

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 January 2010

**TRIAL CHAMBER I**

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

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

**Public**

**Redacted Second Decision on disclosure by the defence and Decision on whether  
the prosecution may contact defence witnesses**

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

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**Victims Participation and Reparations Section Other**

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo delivers the following Decisions on, first, whether the prosecution may contact defence witnesses, second, the "Prosecution's Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution's preparation for the Defence case" and, third, the "Prosecution's Application for an Order directing the Defence to provide photographs of the witnesses they intend to call":

## **I) Procedural History**

### **Contact with defence witnesses - the submissions**

#### **A. The submissions of the prosecution on contact with defence witnesses**

1. On 9 September 2009, the defence sent an email<sup>1</sup> to the legal adviser to the Division asking the Chamber to include in the agenda for the status conference on 17 September 2009 the issue of whether it is appropriate for the Office of the Prosecutor ("prosecution") to contact defence witnesses in advance of their oral testimony.
2. Between [REDACTED] representatives of the defence team visited the Democratic Republic of the Congo ("DRC"), when they identified 16 potential witnesses for the accused. They provided the names and addresses of these individuals to the prosecution, along with a brief summary of the matters it is anticipated they will cover in their evidence.<sup>2</sup> It was made clear that additional witnesses may be identified and called to testify.
3. On 8 September 2009, the prosecution informed the defence that it intended to meet one of the individuals on the list of defence witnesses, as part of its

<sup>1</sup> Email from the defence to the legal adviser to the Trial Division, 9 September 2009.

<sup>2</sup> Transcript of hearing on 17 September 2009, ICC-01/04-01/06-T-210-ENG-ET, page 24, lines 3 – 5.

investigations relating to the intermediary witness 316, in the presence of a representative of the defence (at the latter's discretion).

4. The prosecution maintained generally that it is entitled to contact defence witnesses, provided it has obtained the consent of the person it seeks to meet, with the underlying protection that the Chamber will be seized in the event of *inter-partes* disagreement.<sup>3</sup>

B. The submissions of the defence on contact by the prosecution with defence witnesses

5. The defence objected to the prosecution contacting, or meeting with, the witnesses on its list, absent its express consent. During the status conference on 17 September 2009 the defence, having generally indicated that its position was not the same as that of the prosecution<sup>4</sup> and having observed that it did not understand the underlying reasons for this request to conduct an interview or interviews,<sup>5</sup> raised a number of arguments in support of its objections. The defence contended that it had already provided information<sup>6</sup> to the prosecution in excess of its obligations pursuant to the Chamber's decision entitled "Decision on disclosure by the defence",<sup>7</sup> in which the Chamber ordered the defence to:

d) Furnish the prosecution and the Chamber after the presentation of the evidence of the prosecution is completed with the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries;

The defence suggested that providing the witness summaries exceeded that requirement.

<sup>3</sup> ICC-01/04-01/06-T-210-ENG-ET, page 27, lines 8 – 21.

<sup>4</sup> ICC-01/04-01/06-T-210-ENG-ET, page 23, lines 22 – 23.

<sup>5</sup> ICC-01/04-01/06-T-210-ENG-ET, page 24, lines 5 – 10; page 25, lines 5 – 6.

<sup>6</sup> ICC-01/04-01/06-T-210-ENG-ET, page 24, lines 3 – 4.

<sup>7</sup> Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235-Corr-Anx1, paragraph 41.

6. Counsel emphasised that the defence aim was not to hide the witnesses or conceal their anticipated evidence,<sup>8</sup> but instead their objections reflect the short period of time the members of the defence team have had with the witnesses (between three and four hours each),<sup>9</sup> and the difficulties for the witnesses in giving evidence, particularly about family members. The defence expressly disavowed any suggestion that the prosecution intends to intimidate or discourage the defence witnesses, but it emphasised that these further interviews will be experienced by the witnesses as intimidating and destabilising.<sup>10</sup>
  
7. Further, counsel emphasised that the witnesses and their evidence will not surprise the prosecution – they are each individuals who the prosecution could have arranged to meet during its four to five year investigations, and their relevance has been established because they have been mentioned during the evidence to date. It is said, therefore, that they are all linked to witnesses who have already given evidence, and generally this will not be surprise testimony. Therefore, the prosecution could – indeed should – have been in touch with them previously.<sup>11</sup> Furthermore, the defence contended that for some of these witnesses it is the documents they will produce that are of significance, rather than the individuals who will provide them to the Court.<sup>12</sup>
  
8. The defence emphasised that, save once when a witness was removed from the prosecution's list of witnesses, it has not sought at any stage to meet with the prosecution's witnesses prior to their testimony (except during the familiarisation process).<sup>13</sup>

<sup>8</sup> ICC-01/04-01/06-T-210-ENG-ET, page 24, lines 11 – 12.

