

**Cour
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**International
Criminal
Court**

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Date: 11 July 2008

THE APPEALS CHAMBER

Before:
Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Navanethem Pillay
Judge Erkki Kourula

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

**on the appeal of Mr. Lubanga Dyilo against the
Oral Decision of Trial Chamber I of 18 January 2008**

Shs

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

International Criminal Bar
Ms Virginia C. Lindsay

REGISTRY

Registrar
Ms Silvana Arbia

Sh3

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Thomas Lubanga Dyilo pursuant to the decision of Trial Chamber I of 6 March 2008, entitled “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” (ICC-01/04-01/06-1210),

After deliberation,

By majority, Judge Pikis and Judge Song partly dissenting,

Delivers the following

JUDGMENT

The decision of the Trial Chamber is confirmed, save that the ruling that the Prosecutor is not under an obligation to serve material that relates to the general use of child soldiers in the Democratic Republic of the Congo is reversed.

REASONS

I. KEY FINDINGS

1. The accused is fully entitled to rely upon the right to remain silent, as provided for in article 67 (1) (g) of the Statute. Furthermore, the oral decision of Trial Chamber I of 18 January 2008 (hereinafter: “Impugned Decision”) should not be read so as to place pressure on the accused to testify or to raise defences at an early stage as a condition of obtaining prosecution disclosure.

2. In rule 77 of the Rules of Procedure and Evidence, the term “material to the preparation of the defence” should be understood as referring to all objects that are relevant for the preparation of the defence.

II. PROCEDURAL HISTORY

3. The Impugned Decision was prompted by six filings of the Prosecutor relating to the disclosure by the Prosecutor of information to Mr. Lubanga Dyilo (hereinafter: “appellant”) prior to the commencement of his trial. The filings of the Prosecutor contained mainly applications to the Trial Chamber for authorisation of disclosure of information with redactions, for authorisation of the lifting of redactions previously granted, and for authorisation of the disclosure of summaries of documents instead of their disclosure in full. The Impugned Decision consists of a public part (see ICC-01/04-01/06-T-71-Eng), and a part which was issued in a hearing that was held in closed session, with only the Prosecutor participating (see ICC-01/04-01/06-T-72-Conf-Exp). In the present judgment references are to the public part of the Impugned Decision.

4. On 28 January 2008, the appellant submitted the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008 (*Règle 155 du Règlement de procédure et de preuve*)” (ICC-01/04-01/06-1134; hereinafter: “Application for Leave to Appeal”), requesting leave to appeal in respect of three issues purportedly arising from the Impugned Decision. The Prosecutor responded to the Application for Leave to Appeal in the “Prosecution’s Response to ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008’” of 1 February 2008 (ICC-01/04-01/06-1153; hereinafter: “Response to Application for Leave to Appeal”).

5. On 6 March 2008, the Trial Chamber rendered the “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” (ICC-01/04-01/06-1210; hereinafter: “Decision Granting Leave to Appeal”), granting leave to appeal in respect of three issues. A corrigendum to this decision was filed on 14 March 2008 (ICC-01/04-01/06-1224).

6. On 17 March 2008, the appellant filed the “Defence Appeal against the Decision on Redactions and Disclosure Issued Orally on 18 January 2008” (ICC-01/04-01/06-1227-tENG; hereinafter: “Document in Support of the Appeal”). The “Prosecution’s Response

to Defence Document in Support of Appeal against Oral Decision of Trial Chamber I rendered on 18 March 2008” (ICC-01/04-01/06-1243; hereinafter: “Response to the Document in Support of the Appeal”) was filed on 28 March 2008.

7. On 10 April 2008, the International Criminal Bar submitted the “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence” (ICC-01/04-01/06-1273; hereinafter: “Motion of the International Criminal Bar”), requesting that annex A to the Motion of the International Criminal Bar (ICC-01/04-01/06-1273-AnxA; hereinafter: “Observations”) be accepted as observations pursuant to rule 103 (1) of the Rules of Procedure and Evidence.

8. After having given the appellant and the Prosecutor an opportunity to respond to the Motion of the International Criminal Bar (ICC-01/04-01/06-1282) and having considered these responses (ICC-01/04-01/06-1276 and ICC-01/04-01/06-1284 respectively), the Appeals Chamber decided on 22 April 2008 to accept the Observations (ICC-01/04-01/06-1289). The appellant and the Prosecutor indicated that they did not wish to comment on the substance of the Observations of the International Criminal Bar.¹

9. Also on 22 April 2008, the Appeals Chamber rendered the “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008” (ICC-01/04-01/06-1290; hereinafter: “Decision on Suspensive Effect”), rejecting a request pursuant to rule 156 (5) of the Rules of Procedure and Evidence, which the appellant had made in his Document in Support of the Appeal.

¹ See “Observations de la Défense relatives à la « Proposed Amicus Curiae Submission Of The International Criminal Bar Pursuant To Rule 103 Of The Rules Of Procedure And Evidence » (Annexe A), datée du 10 avril 2008” of 29 April 2008 (ICC-01/04-01/06-1298), paragraph 5; and “Prosecution's Response to Application by the International Criminal Bar for leave to file Proposed Amicus Curiae Submission pursuant to Rule 103” of 18 April 2008 (ICC-01/04-01/06-1284), at paragraph 12.

III. APPEALABILITY OF THE IMPUGNED DECISION IN RESPECT OF THE FIRST TWO ISSUES CERTIFIED FOR APPEAL

10. In the present appeal, the Trial Chamber granted leave to appeal in relation to the following three issues: “whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure” (Decision Granting Leave to Appeal, paragraph 14); whether “the Chamber was wrong in giving preference to the protection of witnesses for the defence over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”² (Decision Granting Leave to Appeal, page 6); and whether the conclusion of the Trial Chamber “that the prosecution is not under an obligation to ‘serve material that relates [to] the general use of child soldiers’ [in the Democratic Republic of the Congo (hereinafter: “DRC”)] because it does not constitute exculpatory material contravenes Rule 77 of the Rules [of Procedure and Evidence]” (Decision Granting Leave to Appeal, paragraph 21).

11. For the reasons stated below, the Appeals Chamber concludes, by majority, that all three issues are properly before the Appeals Chamber. Judge Song disagrees that the first two issues are properly before the Appeals Chamber, for the reasons that he sets out in his separate opinion which is appended to the end of this judgment.

12. The Trial Chamber stated that the first and second issues are “inextricably linked” (Decision Granting Leave to Appeal, paragraph 15). The Appeals Chamber agrees with this assessment, noting that whereas the first issue addresses generally the extent to which unnecessary and unjustified late disclosure of defences or issues by the defence can affect prosecution disclosure, the second issue considers this same question in the more specific context of whether prosecution disclosure of the identity of exculpatory witnesses may be affected by late disclosure of the defence case. As such, the Appeals Chamber considers that the first and second issues are connected.

² In the corrigendum to the Decision Granting Leave to Appeal, the relevant passage reads as follows: “Whether the Chamber was wrong in giving preference to the protection of witnesses for the prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”

13. In the Impugned Decision, the Trial Chamber said the following:

The Defence declined an invitation from the Chamber to set out the defences the accused is likely to rely on, together with the anticipated issues in the case. At this stage his stance is that he relies on the right to silence, which is his undoubted entitlement. However, unreasonable decisions by the Defence to make late disclosure may have an effect on determinations by the Chamber as to what constitutes a fair trial. For instance, given the need to protect witnesses and others who have provided information to the Court, if the Bench is -- let me start that part again -- if the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused. Accordingly, if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused. (ICC-01/04-01/06-T-71-ENG, p. 9, lines 4 to 21)

14. In its Decision on Suspensive Effect, the Appeals Chamber stated that “whether the issues raised for consideration derive from the Impugned Decision of the Trial Chamber is a matter the Chamber shall address in its final decision on the present appeal” (Decision on Suspensive Effect, paragraph 10).

15. The Trial Chamber considered specific submissions from the Prosecutor to the effect that “the first two issues for which leave to appeal was sought by the defence did not arise out of the [I]mpugned [D]ecision and that accordingly leave should not be granted in respect thereof” (Decision Granting Leave to Appeal, paragraph 4). Having received the benefit of such submissions, the Trial Chamber determined that leave should be granted (Decision Granting Leave to Appeal, paragraphs 15 and 20). In doing so, the Trial Chamber implicitly indicated its belief that the issues arose out of the Impugned Decision and that they were issues that were relevant to the manner in which the Trial Chamber might intend to act during the proceedings.

