-01/04-01/06-T-72-Conf-Exp-ENG, page 10, lines 1-5.

<sup>68</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 22.

prosecution indicated that for 14 (now 13) witnesses in this category they proposed to concede the evidence that has “exonerating value” by way of agreed facts.<sup>69</sup> The relevant witnesses are set out in Annex C to this Decision.<sup>70</sup> In relation to a further group of 15 (now 29) witnesses (also listed in Annex C),<sup>71</sup> although concessions may be possible for part of the material, there are areas of evidence which are not susceptible to agreement and concessions.<sup>72</sup>

29. The prosecution’s submissions in relation to this latter group of 29 witnesses have changed to an important extent. During the Status Conference on 13 February 2008 the prosecution conceded that if the Chamber decides that responsibility for protection lies, in part, with the prosecution, it will, when under that obligation and to the extent that is achievable, protect individuals who provide potentially exculpatory evidence (because their identities will have been revealed).<sup>73</sup> However, in a confidential, *ex parte*, prosecution only filing on 22 February 2008,<sup>74</sup> the prosecution sought to persuade the Chamber that there are 6 witnesses who,<sup>75</sup> notwithstanding their potentially exculpatory evidence which the prosecution does not concede, should remain anonymous. With these 6 witnesses, the prosecution has disclosed in one case the witness’s statement,<sup>76</sup> with redactions, and for the remaining 5 witnesses,<sup>77</sup> summaries of their statements which include a section setting out the

<sup>69</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 22, lines 17-24.

<sup>70</sup> [REDACTED] (WWW-0103), [REDACTED] (WWW-0051), [REDACTED] (WWW-0077), [REDACTED] (WWW-0301), [REDACTED] (WWW-0105), [REDACTED] (WWW-0104), [REDACTED] (WWW-0269), [REDACTED] (WWW-0023), [REDACTED] (WWW-0059), [REDACTED] (WWW-0118), [REDACTED] (WWW-0137), [REDACTED] (WWW-0106), [REDACTED] (WWW-0300), [REDACTED] (WWW-0140).

<sup>71</sup> [REDACTED] (WWW-0048), [REDACTED] (WWW-0147), [REDACTED] (WWW-0062), [REDACTED] (WWW-0058), [REDACTED] (WWW-0067), [REDACTED] (WWW-0091), [REDACTED] (WWW-0092), [REDACTED] (WWW-0126), [REDACTED] (WWW-0095), [REDACTED] (WWW-0123), [REDACTED] (WWW-0057), [REDACTED] (WWW-0083), [REDACTED] (WWW-0139), [REDACTED] (WWW-0096), [REDACTED] (WWW-0107).

<sup>72</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 32, line 20 to page 36, line 16.

<sup>73</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 32, line 22 to page 34, line 14.

<sup>74</sup> Prosecution’s submission of information on certain individuals pursuant to the *ex parte* order of the trial chamber of 13 February 2008, 22 February 2008, ICC-01/04-01/06-1187-Conf-Exp.

<sup>75</sup> [REDACTED] (WWW-0021), [REDACTED] (WWW-0040), [REDACTED] (WWW-0020), [REDACTED] (WWW-0003), [REDACTED] (WWW-0034), [REDACTED] (WWW-0290).

<sup>76</sup> [REDACTED] (WWW-0020).

<sup>77</sup> [REDACTED] (WWW-0021), [REDACTED] (WWW-0040), [REDACTED] (WWW-0003), [REDACTED] (WWW-0034), [REDACTED] (WWW-0290).

information from the statements that could be potentially exculpatory. Additionally, the prosecution intends to disclose relevant excerpts on an anonymous basis to the defence, pending a ruling by the Chamber on the most appropriate manner of provision of this information. The prosecution submits that these witnesses primarily provide evidence of an incriminating nature, although there are elements which assist the accused. The prosecution submits that the incriminating nature of the evidence of these witnesses, the value of the potentially exculpatory evidence (including, in particular, whether the defence already possesses substantially similar evidence) and the substantial security risks to the witnesses upon disclosure of their identities, are all factors for the Chamber to consider in its determination of the need to disclose the statements and identities of the witnesses to the defence. The argument of the prosecution is that if a witness provides, in the main, incriminating information and only limited evidence of a potentially exculpatory nature – particularly if it is substantially similar to other evidence in the possession of the defence – and if disclosure of identifying information would pose significant risks to witness security, the balance between fair process for the defence and the protection risks to the witnesses may favour non-disclosure of the statement and identity of the witness.<sup>78</sup> The circumstances of these 6 witnesses are set out in full in Annex C.<sup>79</sup>

30. In its confidential “Prosecution’s submission of information on the status of one witness and request for non-disclosure of information” filed on 29 February 2008 (see paragraph 18 above), the prosecution informed the Chamber that the statements of a witness withdrawn from its trial witness list (WWWW-110) contained potentially exculpatory material and requested the Chamber to determine whether the witness’s identity and his material should

<sup>78</sup> Prosecution’s submission of information on certain individuals pursuant to the *ex parte* order of the Trial Chamber of 13 February 2008, 22 February 2008, ICC-01/04-01/06-1187-Conf-Exp, paragraphs 4-8.

<sup>79</sup> [REDACTED] (WWWW-0021), [REDACTED] (WWWW-0040), [REDACTED] (WWWW-0020), [REDACTED] (WWWW-0003), [REDACTED] (WWWW-0034), [REDACTED] (WWWW-0290).

be disclosed to the defence.<sup>80</sup> This application is discussed in Annex C to this Decision.

31. The limitations on disclosure following agreements made with information providers made pursuant to Article 54(3)(e) of the Statute were discussed at the Status Conference on 13 March 2008 and the Chamber ordered the prosecution to file a written submission by 28 March 2008 identifying, on an *ex parte* basis, the areas of evidence which are potentially exculpatory and which cannot be disclosed due to the information provider's restrictions, whilst at the same time identifying the alternative evidence which the prosecution has been able to disclose.<sup>81</sup>

32. On 28 March 2008, the prosecution filed written submissions as ordered.<sup>82</sup> On 3 April 2008, the Chamber issued an order requesting additional information from the prosecution to enable the Chamber to consider the issue fully.<sup>83</sup> At a Status Conference on 9 April 2008, the prosecution was requested to file a written submission on the matters which needed to be dealt with *ex parte* and the Chamber adjourned all other issues to an *inter partes* hearing.<sup>84</sup> On 22 April 2008, the defence filed a response to the prosecution's submission of 28 March.<sup>85</sup> The matters raised therein will be addressed in a separate decision of the Chamber in due course.<sup>86</sup>

<sup>80</sup> 29 February 2008, ICC-01/04-01/06-1203-Conf with confidential *ex parte* prosecution only Attachment A and Annexes.

<sup>81</sup> ICC-01/04-01/06-T-79-ENG, page 6, line 4 to page 9, line 14.

<sup>82</sup> Prosecution's submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248.

<sup>83</sup> Order on the "Prosecution's submission on undisclosed documents containing potentially exculpatory information", 3 April 2008, ICC-01/04-01/06-1259; Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267, and public Annexes 1 and 2.

<sup>84</sup> ICC-01/04-01/06-T-81-Conf-Exp-ENG, page 24, line 22 to page 25, line 5; page 26, lines 2-3.

<sup>85</sup> Réponse de la Défense à la "Prosecution's submission on undisclosed documents containing potentially exculpatory information" datée du 28 mars 2008, 22 April 2008, ICC-01/04-01/06-1291.

<sup>86</sup> Scheduling Order, 16 April 2008, ICC-01/04-01/06-1283; Prosecution's additional information on the Undisclosed Evidence, 15 April 2008, ICC-01/04-01/06-1281.

### **(3) Responsibility for providing protective measures**

#### **(i) The relevant provisions**

Article 43 of the Statute, "The Registry":

[...]

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 68, "Protection of the victims and witnesses and their participation in the proceedings":

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender ... health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. The measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in Article 43, paragraph 6.

[...]

Regulation 96 of the Regulations of the Registry, "Protection Programme":

1. The Registry shall take all necessary measures to maintain a protection programme for witnesses, including accompanying support persons, and others considered to be at risk of harm and/or death on account of a testimony given by such witnesses or as a result of their contact with the Court.
2. An application for inclusion in the protection programme may be filed by the Prosecutor or by counsel.
3. In assessing admission to the protection programme, in addition to the factors set out in article 68, the Registry shall consider, *inter alia*, the following:



- i. The involvement of the person before the court;
  - ii. Whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court; and
  - iii. Whether the person agrees to enter the protection programme.
4. Inclusion in the protection programme shall be subject to the decision of the Registrar after the assessment made under sub-regulation 3.
5. [...]

(ii) *Procedural history and submissions*

**The Victims and Witnesses Unit**

33. On 25 January 2008 the Victims and Witnesses Unit submitted a report on the status of witness referrals.<sup>87</sup> It indicated that the prosecution had referred a total of [REDACTED] applications to the Victims and Witnesses Unit of which [REDACTED] had been accepted into the Court's Protection Programme and for whom protective measures were in place. A further [REDACTED], who had only recently been referred, were under assessment by the Victims and Witnesses Unit, with decisions expected by [REDACTED] and any protective measures in respect of these [REDACTED] were to be implemented by the [REDACTED]. For [REDACTED] of the applications, the prosecution had not made the applicants available for assessment. A further [REDACTED] applications had been withdrawn and [REDACTED] applications had been rejected.

34. During the closed, *ex parte* Status Conference on 12 and 13 February 2008<sup>88</sup> the Victims and Witnesses Unit sought to address the main contentions of the prosecution which criticised the work of the Unit, namely that:

<sup>87</sup> Victims and witnesses unit report on the status of referrals, 25 January 2008, ICC-01/04-01/06-1131-Conf-Exp.

<sup>88</sup> See also Victims and Witnesses Unit report on its oral submissions, 15 February 2008, ICC-01/04-01/06-1173-Conf-Exp.

- i) The Victims and Witnesses Unit is in breach of the strategic plan of the Court in relation to the protection of victims and witnesses;<sup>89</sup>
- ii) The Victims and Witnesses Unit has abandoned a set of criteria which had been previously applied to the protection of victims and witnesses (see paragraph 40);<sup>90</sup> and
- iii) The Chamber, *proprio motu*, should provide for the protection of witnesses in the absence of protection from the Victims and Witnesses Unit.<sup>91</sup>

35. In dealing with these points, the Victims and Witnesses Unit revealed that a fundamental difference of approach had emerged between the prosecution and the Unit during the preceding year that has impeded the progress of this case.<sup>92</sup> Indeed, the Victims and Witnesses Unit urged the Chamber to resolve this disagreement, for the benefit of this trial and those to follow. Overall, the stance of the Victims and Witnesses Unit can be summarised as follows.

36. First, the Chamber was reminded of Regulation 96 of the Regulations of the Registry (set out above) which provides that the Registry, when assessing admission to the protection programme, shall take account of the involvement of the person before the Court, whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court and whether the person agrees to enter the protection programme.

<sup>89</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 10, lines 3-5.

<sup>90</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 10, lines 6-8.

<sup>91</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 10, lines 9-11.

<sup>92</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 11, lines 13-15.