<sup>9</sup> ICC-01/04-01/06-T-210-ENG-ET, page 24, lines 12 – 14.

<sup>10</sup> ICC-01/04-01/06-T-210-ENG-ET, page 24, lines 14 – 19.

<sup>11</sup> ICC-01/04-01/06-T-210-ENG-ET, page 25, line 4 to page 26, line 12.

<sup>12</sup> ICC-01/04-01/06-T-210-ENG-ET, page 29, lines 14 – 24.

<sup>13</sup> ICC-01/04-01/06-T-210-ENG-ET, page 25, lines 16 – 21.

9. The defence highlighted its straightened financial circumstances, in the context that it would wish to be present during any further interviews. This could lead to a number of “major trips” to the DRC, and it was contended that the accused does not presently have the resources for this undertaking.<sup>14</sup>
10. In its written response to the prosecution’s omnibus application, the defence focussed particularly on the prosecutor’s additional request to meet with three prospective witnesses, 0003, 0005, and 0020 (to prepare for the defence evidence) and with witnesses 0005, 0020, and 0021 (as part of its [REDACTED]). The defence opposes this request, submitting that the proposed meetings are unjustified and potentially prejudicial. It is argued that the contact is unjustified because, unlike the defence, the prosecution has already had the opportunity to meet these witnesses several times when taking statements from them, at an earlier stage in these proceedings. Further, it is suggested these meetings are potentially prejudicial because, notwithstanding a fair approach by the prosecution, they risk influencing the answers of the witnesses and they may dissuade them from testifying.<sup>15</sup>

C. The concluding submissions by the prosecution on contact with defence witnesses

11. The prosecution suggested that the overarching principle, established by the Chamber, is that the individual witness’s consent is the determining factor for pre-evidence meetings, which are in any event to be organised by the Victims and Witnesses Unit (“VWU”). The prosecution rejected the suggestion that it should have been able to anticipate which witnesses the defence intends to call.<sup>16</sup>

<sup>14</sup> ICC-01/04-01/06-T-210-ENG-ET, page 25, line 25 to page 26, line 8.

<sup>15</sup> Réponse de la Défense à la “Prosecution’s Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution’s preparation for the Defence case” datée du 2 octobre 2009, 14 October 2009, ICC-01/04-01/06-2160, paragraphs 26 – 29.

<sup>16</sup> ICC-01/04-01/06-T-210-ENG-ET, page 27, lines 8 – 23.

12. Further, the prosecution indicated that the opportunity to meet with witnesses before their evidence will spare the Court from unnecessary questioning during the proceedings, once it has “discuss[ed] some of the assertions” and sought “further clarifications”.<sup>17</sup>
13. The prosecution gave examples of some particular issues that it wishes to raise with individual witnesses,<sup>18</sup> and asserted that any “appearance of intimidation” can be minimised by the presence of a representative of the defence.<sup>19</sup>

**The prosecution’s omnibus application on disclosure by the defence and other procedural issues - the submissions**

D. The general introduction by the prosecution

14. On 2 October 2009, the prosecution filed the “Prosecution’s Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution’s preparation for the Defence case” (“the omnibus application”).<sup>20</sup> At the outset (in the preamble) it was suggested that there is a “[...] principle previously enunciated by this Chamber that obligations of disclosure on the Defence must be commensurate with the status of prosecution disclosure at the time and the proximity of the commencement of the trial [...]”.

15. Against that background, the prosecution makes four requests (as set out in the preamble), the first two for disclosure from the defence:

<sup>17</sup> ICC-01/04-01/06-T-210-ENG-ET, page 27, line 23 to page 28, line 3.

<sup>18</sup> ICC-01/04-01/06-T-210-ENG-ET, page 28, line 4 to page 29, line 1.

<sup>19</sup> ICC-01/04-01/06-T-210-ENG-ET, page 29, lines 6 – 10.