16. In relation to the first issue, the Trial Chamber referred to the concern addressed in the relevant part of the Impugned Decision as being “whether the prosecution has an inflexible obligation to disclose material, irrespective of whether or not the defence has acted unreasonably in revealing relevant aspects of the defence or the issues to be raised late in the case” (Decision Granting Leave to Appeal, paragraph 12). This concern

ultimately gave rise to the first issue for which leave to appeal was certified (Decision Granting Leave to Appeal, paragraphs 12 and 14). The Trial Chamber then concluded that the first issue as set out in paragraph 10, above, “could significantly affect the fair and expeditious conduct of the proceedings, and the outcome of the trial, and furthermore an immediate resolution of this issue by the Appeals Chamber could materially advance the proceedings” (Decision Granting Leave to Appeal, paragraph 14).

17. The second issue must be viewed as “inextricably linked” to the first (Decision Granting Leave to Appeal, paragraph 15). The Trial Chamber concluded that “[a]lthough the [I]mpugned [D]ecision does not provide for the non-disclosure of the identity of any specific witnesses, and while it remains possible that the issue may not arise at all in the course of the proceedings, this aspect of the decision may nonetheless have a significant impact on the trial because if applied to individual witnesses, it could have far-reaching implications on the extent of the disclosure or the right to tried [*sic*] without undue delay. Therefore, this concerns the fairness of the proceedings and their expeditiousness...” (Decision Granting Leave to Appeal, paragraph 19).

18. It is significant that the Trial Chamber concluded that the first and second issues satisfy the criteria for appealable issues as set out in article 82 (1) (d) of the Statute in concluding that they each involve “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. The Appeals Chamber also takes the view that its previous findings that “[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”,³ is consistent with a determination that the first and second issues raised for consideration are appropriately before the Chamber.

19. In addition to noting the views of the Trial Chamber as to the appealability of these issues, the Appeals Chamber also notes that these issues, if not addressed and placed in

³ “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (ICC-01/04-168), paragraph 9.

their proper context, could have an impact on the conduct of the proceedings. In particular, the Appeals Chamber considers that the parts of the Impugned Decision reproduced in paragraph 13 above, could give the impression that a failure by the Defence to reveal its defences at an early stage might result in later denial of access to exculpatory evidence, or significant parts thereof, to which it would otherwise have been entitled. The Impugned Decision thereby could create an indirect but ongoing pressure on the Defence to reveal defences so as to ensure full prosecution disclosure. As such, the first and second issues are properly before the Appeals Chamber.

20. The Appeals Chamber, therefore, shall proceed to consider the merits of the first and second issues.

IV. MERITS OF THE APPEAL

A. The first issue on appeal

21. The first issue on appeal has been defined by Trial Chamber as “whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure” (Decision Granting Leave to Appeal, paragraph 14).

1. Relevant part of the decision of the Trial Chamber

22. The part of the Impugned Decision that is relevant for this issue on appeal is the same as the one reproduced in paragraph 13 above.

2. Arguments of the appellant

23. The appellant submits that the Trial Chamber erred by finding that late disclosure of the lines of defence “could justify partial or complete non-disclosure of exculpatory material by the Prosecutor [to the defence] without impairing the fairness of the trial” (Document in Support of the Appeal, paragraph 9) and that the Prosecutor’s disclosure obligations cannot be contingent on any prior action by the defence (Document in Support of the Appeal, paragraph 16). The appellant underlines that pursuant to article 54 (1) (a) of the Statute, the Prosecutor is under an obligation to investigate both

incriminating and exonerating circumstances and that one of the reasons for this obligation is that the defence does not have the same resources as the Prosecutor (Document in Support of the Appeal, paragraph 11). The appellant submits that the Prosecutor's obligation under article 54 (1) (a) reinforces the disclosure obligations of the Prosecutor. By reference to jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") and of the International Criminal Tribunal for Rwanda (hereinafter: "ICTR") the appellant argues that the onus is on the Prosecutor alone to identify material that has to be disclosed to the defence and that the Appeals Chambers of the ICTY and of the ICTR have broadly interpreted the disclosure obligations of the prosecution, even though in the ICTY and the ICTR the prosecution is not obliged to investigate exonerating circumstances (Document in Support of the Appeal, paragraph 15). The appellant also refers to a decision of the Trial Chamber of 9 November 2007, which addressed the consequences of non-disclosure by the Prosecutor of exculpatory material (Document in Support of the Appeal, paragraphs 13 and 14).

24. The appellant submits furthermore that he has an absolute right to silence (article 67 (1) (g) of the Statute) and that the "exercise of this right cannot be taken into account by the Chamber, either to restrict the obligations incumbent on the Prosecutor or to limit the rights of the accused" under the Statute and the Rules of Procedure and Evidence (Document in Support of the Appeal, paragraph 17). The appellant submits that, "[b]y considering that late disclosure by the accused of his lines of defence might be grounds for infringing one of the essential guarantees of a fair trial, the Chamber presupposes a disclosure obligation on the part of the accused, and this directly affects the exercise of his right to remain silent" (Document in Support of the Appeal, paragraph 18). The appellant emphasises that none of the legal instruments of the Court provides for a disclosure obligation on the defence and that a non-existing obligation cannot be breached (Document in Support of the Appeal, paragraph 19).

3. *Arguments of the Prosecutor*

25. The Prosecutor opposes the arguments raised by the appellant in respect of the first issue on appeal. He submits that the appellant has misconstrued and mischaracterised the

Impugned Decision, which, in the view of the Prosecutor, did not impose any disclosure obligation on the defence, but merely recognises that if the defence discloses its lines of defence at a late stage in trial, “this will necessarily affect the Prosecution’s ability to identify and disclose such information in a timely manner, and this may in turn be taken into account by the Chamber in assessing impact on the fairness of the trial” (Response to the Document in Support of the Appeal, paragraph 14, footnote omitted). The Prosecutor challenges the appellant’s submission that article 54 (1) (a) of the Statute should have an impact on the obligation of the Prosecutor to disclose exonerating material pursuant to article 67 (2) of the Statute and submits that the two provisions deal with separate and independent functions of the Prosecutor (Response to the Document in Support of the Appeal, paragraphs 15 and 16). The Prosecutor underlines that the Impugned Decision did not suggest that the obligation of the Prosecutor to disclose information to the defence is subordinated to action by the defence, and that the Prosecutor will continue to review and analyse the material in his possession; in the view of the Prosecutor, the Impugned Decision only emphasises that the Prosecutor can carry out this review only on the basis of the Prosecutor’s case, his best understanding of the defence case and the main exonerating hypotheses that can reasonably be identified in advance. In the view of the Prosecutor, the Impugned Decision did not alleviate his disclosure obligations, but recognises that the absence of communication by the defence to the Prosecutor may have, in practical terms, detrimental consequences (Response to the Document in Support of the Appeal, paragraphs 17 to 19).

26. The Prosecutor submits furthermore that the arguments of the appellant regarding his right to silence are misplaced. The Prosecutor underlines that the Impugned Decision did not touch upon this right at all, nor did it draw, as a matter of law, any adverse inferences from the failure of the defence to disclose its lines of defence. In the view of the Prosecutor, the Impugned Decision merely stated that there may be certain practical consequences from a decision of the defence not to engage actively in the disclosure process (Response to the Document in Support of the Appeal, paragraph 20).



4. *Determination by the Appeals Chamber*

27. Given that the first and second issues are “inextricably linked”, the determination by the Appeals Chamber in relation to this first issue is set out together with the determination in relation to the second issue at paragraphs 34 to 55 below.

B. The second issue on appeal

28. The second issue on appeal has been defined by the Trial Chamber as whether “the Chamber was wrong in giving preference to the protection of witnesses for the defence over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”⁴ (Decision Granting Leave to Appeal, page 6).

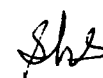
1. *Relevant part of the decision of the Trial Chamber*

29. The part of the Impugned Decision that is relevant for this issue on appeal is the one reproduced in paragraph 13 above, and in particular the references therein to the need for protection of witnesses.

2. *Arguments of the appellant*

30. The appellant submits that the Trial Chamber erred by concluding that his rights may be restricted by protective measures for witnesses and that the non-disclosure of the identity of a witness prevents the defence from effectively using the information disclosed by the Prosecutor. He emphasises that the Prosecutor does not intend to call the makers of the statements as witnesses at the trial (Document in Support of the Appeal, paragraphs 20 and 21). The appellant emphasises that the right of the accused person to disclosure of exculpatory material is a fundamental right and that the Trial Chamber cannot give precedence to witness protection over this right (Document in Support of the Appeal, paragraphs 22 and 23). He furthermore refers the Appeals Chamber to

⁴ In the corrigendum to the Decision Granting Leave to Appeal, the relevant passage reads as follows: “Whether the Chamber was wrong in giving preference to the protection of witnesses for the prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”.



jurisprudence of the Appeals Chamber of the ICTR, which has held that protective measures do not exempt the prosecution from disclosure obligations, and questions the assumption that the disclosure to the defence of identities of potentially exculpatory witnesses could put those witnesses at risk (Document in Support of the Appeal, paragraphs 24 and 25). The appellant submits that in order for disclosure by the Prosecutor to the defence to be useful, all relevant information and not only summaries thereof, as well as the identities of the witnesses, must be disclosed and refers to jurisprudence of the ICTY and ICTR that disclosure must enable the defence to use the information effectively and that the identity of a witness is inextricably connected to the substance of the information disclosed (Document in Support of the Appeal, paragraphs 26 to 31).