37. Second, the Victims and Witnesses Unit submitted that the protection of witnesses is not the sole responsibility of a particular organ of the Court<sup>93</sup> and that the Prosecutor has an independent duty to protect witnesses.<sup>94</sup> It was argued that by Article 68<sup>95</sup> this is a generic obligation encompassing the Court as a whole and in particular the Chamber, the prosecution and the Victims and Witnesses Unit:

**The Court** shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, **the Court** shall have regard to all relevant factors, including age, gender [...] health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. **The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes** [...] (emphasis added to reflect the content of the submissions).

38. Third, it was contended that the obligation to provide protection only relates to risks arising out of interaction with the Court.<sup>96</sup>

39. Fourth, the Unit maintained that the assessment of risk should coincide with an assessment of the impact of protective measures on the life of the witness and the ultimate decision should be proportionate.<sup>97</sup> Frequently, if a witness is included into the protection programme, [REDACTED].<sup>98</sup> The Unit has adopted a risk-assessment model that has been tested across, and approved by, numerous agencies.<sup>99</sup> [REDACTED].<sup>100</sup> Thereafter, a recommendation for inclusion in the protection programme is dependent, in part, on the type of protection that will be suitable for the individual.<sup>101</sup> It follows that the steps which are taken for any particular individual will be tailor-made to meet their situation and requirements. This process can involve the Victims and

<sup>93</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 12, lines 12-13.

<sup>94</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 17, lines 4-5 and 8.

<sup>95</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 12, lines 17-18.

<sup>96</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 13, lines 1-2.

<sup>97</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 13, lines 13-18.

<sup>98</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 30, lines 1-9.

<sup>99</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 30, line 23.

<sup>100</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 31, line 18.

<sup>101</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 31, line 23.

Witnesses Unit making decisions about the reliability, truthfulness and weight of the evidence provided to them.<sup>102</sup>

40. Fifth, the Chamber was informed that during the period whilst the Victims and Witnesses Unit was seeking agreement with the prosecution on these issue, they agreed upon [REDACTED] criteria (see paragraph 34(ii)):

- i) [REDACTED];
- ii) [REDACTED];
- iii) [REDACTED];
- iv) [REDACTED].<sup>103</sup>

41. However, as indicated above, problems have arisen between the prosecution and the Victims and Witnesses Unit, and in particular as regards the interpretation and application of these principles. In the submission of the Unit, the quality of the information underpinning the assessment for each criterion has not always been adequate<sup>104</sup> and on occasion the information has not been tested. Furthermore, it is suggested that a mechanistic approach to these criteria has led to inappropriate results.<sup>105</sup> Not least, the Victims and Witnesses Unit rejected the approach originally applied of automatically granting entry into the protection programme whenever [REDACTED] of the criteria were met. The Victims and Witnesses Unit therefore views this as an organic and developing area and currently uses the [REDACTED] criteria as no more than one of the

<sup>102</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 33, line 2.

<sup>103</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 14, line 8.

<sup>104</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 14, lines 24-25.

<sup>105</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 15, lines 7-17.

available tools for the detailed assessment process.<sup>106</sup> The Unit rejected the prosecution's suggestion that a change in the approach to assessment was preventing the latter from exercising its statutory duty under Article 68.<sup>107</sup>

42. The Victims and Witnesses Unit submitted the prosecution has tended to apply an inappropriately low threshold for inclusion into the group of [REDACTED], set out in paragraph 40(i) above).<sup>108</sup> As regards exposure to harm, the Unit indicated that it is impossible to eliminate all danger because the operations of the Court carry an inherent risk, and in consequence the approach should be, in the first instance, to make an assessment and thereafter to mitigate any risk to an acceptable level, by good practices and protective measures.<sup>109</sup> The Victims and Witnesses Unit submitted its role was to exercise independent judgment on the applications, as opposed merely to implementing the wishes of the parties.

43. Therefore, although the Victims and Witnesses Unit takes into account information relating to risk provided by the prosecution, it does not do so unquestioningly but rather it conducts its own assessment as to the reliability of the information and the likelihood of risk. This part of the process, whereby an overall threat-rating is reached, focuses on the likelihood and severity of the risk,<sup>110</sup> and admission<sup>111</sup> into the protection programme is only triggered if there is a high likelihood that the witness will be harmed or killed unless action is taken.<sup>112</sup> Intimidation alone is not considered to be sufficient.

<sup>106</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 15, lines 20-24; page 16, line 5.

<sup>107</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 17, lines 1-6.

<sup>108</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 16, line 8.

<sup>109</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 17, lines 17 and 23.

<sup>110</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 30, line 20 to page 33, line 14.

<sup>111</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 18 and following.

<sup>112</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 41, lines 5-13.

44. [REDACTED].<sup>113</sup>

45. The Victims and Witnesses Unit rejected the suggestion that the witnesses that have been referred to it are collectively at risk because of potential threats from [REDACTED] in the Democratic Republic of Congo, following disclosure to the defence of their identities. It was submitted that part of the fallacy in the prosecution argument lies in an apparent assumption that all witnesses will give evidence in court without any protective measures, such as screens or voice distortion.<sup>114</sup>

46. The Victims and Witnesses Unit contended that if the prosecution's general approach on this issue is followed it would result in all the witnesses [REDACTED] living in areas of risk needing full security measures, [REDACTED], before their identities can be revealed.<sup>115</sup> The Unit suggested that the Court should take appropriate action, including steps falling short of full participation in the protection programme, only if there are specific threats based on reliable information, having conducted careful investigations in the field.<sup>116</sup> Therefore, the Victims and Witnesses Unit submitted that it was not appropriate to [REDACTED] witnesses [REDACTED].

47. The Victims and Witnesses Unit have investigated each of the occasions when it has been alleged that threats of a general or a specific nature have been made, always taking into account the background that there is a high level of criminality in certain areas and that [REDACTED].<sup>117</sup> In each instance none of the general threats have led to appreciable difficulties and where specific individuals have been approached in a hostile manner, on

<sup>113</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 25, lines 1-9.

<sup>114</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 18, line 5 to page 19, line 9.

<sup>115</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, pages 18 and 19.

<sup>116</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 20, lines 1-14.

<sup>117</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, pages 20-25.

investigation they frequently do not wish for [REDACTED]. As regards the general risks that result, *inter alia*, from the high levels of [REDACTED], witnesses who are assessed by the Unit to be at risk are offered other forms of assistance in the protection programme. However, not infrequently witnesses refuse to participate in the full programme.

48. [REDACTED].<sup>118</sup>

49. The Victims and Witnesses Unit addressed the possibility that [REDACTED].<sup>119</sup>

50. [REDACTED].<sup>120</sup>

51. The Victims and Witnesses Unit expressed concern that the prosecution [REDACTED], which may be binding on it, without prior consultation.<sup>121</sup>

52. Following the notification to the Victims and Witnesses Unit (which the Chamber ordered orally on 13 March 2008)<sup>122</sup> of the "Prosecution's submission of information on the 29 February 2008 disclosure of incriminatory evidence and request for protection",<sup>123</sup> the Unit filed a reply to the submission on 28 March 2008.<sup>124</sup> The Unit submitted that the drafting history of the Statute clearly showed that the intention of the drafters was to establish an independent Victims and Witnesses Unit. The interpretation of the role of the Unit advanced by the prosecution would reduce its role to that of an implementer of the requests of the parties and participants

<sup>118</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 23, lines 3-14.

<sup>119</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 42, lines 1-6.

<sup>120</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 41, lines 4-8.

<sup>121</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 41, lines 9-25.

<sup>122</sup> ICC-01/04-01/06-T-80-Conf-Exp-ENG, page 25, line 4 to page 26 line 17.

<sup>123</sup> 7 March 2008, ICC-01/04-01/06-1212 with confidential *ex parte* prosecution only Attachment A.

<sup>124</sup> Victims and Witnesses Unit reply to Prosecution's submission of information on the 29 February 2008 disclosure of incriminatory evidence and request for protection, 28 March 2008, ICC-01/04-01/06-1249-Conf-Exp.

without performing any independent assessment.<sup>125</sup>

### The Prosecution

53. In its filing of 29 January 2008, the prosecution suggested that the Victims and Witnesses Unit had responsibility to address “all security risks”, and should strive for “maximum security of all participants”.<sup>126</sup> It requested the Chamber to provide “*proprio motu* for the protection” of the [REDACTED] witnesses in respect of whom there was dispute between the Victims and Witnesses Unit and the prosecution as to which body should provide the necessary protective measures. It was suggested this dispute was delaying disclosure of the full statements and the identities of these witnesses.<sup>127</sup> In the alternative, the prosecution requested the Chamber to order the Registry to protect the witnesses (see paragraph 20 above). Additionally, the prosecution requested a delay to the 31 January 2008 deadline for disclosure, in order to enable the implementation of protective measures.<sup>128</sup>

54. The prosecution referred to certain strategies and threats that have been employed by [REDACTED]. The following example was set out:

[REDACTED].<sup>129</sup>

55. Additionally, it was suggested that [REDACTED].<sup>130</sup>

56. At the Status Conference on 12 and 13 February 2008, the prosecution argued that under Article 43(6) the Victims and Witnesses Unit is the body that is

<sup>125</sup> ICC-01/04-01/06-1249-Conf-Exp, paragraphs 5-14.

<sup>126</sup> Prosecution’s response to the victims and witnesses unit report on the status of referrals, 29 January 2008, ICC-01/04-01/06-1138-Conf-Exp, paragraph 5.

<sup>127</sup> Prosecution’s response to the victims and witnesses unit report on the status of referrals, 29 January 2008, ICC-01/04-01/06-1138-Conf-Exp, Annex A (first [REDACTED] witnesses).

<sup>128</sup> Prosecution’s response to the victims and witnesses unit report on the status of referrals, 29 January 2008, ICC-01/04-01/06-1138-Conf-Exp, paragraph 29.

<sup>129</sup> Prosecution’s response to the victims and witnesses unit report on the status of referrals, 29 January 2008, ICC-01/04-01/06-1138-Conf-Exp, paragraph 14.

<sup>130</sup> Prosecution’s response to the victims and witnesses unit report on the status of referrals, 29 January 2008, ICC-01/04-01/06-1138-Conf-Exp, paragraphs 14-18.



responsible, following consultation, for providing protective measures and security.<sup>131</sup> In particular, it was suggested that the prosecution does not have the budget to provide protective measures. The prosecution accepted that all levels of protection needed to be explored on an individual basis,<sup>132</sup> but nonetheless it submitted that “the risk to witnesses must be eliminated to the highest degree possible” and that the risk to which a witness is exposed should be “as close as possible to zero” and that it was, therefore, in dispute with the Victims and Witnesses Unit over the assessment of what level of risk is acceptable.<sup>133</sup> In summary, the prosecution contended that the Unit is obliged by the Statute to provide protective measures for all witnesses “who are at risk” and not just those who meet the Victims and Witnesses Unit’s threshold<sup>134</sup> (viz. a high likelihood that the witness will be harmed or killed unless action is taken) and that, in real terms, all risk should be eliminated.<sup>135</sup>

57. [REDACTED].<sup>136</sup>

58. The prosecution, with the assistance of the Victims and Witnesses Unit, provided detailed information in respect of the protection status of all its witnesses, including the dates at which referrals were made to the Victims and Witnesses Unit and the reasons for the disagreements on the current protection assessments by the Victims and Witnesses Unit.<sup>137</sup> In Annexes A and C to this Decision the Bench has undertaken a detailed analysis of the position of each of the [REDACTED] witnesses about whom there is a dispute between the Victims and Witnesses Unit and the Prosecution. As part of this process it emerged that several of the witnesses failed to

<sup>131</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 35, lines 20-24.