<sup>20</sup> Prosecution’s Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution’s preparation for the Defence case, 2 October 2009, ICC-01/04-01/06-2144-Conf. A public redacted version of the application was filed on 5 October 2009, ICC01/04-01/06-2144-Red.

i) Further details regarding the evidence the Defence witnesses intend to give, whether in the form of statements, notes or other means of recording. Thus far, the Defence has identified 16 witnesses and provided very brief summaries of their anticipated evidence, which is consistent with disclosure ordered by the Chamber on 20 March 2008, but nonetheless is inadequate to enable the Prosecution to prepare for the witnesses. The Prosecution thus suggests it may be appropriate to re-evaluate those conclusions at this stage of the trial.

ii) Timely disclosure/inspection of Defence materials, as required under Rule 78, at least three weeks in advance of the commencement of the Defence's case in order to enable the Prosecution to prepare for the Defence case.

16. In the other two requests, the prosecution seeks the leave of the Chamber to undertake the following:

iii) to contact trial witnesses called by the Prosecution, when necessary to conduct further enquiries regarding the Defence case, specifically to assess the veracity of facts and allegations that may be raised by Defence witnesses and obtain contact information for persons who may be potential leads for the Prosecution investigation into the Defence case; and

iv) to consult/interview potential court witness in order to enable the Prosecution to adequately prepare for the Defence case [REDACTED].

#### E. The submissions by the prosecution on disclosure

17. Having summarised the history of its submissions and the Chamber's Decisions on this issue,<sup>21</sup> the prosecution set out the essence of its complaint in paragraph 7 of the omnibus application:

Between 26 August and 7 September 2009, almost two months after the Prosecution completed its case, the Defence disclosed the names and identities of 16 witnesses it intends to call, along with abbreviated summaries of their anticipated testimony. Most of the summaries consist of two or three sentences generally describing only the broad subject matter about which the witness will testify. In response to an *inter partes* request by the Prosecution, the Defence declined to provide further information and confirmed its position at the Status Conference on 17 September 2009.<sup>22</sup>

18. The prosecution acknowledged<sup>23</sup> that the defence has exceeded the present requirements imposed on it by the Chamber in its "Decision on disclosure by

<sup>21</sup> ICC-01/04-01/06-2144-Conf, paragraphs 1 – 5.

<sup>22</sup> ICC-01/04-01/06-2144-Conf, paragraph 7.

<sup>23</sup> ICC-01/04-01/06-2144-Conf, paragraph 8.



the defence".<sup>24</sup> The prosecution make two cardinal points: first, defence disclosure will occur some months after the prosecution called its witnesses, and, second, as presently effected it does not enable the prosecution to conduct meaningful preparation.<sup>25</sup> It suggested that the information that has been provided by the defence thus far "[...] is inadequate to enable the Prosecution to prepare for its questioning of the [defence] witnesses".<sup>26</sup>

19. The prosecution suggests that the Chamber has previously described its ability to order the defence to disclose witness statements, or summaries thereof. In particular the prosecution relies on a number of paragraphs of the "Decision on disclosure by the defence", as follows:

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

a) By Rule 78 of the Rules, the defence shall permit the prosecution to inspect any documents or other tangible materials which are intended for use by the defence during the trial;

b) Rule 79(4) of the Rules expressly includes, as a separate provision, the power of the Chamber to "(order) disclosure of any other evidence" (emphasis added);

c) By Regulation 54 of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice during a status conference concerning a summary of evidence the accused is to rely on (54(b)), the length of questioning (54(d)), the number and identity of witnesses (54(e)), the production and disclosure of the statements of the witnesses the accused intends to call (54(f)), the issues the accused intends to raise (54(h)) and the disclosure of evidence (54(1)); d) By Regulation 52 of the Regulations of the Registry, the parties and participants shall provide the court officer, at least three working days before the hearing, the evidence they intend to use (in an electronic form if possible).

31. Thus, it seems clear that under the Rome Statute framework it is envisaged that an accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.

<sup>24</sup> ICC-01/04-01/06-1235-Corr-Anx1.

<sup>25</sup> ICC-01/04-01/06-2144-Conf, paragraph 8.

<sup>26</sup> ICC-01/04-01/06-2144-Conf, paragraph 12.

32. The question is the extent of this obligation to give advance notification and the circumstances in which it is appropriate. Regulation 54 permits the Chamber to order advance disclosure of summaries of evidence, copies of witness statements from the witnesses who the defence intends to call, the number and the identities of those witnesses, the issues it is intended are to be raised and the defences the accused intends to advance.