3. *Arguments of the Prosecutor*

31. The Prosecutor opposes the arguments of the appellant in respect of the second issue on appeal and submits that the appellant failed to identify any error of law (Response to the Document in Support of the Appeal, paragraph 22). The Prosecutor emphasises that the issue arose “in a highly contingent and circumscribed manner” and merely foreshadowed that if information is identified as exculpatory at a late stage of the proceedings, as a result of a decision by the defence, without any justification, not to indicate its lines of defence earlier, and that at this late stage of the proceedings, the proper protection of the witnesses may not be possible, the trial may still be fair, even if the exculpatory information is disclosed without disclosing the identities of the witnesses (Response to the Document in Support of the Appeal, paragraph 21). The Prosecutor argues that the Impugned Decision is based on the assumption that when disclosing potentially exculpatory evidence, the identities of the relevant witnesses shall generally be disclosed, but “that this does not exclude the possibility that, in certain circumstances, the identity of a particular individual may be withheld without compromising the fairness of the trial” (footnote omitted), and that in that respect, a decision would have to be taken on a case-by-case basis (Response to the Document in Support of the Appeal, paragraph 23). The Prosecutor underlines that in the Impugned Decision, the Trial Chamber did not authorise the non-disclosure of the identity of any person whose statement contains

exculpatory material and that the appeal therefore is premature (Response to the Document in Support of the Appeal, paragraph 24).

32. The Prosecutor submits that the appeal only could be successful in this respect if “the Trial Chamber could never have the power to authorise non-disclosure of the identity of an individual whose statement contains an element which may be potentially exculpatory, regardless of the circumstances; or ... that it would never be reasonable for a Trial Chamber to determine that a fair trial could be maintained if such an identity was not disclosed, again regardless of the circumstances” (Response to the Document in Support of the Appeal, paragraph 24, footnote omitted). The Prosecutor argues that article 67 (2) of the Statute and rule 83 of the Rules of Procedure and Evidence expressly grant the Trial Chamber the power to supervise the disclosure of potentially exculpatory material and that the assessment of the fairness of a trial can only be done on a case-by-case basis, taking into account a number of different factors, including whether there are any other means of maintaining the fairness of the trial, and refers the Appeals Chamber to jurisprudence of the European Court of Human Rights (Response to the Document in Support of the Appeal, paragraphs 25 to 28). The Prosecutor underlines the obligation of the Court to protect witnesses pursuant to article 68 (1) of the Statute, and that nothing in the Impugned Decision indicated that the Trial Chamber contemplated withholding the identities of witnesses in circumstances where this would be inconsistent with a fair trial (Response to the Document in Support of the Appeal, paragraph 27).

33. The Prosecutor is of the opinion that the maintenance of the fairness and expeditiousness of proceedings requires “a degree of commitment from all parties and participants” and that if “the conduct of one party, ‘without any proper justification’, has resulted in a situation where a witness cannot be afforded necessary protection, then ... some element of balancing of rights and interests may be appropriate” (Response to the Document in Support of the Appeal, paragraph 29; footnotes omitted). The Prosecutor submits that the Trial Chamber must have “a small degree of flexibility ... to deal with exceptional circumstances” in such situations (Response to the Document in Support of the Appeal, paragraph 30).

Jhs

4. *Determination by the Appeals Chamber*

(a) **Interpretation of the Impugned Decision**

34. The Appeals Chamber considers it important to clarify its understanding of the passage of the Impugned Decision to which the first and second issues relate, which is set out at paragraph 13 above. In so doing, the Appeals Chamber has taken into account the following extract of the Decision Granting Leave to Appeal, which indicates the Trial Chamber's view that the Impugned Decision does not impose disclosure obligations on the Defence which are extraneous to those provided for in the Statute and the Rules of Procedure and Evidence:

9. In its request [for leave to appeal], the defence submits that the impugned decision undermines the accused's fair-trial rights if he decides not to divulge in advance of the trial his defence or the issues that will arise, in full or in part, and that the Chamber has imposed on the defence a disclosure burden that rests only on the prosecution. The defence further submits that the prosecution alone can identify the material that tends to exculpate, or assist, the accused.

10. The defence bases its argument principally on the following passage from the Chamber's decision:

[...] if the defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused.

11. The prosecution submits in its response that the defence has misunderstood the decision of the Chamber, since it has not imposed a burden of disclosure on the defence or shifted that burden away from the prosecution. The prosecution argues that the Chamber's decision merely acknowledges the self-evident reality that the prosecution can only fulfil its obligation of disclosure of exculpatory materials on the basis of its best understanding of the likely defence case and the issues in the trial, and that a (late) revelation of the defence case and the issues in the trial, which the prosecution was not able reasonably to anticipate, may have an impact on the disclosure process.

12. In the view of the Chamber, the defence appears to have misinterpreted the effect of the oral decision. The Chamber has not imposed a duty of disclosure on the accused in the sense suggested. Instead, the Chamber addressed the practical consequences for prosecution disclosure if the accused reveals, at an unnecessarily and unjustifiably late stage in proceedings, that particular material is potentially exculpatory, and especially if arrangements (which may take many weeks) for the protection of individuals have to be put in place in order to effect service... [footnotes omitted].

35. The Appeals Chamber understands the relevant statements in the Impugned Decision to be limited to the narrow issue of the prospective situation *if* the Defence elects to reveal a line of defence or an issue “at an unnecessarily and unjustifiably late stage in proceedings”. This limited situation does not directly engage or infringe an accused’s right to remain silent – an assessment which is supported by the express observation in the Impugned Decision that the accused is undoubtedly entitled to rely on the right to silence (p. 9, lines 6 to 7).

36. The Appeals Chamber also does not see the Impugned Decision as having linked the revelation of defences to the entitlement to full prosecution disclosure, and the Impugned Decision should not be viewed as having such an effect. The Appeals Chamber views the Impugned Decision as relating instead to very narrow circumstances: namely, those in which a line of defence or an issue voluntarily revealed “at an unnecessarily and unjustifiably late stage in proceedings” was one which the Prosecutor could not reasonably have foreseen; thus the decision of the Defence to reveal this line of defence or issue triggered a need for further prosecution disclosure. The appellant’s submissions point out that “the Prosecutor has the duty to assess the nature of the material in his possession and, in particular, its exculpatory nature” (Document in Support of the Appeal, paragraph 13). The Prosecutor’s submissions further consider this duty and note that “the Decision merely emphasizes that the Prosecution can only discharge its duties under Article 67(2) on the basis of the prosecution case, its best understanding of the defence case, and the main exonerating hypotheses that can reasonably be identified in advance; and that timely provision by the Defence of the parameters of the information that it considers to be of an exonerating nature or its proposed lines of defence will obviously assist the Prosecution and enhance the process of disclosure” (Response to the Document in Support of the Appeal, paragraph 18). The Appeals Chamber observes that the Prosecutor’s ordinarily unfettered duty to disclose must necessarily be based, *inter alia*, on the Prosecutor’s understanding of the case as a whole, including what is known or anticipated about possible defence(s). The fact that the Prosecutor is required “to investigate incriminating and exonerating circumstances equally”, pursuant to article 54 (1) (a) of the Statute, means that the Prosecutor will be aware, during the course of his investigations, of material that may be of assistance to the defence.

37. The Appeals Chamber therefore considers that the practical effect of the Impugned Decision was focussed on the need to provide *further* exculpatory material, in circumstances in which the fact that material in the possession or control of the Prosecutor was of an exculpatory nature only became apparent as a result of something that the Defence disclosed.

38. The essential question which is raised by the first and second issues is therefore whether *if* the Defence *unreasonably* and *unjustifiably* makes late disclosure of a defence line or an issue in a manner which makes it *impossible* to secure the necessary protection of exculpatory witnesses, this can affect whether the Defence obtains all the remaining exculpatory material pertaining to the case and whether the accused can still receive a fair trial without such full disclosure.

39. Given that this question is posed both hypothetically and in the abstract, the Appeals Chamber cannot answer this question definitively in the context of the current appeal and in the absence of specific facts. The observations that it makes below on this specific question must be seen in that light.