<sup>132</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 36, lines 3-9

<sup>133</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 36, lines 17-25.

<sup>134</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 37, lines 10-14.

<sup>135</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 37, line 22.

<sup>136</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG page 44, line 6.

<sup>137</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 47, line 16 to page 95, line 3.

[REDACTED]<sup>138</sup> and [REDACTED] had only been referred on [REDACTED].<sup>139</sup> In respect of the individuals who failed to [REDACTED], or with whom contact has been difficult to establish, the prosecution informed the Court that it no longer seeks to include them as trial witnesses.<sup>140</sup> In respect of at least one witness (WWWW-0286), the prosecution had at the time of the Status Conference (12 February 2008) not yet taken a final decision as to whether she would be relied upon and hence had not made a referral to the Victims and Witnesses Unit for assessment for inclusion in the protection programme.<sup>141</sup>

59. In respect of another witness (WWWW-0031), the prosecution informed the Chamber that the Victims and Witnesses Unit had rejected his admission to the programme on 23 November 2007, but that the prosecution had failed either to make an application to the Chamber seeking variation of the deadline for disclosure in respect of his evidence or to serve his evidence in full on the defence.<sup>142</sup>

60. The prosecution informed the Bench during the confidential Status Conference on 13 February 2008 that [REDACTED] witnesses had been interviewed [REDACTED] (witnesses WWWW-298 and WWWW-299 were interviewed in [REDACTED]; witness WWWW-55 [REDACTED]). The following was set out:

(a) Witnesses 298 and 299: As regards protection, the Chamber was informed that witnesses 298 and 299 [REDACTED]. A confidential *ex parte* Status Conference took place on 13 March 2008 regarding

<sup>138</sup> See for example ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 84, line 3.

<sup>139</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 67, line 15 to page 82, line 3.

<sup>140</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, pages 1-10.

<sup>141</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 49, line 10, page 50, line 11 to page 51, line 14. Witness 286 has since been withdrawn from the prosecution's witness list: ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 15, line 9.

<sup>142</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 56, line 22 to page 57, line 20.

these two witnesses at which the Victims and Witnesses Unit, the prosecution, the legal representative of the victims and the Registry made submissions. The Chamber made an oral ruling to readmit both of these witnesses into the protection program.<sup>143</sup> The identity and statements of these two witnesses were disclosed to the defence on 20 and 28 March 2008.<sup>144</sup>

(b) Witness 55: Statements and transcripts for this witness are in the process of compilation, and the Bench was informed that the transcripts of his interviews will not be ready before mid-March and “[...] there will have to be some decision on his protection as well”.<sup>145</sup> The Chamber was informed at the Status Conference on 12 March 2008 that he had [REDACTED] to the Victims and Witnesses Unit.<sup>146</sup> However, his identity and the audio recordings of his interviews were disclosed to the defence on 28 March 2008.<sup>147</sup>

61. During the Status Conference on 13 February 2008 the Chamber imposed deadlines for full disclosure in relation to a number of witnesses, as analysed in Annex A. In its filing of 7 March 2008 entitled “Prosecution’s Submission of Information on the 29 February 2008 Disclosure of Incriminatory Evidence and Request for Protection” the prosecution, without requesting leave, sought to introduce further substantive arguments on the subject-matter of the respective responsibilities of the Victims and Witnesses Unit and the prosecution for protecting witnesses. It should be noted that the Chamber has established *de facto* working procedures (pursuant to Article 64(3)(a)) with the parties and the participants whereby written submissions are invited by the Chamber in

<sup>143</sup> ICC-01/04-01/06-T-80-Conf-Exp-ENG, page 38, line 12 to page 41, line 16.

<sup>144</sup> 26 March 2008, ICC-01/04-01/06-1242-Conf-Anx1; 2 April 2008, ICC-01/04-01/06-1254-Conf-Anx4.

<sup>145</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 16, line 21.

<sup>146</sup> ICC-01/04-01/06-T-78-Conf-ENG, page 78, lines 19-24.

<sup>147</sup> 2 April 2008, ICC-01/04-01/06-1254-Conf-Anx4.

advance of oral submissions, which in turn are followed, where appropriate, by a decision of the Chamber.<sup>148</sup> If the parties and the participants wish to file further written submissions prior to the delivery of the decision, it has been their general practice to seek leave in advance.<sup>149</sup> The Chamber in the circumstances has ignored this filing to the extent that it seeks to re-open the issues of principle that were canvassed before the Chamber on 12 and 13 February 2008. In order to ensure there is no perception of residual injustice, it is to be noted that on analysis this filing did not add substantively to the prosecution's earlier filing.

62. In the confidential Attachment, which was not served on the Victims and Witnesses Unit, the prosecution sought to introduce facts in addition to those referred to during the detailed consideration of each relevant witness during the Status Conference of 13 February 2008. Particularly given the involvement of the Unit and the extent to which it has been able to assist the Chamber on these issues, the approach of the prosecution is wholly inappropriate: an attempt should not be made to reopen these matters without the permission of the Chamber and without serving the submissions on the Victims and Witnesses Unit. In the circumstances, the Chamber ordered notification of the submission to the Victims and Witnesses Unit, which filed a reply (see paragraph 52 above).

63. On 20 March 2008, the prosecution filed a "Prosecution's request for variation of time-limit to disclose the evidence of one witness" (Witness WWWW-5).<sup>150</sup> On 13 February 2008 the Chamber ordered the prosecution to disclose the

<sup>148</sup> See for example Order setting out the schedule for submissions and hearings on further subjects which require determination prior to trial, ICC01/04-01/06-1083; Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC 01/04-01/06-947.

<sup>149</sup> ICC 01/04-01/06-T-ENG, page 67 lines 4-15; Prosecution's Submission of Authorities supporting the withdrawal of a fact or element underpinning a charge, ICC01/04-01/06-1041 paragraph 5; ICC 01/04-01/06-T-63-ENG, page 27, lines 18-25. ICC01/04-01/06-T-73-ENG, page 36, lines 9-12; ICC01/04-01/06-T-78-CONF-ENG page 92, lines 3-15.

<sup>150</sup> 20 March 2008, ICC-01/04-01/06-1234-Conf with confidential *ex parte* prosecution and Victims and Witnesses Unit only Attachment A.

evidence of this witness by 20 March 2008.<sup>151</sup> The witness is one of the [REDACTED] witnesses over which the Victims and Witnesses Unit and the prosecution disagreed (see Annex A). The request outlined protection issues in relation to this witness [REDACTED] which were still unresolved and which in the prosecution's view justified an extension of the deadline for disclosure to 28 March 2008. As the general deadline for disclosure was extended until 28 March 2008, there was no need to seek an extension in relation to any specific witness. However, the name of Witness 5 does not appear on the list of witnesses filed by the prosecution on 2 April 2008.<sup>152</sup>

64. On 8 April 2008, the prosecution filed an *ex parte* prosecution and Victims and Witnesses Unit only request for a hearing to be given an opportunity to address matters raised in the reply filed by the Victims and Witnesses Unit on 28 March 2008.<sup>153</sup> The matter was dealt with *ex parte* at the Status Conference on 9 April 2008 when the prosecution provided additional information on the circumstances of a number of witnesses included in Annexes A and C.<sup>154</sup>

## B. ADDITIONAL MATTERS

### (1) The requirement on the parties to give notice of *ex parte* procedures (written filings or hearings)

65. During the Status Conference of 12 and 13 February 2008, the defence raised concerns in relation to *ex parte* proceedings and the lack of advance notification, particularly since it had not been informed in advance of 15 *ex parte* procedures.<sup>155</sup> It submitted that undisclosed *ex parte* hearings should be an exceptional event, and otherwise the defence should be notified of the

<sup>151</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 17.

<sup>152</sup> 2 April 2008, ICC-01/04-01/06-1254-Conf-Anx4.

<sup>153</sup> Prosecution's request for a hearing, 8 April 2008, ICC-01/04-01/06-1268-Conf-Exp, paragraph 4.

<sup>154</sup> ICC-01/04-01/06-T-82-Conf-Exp-ENG, pages 1-29.

<sup>155</sup> ICC-01/04-01/06-T-75-ENG, page 32, line 5.

existence of *ex parte* hearings, the issues to be raised and their legal basis.<sup>156</sup> The defence further queried its exclusion from certain hearings, for instance when the postponement of disclosure and the approach to confidentiality were discussed.<sup>157</sup>

66. In response, the prosecution submitted that it was aware of only 12 *ex parte* communications, only some of which were generated by the prosecution. Of those which it had initiated, it was submitted that 6 were filed pursuant to *ex parte* orders of the Court and 2 related to matters which were made public as part of the Chamber's "Decision suspending deadline for final disclosure",<sup>158</sup> and accordingly it was not necessary in those circumstances to issue redacted versions.<sup>159</sup>

67. The legal representative for victims a/0001/06 to a/0003/06 requested that all participants be provided with advance information concerning the subject-matter of *ex parte* hearings, this being especially relevant for victims since they might be able to ask to participate in *ex parte* proceedings.<sup>160</sup>

## **(2) Conducting part of the trial in the Democratic Republic of Congo**

68. On 15 August 2007, the prosecution suggested adding to the list of subjects that require early resolution the issue of the place of the trial.<sup>161</sup> During the Status Conference on 4 September 2007, the Chamber informed the parties and participants that the possibility of hearings outside the seat of the Court was being investigated and that a feasibility study was being prepared.<sup>162</sup>

On 17 October 2007, the Chamber listed the issue of the place of trial for

<sup>156</sup> ICC-01/04-01/06-T-75-ENG, page 32, lines 8-13.

<sup>157</sup> ICC-01/04-01/06-T-75-ENG, page 34, lines 3-5.

<sup>158</sup> Decision suspending deadline for final disclosure, 30 January 2008, ICC-01/04-01/06-1141.

<sup>159</sup> ICC-01/04-01/06-T-75-ENG, page 35, line 17 to page 36, line 5.

<sup>160</sup> ICC-01/04-01/06-T-75-ENG, page 37, lines 5-9.

<sup>161</sup> Prosecution's response to the "Réponse de la Défense à l'invitation de la Chambre de Première Instance à présenter des conclusions sur des questions devant être tranchées à un stade précoce de la procédure", 15 August 2007, ICC-01/04-01/06-941, paragraph 11.