33. The critical issue is the appropriate use of these powers. It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case. At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.

34. There is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other. At present the prosecution has revealed the identity and statements (some with redactions) of approximately two thirds of the witnesses it is proposing to rely on and there is a body of potentially exculpatory material which has yet to be resolved by the Bench. The final date for disclosure has been set for 28 March 2008. Furthermore, the six charges as confirmed by the Pre-Trial Chamber - which essentially define the ambit of this case - are confined to issues concerning child soldiers and, therefore, to a significant extent the issues in this trial have been delineated by the evidence to be presented on these charges. In order to ensure the trial process is fair, only proportionate disclosure obligations should be imposed on the accused in relation to the evidence he intends to advance. In the circumstances, the Chamber will reflect in any order it makes on defence disclosure that a material element of the prosecution's evidence is still outstanding (along, potentially, with evidence that is helpful to the accused); the trial date has been set for 23 June 2008; and the charges are of limited ambit. The Chamber is of the view that the obligations of disclosure on the accused, for these reasons, should be of an appropriately restricted nature.

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

20. Against that background, the prosecution requests the Chamber to order the defence to disclose "[...] any existing statements of the witnesses or, at a

minimum, more detailed summaries of their anticipated evidence”.<sup>27</sup> The prosecution submitted that it is appropriate to make this order, given “[...] the significant difference in the stage of the proceedings compared to when the March 2008 Decision was rendered, and the disparity between the disclosure effected by the Prosecution and the information received thus far from the Defence.”<sup>28</sup> By way of detail, the prosecution highlighted that in the “Decision on disclosure by the defence”, the Chamber took into account that the prosecution, by that date, had failed to disclose the identity of a third of its witnesses, and that disclosure was incomplete. The prosecution highlighted that the Chamber had then decided that “[...] incomplete disclosure three months in advance of trial merited a proportionate (and in this case a more restrictive) disclosure obligation upon the Defence”.<sup>29</sup> The prosecution underlines the length of time that has elapsed since that Decision.<sup>30</sup>

21. It is suggested that additional information, whether in the form of supplemental summaries or statements, is necessary to secure fairness and efficiency; to protect the equality of arms; and to discover the truth.<sup>31</sup> The prosecution, without giving any details or citing any relevant provisions, prayed in aid of the rules of three of the *ad hoc* tribunals. The Chamber was also referred to one of their decisions, dated 26 June 2007, without any supporting details or suggested *ratio decidendi*.<sup>32</sup>

22. Thereafter, the prosecution sets out and criticises what is said to be a lack of information that has been provided as regards individual prospective defence witnesses. Examples of the absence of detail and the consequential difficulties highlighted by the prosecution are: the lack of a name for the person who

<sup>27</sup> ICC-01/04-01/06-2144-Conf, paragraph 10.

<sup>28</sup> *Ibid.*

<sup>29</sup> ICC-01/04-01/06-2144-Conf, paragraph 11.

<sup>30</sup> ICC-01/04-01/06-2144-Conf, paragraph 12.

<sup>31</sup> ICC-01/04-01/06-2144-Conf, paragraph 13.

<sup>32</sup> ICC-01/04-01/06-2144-Conf, paragraph 13, footnote 17.

allegedly asked witness 0004 to concoct a story for the prosecution;<sup>33</sup> the absence of a suggested location, or the dates, [REDACTED];<sup>34</sup> the absence of a suggested location, or the dates, when prospective [REDACTED];<sup>35</sup> insufficient information as to the dates when, as prospective witness 0007 alleges, [REDACTED], the identity of those who established and coordinated [REDACTED], where in Ituri it functioned and the dates and details of events in Ituri referred to by this prospective witness;<sup>36</sup> and the lack of specificity as to the time, place character, manner and frequency of the accused's demobilisation activities, as alleged by [REDACTED].<sup>37</sup>

#### E. The submissions by the defence on disclosure

23. The defence suggests that this request is inadmissible.<sup>38</sup> It is argued that the prosecution is asking the Chamber to vary its "Decision on disclosure by the defence" of 20 March 2008.<sup>39</sup>

24. The defence submitted that there is no proper basis for this suggested reconsideration of established authority. It was argued that the arguments deployed by the prosecution (*e.g.* the latter's suggested inability adequately to prepare for cross-examination and the suggested disparity between the disclosure obligations imposed on the prosecution and the defence) have been fully considered and determined by the Chamber in its Decision of 20 March 2008, and the principle of *stare decisis* therefore applies.<sup>40</sup>

<sup>33</sup> ICC-01/04-01/06-2144-Conf, paragraph 15.