40. However, given the impression that the appellant appears to have gained from the Impugned Decision, the Appeals Chamber considers it important to emphasise the following points.

(i) *The right of the accused to remain silent*

41. Article 67 (1) (g) of the Statute provides that:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: ...

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; ...

42. It can be affirmed therefrom that the accused has the right to remain silent and is entitled to exercise that right without silence being a consideration in the determination of guilt or innocence.

43. The Trial Chamber itself explicitly recognised the right of the accused to remain silent when it noted in the Impugned Decision that the accused’s “stance is that he relies on the right to silence, which is his *undoubted entitlement*” (Impugned Decision, p. 8, lines 6-7, emphasis added).

44. The Appeals Chamber does not regard the Impugned Decision as having impacted upon the exercise by the accused of his right to silence. The points raised by the relevant part of the Impugned Decision could only arise if the accused voluntarily chose to raise a defence or issue at a stage in proceedings that was “unnecessarily and unjustifiably late”.

(ii) The correlation between disclosure obligations of the Prosecutor and defence disclosure

45. While the Appeals Chamber does not purport comprehensively to address the entire disclosure regime in this judgment, it notes that the tenor of the disclosure regime established by the Statute and the Rules of Procedure and Evidence is that the Prosecutor is ordinarily obliged to make full disclosure, save for where specific provision is made for restrictions on disclosure to be permitted.⁵ For example, under article 61 (3) (b) of the Statute, prior to the hearing to confirm the charges, the Defence shall be informed of the evidence on which the Prosecutor intends to rely at the hearing. Further particulars of the requirement of prosecution disclosure are set out, *inter alia*, in rules 76, 81 and 121 of the Rules of Procedure and Evidence.

46. In addition, the Statute and the Rules of Procedure and Evidence not only emphasise the duty of the Prosecutor ordinarily to make full disclosure, but also indicate that the Prosecutor’s duty to disclose information to the Defence is not linked to any requirement that the Defence reveal defence(s) in advance. In the present context, the provisions set out below are of particular importance.

47. Article 67 (2) of the Statute provides that:

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

⁵ See, for example, rule 81 of the Rules of Procedure and Evidence.

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

48. Article 67 (2) operates in conjunction with rule 83 of the Rules of Procedure and Evidence which provides that:

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.

49. Rule 77 of the Rules of Procedure and Evidence further specifies the disclosure obligations of the Prosecutor by providing that:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

50. Article 67 (2) and rule 77 place mandatory disclosure obligations on the Prosecutor. The Appeals Chamber notes the absence in these provisions of any requirement that an accused provide advance revelation of his or her defences in order to receive full prosecution disclosure. The lack of any correlation between the right to receive prosecution disclosure and any disclosure obligations of the Defence is evident in that the Prosecutor is duty-bound to provide full disclosure even if an accused elects to remain silent or does not raise a defence. In addition, the provisions of the Statute and the Rules of Procedure and Evidence relating to defence disclosure, including rules 78 and 79, similarly do not connect defence disclosure to an entitlement to receive full prosecution disclosure.

51. The Appeals Chamber notes that the Impugned Decision makes no order requiring that the accused reveal his defence(s). The precise scope of defence disclosure obligations is not the subject of this appeal. The Appeals Chamber is currently concerned only with the extent to which disclosure of defences, if made, might affect or connect to the disclosure obligations of the Prosecutor. As such, the Appeals Chamber considers it unnecessary and outside the scope of the current appeal to consider the appellant's claim

that an obligation on the accused to disclose defences does not exist (Document in Support of the Appeal, paragraph 19).

(b) Further observations of the Appeals Chamber

52. In addressing the question posed for resolution in this appeal, set out at paragraph 38 above, the Appeals Chamber notes that the matter arises only in the abstract and that it is therefore unable to make an absolute determination in the absence of a concrete factual situation. Thus the comments of the Chamber should be viewed in this context and treated with appropriate caution.

53. Should a factual situation arise of the nature set out at paragraph 38 above, it would need to be carefully determined on a case-by-case basis. In the absence of any such factual situation, the Appeals Chamber can only comment generally that the ordinary expectation as set out in the Statute and the Rules of Procedure and Evidence is that the Defence would be entitled to receive any additional material in the possession or control of the Prosecutor which a line of defence has revealed as exculpatory in nature, regardless of the stage at which the defence was raised. The Statute and the Rules of Procedure and Evidence do not expressly provide that the scope of prosecution disclosure is to be altered by the timing and nature of defence disclosure.

54. In the abstract, however, the Appeals Chamber is unable categorically to rule out the possibility that if a factual situation arises in which it could be demonstrated that the Defence had unjustifiably and unreasonably held back the revelation of a line of defence or issue in circumstances that made it impossible for the Court to ensure the protection of the exculpatory witnesses, it may conceivably be possible for the accused to receive a fair trial notwithstanding the non-disclosure of certain limited material. Such a situation clearly does not arise from the Impugned Decision and is therefore not being considered by the Appeals Chamber in this appeal. The Appeals Chamber cannot comment further in the absence of specific facts.

55. The Appeals Chamber concludes that, in relation to the first and second issues, the Defence is entitled to full disclosure in relation to the case as a whole as known by the Prosecutor (subject to the statutory regime relating to restrictions on disclosure) and is

fully entitled to rely on the right to remain silent. The Impugned Decision should not be read so as to place pressure on the accused to testify or to raise defences at an early stage as a condition of obtaining prosecution disclosure. If the Impugned Decision is understood in the narrow context set out above, the Appeals Chamber does not find any identifiable error of law necessary of correction in this appeal.

C. The third issue on appeal

1. Relevant part of the decision of the Trial Chamber

56. In the Impugned Decision, the Trial Chamber ruled that:

The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC. (See ICC-01/04-01/06-T-71-ENG, p. 10, lines 11 to 13; hereinafter: “Order on Non-Disclosure”).

57. The Trial Chamber explained the reasons for the Order on Non-Disclosure as follows:

It is only necessary to set out, additionally, by way of general approach that the Chamber is unpersuaded, on the basis of the material before it, that evidence relating to the use of child soldiers by other individuals or groups is relevant to the charges the accused faces. Any evidence on this subject will not undermine the Prosecution case and on the basis of what has been revealed by the Defence (following an invitation from the Bench for assistance on this issue), it does not support any defence or line of argument to be relied on by the accused. Put otherwise, this area of evidence has not been demonstrated to relate to a live issue in the case and it is not one that could assist the accused. The sole argument of the Defence on this subject - that they wish to be provided with the maximum information on the phenomenon of the use of child soldiers in Ituri - does not sufficiently support the argument that it is necessary for the Prosecution to disclose this material. Nothing has been revealed that tends to indicate that an investigation of this phenomenon will materially assist Mr. Thomas Lubanga Dyilo. (Impugned Decision, p. 8, lines 11 to 25, and p. 9, lines 1 to 3.)

58. Prior to the issuance of the Impugned Decision, the Prosecutor had disclosed to the appellant material in his possession relating to the use of child soldiers by groups other than those for which the appellant allegedly was responsible. On 21 December 2007, the Prosecutor had filed the “Prosecution's Application for Non-Disclosure of Information on the Basis of Article 54(3) (f)” (ICC-01/04-01/06-1102; hereinafter: “Application of 21

December 2007”), requesting to be relieved of his obligation to disclose certain witness statements to the appellant. The Prosecutor stated that the witness statements contained information that had to be disclosed pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence, but that the disclosure of the statements would endanger the witnesses (Application of 21 December 2007, paragraphs 6 and 7). Therefore, the Prosecutor had disclosed to the appellant only excerpts of the witness statements, which contained the relevant information, but did not reveal the identities of the witnesses (Application of 21 December 2007, paragraph 8). The Trial Chamber was provided with the excerpts that had been disclosed to the appellant.

59. At a status conference on 10 January 2008, which preceded the Impugned Decision, the Presiding Judge of the Trial Chamber noted that much of the information in the excerpts related to the general use of child soldiers and asked the representative of the Prosecutor how such information could have an impact on the criminal responsibility of the appellant. The representative of the Prosecutor explained that in his view, such information is not exculpatory, and that the Prosecutor did not accept the defence of *tu quoque*. However, the Prosecutor, following an exchange of views with the counsel for the appellant, had decided to disclose the relevant information pursuant to rule 77 of the Rules of Procedure and Evidence as being “material to the preparation of the defence” (see ICC-01/04-01/06-T-69-ENG, p. 58, line 24, to p. 60, line 16). The representative of the Prosecutor confirmed that he would be willing to admit at trial that other armed groups in the DRC had also been using child soldiers (see ICC-01/04-01/06-T-69-ENG, p. 62, line 23, to 63, line 3).