<sup>162</sup> Transcript of hearing on 4 September 2007, ICC-01/04-01/06-T-50-ENG, page 4, lines 6-21.

consideration at the Status Conference on 30 October 2007.<sup>163</sup>

69. In their written submissions filed on 19 October 2007, the legal representatives of victims a/0001/06 to a/0003/06 submitted that hearings in the Democratic Republic of Congo may make the trial more visible for the victims and allow victims, who would otherwise not be able to participate in the proceedings, access to the trial. As long as the security of victims and witnesses was guaranteed, the representatives did not object to part of the trial taking place in the Democratic Republic of Congo.<sup>164</sup> During the Status Conference on 30 October 2007, the Chamber canvassed with the parties and participants the advantages and disadvantages of the proposal of sitting in or close to the Democratic Republic of Congo, in particular whether there would be identifiable advantages to the victims and witnesses.<sup>165</sup> The parties and participants were invited to make submission in closed session on specific identified locations in the Democratic Republic of Congo or close-by. The legal representatives of the victims expressed support for conducting part of the trial at one of the locations. The prosecution submitted that although it was in favour of bringing the trial as close as possible to the victims, it was not intending to apply for a change in the place of the proceedings. It suggested the security of witnesses would require careful consideration. The defence agreed that ideally the trial should take place amongst the people concerned in Ituri so that the community concerned may attend the trial.<sup>166</sup> The prosecution and the Victims and Witnesses Unit were requested to contact the witnesses to ascertain their views on the three locations.<sup>167</sup> On 20 November 2007, the prosecution and the Victims and Witnesses Unit filed submissions informing the Chamber of the views of the witnesses on the locations

<sup>163</sup> The Trial Chamber's agenda for the hearing on 29-31 October 2007, 17 October 2007, ICC-01/04-01/06-985.

<sup>164</sup> Conclusions des victimes a/0001/06 à a/0003/06 en vue de l'audience du 29.10.2007, 19 October 2007, ICC-01/04-01/06-992, paragraphs 26-28.

<sup>165</sup> ICC-01/04-01/06-T-58-ENG, pages 78-79.

<sup>166</sup> ICC-01/04-01/06-T-59-Conf-ENG, pages 1-14.

<sup>167</sup> ICC-01/04-01/06-T-60-ENG, page 4.

proposed. In summary, over two thirds of the witnesses contacted stated that they did not want to testify in the Democratic Republic of Congo.<sup>168</sup> In a written submission filed on 27 November 2007, the defence submitted that the trial should be held in The Hague because of the right of the accused to be physically present during his trial, his right to be tried without undue delay and the potential problems of remote access to the case record.<sup>169</sup>

70. At the Status Conference on 13 February 2008, the prosecution submitted orally that it is in favour of *in situ* proceedings<sup>170</sup> and the defence indicated that it did not object to part of the trial being held in the Democratic Republic of Congo, so long as the accused is present,<sup>171</sup> full access to necessary records is provided<sup>172</sup> and the commencement of the trial is not delayed.<sup>173</sup> At the Status Conference on 12 March 2008, the Chamber informed the parties and participants that the detailed feasibility study had been completed.<sup>174</sup>

### **(3) Timetable for the parties to agree facts**

71. On the basis that the trial is to commence in June, at the Status Conference on 13 February 2008, the prosecution and the defence agreed with the proposal of the Chamber of fixing 25 April 2008 as the deadline for agreement (if any) on matters subject to admissions and facts.<sup>175</sup> The Chamber's Decision on agreements between the parties issued on 20 February 2008 set the 25 April 2008 ("approximately eight weeks prior to the start of the trial"), as the date by which the facts and issues not in dispute

<sup>168</sup> Prosecution's information on the trial witnesses' views on the location of the trial, 20 November 2007, ICC-01/04-01/06-1037-Conf and Victims and Witnesses Unit report on the questioning of witnesses regarding the location of the trial, 20 November 2007, ICC-01/04-01/06-1036-Conf.

<sup>169</sup> Observations de la Défense portent sur le lieu du procès, 27 November 2007, ICC-01/04-01/06-1045-Conf.

<sup>170</sup> ICC-01/04-01/06-T-75-ENG, page 28, line 17.

<sup>171</sup> ICC-01/04-01/06-T-75-ENG, page 30, lines 1-2.

<sup>172</sup> ICC-01/04-01/06-T-75-ENG, page 30, lines 4-8.

<sup>173</sup> ICC-01/04-01/06-T-75-ENG, page 31, lines 9-10.

<sup>174</sup> ICC-01/04-01/06-T-78-Conf-ENG, page 3, line 18 to page 4, line 15.

<sup>175</sup> ICC-01/04-01/06-T-75-ENG, page 40, line 23 and page 41, line 7.



should be provided by the parties in a filed draft schedule of agreed facts.<sup>176</sup> The defence was to notify the Chamber by 15 April if it considered it was unable to comply with the order.

72. However, at the Status Conference on 12 March 2008, the defence indicated that no progress could be made as there was no agreement by the prosecution as to the confidentiality of discussions until such time as agreement was reached on particular facts. The prosecution also submitted that the defence had declined to reach agreement until full disclosure had taken place. The prosecution informed the Chamber that it had undertaken not to use facts agreed in these proceedings in any other proceedings.<sup>177</sup> On 15 April 2008, the defence filed observations which informed the Chamber that it is unable to continue the discussions with the prosecution due to a disagreement as to their confidential nature.<sup>178</sup>

**(4) The oral request of the Office of Public Counsel for Victims for access to the material of victim applicants**

73. The Office of Public Counsel for Victims, in its capacity as legal representative of victim applicants, attended the *ex parte* Status Conference on 12 February 2008 during which, *inter alia*, submissions were advanced on the prosecution's applications concerning Witness WWWW-11 [REDACTED] (see paragraphs 13 and 15 above). The representative of the Office of Public Counsel for Victims raised a number of matters, none of which were contentious. In summary, the submissions focussed on issues concerning the process of re-interviewing [REDACTED] of the prosecution's witnesses who have applied to participate as victims in the trial.<sup>179</sup> The

<sup>176</sup> 20 February 2008, ICC-01/04-01/06-1179, paragraph 11.

<sup>177</sup> ICC-01/04-01/06-T-78-Conf -ENG, page 92, line 22 to page 93 line 10; page 97, lines 2-6 and 14-17.

<sup>178</sup> Observations de la Défense concernant les éléments factuels pouvant faire l'objet d'entente entre les Parties, 15 April 2008, ICC-01/04-01/06-1278, and confidential Annex 1, paragraphs 5-7.

<sup>179</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 2, line 10.

Office is assisting in the interviews, having been instructed to protect the interests of these victims with dual status. It learned that the interviewing process was expected to take place in accordance with the Chamber's confidential decision of 21 November 2007,<sup>180</sup> which addressed, amongst other things, the circumstances in which witnesses can be asked additional questions, including about the content of the standard application form.<sup>181</sup> The Office was concerned that unless it had access to this decision, it would be unable to assess whether or not the interviews are being conducted in accordance with the approach laid down by the Chamber. Additionally, the Office did not have access to any of the witness statements or to a redacted version of relevant video footage<sup>182</sup> which form a critical background to the assessment of whether the questioning is legitimate.<sup>183</sup>

74. The prosecution did not oppose these applications, on the basis they are advanced by the Office of Public Counsel for Victims in its role as the representative of individual victims who have applied to participate in the proceedings.<sup>184</sup>

### III. ANALYSIS AND CONCLUSIONS

75. As set out above, three principal interrelated issues fall to be considered in this Decision. The order in which they have thus far been considered has followed the procedural history and the submissions. However, this analysis will follow a slightly different order to permit a purposive approach, as follows: first, the respective responsibilities of the prosecution and the Victims and Witnesses Unit as regards protective measures for witnesses; second, disclosure by the prosecution, particular proposed redactions, the pending

<sup>180</sup> Decision on "Prosecution request for the preservation of evidence", 21 November 2007, ICC-01/04-01/06-1040-Conf.

<sup>181</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 3, line 25 to page 4, line 4.

<sup>182</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 4, lines 10-12; page 7, line 8.

<sup>183</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 3, line 18.

<sup>184</sup> ICC-01/04-01/06-T-74-Conf-Exp-ENG, page 6, line 6.

interlocutory appeals as regards participation by victims and disclosure, and their joint impact on the determination of an appropriate date for trial; and, third, with particular focus, the disclosure of potentially exculpatory material, which may also impact on the date of trial.

76. In addition, the Decision addresses the requirement on the parties to give notice of *ex parte* procedures (written filings or hearings); conducting part of the trial in the Democratic Republic of Congo; consideration of agreed facts by the parties; and the Office of Public Counsel for Victims' request for access to the material of victim applicants it represents.

## A. PRINCIPAL ISSUES

### (1) Responsibility for providing protective measures

77. This part of the Decision addresses the provision of protective measures for particular people who can supply information relevant to this case. This is, therefore, a fact-specific decision in which the respective roles of the Victims and Witnesses Unit and the prosecution have not been defined in any wider sense. In particular, it needs to be stressed that the exigencies of different cases may necessitate differing solutions. Notwithstanding the lengthy history to this case, the prosecution and the Victims and Witnesses Unit regrettably have been unable to agree on the extent of their respective responsibilities for witnesses who may be at risk of harm. As described above, the prosecution alleges that the Victims and Witnesses Unit is in breach of its obligations by applying an inappropriate and overly restrictive approach when determining applications for protective measures and by foregoing its original approach of providing protection whenever [REDACTED] criteria were met. These criticisms are without sustainable foundation. Instead, on the prosecution's formulation, which is based in part on the material it has advanced

concerning the apparent hostility [REDACTED], any witness living in the relevant areas of the Democratic Republic of Congo who is not in the protection programme is at risk of harm. The prosecution does not accept that it is legitimate for the Victims and Witnesses Unit to assess degrees, or the extent, of risk. Instead, it suggests that any apparent risk should result in the witness's inclusion in the Court's protection programme.

78. Whilst there is no doubt as to the continuing instability in parts of the Democratic Republic of Congo, the risks to the witnesses in question are not uniform and instead depend on a range of factors that require detailed and careful assessment, applying appropriate criteria. The Unit has taken this approach: it has identified [REDACTED] criteria; it assesses the level of any threat, the likelihood of harm and the overall risk to the particular applicant; and it then considers each application on its individual merits, on a fact-sensitive rather than a mechanical or formulistic basis. It is clear from the detailed consideration of the disputed applications in this decision that the Unit is approaching and discharging its considerable duties with skill and care. Indeed, it has been necessary to analyse each of the relevant individual decisions that have been taken by the Registrar, and this analysis is set out in Annex A.

79. The only note of caution to be sounded is that whilst it is unhelpful to engage in a debate over the precise difference between the meaning of the expressions "likelihood of harm" and "a high likelihood of harm", the latter test, which is applied by the Victims and Witnesses Unit, should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death. That said, the Victim and Witnesses Unit's overall approach to the disputed [REDACTED] witnesses has been correct (see Annexes A and C).

80. The consequence of this disagreement over the decisions taken by the Unit, which the Chamber has been asked to resolve at this markedly late stage in the proceedings, is that the disclosure by the prosecution of the non-redacted evidence of the witnesses whose applications to the programme were refused has been delayed, and the prosecution only very recently took steps [REDACTED], or otherwise. It is to be stressed that if the Unit properly assesses and rejects referrals to its protection programme, thereafter it is for the referring party to decide whether to secure any other protective solution, as it considers appropriate. Budgetary difficulties, which appear to have driven this disagreement, at least in part, cannot be resolved in this Decision. Furthermore, save in exceptional circumstances, issues that should be resolved administratively ought not to be the subject of judicial consideration. What is beyond doubt, however, is that the prosecution was not entitled to assume that the Victims and Witnesses Unit would accept all those referred to it into the protection programme.