<sup>34</sup> ICC-01/04-01/06-2144-Conf, paragraph 16.

<sup>35</sup> ICC-01/04-01/06-2144-Conf, paragraph 17.

<sup>36</sup> ICC-01/04-01/06-2144-Conf, paragraph 18.

<sup>37</sup> ICC-01/04-01/06-2144-Conf, paragraph 19.

<sup>38</sup> ICC-01/04-01/06-2160, paragraph 8.

<sup>39</sup> ICC-01/04-01/06-2160, paragraph 3.

<sup>40</sup> ICC-01/04-01/06-2160, paragraphs 3 – 5.

25. Additionally, it is suggested that the Decision of 20 March 2008 is limited to the obligation of the defence to disclose documents, and that the Chamber in the Decision did not address disclosure by the defence of its witnesses. Therefore, the defence argued that no sufficient reasons had been provided for the Chamber to reopen the issues determined on 20 March 2008 (which the prosecution did not appeal).<sup>41</sup>

26. The defence suggests that this request is made inexcusably late, when an important element of the trial investigations by the defence have already been conducted on the basis of a clear understanding of its disclosure obligations, as set out in the Decision of 20 March 2008. It is argued that any change in this approach would unreasonably compel the defence henceforth to treat its witnesses differently, resulting in probable delays to the case.<sup>42</sup>

27. The defence contends there is no existing general obligation on the defence to inform the prosecution of the evidence to be called, save for the limited provisions of Rule 79 of the Rules of Procedure and Evidence ("Rules"). The defence suggests – without providing any detail – that the jurisprudence of the *ad hoc* tribunals supports this broad approach.<sup>43</sup>

28. The defence emphasised that in its Decision of 20 March 2008 the Chamber augmented the defence disclosure obligations established in the Rome Statute framework, and that in consequence the defence has disclosed to the prosecution its list of 22 witnesses.<sup>44</sup> Additionally, as a matter of courtesy, the defence provided the prosecution with a summary of the key elements that

<sup>41</sup> ICC-01/04-01/06-2160, paragraph 6.

<sup>42</sup> ICC-01/04-01/06-2160, paragraph 9.

<sup>43</sup> ICC-01/04-01/06-2160, paragraph 10.

<sup>44</sup> ICC-01/04-01/06-2160, paragraphs 11 – 12.

each witness will address during their testimony.<sup>45</sup> It is argued that this information will enable the prosecution to conduct its own investigations. In support of this contention, it was highlighted that:<sup>46</sup>

- The defence has provided the current address of each of its witnesses; it is submitted that a similar facility was not provided to the defence for its own investigations into the prosecution witnesses;
- 14 of the 22 prospective defence witnesses were, at some stage, on the prosecution's list of witnesses; it is observed that the prosecution has had several years to complete its investigations, and its obligations include the duty to investigate the defence case;
- For the other 8 witnesses, the majority collaborated with the UPC or the FPLC during the period relevant to the charges, and they are known to the prosecution; and
- The evidence otherwise in the prosecution's possession is sufficient to facilitate its investigations.

29. Moreover, it is suggested that it is impossible for the defence to supply written statements to the prosecution because the defence has, thus far, not taken any written statements from the prospective witnesses, *inter alia*, because it has neither the time nor the resources to obtain a signed statement from each witness.<sup>47</sup>

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<sup>45</sup> ICC-01/04-01/06-2160, paragraph 13.

<sup>46</sup> ICC-01/04-01/06-2160, paragraph 14.

<sup>47</sup> ICC-01/04-01/06-2160, paragraph 15.