60. The Presiding Judge also asked the representative of counsel for the appellant how information relating to the general use of child soldiers could be relevant to the preparation of the defence. The Presiding Judge emphasised that the defence was under no obligation to respond, but that an answer would assist the Trial Chamber in determining whether the material in question had to be disclosed pursuant to rule 77 of the Rules of Procedure and Evidence. The representative of counsel for the appellant explained that while such information could not exclude the criminal responsibility of the appellant,

[I]t appeared necessary to us in the preparation of the defence to be able to inspect a maximum amount of information with regards to the phenomenon of the use of child soldiers in Ituri during this period. Before setting a defence line, it's necessary to understand the situation, and it appeared to us that this information was useful to us and even necessary to us to be able to understand the situation in Ituri at that time, and it's this necessary understanding which has made us ask the Prosecutor, on the basis of Rule 77, for this evidence. (See ICC-01/04-01/06-T-69-ENG, p. 61, line 18, to p. 62, line 22.)

61. In his response to the Application of 21 December 2007 entitled “Réponse de la Défense à la « Prosecution’s Application for Non-Disclosure of Information on the Basis of Article 54(3)(f) »” of 10 January 2008 (ICC-01/04-01/06-1112), the appellant did not elaborate why the information regarding the general use of child soldiers was, in his view, necessary for the preparation of his defence; he requested, however, that the full witness statements, and not only excerpts of these statements, be disclosed to him.

2. *Arguments of the appellant*

62. At paragraphs 32 and 33 of the Document in Support of the Appeal, the appellant submits that the Prosecutor is obliged, pursuant to rule 77 of the Rules of Procedure and Evidence, to disclose material in his possession regarding the general use of child soldiers in the DRC. The appellant underlines that the Prosecutor had voluntarily disclosed such material to the appellant until the Trial Chamber rendered the Impugned Decision. The appellant submits that the purpose of rule 77 is to bring to the notice of the defence all material that is necessary for its preparation and that this may include material that is required for the understanding of the context in which the alleged crimes were committed (Document in Support of the Appeal, paragraph 34). The appellant refers the Appeals Chamber to the jurisprudence of the Appeals Chamber of the ICTR, which held that “preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence” (Document in Support of the Appeal, paragraph 36). The appellant argues that the disclosure obligations of the Prosecutor must be interpreted broadly in order to achieve equality of arms because the appellant has fewer resources than the Office of the Prosecutor, and that it would be unfair to require the appellant to spend any of its scarce resources on obtaining information that the Prosecutor has already collected (Document in Support of the Appeal, paragraphs 36 and 42).

63. The appellant submits furthermore that information regarding the general use of child soldiers in the DRC is relevant for the preparation of the defence because it is important to understand the circumstances of the alleged crimes in order for the defence to conduct its own investigations (Document in Support of the Appeal, paragraph 41). The appellant emphasises that the information sought might be useful for collecting information in relation to, *inter alia* the “direct and indirect causes of the presence of child soldiers in the armed forces, ... the circumstances of their participation, if any, in the hostilities, and ... the policies implemented for their demobilisation” (Document in Support of the Appeal, paragraph 43).

3. *Arguments of the Prosecutor*

64. In his Response to the Document in Support of the Appeal, the Prosecutor states that he does not oppose the appeal in respect of the third issue (Response to the Document in Support of the Appeal, paragraph 33). He underlines that this issue on appeal is only related to the scope of rule 77 of the Rules of Procedure and Evidence and not to the question of whether the use of child soldiers by armed groups other than those for which the appellant allegedly was responsible can legitimately be raised as a defence (Response to the Document in Support of the Appeal, paragraphs 31 and 32).

4. *Submission of the International Criminal Bar*

65. The International Criminal Bar submits that the Trial Chamber acted *ultra vires* when it intervened in the disclosure of material relating to the general use of child soldiers in the DRC. The International Criminal Bar submits that in the absence of written motions by one of the parties, neither rule 134 of the Rules of Procedure and Evidence nor article 64 or 69 of the Statute provide a legal basis for orders relating to the preparation of the defence. It is argued that while rule 134 authorises the Trial Chamber to “rule on any issue concerning the conduct of the proceedings”, the term “proceedings” does not cover the preparation of the defence; similarly, the International Criminal Bar submits that articles 64 and 69 of the Statute do not provide a legal basis for the Order on Non-Disclosure because these provisions only regulate rulings by a Trial Chamber on the admissibility of evidence (Observations, pp. 8 and 9). The International Criminal Bar is

of the opinion that the Trial Chamber “invade[d] the realm of confidentiality and discretion which belongs to defence counsel” by declaring “off-limits to the defence information which relates to the time and the place covered by the charges being defended against” (Observations , p. 9). It is argued that the Trial Chamber confused the relevance of evidence at trial with what might be necessary for the preparation of the defence, as the latter may include information irrelevant to the trial (Observations, p. 9). The International Criminal Bar recalls that it is the Prosecutor’s obligation under article 54 (1) (a) of the Statute to “investigate incriminating and exonerating circumstances equally” and to disclose exonerating evidence to the defence (article 67 (2) of the Statute), and that rule 77 of the Rules of Procedure and Evidence is an “important part of the comprehensive system of cooperation which is necessary in order to provide more equality of investigative arms” (Observations, p. 10).

66. The International Criminal Bar emphasises furthermore that information regarding the general use of child soldiers might be relevant at the sentencing stage, if any, and may shed light on the appellant’s “role and his level of responsibility in the context of Ituri” and is therefore material for the preparation of the defence (Observations, pp. 10 and 11).

67. The International Criminal Bar submits that the Impugned Decision should be “vacated as *ultra vires* insofar as it relates to Rule 77”, or, in the alternative, that

the appeal of the Lubanga defence team be granted and the oral decision and public orders should be remanded to the Trial Chamber with instructions to grant a broader degree of discretion to defence counsel in determining whether tangible documents within the possession of the prosecution are material to the preparation of the defence, including full consideration of how the documents may relate to preparations for a possible sentencing phase defence case. (Observations, p. 12)

5. *Determination by the Appeals Chamber*

68. For the reasons given below, the Appeals Chamber finds that the Trial Chamber erred in law when ordering that the Prosecutor is not under an obligation to serve material that relates to the general use of child soldiers in the DRC.

(a) Legal basis for Order on Non-Disclosure

69. The International Criminal Bar submits that the Trial Chamber issued the Order on Non-Disclosure *proprio motu* and that neither rule 134 of the Rules of Procedure and Evidence nor articles 64 or 69 of the Statute provide a legal basis for such a *proprio motu* order. The Appeals Chamber is not persuaded by these arguments.

70. The submission of the International Criminal Bar that there was no written motion before the Trial Chamber and that therefore the Trial Chamber should not have ruled on the scope of the disclosure obligations of the Prosecutor is misconceived. The issue of whether the Prosecutor is under an obligation to disclose material relating to the general use of child soldiers in the DRC arose in the context of the Prosecutor's Application of 21 December 2007. As stated above, the Prosecutor had only disclosed excerpts of the material in question to the defence and had requested the Trial Chamber to authorise the non-disclosure of the remainder of the material. It appears from the transcript of the status conference of 10 January 2008 (see above, paragraphs 59 and 60) that the Trial Chamber was considering whether the material in respect of which the Prosecutor had requested authorisation of non-disclosure in order to protect witnesses had to be disclosed at all. This question was directly relevant for the proper disposal of the Prosecutor's Application of 21 December 2007 because if the Prosecutor was not under an obligation to disclose such material under rule 77 of the Rules of Procedure and Evidence, the Trial Chamber would not have to rule on the requests for authorisation of non-disclosure for the purpose of witness protection. Given the above, the legal basis for the ruling made in the Impugned Decision can be found in rule 81 of the Rules of Procedure and Evidence, the provision under which the Trial Chamber potentially could have authorised the non-disclosure of the material in question.

71. Nor is the Appeals Chamber persuaded by the argument of the International Criminal Bar that the Trial Chamber confused the admissibility of evidence with what is relevant for the preparation of the defence. The Impugned Decision involved a ruling regarding the scope of material which has to be disclosed; it did not entail a ruling regarding the admissibility of such material as evidence.

72. As the Trial Chamber did not act *proprio motu* in the present case, there is no need to consider rule 134 of the Rules of Procedure and Evidence or articles 64 and 69 of the Statute to determine under which circumstances a Trial Chamber may render orders on the scope of disclosure on its own motion.

(b) Interpretation of rule 77 of the Rules of Procedure and Evidence

73. Although there was, as explained above, a legal basis for a ruling by the Trial Chamber regarding the scope of the disclosure obligations of the Prosecutor, the Order on Non-Disclosure was nevertheless erroneous because it was based on an interpretation of rule 77 of the Rules of Procedure and Evidence that was too narrow.