81. It is apparent that the prosecution, until the very recent past, had not commenced the process of identifying and creating alternative protective arrangements; as rehearsed elsewhere,<sup>185</sup> it referred a significant portion of the witnesses to the Unit for protective measures excessively late, and, in the result, it failed to raise for the Chamber's consideration the differences of approach between itself and the Unit on what is a highly significant issue until this markedly advanced stage in the case. If the prosecution had acted timeously, this issue would have been identified, listed for hearing and resolved during the second half of 2007.

82. The decisions of the Registrar on protective measures will only be struck down either if it has applied an incorrect approach (e.g. the wrong criteria) or

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<sup>185</sup> Decision regarding the timing and manner of disclosure and the date of trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 20.

if the Victims and Witnesses Unit has arrived at a conclusion which, on an assessment of the facts, is plainly wrong. The Unit has been entrusted with the discretion to consider these applications pursuant to Articles 43 and 68 of the Statute and Regulation 96 of the Regulations of the Registry, and the Court may review its decisions either *proprio motu* or upon an application by the parties or the participants, applying judicial review principles. As regards these disputed applications, the approach of the Unit has been flawless.

83. As stated above, the analysis of the specific witnesses is set out in Annex A to this Decision.

## (2) Disclosure and trial date

84. During the Status Conference on 12 and 13 March 2008, the Chamber set new dates for the final disclosure of evidence and the commencement of the trial, bearing in mind the imperative that the trial commences in the near future, once protective measures have been put in place (whether on an interim or a long-term basis). In order to provide one last opportunity for these measures to be implemented and to ensure that the defence is given full disclosure 12 weeks in advance of the trial, the prosecution was granted until Friday 28 March 2008 to serve their evidence in full, save to the extent that redactions have been approved in advance by the Chamber.<sup>186</sup> As indicated during the confidential Status Conference on 13 February 2008, if the Victims and Witnesses Unit experienced difficulties in implementing the outstanding protective measures by 20 March 2008, the Chamber was to be given “early” warning.<sup>187</sup> The Chamber also fixed the deadline for the service of expert reports for **Friday 23 May 2008**, reminding the parties of their obligation to discuss the possibility of joint instruction of experts in relevant fields (thereby

<sup>186</sup> ICC-01/04-01/06-T-79-ENG, page 10, lines 3-5.

<sup>187</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 6, line 7.

addressing the prosecution's application filed on 29 February 2008 – see paragraph 19 above).<sup>188</sup>

85. The Chamber made it clear to the prosecution on 13 February 2008 that since it was inevitable that the trial date was to be put back to mid-June, and that the prosecution would consequently be afforded some further leeway for serving the full content of the entirety of its evidence, thereafter additional evidence should not be served.<sup>189</sup>

86. Although the requests to add evidence will be resolved on their merits, the decisions will be made within the context of the history and the requirements of this case. In summary, the prosecution may not add witnesses or documents to its trial evidence without the leave of the Chamber, and given the length of time afforded to the prosecution to investigate these alleged crimes, the delays to date and the requirement of guaranteeing the accused a fair trial, any request to add evidence hereafter will be scrutinised with great care.<sup>190</sup>

87. The Chamber and the defence are to be informed immediately if the prosecution intends not to rely on any evidence that has been included as part of its evidence.

88. The trial will commence on **Monday 23 June 2008 at 10.00**, provided that the prosecution has discharged its disclosure obligations as regards potentially exculpatory and incriminatory materials, in accordance with the approach set out by the Chamber on 9 November 2007.<sup>191</sup> In identifying that date, it has

<sup>188</sup> ICC-01/04-01/06-T-78-ENG, page 35, lines 9-14.

<sup>189</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 16, line 23 to page 17, line 15.

<sup>190</sup> ICC-01/04-01/06-T-79-ENG, page 10, lines 3-13.

<sup>191</sup> ICC-01/04-01/06-T-78-Conf-ENG, page 5, line 5; “Based on these submissions, the Trial Chamber has determined that the trial will commence no earlier than 12 weeks following the date of full disclosure, as set out below.” (Decision regarding the timing and manner of disclosure and the date of trial, ICC-01/04-01/06-1019, 9 November 2007, paragraph 23); “This is to include the incriminatory material in the form of witness statements

been necessary to incorporate the length of time that the interlocutory appeal process is likely to take. The prosecution, the defence and the participants have not objected, subject to any decision of the Appeals Chamber on requests for suspensive effect, to the Chamber continuing trial preparation whilst this occurs, and including determining applications to participate by alleged victims of the crimes confirmed against the accused where direct harm is said to have resulted.<sup>192</sup> All other applications by victims will await the final decision of the Appeals Chamber on this subject. However, before the trial commences, all relevant exculpatory material in the possession of the prosecution must have been disclosed to the defence sufficiently in advance.

89. Finally, the "Prosecution's application for authorisation to add a further expert report on age determination to the evidence to be relied on at trial" filed on 3 April 2008 (see paragraph 22 above),<sup>193</sup> is granted and the prosecution is authorised to add the expert report disclosed late, bearing in mind, *inter alia*, that the defence did not object to the relief sought (on an exceptional basis), the disclosure occurred 3 working days after the deadline due to an oversight and, in the circumstances, the late disclosure does not cause any prejudice to the defence.

### **(3) Disclosure of potentially exculpatory material**

90. Turning to the approach that should be taken to potentially exculpatory material where there is an established danger that the witness or information-provider may be harmed or killed if his or her identity is revealed, the Presiding Judge on 10 January 2008 suggested,<sup>194</sup> and the Chamber has thereafter tacitly or seemingly approved, that the prosecution should identify

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and any other material which the prosecution intends to rely upon at trial, and any exculpatory material." (ICC-01/04/01/06-1019, 9 November 2007, paragraph 25).

<sup>192</sup> ICC-01/04-01/06-T-75-ENG, page 3.

<sup>193</sup> 3 April 2008, ICC-01/04-01/06-1258.

<sup>194</sup> ICC-01/04-01/06-T-70-Conf-Exp-ENG, page 8, lines 1-15.



the witnesses for whom it is able to concede all of the potentially exculpatory elements that may assist the defence (within the terms of Article 67 (2)), by serving a document or documents setting out relevant admissions. This would provide an alternative to full disclosure of the relevant evidence or material. However, it is to be stressed that the Bench is not bound by any admission of this kind, given that it is the final arbiter of issues of fact.<sup>195</sup> The prosecution during the confidential part of the Status Conference on 13 February 2008 accepted that this is an appropriate approach, and indicated that for 14 witnesses it is able to “[...] concede the facts they are alleging in terms of the exonerating value of the information in an agreed set of facts so that the evidence wouldn’t need to be called, pending a review with the Defence”.<sup>196</sup> It follows that final admissions which reflect the detail of the potentially exculpatory material provided by these witnesses or information-providers **should be drafted and served on the defence not later than 6 May 2008**. Where this occurs and the relevant facts are admitted, unless substantive issues are raised hereafter by the defence, it is unnecessary to serve the underlying material or to reveal the identity of the witness or the information-provider. It will be necessary to ensure that the admissions fully reveal to the defence all the potentially exculpatory facts. The Chamber will keep the underlying materials under review during the trial to ensure that as the evidence emerges and the issues crystallize, this approach at all times meets the requirements of Article 67.

91. This course is in full accord with the provisions of Article 67(2). If the prosecution **admits as true** material that otherwise shows or tends to show the innocence of the accused or which affects the credibility of prosecution evidence, that is to go a stage further than the obligation of **disclosure** referred to in Article 67(2). Indeed, the necessity to provide disclosure would

<sup>195</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 31, lines 17-25.

<sup>196</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 22, lines 21-24.

have fallen away: the facts set out in the material potentially showing or tending to show the innocence of the accused or affect the credibility of prosecution evidence would be admitted in the trial in the favour of the accused. Thirteen witnesses in this category are considered in Annex C.

92. As indicated above, the prosecution indicated that there are [REDACTED] witnesses [REDACTED] who require protection and for whom admissions cannot be made.<sup>197</sup> The approach suggested by the prosecution is that they are treated in the same way as trial witnesses, including by way of referrals to the Victims and Witnesses Unit. The prosecution originally accepted that if disclosure of information from witnesses in this category is ordered by the Chamber, protection will be provided by the prosecution in the “short term” and, if ordered by the Chamber, this protection will continue thereafter to “allow for the fullest disclosure [...] at the earliest time”.<sup>198</sup> It is to be emphasised, therefore, that the prosecution conceded during the Status Conference on 13 February 2008 that if the Chamber decides that responsibility for protection rests, in part, with the prosecution, it will, to the extent that is achievable, protect individuals who provide potentially exculpatory evidence (if they are not included in the programme).<sup>199</sup>

93. However, in the 22 February 2008 filing,<sup>200</sup> this position changed. In this written submission, the prosecution argued that as regards certain witnesses, the Bench should weigh three competing factors: first, the weight and the evidential value of the potentially exculpatory evidence; second, the risk to the witness or information-provider if his or her identity is revealed; and third the right of the accused to a fair trial. It is suggested, therefore, that the

<sup>197</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 32.

<sup>198</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, pages 33 and 34.

<sup>199</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 34, lines 2-14.

<sup>200</sup> Prosecution’s submission of information on certain individuals pursuant to the *ex parte* order of the Trial Chamber of 13 February 2008, 22 February 2008, ICC-01/04-01/06-1187-Conf-Exp, paragraph 8; see also Prosecution’s submission of information on the status of one witness and request for non-disclosure of information, 29 February 2008, ICC-01/04-01/06-1203-Conf-Exp-AnxA, paragraph 9.

right of witnesses to protection from danger and the right of the accused to a fair trial are not absolute but instead they are relative, and the extent to which they are implemented depends on a complex evaluation of factors that are sometimes in opposition to each other.

94. This approach, with respect, is erroneous. The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests. In the context of the kind of material under consideration in this Decision, which is essentially eye-witness or other narrative accounts of events relevant to these charges, if the prosecution has in its possession potentially exculpatory evidence which in accordance with Article 67(2) of the Statute may have a real, as opposed to minimal, impact on the trial in favour of the accused, he has an absolute entitlement to receive it, albeit in an appropriate form. The fact that it may be undermined by other evidence, or the witness may also provide incriminating evidence, or there are other sources providing similar evidence are all irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it, once protective measures, if relevant, have been implemented. Similarly, the right of a witness to protection cannot be diminished because of the importance of other considerations.