30. Finally, it is argued that Rule 81 of the Rules specifically excludes disclosure of the personal notes compiled by members of the defence team when meeting potential witnesses.<sup>48</sup>

#### F. The submissions by the prosecution on Rule 78 inspection and disclosure

31. The prosecution seeks an order that the defence discloses, or permits inspection of, the materials it intends to introduce at trial, at least three weeks in advance of its case. Additionally, the prosecution suggests the defence should be ordered to notify the prosecution seven days in advance of each witness “of the evidence that is to be used or tendered through that witness”.<sup>49</sup> In support of this submission, the prosecution suggests that Rule 78 of the Rules is the “direct corollary” of the obligation placed on the prosecution by Rule 77 of the Rules. It is convenient to set out both Rules at this stage:

##### **Rule 77**

##### **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.

##### **Rule 78**

##### **Inspection of material in possession or control of the defence**

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

32. The prosecution suggests that Rule 78 of the Rules is designed to facilitate the prosecution’s preparation for the defence case, which cannot be undertaken

<sup>48</sup> ICC-01/04-01/06-2160, paragraph 16.

<sup>49</sup> ICC-01/04-01/06-2144-Conf, paragraph 20.

satisfactorily if the material is withheld until the last moment.<sup>50</sup> The prosecution emphasises the mandatory ingredient of this Rule. Further, it is argued that Rule 78 of the Rules has been the subject of “prior litigation” which has not been resolved. In the “Decision on disclosure by the defence”, the Chamber restricted the advance-disclosure obligations of the defence to filing the relevant materials three days prior to its introduction. This requirement was based on Regulation 52(2) of the Regulations of the Registry, although the prosecution observed that this Regulation “[...] is not intended to regulate disclosure obligations, it is instead designed to ensure that the court officer have (*sic*) adequate advance time to take care of the administrative tasks involving the admission of evidence”.<sup>51</sup>

33. The prosecution reminded the Chamber that shortly before the trial opened, it ordered the prosecution to provide a week’s advance notification of the order of witnesses and the exhibits to be introduced.<sup>52</sup> On 16 January 2009 (ten days before the trial commenced) the Chamber observed at pages 38 and 39 of the transcript:

We wish, first of all, to deal with the Prosecution's consolidated motion, which bears the number 1596, and which was filed on the 12th of January, 2009. Point (A) in that consolidated motion is a request for an order requiring the advance notification of documents and exhibits to be used or tendered through witnesses.

Mr. Sachdeva, I think the position is that in our decision in relation to [...] the way in which the Defence [...] should be involved in the trial, we indicated [...] in accordance with the Regulations of the Registry that there should be three days' notification of any documents that are to be used during the examination of witnesses by the Defence. We now need to set parameters as regards the Prosecution principally, but also certainly theoretically as regards the participants.

What we have in mind is requesting the Prosecution to supply the Chamber on a Friday with a list of the witnesses who are to be called during the week to come, together with an anticipated schedule as to which days during the week they will be

<sup>50</sup> ICC-01/04-01/06-2144-Conf, paragraph 21.

<sup>51</sup> ICC-01/04-01/06-2144-Conf, paragraph 22 and footnote 24.

<sup>52</sup> ICC-01/04-01/06-2144-Conf, paragraph 23; Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG-ET, page 38, line 10 to page 39, line 8.



called. Of course you cannot provide finality in relation to that because it depends on the length of questions, but your anticipation, together with a list of any documents that, as far as the Prosecution is concerned, are going to arise during the course of the evidence of those witnesses, together with any documents that the Prosecution is going to seek to introduce from the bar table.<sup>53</sup>

34. The prosecution emphasises that this direction was not, in its submission, intended to provide “[...] the required advance access to the opposing party’s evidence, but merely to alert the parties to the sequence of the other party’s case”. Put otherwise, it is submitted that this order was not meant to supplant, or define, the defence obligation under Rule 78 of the Rules to provide for inspection of its evidence.<sup>54</sup> The prosecution submits that in any event it would be unreasonable to impose different time-limits for disclosure on the prosecution and the defence: at present, seven days in advance of its evidence for the prosecution and three days before the evidence is introduced for the defence.<sup>55</sup>

35. In all the circumstances the prosecution requests the Chamber to order the defence to “[...] permit inspection or to disclose to the Prosecution the totality of evidence it intends to use at least three weeks in advance of the commencement of its case. In addition, the Prosecution requests the Chamber to order the Defence to identify the exhibits it intends to use through witnesses it calls or from the bar table seven days in advance”.<sup>56</sup>

#### G. The submissions by the defence on Rule 78 inspection and disclosure

36. The defence emphasises that under Rule 78 of the Rules the Prosecutor may inspect material in the possession or control of the defence, which will be

<sup>53</sup> ICC-01/04-01/06-T-104-ENG-ET, page 38, line 10 to page 39, line 8.