74. Rule 77 of the Rules of Procedure and Evidence reads as follows:

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

75. The material relating to the general use of child soldiers in the DRC is not intended for use by the Prosecutor as evidence, nor was it obtained from or belonged to the appellant. Accordingly, the question that presents itself in the context of the third issue on appeal is whether the material in question is “material to the preparation of the defence”.

76. In the Impugned Decision, the Trial Chamber did not make explicit reference to rule 77 of the Rules of Procedure and Evidence nor to any of the elements of this provision. Nevertheless, it must be assumed that the Order on Non-Disclosure was based on the Trial Chamber’s understanding of the scope of rule 77 and that in the relevant reasoning of the Impugned Decision the Trial Chamber gave an interpretation to that rule, in particular because at the status conference of 10 January 2008 the Presiding Judge and the parties had referred to rule 77. If the Impugned Decision is read in this way, objects are not material to the preparation of the defence if “[a]ny evidence on this subject will not undermine the Prosecution case and ... does not support any defence or line of

argument to be relied on by the accused. Put otherwise, this area of evidence has not been demonstrated to relate to a live issue in the case and it is not one that could assist the accused” (see above, paragraph 56). Thus, according to the Trial Chamber’s view, only material that relate to issues which would either directly undermine the “Prosecution case” or support a line of argument of the defence are material to the preparation of the defence.

77. The Appeals Chamber finds that the Trial Chamber interpreted rule 77 of the Rules of Procedure and Evidence too narrowly because it excluded objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence. The wording of rule 77 of the Rules of Procedure and Evidence does not suggest that the term “material to the preparation of the defence” should be construed as narrowly as the Trial Chamber did. Rather, the term should be understood as referring to all objects that are relevant for the preparation of the defence.

78. Given that the wording of rule 77 of the Rules of Procedure and Evidence is based on the wording of rule 66 (B) of the Rules of Procedure and Evidence of the ICTY,⁶ it is useful to consider the relevant jurisprudence of the ICTY and the ICTR on the corresponding provisions in the ICTY and ICTR Rules of Procedure and Evidence. This jurisprudence confirms that the term “material to the preparation of the defence” must be interpreted broadly.

79. The appellant has referred the Appeals Chamber to the decision of the ICTR Appeals Chamber of 25 September 2006 in the case of *Bagosora et al.* (hereinafter: “*Bagosora Decision*”). The ICTR Appeals Chamber explained at paragraph 9 of the decision that

In accord with the plain meaning of Rule 66 (B) of the Rules [of Procedure and Evidence of the ICTR], the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a

⁶ See Preparatory Committee for the International Criminal Court, Proposal submitted by Australia, Draft Rules of Procedure and Evidence of the International Criminal Court, 26 January 1999, PCNICC/1999/DP.1, where it is stated at page 37 that the original draft of what should become rule 77 “closely follows rule 66 (B) of the ICTY Rules.”

broad concept and does not necessarily require that the material itself counter the Prosecution case.

80. While it must be noted that the context of the *Bagosora* Decision was different from the present case – the ICTR Appeals Chamber had to decide whether material held by the ICTR Prosecutor that was related to the credibility of potential defence witnesses had to be disclosed – the decision indicates that an interpretation of the disclosure obligation that is too narrow must be avoided.

81. A broader interpretation of the disclosure obligations is also supported by the decision of 26 September 1996 of a Trial Chamber of the ICTY in the case of *Delalić et al.* At paragraph 7 of that decision, the ICTY Trial Chamber cited case law of U.S. federal jurisdictions that the “requested evidence must be ‘significantly helpful to an *understanding* of important inculpatory or exculpatory evidence’” (emphasis added). This formulation of the ICTY Trial Chamber was cited with approval by a commentator on the disclosure regime established by rule 77 of the Rules of Procedure and Evidence.⁷

82. The Appeals Chamber finds that in the present case, the appellant has sufficiently demonstrated that material relating to the general use of child soldiers in the DRC is material to the preparation of his defence: at the status conference of 10 January 2008, counsel for the appellant explained that such material will be relevant because “[b]efore setting a defence line, it’s necessary to understand the situation, and it appeared to us that this information was useful to us and even necessary to us able to understand the situation in Ituri at that time.” In his Document in Support of the Appeal, the appellant further specified that the requested material might be relevant, for example, to understand the phenomenon of the use of child soldiers and their demobilisation in the DRC. In addition to this, the International Criminal Bar observes that information relating to the general use of child soldiers might be relevant at the sentencing phase of the proceedings, if any, and that counsel for the defence will have to prepare herself for such a phase.

⁷ See H Brady, “Disclosure of Evidence”, in R.S. Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (2001), 403, at 411.

V. APPROPRIATE RELIEF

83. Rule 158 (1) of the Rules of Procedure and Evidence provides that the Appeals Chamber may “confirm, reverse or amend the decision appealed.”

84. In relation to the first and second issues, to the extent that the Impugned Decision is understood in the manner set out above at paragraphs 35 to 38, it is confirmed.

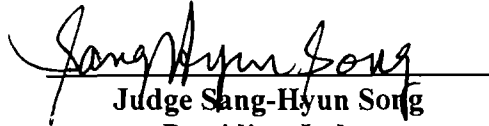
85. In relation to the third issue, the appellant requests the Appeals Chamber to “order the Prosecutor to immediately disclose to the Defence material in his possession relating to the general use of child soldiers in the DRC” (Document in Support of the Appeal, p. 13). This would amount to an amendment of the Impugned Decision.

86. For the following reasons, the Appeals Chamber considers that the Impugned Decision should not be amended as requested by the appellant. The Prosecutor had requested the Trial Chamber to be relieved of his obligation to disclose the statements containing the relevant information, and to disclose summaries of these statements instead. The Trial Chamber has not yet decided on this request. In such circumstances, the Appeals Chamber considers that it is appropriate to reverse the Order on Non-Disclosure because this order was materially affected by an error of law. The Trial Chamber will have to determine whether or not the appellant has a right to access the entire statements containing information on the general use of child soldiers.

Judge Pikis and Judge Song append partly dissenting opinions to this judgment.



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


Judge Sang-Hyun Song
Presiding Judge

Dated this 11th day of July 2008

At The Hague, The Netherlands

Partly dissenting opinion of Judge Georghios M. Pikis

1. At the preliminary stage of the proceedings, the Appeals Chamber identified the appealable issues in order to determine whether suspensive effect, sought by the appellant, should be given to the appeal, leading to the suspension of the enforcement of the decision giving rise to the issues made the subject of appeal.¹ The majority, that is, all judges of the Chamber other than myself, and the minority, were *ad idem* as to the nature and content of issue two, but were in disagreement as to the precise nature of the other two questions. The majority discerned issue one to be “whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure”², whereas I identified it to be “whether the Trial Chamber erred in imposing an obligation on the defence to disclose its lines of defence in advance”³. There is no significant difference between the two issues, inasmuch as they both revolve around the obligation, if any, of the accused to disclose his defence or any aspect of it at any time prior to its advancement before the Chamber. Put another way, the two issues boil down to whether the Prosecutor’s duty to disclose evidence in his possession, in particular exculpatory evidence, is in any way or to any extent dependent upon prior disclosure of the line or lines of the defence.

2. The third issue, as identified by myself, involved “the interpretation of rule 77 of the Rules of Procedure and Evidence”⁴, whereas the majority found it to be “whether the conclusion of the Trial Chamber ‘that the prosecution is not under an obligation to ‘serve

¹ *Prosecutor v Lubanga Dyilo* “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008” 22 April 2008 (ICC-01/04-01/06-1290); “Dissenting Opinion of Judge Georghios M. Pikis” 13 May 2008 (ICC-01/04-01/06-1290-Anx)

² *Prosecutor v Lubanga Dyilo* “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008” 22 April 2008 (ICC-01/04-01/06-1290), para. 2.

³ *Prosecutor v Lubanga Dyilo* “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, Dissenting Opinion of Judge Georghios M. Pikis” 13 May 2008 (ICC-01/04-01/06-1290-Anx), para. 6.

⁴ *Ibid*

material that relates [to] the general use of child soldiers' because it does not constitute exculpatory material contravenes Rule 77 of the Rules [of Procedure and Evidence]”⁵.