95. Therefore, to summarise, given the approach of the Victims and Witnesses Unit is appropriate, following a valid refusal by the Unit to provide protective measures for a particular witness or information-provider who provides eye-witness or first hand evidence of relevant events, the prosecution must serve the potentially exculpatory material (the non-redacted witness statements and accompanying documents) in a suitably full and non-redacted form, and including by revealing the identity of the witness. In order for the defence to

evaluate and, if they wish, to call evidence of this kind, they need to know the identity of the individual so they can investigate or interview him or her, and assess the likely value of the evidence, having been informed of all relevant matters relating to the witness. If the prosecution considers that discrete redactions are necessary (e.g. to protect others), it must request a hearing forthwith so that the issue can be considered, having first provided the Chamber with the statements or materials, setting out any suggested additional redactions. The prosecution, whether or not with the assistance of other outside bodies, is to provide suitable protective measures if it considers they are a necessary precondition for effecting service.<sup>201</sup> If for any witness it is impossible to implement these measures, the matter is to be listed before the Chamber forthwith so that any difficulties can be canvassed prior to effecting this order for service. Otherwise, to the extent that the Chamber has ordered the service of potentially exculpatory material in Annex C but not stipulated a deadline therein, **this must be done by 16 May 2008.**

#### **(4) Disclosure of a sub category of exculpatory evidence**

96. Amongst this group of witnesses, there is a subgroup who provide potentially exculpatory evidence, which the prosecution is unable to concede, and who may be at risk if their identity and involvement with the court is revealed but who either refused offers of protection or have declined to cooperate further with the court, or both. These witnesses, along with any who cannot be traced, are considered generally in the analysis below and they are the subject of individual consideration in Annex C.

97. For this particular group of witnesses, the Chamber is confronted with a dual problem: the need to ensure that all relevant exculpatory evidence is served on the accused and the need to ensure that victims and witnesses are properly protected. The Court's twin duties are set out in Article 68(1), which imposes

<sup>201</sup> ICC-01/04-01/06-T-76-Conf-Exp-ENG, page 29, line 6; page 34, lines 8-9.

the obligations on the Chamber to take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” whilst ensuring that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

98. The Chamber must select a solution from the range of possibilities for dealing with this problem that satisfies both obligations. If, following further discussion with individual witnesses, he or she decides to cooperate with the judicial process, the options, which largely depend on an assessment of the requirements of fairness and the need to protect those at risk of harm, include: full disclosure of witness’s identity and evidence to all parties, participants and the public, and giving evidence publicly in open court without Special Measures (Rule 88), through to serving redacted evidence and permitting varying levels of anonymity (including the use of a pseudonym vis-à-vis the public), together with the witness testifying behind a screen or remotely, either via video-link from the Democratic Republic of Congo or by way of pre-recorded testimony (Rules 67 and 68). Individual, fact-sensitive decisions for these witnesses will be taken once the relevant details have been assembled, and following submissions, in accordance with the procedure set out hereafter (see paragraphs 100-102).

99. Should a witness indicate a settled intention not to cooperate further with the Court, or if he cannot be traced, the Chamber must consider whether it is sufficient, in order to secure fairness, to disclose to the accused a redacted version of his or statement and any other relevant material on an anonymous basis. It will have to decide whether, given the witness is not available to testify, the evidential value of his or her statement and the need to disclose his or her identity are significantly reduced, and as regards the latter, effectively eliminated. Consideration will be given to the extent to which, in these particular circumstances, the exculpatory elements have been sufficiently

dealt with by other witnesses who apparently are available to give evidence, and whether what remains of evidential or “spring-board” value can be provided by service of statements from which the witness’s identity and whereabouts have been redacted.

100. However, as a first stage, it is necessary to explore further with each relevant witness whether he or she will cooperate with the Court, whilst affording the witness a proper level of protection. To this end, the Chamber will send, *proprio motu*, a suitably qualified and independent representative of the Registry to speak in person with each of them. The power to take this step is to be found in Article 64(3)(a): “[the Trial Chamber shall] adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”, along with Article 64(2): “[t]he Trial Chamber shall ensure that the 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.” Furthermore, it has been firmly established in international law that an international body not only has those powers that are explicitly provided in its legal instruments but also those that are essential to the performance of its explicit duties.<sup>202</sup> There is no doubt that this step is necessary, indeed essential, in order to secure a fair trial for the accused and to assist the Chamber. It would be wrong to leave it to the prosecution to decide whether a witness, who provides evidence that may be exculpatory in nature, is prepared to cooperate (once protective measures, if necessary, have been implemented). The defence cannot undertake this work because it would be wrong to provide it with the details of the relevant witnesses, for self-evident reasons. The Chamber has been informed by the defence on a number of occasions that it considers all potentially exculpatory

<sup>202</sup> See, *inter alia*, International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 at 182; International Court of Justice, *The Effects of Awards of Compensation made by the United Nations Administrative Tribunal* case, Advisory Opinion, ICJ Reports 1954, 47 at 57; ICTY, Trial Chamber, *Prosecutor v. Tihomir Blaskic*, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Case No. IT-95-14-PT, 18 July 1997, paragraphs 24-41.

materials should be served on the defendant.<sup>203</sup> It is therefore aware of the defence approach on this issue for the purposes of this preparatory step. Accordingly, prior to the Status Conference when these issues are to be fully discussed it is necessary for the Chamber to investigate whether cooperation is achievable, through a neutral representative of the Registrar, in the interests of the defence and to assist the Chamber in requesting all evidence that it considers necessary for the determination of the truth.<sup>204</sup> The prosecution will need to assist the Registrar by providing sufficient contact details.

101. As set out in the preceding paragraph, once the views of the witnesses have been collected, the Chamber will further consider how to proceed with this category of witness, following submissions at a Status Conference. The Chamber will address, *inter alia*, the proper limits of its power “to request the submission of all evidence it considers necessary for the determination of the truth” pursuant to Article 69(3) and specifically the circumstances in which the Chamber should call witnesses.
102. [REDACTED], in order to provide the defence with the fullest and earliest opportunity of access to potentially exculpatory material, the prosecution is ordered to serve the defence no later than **6 May 2008** with copies of the statements of these witnesses and other relevant materials from these witnesses (if any), with redactions that are necessary to protect their identities and whereabouts. If the prosecution considers that more substantial redactions are necessary, it must request a hearing so that the issue can be considered, having first provided the Chamber with the statements or materials, setting out any suggested additional redactions.

<sup>203</sup> ICC-01/04-01/06-T-52-ENG, page 45, lines 20-24; ICC-01/04-01/06-T-67-ENG, page 27, lines 5-7; ICC-01/04-01/06-T-69-ENG, page 51, lines 17-25 and page 52, lines 6-14; 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, paragraph 8.

<sup>204</sup> Article 69(3).

103. The prosecution made some preliminary remarks at the Status Conference on 13 March 2008 regarding the apparent tension between Article 54(3)(e) and Article 67(2) of the Statute but given the importance of this issue, preferred to give supplementary submissions in writing,<sup>205</sup> which it was ordered to provide by 28 March 2008.<sup>206</sup> The issue will be dealt with separately by the Chamber in due course.<sup>207</sup>

## B. ADDITIONAL MATTERS

### (1) Notification of *ex parte* procedures

104. As set out above, the defence complained that frequently they have not been informed about the existence and the subject matter of, and the legal justification for, *ex parte* hearings or filings, in apparent breach of the Chamber's existing order on this issue (save for the instances when, exceptionally, non-disclosure is justified.<sup>208</sup>) Notwithstanding the helpful competing analyses, both oral and in writing, provided by the parties on the extent of notification historically, it is sufficient for these purposes for the Chamber to reiterate that in future *ex parte* filings shall be notified in accordance with the terms of the Chamber's decision of 6 December 2007.<sup>209</sup> The Chamber is mindful of the exceptional character of *ex parte* procedures and the need to ensure that they are justified and follow proper notification given the potential prejudice to the absent party.

<sup>205</sup> ICC-01/04-01/06-T-79-ENG, page 7, line 6 and page 8, lines 3-5.

<sup>206</sup> ICC-01/04-01/06-T-79-ENG, page 8, lines 6-16.

<sup>207</sup> Order on the "Prosecution's submission on undisclosed documents containing potentially exculpatory information", 3 April 2008, ICC-01/04-01/06-1259; Prosecution's submission on Article 54(3)(e) confidentiality agreements, 7 April 2008, ICC-01/04-01/06-1267.

<sup>208</sup> ICC-01/04-01/06-T-75-ENG, page 32, lines 5-13.

<sup>209</sup> Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058.



**(2) Conducting part of the trial in the Democratic Republic of Congo**

105. At the Status Conference on 12 March 2008, the Chamber stated that a detailed feasibility study had taken place and a letter from the Democratic Republic of Congo had been received in which the Minister of Justice informed the Court that the location identified by the Chamber for a hearing in the Democratic Republic of Congo was inappropriate as it could lead to ethnic tensions in an area that had been recently pacified and is potentially unstable. The location had been selected by the Chamber as the only one that satisfied all the criteria for a hearing in the Democratic Republic of Congo. Moving part of the proceedings to the Democratic Republic of Congo can only take place with the consent of the Government, which in the event has not been given. Therefore the trial in its entirety will be conducted in The Hague.<sup>210</sup>

**(3) Consideration of agreed facts by the parties**

106. The issue is to be re-visited at the Status Conference on 6 May 2008.

**(4) The Office of Public Counsel for Victims' request for access to the material of victim applicants it represents**

107. The role of the Office of Public Counsel for Victims in this trial, and its entitlement to information, has been addressed in a separate decision.<sup>211</sup> This decision *inter alia* granted the Office's request for access to a document concerning the same victim applicants.<sup>212</sup> The requests made during the Status Conference on 12 February 2008, summarised above at paragraph 73, were all unopposed and are granted. The Registrar is ordered to notify the confidential

<sup>210</sup> ICC-01/04-01/06-T-78-Conf-ENG, page 3, line 18 to page 4, line 15.

<sup>211</sup> Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, 6 March 2008, ICC-01/04-01/06-1211.

<sup>212</sup> *Ibid*, paragraphs 36-39 and 41 2).

decision of 21 November 2007<sup>213</sup> to the Office of Public Counsel for Victims. The prosecution is ordered to provide the relevant witness statements and video footage to the Office, to the extent that those materials relate to victims the Office is currently representing.

Judge René Blattmann will file a partly separate and partly dissenting opinion to this Decision.

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<sup>213</sup> Decision on “Prosecution’s request for the preservation of evidence”, 21 November 2007, ICC-01/04-01/06-1040-Conf.

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

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**Judge Adrian Fulford**

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**Judge Elizabeth Odio Benito**

Dated this 24 April 2008

At The Hague, The Netherlands

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 28 April 2008

**TRIAL CHAMBER I**

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

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

**ANNEX 3**

**Public**

**Separate and Dissenting Opinion of Judge Blattmann attached to Decision on  
Disclosure Issues, Responsibilities for Protective Measures and other Procedural  
Matters**

**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, Deputy Prosecutor  
Mr Ekkerhard Withopf, Senior Trial  
Lawyer

**Counsel for the Defence**

Ms Catherine Mabilille  
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**

Ms Paolina Massida

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Vaatainen

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 24 April 2008 the Majority of Trial Chamber I issued its 'Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters'.<sup>1</sup> This decision considers matters concerning the disclosure of both inculpatory and exculpatory material by the prosecution, redactions and other protective measures with regard to the responsibilities of the Victims and Witnesses Unit and the prosecution for the protection of witnesses, and the date of trial which is impacted by the above issues.
2. While there are parts of the decision which I am in agreement with, I strongly dissent with portions of the reasoning as well as with some of the procedural conclusions drawn by the Majority. I specifically have reservations where decisions of the Chamber may impact upon the rights of the accused without granting the defence, previous to the implementation of those decisions, the right to be heard in regard to the substantive issues and the impact, if any, which could be felt by the defence. In particular, the aspects of the Majority Opinion which I feel may erroneously impact upon the rights of the accused include 1) the concession of facts by the prosecution as an alternative to full disclosure of the relevant evidence or material, 2) the sending of a representative of the Registry on behalf of the Trial Chamber on an investigative mission to explore the cooperation possibilities of reluctant witnesses to be called by the prosecution and 3) the Majority's interpretation of Article 67(2) with respect to disclosure of exculpatory materials by the prosecution.
3. Two other concerns I have include: 1) the issue of fairness to all parties and participants in the case, and the procedural mechanisms which the Trial Chamber puts into place in order to manage expeditious and fair proceedings and 2) the responsibility for protection of witnesses and the application of

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<sup>1</sup> *Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters* (Majority Decision), ICC-01/04-01/06-1295-US-EXP, 24 April 2008.

Article 68(1). Each of these elements of the Majority Opinion are discussed in further detail below.

## I. Responsibility for Protection of Witnesses

4. The Majority Opinion stresses that, “if the [Victims and Witnesses] Unit properly assesses and rejects referrals to its protection programme, thereafter it is for the referring party to decide whether to secure any other protective solution, as it considers appropriate”.<sup>2</sup> I do not agree with the prosecution taking on a function which has been assigned to the Registry by the Statute and Rules of the ICC. Rather, my view on this issue is in line with that of Pre-Trial Chamber I.<sup>3</sup> As was noted by the prosecution and confirmed by Pre-Trial Chamber I:

Under Article 68(1) of the Statute, the Court, including the Prosecution, bears the responsibility to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” Under Article 43(6) of the Statute, the Registry through the establishment of the VWU, is mandated “to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses”. The VWU is also empowered to “advise the Prosecutor and the Court on the appropriate protection measures.” In accordance with those provisions, the Prosecution relies on the VWU to implement the measures required for the protection of its witnesses.<sup>4</sup>

5. The Single Judge of Pre-Trial Chamber I, noted in a decision of 21 April 2008 that, “...there is no provision in the Statute, the Rules, the Regulations or the RoR, which expressly confers upon the Prosecution the power to preventively

<sup>2</sup> Majority Decision, 24 April 2008, paragraph 80.

<sup>3</sup> See *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, ICC-01/04-01/07-428, 21 April 2008, paragraphs 11-40.

<sup>4</sup> *Ibid.*, paragraph 11.

relocate witnesses until they are included in the ICCPP”.<sup>5</sup> Further, the Single Judge states:

Article 68(1) of the Statute should be interpreted in a manner which is fully consistent with the attribution to the Registrar of the power to decide which witnesses of the Court can be included in the ICCPP and to implement their relocation. In this regard, the Prosecution’s mandate, pursuant to article 68(1) of the Statute, is limited to, *inter alia*, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber.

Finally, the teleological interpretation of Article 68(1) of the Statute also requires that the Prosecution’s mandate under this provision not be extended to the preventive relocation of witnesses. Article 68(1) of the Statute is a provision of a general nature, which aims at placing on all organs of the Court, including the Prosecution, the obligation to take “appropriate measures” for the protection of witnesses.

6. I am in complete agreement with the Decision of the Single Judge of Pre-Trial Chamber I in that I do not find any statutory support for the notion that the prosecution may consider relocation of witnesses as a possibility in their protection procedures. Thus, within the framework of the Majority Opinion of Trial Chamber I, I do not believe that the prosecution has the mandate to “secure any other protective solution, as it considers appropriate”.<sup>6</sup> This places multiple organs of the Court in a position to be relocating witnesses and departs from the framework provided in the Rome Statute for responsibility of protection of witnesses. The prosecution must provide such

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<sup>5</sup> *Ibid*, paragraph 23.

<sup>6</sup> Majority Decision, 24 April 2008, paragraph 80.



protection measures as are within its mandate which may include referral to the Victims and Witnesses Unit, and if necessary an application to the Trial Chamber for a review of a protection assessment which they feel is erroneous in application.

## II. Aspects of the Majority Opinion which may affect the rights of the parties

7. With concern for all parties and participants of the case, as regards the Trial Chamber's working methodology, I am troubled that the Majority Opinion asserts that *de facto* working procedures have been established whereby upon oral submissions on a topic, the issue is thought to be closed and leave to make further submissions is required. In my opinion, there has been no such working methodology established. The Majority asserts that this working procedure has been established pursuant to Article 64(3)(a). As stated by the Appeals Chamber, "[t]he rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety".<sup>7</sup> Under Article 64(3)(a) the Trial Chamber shall: "confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. However, in this instance the parties and the Chamber did not confer, nor did the Chamber establish a working methodology. An assumption from the Trial Chamber that the parties must request leave to make further submissions before an issue has

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<sup>7</sup> *Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-01/06-168, 13 July 2006, paragraph 33. See also, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, ICC-01/04-01/06-824, 13 February 2007, Separate Opinion of Judge Georgios M. Pikis, paragraph 15 which states, "The guide to the interpretation of the Statute is the language used to convey what is intended that the statutory provision should embody."

been closed by the Trial Chamber's decision is not, in my opinion, an established working procedure.

8. This is not to deny the Trial Chamber's need to establish efficient working procedures, pursuant to Article 64(3)(a). In fact, the Chamber has established working practices with the parties with regard to procedures in the past. However, in those instances the practices were established in accordance with Article 64(3)(a). On 15 November 2007 a joint submission from the parties requested the Trial Chamber to address 'practical aspects of the administration of justice' pertaining to what would become working methodology of the case.<sup>8</sup> These aspects were added to the agenda of the Status Conference of 20 November 2007.<sup>9</sup> The various aspects of working practices were discussed by the parties, participants and Trial Chamber at the Status Conference and a final procedure with regard to the particular working practices was established.<sup>10</sup>
9. In short, it is my opinion that the Trial Chamber has not established this working methodology as is asserted by the Majority Opinion, and in future, I believe that if the Trial Chamber is to adopt certain working procedures to ensure fair and expeditious trial practices, it is necessary to first confer with the parties and then to firmly establish the method which will be used going forward. An assumption by the Trial Chamber that the parties understand a working practice which has not been explicitly established by the Chamber does not, in fact, establish a trial procedure.

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<sup>8</sup> *Joint Request of the Prosecution and the Defence to Add a Further Agenda Item to the Agenda of the Hearing on 20 November 2007*, ICC-01/04-01/06-1029, 15 November 2007.

<sup>9</sup> *Order on joint prosecution and defence request to add an agenda item to the agenda of the hearing of 20 November 2007*, ICC-01/04-01/06-1032, 26 November 2007.

<sup>10</sup> ICC 01/04-01/06-T-61-ENG, 20 November 2007, page 71-79.

### III. Aspects of the Majority Opinion which may affect the rights of the accused

10. With regard to concerns of an impact upon the rights of the accused, it is worth noting that while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial.<sup>11</sup> As is stated in the Majority Opinion, “[t]he right of...the defendant to a fair trial [is] immutable”.<sup>12</sup> Therefore, I believe that it is essential, at all times, to maintain the utmost respect and care for the rights of the accused in order to ensure that the result of the trial not be tainted.

#### *Use and interpretation of Article 67(2) by the Trial Chamber*

11. I do not find that the requirements under Article 67(2) have been fulfilled by the Majority’s treatment of the Article. The Majority uses only partial language of Article 67(2) in its discussion by using the phrase “material that shows or tends to show the innocence of the accused or which affects the credibility of prosecution evidence” as that which is in full accord with the provision set out in Article 67(2).<sup>13</sup> I do not accept this approach as I note that the complete text of Article 67(2) reads, “In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable,

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<sup>11</sup> “Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.”, *Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, 14 December 2006, paragraph 39. See also, *Prosecutor v. Barayagwiza, Appeals Chamber Decision*, 3 November 1999, paragraph 108 which states: “the Appeals Chamber believes that to proceed with the Appellant’s trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused’s rights.” See also, *Barberá, Messegué and Jabardo v. Spain, European Court of Human Rights*, 10588/83 in which the original 6 December 1988 decision was set aside due to “the cumulative effect of a series of procedural shortcomings, which individually may be of minor significance, [but which] may compromise the person’s right to a fair trial”. (Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R., Mahoney, Paul, 2004, page 111).

<sup>12</sup> The full text of the sentence states: “The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests.” Majority Decision, paragraph 94.

<sup>13</sup> Majority Decision, 24 April 2008, paragraph 91.

disclose to the defence evidence in the Prosecutor's possession or control which 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. ..." Thus, in the Majority Opinion, a section of the sentence is omitted; by which it excludes as exculpatory, evidence which mitigates the guilt of the accused.

12. In my opinion, the Statute is clear as to what is to be considered as exculpatory material and how this material is to be treated. Article 67(2) clearly provides three categories of information as that which is exculpatory in nature; 1) evidence which may show the innocence of the accused, 2) evidence which may mitigate the guilt of the accused, and 3) evidence which may affect the credibility of prosecution evidence. Further, the Statute is clear that these categories of material, if found by the Prosecutor must be disclosed as soon as is practicable to the defence. This is the text of Article 67(2) and I do not believe that it can be deviated from. Further, I believe that selectively applying portions of the Statute violates the interpretation of treaties as governed by the Vienna Convention of the Law of Treaties (23 May 1969),<sup>14</sup> and should not be practiced in relation to any provision within the Statute.
13. Further indications of a concerning deviation from the text of Article 67(2) are found within the text of the Majority Opinion which I find to be an inappropriate application of the requirement to disclose exculpatory

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<sup>14</sup> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose", Vienna Convention on the Law of Treaties, 23 May 1969, Article 31. See also, *Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-01/06-168, 13 July 2006, paragraph 33 which states, "The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of article 31 and 32. The principle rule of interpretation is set out in article 31(1) that reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The Appeals Chamber shall not advert to the definition of good faith, save to mention that it is linked to what follows and that is the wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its object may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty." (emphasis added)

materials. The Majority indicates that it is of the opinion that the obligation of the prosecution in accordance with Article 67(2) is to disclose material which may have a real, as opposed to minimal impact on the trial,<sup>15</sup> and that there may be alternatives to full disclosure of exculpatory materials.<sup>16</sup> I do not find the possibility of these variations to the Article in question in my reading and understanding of the Statute, and I cannot accept them as legal alternatives which the Statute of the ICC permits.

14. Another point which need only be touched upon briefly at this juncture is the Majority's suggestion that in the Trial Chamber's assessment of exculpatory disclosure under Article 67(2) of information provided by witnesses who may be at risk, but who either refuse protection or decline to cooperate further with the court, the Chamber will take into account whether such information has been sufficiently dealt with by other witnesses and whether any remaining information could be provided in permanent redacted form.<sup>17</sup> I need only reiterate that, in my opinion, the text of the Statute is quite clear that the defence must have full disclosure of all exculpatory materials. Further, these materials need to be provided in their full form in order that the defence have the possibility to use the exculpatory material in the appropriate way for their investigative purposes.

*The concession of facts by the prosecution as an alternative to full disclosure of the relevant evidence or material*

15. The Majority Opinion provides as an alternative to full disclosure that the prosecution should serve to the defence a document setting out relevant exculpatory facts that it would concede to, from witnesses who require

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<sup>15</sup> Majority Decision, 24 April 2008, paragraph 94 which states, "...if the prosecution has in its possession potentially exculpatory evidence which in accordance with Article 67(2) of the Statute may have a real, as opposed to minimal, impact on the trial in favour of the accused, he has an absolute entitlement to receive it, albeit in an appropriate form."