3. Answering question three in the way I perceived it to be, for the purposes of resolution of the appeal, would be a theoretical exercise casting one of the members of the Chamber outside the final decision-making process. The issue, as I comprehended it, involved the rendering of advice by the Appeals Chamber to the Trial Chamber in relation to the interpretation of rule 77 of the Rules. It was extricated from a decision of the Trial Chamber. Issue three, as identified by the majority, is connected with a decision of the Trial Chamber relevant to the disclosure of material about the use of child soldiers. I feel duty-bound, in the interests of the efficacy of the judicial process, to abide by the majority decision as to the identity of issue three. Failing to do that would exclude a member of the Appeals Chamber from participation in the resolution of the sub judice issues, which would be antithetical to the process of judgment rendering. In the *Case of Andronicou and Constantinou v. Cyprus*⁶ before the European Court of Human Rights, I was confronted with an issue not dissimilar to the one facing me in this case. In that case, I noted that “The jurisdiction of the Court is indivisible. It is entrusted to the Court as a whole requiring all its component parts, i.e. each member of it, to take part in the resolution of every issue the determination of which is necessary for the outcome of the case.”⁷ The same holds true in the present proceedings. Dissociating myself from the identification of the subject-matter of the appeal as found to be by the majority would result in decision being taken on the sub judice issues by four and not the five members of the Appeals Chamber, as envisaged by the Statute. Different considerations might come into play if the issue was one affecting the jurisdiction of the Court. The fact that issue three, as depicted by the majority on the one hand and myself on the other, revolve around the same subject, that is, the ambit and implications of rule 77 of the Rules, removes any constraint I might have in answering the question.

⁵ *Prosecutor v Lubanga Dyilo* “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008” 22 April 2008 (ICC-01/04-01/06-1290), para. 2.

⁶ European Court of Human Rights, *Andronicou and Constantinou v Cyprus*, Judgment of 9 October 1997, Application No. 86/1996/705/897.

⁷ *Ibid*, Dissenting Opinion of Judge Georgios M. Pikis.

4. The members of the Chamber other than myself are, be it not for the same reasons, of the view that neither issue emanates from a definitive decision of the Trial Chamber, and for that reason do not merit consideration by the Appeals Chamber. Nonetheless, they do express, by way of guidance, their views on the implications of the right of the accused to silence, and the duty of the Prosecutor to make disclosure to the Defence. The right of the accused to silence is not questioned. In the judgment of the majority, it is asserted that "...the Defence is entitled to full disclosure in relation to the case as a whole as known by the Prosecutor (subject to the statutory regime relating to restrictions on disclosure) and is fully entitled to elect to rely on the right to remain silent. The Impugned Decision should not be read so as to place pressure on the accused to testify or to raise defences at an early stage as a condition of obtaining prosecution disclosure."⁸ This quotation is to an extent qualified by what is stated earlier, "In the abstract, however, the Appeals Chamber is unable categorically to rule out the possibility that if a factual situation arises in which it could be demonstrated that the Defence had unjustifiably and unreasonably held back the revelation of a line of defence or issue in circumstances that made it impossible for the Court to ensure the protection of the exculpatory witnesses, it may conceivably be possible for the accused to receive a fair trial notwithstanding the non-disclosure of certain limited material."⁹

5. In relation to the third issue, I agree with its reversal but disagree with the remission of the issue back to the Trial Chamber with a view to determining, as stated in the majority judgment, "...whether or not the appellant has a right to access the entire statements containing information on the general use of child soldiers."¹⁰ The matter should be determined by the Appeals Chamber by substituting the decision that ought to have been given for the one given by the Trial Chamber. The response of the Prosecutor to this part of the appeal is the following: "Given that the issues in this appeal relate solely to Rule 77, and not to the validity of any defence of *tu quoque* or the characterisation of the relevant material as exculpatory under Article 67(2), the

⁸ Majority judgment, para. 55.

⁹ Majority judgment, para. 54.

¹⁰ Majority judgment, para. 86



Prosecution does not oppose the appeal in relation to this issue”¹¹. The acknowledgment made by the Prosecutor is, to my mind, justified. And the decision of the Appeals Chamber ought to be that the material relevant to the use of child soldiers should be made available for inspection to the defence.

6. Below, I indicate the reasons that lead me to the conclusion that issues one and two do arise from decisions of the Trial Chamber, and consequently merit consideration by the Appeals Chamber.

7. The prerequisites for the certification of appealable issues were addressed in the judgments of the Appeals Chamber of 13 July 2006¹² and 13 October 2006¹³. In the former case, it was emphasised that the appealable issue, certified as such, must, in the opinion of the Trial or Pre-Trial Chamber, be one meriting immediate resolution, ridding, as indicated, “[...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”¹⁴. Elsewhere, it was stressed that the opinion of the certifying Chamber “constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.”¹⁵

8. The Trial Chamber, guided by the aforesaid judgment, determined in its decision granting leave to appeal¹⁶, that the issues raised did arise from its decision, and on that account should be made the subject of appeal. The Chamber refers to the part of its

¹¹ *Prosecutor v Lubanga Dyilo* “Prosecution’s Response to Defence Document in Support of Appeal against Oral Decision of Trial Chamber I rendered on 18 January 2008” 28 March 2008 (ICC-01/04-01/06-1243), para. 33

¹² *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168).

¹³ *Prosecutor v Lubanga Dyilo* “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”” 13 October 2006 (ICC-01/04-01/06-568).

¹⁴ *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168), para. 14.

¹⁵ *Ibid*, para 20

¹⁶ *Prosecutor v Lubanga Dyilo* “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)



earlier oral decision giving rise to the first issue in the following passage: “The issue, therefore, that was addressed in the relevant part of the impugned decision is whether the prosecution has an inflexible obligation to disclose material, irrespective of whether or not the defence has acted unreasonably in revealing relevant aspects of the defence or the issues to be raised late in the case.”¹⁷

9. The second issue is, as the Trial Chamber notes, linked to the first issue: “*Second Issue: Whether the Chamber was wrong in giving preference to the protection of witnesses for the defence over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial*”¹⁸. Specific reference is made to the part of the Chamber’s decision giving rise to issue two, quoted in the Chamber’s decision granting leave to appeal, the following: “If the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused.”¹⁹

10. Examination of the oral decision of the Trial Chamber giving rise to the definition of issues one and two warrants the conclusion of the Trial Chamber that the issues are the offspring of decisions of the Chamber. A critical passage in the oral decision is the following:

The Defence declined an invitation from the Chamber to set out the defences the accused is likely to rely on, together with the anticipated issues in the case. At this stage his stance is that he relies on the right to silence, which is his undoubted entitlement. However, unreasonable decisions by the Defence to make late disclosure may have an effect on determinations by the Chamber as to what constitutes a fair trial.²⁰

¹⁷ *Ibid.*, para. 12

¹⁸ *Ibid.*, para. 15.

¹⁹ *Ibid.*, para 18

²⁰ *Prosecutor v Lubanga Dyilo* Trial Chamber’s Oral Decision on Redactions and Disclosure 18 January 2008 (ICC-01/04-01/06-T-71-ENG ET WT), page 9, lines 4-10.

11. The very invitation of the Trial Chamber to the accused to disclose his lines of defence does suggest that the right to silence is not absolute. The undoubted right of the accused to silence, without such silence drawing adverse inferences, proclaimed in the decision of the Trial Chamber, is qualified by the passage quoted hereafter: "However, unreasonable decisions by the Defence to make late disclosure may have an effect on determination by the Chamber as to what constitutes a fair trial."²¹ This passage signifies a decision that the accused, be it at some stage of the proceedings, is under a duty to disclose his lines of defence. And if he fails to do so, there may be consequences, the ones outlined in the passage sequential to the above, cited below:

For instance, given the need to protect witnesses and others who have provided information to the Court, if the Bench is -- let me start that part again -- if the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at the point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused.²²

12. In the passage following the above extract, the Chamber identifies, in a definitive way, the consequences that may befall the accused if disclosure of the defence lines is made at a belated stage.

Accordingly, if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused.²³

13. The view of the Trial Chamber, set out in its decision granting leave to appeal, that issues one and two are "inextricably linked"²⁴, is both accurate and correct, as both relate to the duty of the Prosecutor to disclose exculpatory evidence and the dependence to any extent of the discharge of this duty by the Prosecutor upon the prior disclosure of the lines of the defence. The position of the Trial Chamber on the implications of failure of the defence to make disclosure is mirrored in the above passage of the oral decision. This

²¹ *Ibid.*, page 9, lines 8-10.

²² *Ibid.*, page 9, lines 12-18

²³ *Ibid.*, page 9, lines 18-21.

²⁴ *Prosecutor v Lubanga Dyilo* "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), para. 15.



passage is expressive of the decision of the Chamber that failure on the part of the accused to make timely disclosure of the lines of defence may have repercussions on the conduct of his case and may deprive him of the right to have disclosure of what the Prosecution is duty-bound to disclose.