<sup>16</sup> Majority Decision, 24 April 2008, paragraph 90 which states, "This would provide an alternative to full disclos[ur]e of the relevant evidence or material."

<sup>17</sup> Majority Decision, 24 April 2008, paragraphs 98-99.

protective measures such that their identity not be revealed.<sup>18</sup> The decision orders that “final admissions which reflect the detail of the potentially exculpatory material provided by these witnesses or information-providers should be drafted and served on the defence not later than 6 May 2008.”<sup>19</sup> Further, the decision states, “[w]here this occurs and the relevant facts are admitted, unless substantive issues are raised hereafter by the defence, it is unnecessary to serve the underlying material or to reveal the identity of the witness or the information-provider.”<sup>20</sup> It is also important to note that both instances where this suggestion was canvassed were in oral *ex parte*, confidential hearings to which the defence was not privy. Thus, they have been unable to raise any objections or concerns to this alternative to disclosure.

16. The purpose behind the disclosure of material to the defence, and especially potentially exculpatory material, is that it may be effectively utilized in the investigation and preparation of the defence of the accused.<sup>21</sup> This cannot be effectively done without the ability to use the material in its original form. This position has been confirmed in the jurisprudence of the ICTY in that “...if the exculpatory material is enclosed in a statement, it is the statement that needs to be disclosed” and that “in order to make real use of material, the [d]efence is entitled to be provided with the exculpatory material in its original form...”<sup>22</sup> Further, the concession of facts without the ability to

<sup>18</sup> Majority Decision, 24 April 2008, paragraph 90.

<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

<sup>21</sup> The purpose of disclosure is confirmed in article 64(3)(c) which confirms the duty of the Trial Chamber to ‘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’. Relevant commentaries provided in: Otto Triffterer, Commentary on the Rome Statute of the ICC – Observers’ Notes Article by Article, Commentary on article 67 of the Rome Statute by William A. Schabas – Rights of the Accused, p. 864. See also, *Decision on “Motion for relief from Rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved”, Prosecutor v. Radoslav Brdjanin* (Case No, IT-99-36-T), Trial Chamber II, ICTY, 30 October 2002, paragraph 26.

<sup>22</sup> *Prosecutor v. Blaskic*, IT-95-14-T, *Decision on the Defence Motion for “Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence”, 29 April 1998*, paragraph 19; *Prosecutor v. Brdjanin*, IT-99-36-T, *Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved”, 30 October 2002*, paragraph 26.

investigate those facts does not contribute to the finding of the truth which is a main object and purpose of the trial as such.

17. I do not believe that there can be an alternative to full disclosure as provided for in the Statute, and I certainly do not think that an alternative can be devised without allowing submissions from the defence on an issue which so directly affects it.
18. Thus, I dissent with the Majority Opinion in that I believe that the defence should have an opportunity to have knowledge of, and make submissions on, any alternative procedures to that of full disclosure of potentially exculpatory materials. Further, if the defence were to have any objection to the concession of facts by the prosecution as an alternative to full disclosure, I believe that it should receive any potentially exculpatory material in its full form within the original document or statement in which it was provided, in order to allow the defence the ability to fully utilize the information.

*The sending of a representative of the Registry on behalf of the Trial Chamber on an investigative mission to explore the cooperation possibilities of reluctant witnesses to be called by the prosecution*

19. In another possible solution to the difficult aspects of exculpatory disclosure faced by the prosecution, the Majority Opinion provides, as a solution to witnesses who have provided potentially exculpatory materials but who are no longer available or refuse to cooperate further with the Court, that the Trial Chamber will send a representative from the Registry to consult further with these persons with regard to their willingness to cooperate with the Court. While the Majority Opinion remains unclear on the implementation of this directive, the transcripts of the trial proceedings may provide an indication. The Presiding Judge discusses with the prosecution in an *ex parte* hearing:

“A possible solution for this problem is to turn those five and any others who come in the same category into Court witnesses, for the Court to establish independently

of the Prosecution as to whether or not the witnesses will cooperate at all in the judicial process. If they will not, then that means that all that exists is a statement to which the witness is not prepared to come and speak to, thereby reducing its evidential value very significantly, and it may be, and I underline those words 'may be,' it may be in those circumstances that would be sufficient to secure fairness for the defendant to deliver the materials with suitable redactions so that identity is protected.

If the witness on mature reflection, having been approached by the Court agrees to participate, then it may be, and again I underline those words, that the witness could be called having implemented the kind of protective measures within this courtroom which would enable the witness to give the evidence but with his or her identity concealed by using screens, distortion, and the like."<sup>23</sup>

The prosecution response during the oral hearing with regard to this subject is also telling:

"Our preliminary view is that the suggestion of the Trial Chamber is one that we would be very much in favour of. As a means of having a witness provide the relevant information in a form that is somewhat more neutral than having been called by one party or another, which would address some of their own concerns about the view of the outside of the participation obviously in the proceeding.

...

To the extent that we've canvassed, to put it rather broadly, the idea of them being court witnesses, with at least several we know it hasn't found particular favour, but that is only because the witnesses in our view don't feel secure enough to participate in the proceeding."<sup>24</sup>

20. It is also helpful to keep in mind that this possibility was, once again, discussed in a confidential *ex parte* hearing without the defence present.
21. In my opinion this solution is flawed in a number of ways, including placing the Trial Chamber in a position closer akin to a party and taking on a role which should be maintained for the prosecution rather than the Trial

<sup>23</sup> ICC 01/04-01/06-T-82-CONF-EXP-ENG, 9 April 2008, page 7, line 16 – page 8, line 6.

<sup>24</sup> *Ibid.*, page 8, line 21 – page 9, line 20.



Chamber. Further, providing the only discussion concerning this possibility during an *ex parte* closed session hearing which does not involve the defence goes against the fundamental principle of *principe du contradictoire*.

22. The right of every party to be in a position to discuss any factual or legal issue put forward, or the *principe du contradictoire*, is a fundamental tenant in the criminal justice system of the major legal systems of the world. This solution was, once again, canvassed at an *ex parte* closed session hearing without the defence present and therefore the order of the Majority Opinion is to be implemented without submissions from the defence ever being heard on the matter, though the prosecution has had ample time to respond with regard to the suggestion. Maintaining the important balance enshrined in the *principe du contradictoire* within the proceedings goes directly to the very essence of fairness and it must be preserved at all cost.
23. While the Trial Chamber has clearly expressed in a previous decision<sup>25</sup> that there are no prosecution or defence witnesses *per se*, and that in fact, all witnesses are to be considered court witnesses, taking these actions, in the manner which the Majority suggests tends to suggest that the Trial Chamber is assuming a role comparable to the role that a party would play in the proceedings. This is further asserted by the Presiding Judge's comment to the prosecution on the implementation of this concept, "It has the great benefit for the prosecution in that it removes responsibility from your shoulders and places it fairly on ours".<sup>26</sup> I do not believe that it is the duty or role of the Trial Chamber to ease the burden which fairly rests upon the prosecution where witnesses which they have interviewed are concerned. Further, nowhere in the Statute do I find any support for the Trial Chamber to take on a role which is assigned to the prosecution.

<sup>25</sup> *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, ICC-01/04-01/06-1049, 30 November 2007, paragraph 34.

<sup>26</sup> *Ibid.*, page 10, lines 3-5.

24. The Trial Chamber must maintain an impartial role within the proceedings in order to ensure fairness. This neutral role is also essential for the Registry to maintain within the proceedings, and requiring the Registry to take on a function which should be the prosecutions alone puts the Registry in a difficult position, endangering its neutrality. For all of the above reasons, I respectfully dissent from the Majority's position that the Trial Chamber may send a representative from the Registry on behalf of the Chamber to ascertain a witness' willingness to participate in the proceedings, as I believe that to be solely a function reserved for the parties.

## **II. Alternative exculpatory disclosure process to ensure the rights of the accused**

25. Along with the above mentioned principled difficulties with the Trial Chamber taking on a role analogous to a party, I also find it a costly one in terms of time and resources. In order to facilitate the disclosure of potentially exculpatory material while maintaining the integrity of the proceedings as well as facilitating practical solutions, I would suggest a two step approach.

26. I would first suggest that disclosure on a redacted basis be provided to the defence of the exculpatory material in its original form with redactions made strictly to ensure protection of individual witnesses. If the defence felt that it was not able to utilize the material contained in the statements provided in the redacted form, it could then, as a second step request from the Chamber any lifting of redactions which might be necessary in order to fully explore and utilize the information contained within the statements. This approach is similar to that of Pre-Trial Chamber I.<sup>27</sup>

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<sup>27</sup> *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, ICC-01/04-01/07-428, 21 April 2008, Paragraphs 139-146.

27. This solution maintains proper roles for each separate and distinct entity within the trial structure while providing the defence to view any exculpatory material which it may be assisted by and further will provide the Chamber with an understanding of whether further disclosure is necessary.

### III. Conclusion

28. Ultimately, I agree with these sections of the Majority opinion:

- I agree with the Majority that the trial will commence on Monday 23 June 2008 providing that all incriminatory and exculpatory disclosure obligations are found to have been met, according to the timeframe set out by the Chamber in its 9 November 2007 decision.
- I agree with the Majority's order that the prosecution may not add witnesses or documents to its trial evidence without the leave of the Chamber.
- I agree with the Majority granting the "Prosecution's application for authorization to add a further expert report on age determination to the evidence to be relied on at trial" filed on 3 April 2008, and its authorization of the prosecution to add the expert report disclosed late.
- I agree with the Majority's reiteration that in future *ex parte* filings shall be notified in accordance with the terms of the Chamber's decision of 6 December 2007.
- I agree with the Majority order to the Registrar to notify the confidential decision of 21 November 2007 to the Office of Public Counsel for Victims.
- I agree with the Majority order that the prosecution must provide the relevant witness statements and video footage to the Office of Public

Counsel for Victims, to the extent that those materials relate to victims the Office is currently representing.

29. However, there are significant portions of the Majority Opinion which I do not agree with and must dissent from, for the reason which I have given above. These include:

- I respectfully dissent with the Majority Opinion that there is a *de facto* working procedure established whereby upon oral submissions on a topic, the issue is thought to be closed and leave to make further submissions is required.
- I respectfully dissent with the Majority Opinion that as an alternative to full disclosure of the relevant evidence or material the prosecution may concede exculpatory facts which can be taken out of a witness statement and placed in a separate document to be served upon the defence.
- I respectfully dissent from the Majority Opinion to order a representative from the Registry to consult further with persons who will no longer cooperate with the prosecution with regard to their willingness to cooperate with the Court.
- I respectfully dissent from the Majority Opinion that the prosecutions responsibility under Article 67(2) to disclose exculpatory material only includes materials which show or tend to show the innocence of the accused or which affect the credibility of the prosecution evidence.
- Finally, I respectfully dissent from the Majority approach in which matters which may directly infringe upon the rights of the accused are considered in *ex parte* submissions without the defence and are further decided upon without allowing submissions from the defence.

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

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**Judge René Blattmann**

Dated this 28 April 2008

At The Hague, The Netherlands