14. The right to silence, guaranteed by article 67 (1) (g) of the Statute as the fundamental right of the accused, is in no way qualified, save in relation to the specific defences prescribed in rule 79 of the Rules.²⁵ The Statute does not merely guarantee the right to silence as the inalienable right of the accused, but further provides that its exercise should draw no adverse consequences for him/her. By the decision of the Trial Chamber, the exercise of the right to silence can draw adverse consequences, of which the accused is warned. The decision compromises the right of the accused to silence in a direct way. In addition, the Statute assures to the accused the right “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.” The right to silence is interwoven with the presumption of innocence of the accused. The accused is presumed to be innocent. He does not have to prove his innocence. What he must do in order to free himself from the accusation is to cast doubt on its validity; it is his right to be acquitted unless the accusations against him are proven beyond reasonable doubt.

15. The accused has a right to disclosure of the case against him, subject to any exceptions approved by the Chamber under rule 81 of the Rules, both at the pre-trial stage of the confirmation hearing and at the trial. Article 61 (3) of the Statute imposes a duty upon the Prosecutor to disclose evidence founding his case, envisaged in relation to evidence not disclosed at the confirmation hearing, and evidence collected by the Prosecutor after the confirmation hearing by article 64 (6) of the Statute.

16. Article 67 (2) of the Statute binds the Prosecutor, in addition to disclosure of the evidence upon which he relies, to disclose to the defence as soon as possible “evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show

²⁵ The only exceptions, of no relevance to the present proceedings, requiring prior disclosure of a defence, are to be found in rule 79 of the Rules. They refer to the defence of alibi and mental incapacity to the extent of excluding criminal responsibility. These are distinct defences, with the facts founding them being peculiarly within the knowledge of the accused.



the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” The Prosecutor is bound to collect both incriminating and evidence exonerating the accused in investigating a case, as laid down in article 54 (1) (a). The ambit of exculpatory evidence, as defined by the aforesaid provisions of article 67 of the Statute, is very wide. It embraces everything that goes to the innocence of the accused, evidence that tends to mitigate his guilt or provide material affecting the credibility of Prosecution witnesses.

17. For the reasons given above, I would reverse the decision of the Trial Chamber founding issue one, and answer the question raised for resolution as follows: Disclosure of evidence by the Prosecutor to the defence is in no way dependent upon or subject to the prior disclosure of the defence or any aspect or line of it. For similar reasons, I would reverse the decision founding issue two, declaring that failure on the part of the Prosecutor to discharge his duty of disclosure to the defence may impair the fairness of the proceedings.

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



Judge Georghios M. Pikis

Dated this 11th day of July 2008

At The Hague, The Netherlands

Partly dissenting opinion of Judge Sang-Hyun Song

1. In the present judgment, the majority of the Appeals Chamber considers the merits of the first and second issues on appeal. I respectfully dissent from this part of the judgment because, for the reasons summarised below, I am of the opinion that the oral decision of Trial Chamber I of 18 January 2008 (see ICC-01/04-01/06-T-71-Eng; hereinafter: “Impugned Decision”) is not appealable in this respect. I therefore would have dismissed the appeal to this extent, without considering the merits. I am in full agreement with the remainder of the judgment, notably the decision of the Appeals Chamber to reverse the decision of the Trial Chamber that the Prosecutor is not under an obligation to serve material that relates to the general use of child soldiers in the Democratic Republic of the Congo.

2. Article 82 (1) of the Statute provides that:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

3. Accordingly, decisions may only be appealed under article 82 (1) (d) of the Statute to the extent that they involve an appealable issue. The word “decision” refers to determinations or rulings made by a Pre-Trial or Trial Chamber, not to all statements that are made in the reasoning. This is not only confirmed by the literal meaning of the word “decision” in the judicial context, but also by a contextual interpretation of article 82 (1) of the Statute: article 82 (1) (a) to (c) provides that specific categories of decisions may be appealed as a matter of right, namely decisions with respect to jurisdiction or

admissibility, decisions granting or denying release of the person being investigated or prosecuted, and decisions of a Pre-Trial Chamber to act on its own initiative under article 56 (3) of the Statute. Whether a decision of a Pre-Trial or Trial Chamber falls under any of those categories will have to be established on the basis of whether a determination or ruling was made regarding admissibility or jurisdiction, and so forth. The Appeals Chamber adhered to this approach in its “Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la confirmation des charges’ of 29 January 2007” of 13 June 2007 (ICC-01/04-01/06-926), where it dismissed an appeal brought under article 82 (1) (b) of the Statute against a decision confirming the charges because such a decision does not deny or grant release. It would be illogical if the word “decision” in article 82 (1) (a) to (c) of the Statute would refer to determinations or rulings, but in article 82 (1) (d) include the entire reasoning supporting a decision.

4. A decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made. This is confirmed by the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March Decision Denying Leave to Appeal” of 13 July 2006 (ICC-01/04-01/06-168), where the Appeals Chamber explained at paragraph 9 that:

An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.

5. As to the present case, the Impugned Decision is, in my view and for the following reasons, not appealable in respect of the first and second issues in respect of which leave to appeal was granted because the Impugned Decision does not involve these issues in the above sense.

6. In the “Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008” of 6 March 2008 (ICC-01/04-01/06-1210¹; hereinafter: “Decision Granting Leave to Appeal”), the Trial Chamber granted leave to appeal in relation to the following three issues: “whether unnecessary and unjustified late

¹ A corrigendum to this decision was filed on 14 March 2008 (ICC-01/04-01/06-1224).

disclosure by the defence can properly have an impact on prosecution disclosure” (Decision Granting Leave to Appeal, paragraph 14; “first issue”); whether “the Chamber was wrong in giving preference to the protection of witnesses for the defence over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”² (Decision Granting Leave to Appeal, page 6; hereinafter: “second issue”); and whether the conclusion of the Trial Chamber “that the prosecution is not under an obligation to ‘serve material that relates [to] the general use of child soldiers’ because it does not constitute exculpatory material contravenes Rule 77 of the Rules [of Procedure and Evidence]” (Decision Granting Leave to Appeal, paragraph 21).

7. The first and second issues relate to the following part of the Impugned Decision:

The Defence declined an invitation from the Chamber to set out the defences the accused is likely to rely on, together with the anticipated issues in the case. At this stage his stance is that he relies on the right to silence, which is his undoubted entitlement. However, unreasonable decisions by the Defence to make late disclosure may have an effect on determinations by the Chamber as to what constitutes a fair trial. For instance, given the need to protect witnesses and others who have provided information to the Court, if the Bench is -- let me start that part again -- if the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused. Accordingly, if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused. (ICC-01/04-01/06-T-71-ENG, p. 9, lines 4 to 21)

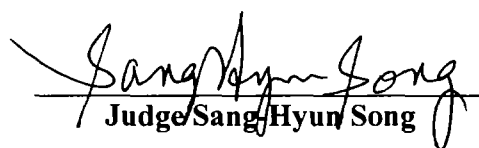
8. In this part of the Impugned Decision, however, the Trial Chamber did not make any determinations, nor were the statements of the Trial Chamber part of, or precondition for, any of the determinations that were made elsewhere in the Impugned Decision. Instead, the Trial Chamber informed the participants what it *might* do in the future. None of the statements that were made regarding defence disclosure or the protection of

² In the corrigendum to the Decision Granting Leave to Appeal, the relevant passage reads as follows: “Whether the Chamber was wrong in giving preference to the protection of witnesses for the prosecution over the defence right to know the identity of those witnesses and in its conclusion that such preference would not impair the fairness of the trial”.

witnesses were made in a conclusive manner. In particular, the statements regarding unjustified late disclosure of the lines of defence must be seen in context: the Trial Chamber emphasised that the defence has a right to silence; the statements of the Trial Chamber regarding implications of “late” defence disclosure were made on the (hypothetical) assumption that the appellant would raise a defence. Neither the Trial Chamber nor the Appeals Chamber currently knows whether this will be the case. Furthermore, the Trial Chamber only alluded to the possibility that it *may* make rulings regarding the fairness of the proceedings as a result of “late” defence disclosure, without providing any details as to what the criteria or circumstances for such rulings might be, or how the Trial Chamber interpreted the applicable law in this respect. Thus, the statements were made in an inconclusive manner and in the absence of, and unrelated to, any facts. In relation to the second issue the Trial Chamber noted at paragraph 19 of the Decision Granting Leave to Appeal that the “issue may not arise at all in the course of the proceedings”.

9. In my view, by considering the merits of these issues, the Appeals Chamber would not examine whether what the Trial Chamber *has done* was in compliance with the applicable law; it would assess what the Trial Chamber *might do* in the future. The Appeals Chamber would thus assume the role of an advisory body. This is not a role foreseen for the Appeals Chamber in either the Statute or the Rules of Procedure and Evidence. It is beyond its jurisdiction.

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



Judge Sang-Hyun Song

Dated this 11th day of July 2008

At The Hague, The Netherlands