<sup>54</sup> ICC-01/04-01/06-2144-Conf, paragraphs 24 and 25.

<sup>55</sup> ICC-01/04-01/06-2144-Conf, paragraph 26.

<sup>56</sup> ICC-01/04-01/06-2144-Conf, paragraph 27.

used by the defence as evidence at trial, and it is submitted that the obligation on the defence under Rule 78 is not engaged until the defence has decided to use a document or any material during the trial.<sup>57</sup>

37. It is submitted that since January 2008, the defence has provided the prosecution with the documents that are covered by Rule 78, once a decision was made to use them at trial. It is said that the defence intends to honour this commitment, but to date counsel has not decided which materials they intend to use during the defence evidence at trial.<sup>58</sup>

38. Finally, the defence suggests that the Chamber in its Decision of 20 March 2008 resolved this matter definitively, when it held that these materials are to be disclosed three days in advance of their introduction.<sup>59</sup>

#### H. The submissions of the prosecution on additional contact with the witnesses it called

39. The prosecution reminded the Chamber that it has previously ruled that “Discussions with a witness about his or her testimony should be delayed until the close of the evidence in the case unless the Chamber has made an order on an application for this to happen earlier”.<sup>60</sup> The prosecution seeks a variation of that order to permit it to contact those prosecution witnesses who may be able to assist in addressing the defence case. Given the suggested lack of detail of the evidence to be given by the defence witnesses, the prosecution submits that it cannot identify in advance all of the witnesses already called who may need to be contacted. However, it has identified – on the present information – that witness [REDACTED] should be spoken to concerning the evidence that is to be given by two prospective defence witnesses

<sup>57</sup> ICC-01/04-01/06-2160, paragraphs 17 and 18.

<sup>58</sup> ICC-01/04-01/06-2160, paragraphs 19 and 20.

<sup>59</sup> ICC-01/04-01/06-2160, paragraph 21.

<sup>60</sup> ICC-01/04-01/06-2144-Conf, paragraph 28; ICC-01/04-01/06-T-104-ENG-ET, page 26, lines 7 – 9.

[REDACTED] who will suggest that [REDACTED] was not under 15 years of age at the relevant time. In particular, the prosecution wish to question him about his living circumstances, [REDACTED] suggest they have shared accommodation with him. The point is made that in cross-examination of [REDACTED] the defence did not raise any of the matters now relied on as regards [REDACTED] and although he was asked if he knew [REDACTED], the details now alleged about their relationship were not explored.<sup>61</sup>

I. The submissions of the defence on additional contact by the prosecution with the witnesses it called

40. The defence indicated that it does not oppose the request by the prosecution to meet again with witnesses 0007, 0008 and 0010. Indeed, it submits that as part of its continuing obligation to investigate the case under Article 54(1) of the Rome Statute ("Statute"), the prosecution has a duty to confront its witnesses with any fresh information provided by the defence, and that under Article 67(2) of the Statute or Rule 77 of the Rules it should disclose the results of its further inquiries to the defence.<sup>62</sup>

41. It is submitted that these meetings should be recorded on audio or video, in line with the procedure implemented for the additional interviews with witnesses 0007, 0008, 0010, 0011, 0015 and 0038.<sup>63</sup>

**The prosecution's Application for an Order directing the Defence to provide photographs of the witnesses they intend to call**

I. The submissions by the prosecution on providing photographs of the defence witnesses

<sup>61</sup> ICC-01/04-01/06-2144-Conf, paragraphs 29 – 32.

<sup>62</sup> ICC-01/04-01/06-2160, paragraphs 22 – 23.

<sup>63</sup> ICC-01/04-01/06-2160, paragraph 24.

42. On 29 October 2009, the prosecution requested the Chamber to order the defence to provide photographs of certain witnesses it intends to call.<sup>64</sup> In particular, the prosecution requests photographs of witnesses DRC WWW-0001, 0002, 0003, 0004, 0005, 0006, 0012, 0014, 0015, 0016, 0023, 0024, 0025, 0026 and 0027 (to the extent the defence is in possession of them).<sup>65</sup>

43. The prosecution relies on the Chamber's "Decision on disclosure by the defence", whereby the accused is required to "furnish the prosecution and the Chamber after the presentation of the evidence of the prosecution is completed with the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries".<sup>66</sup> The prosecution submits that the Chamber was thereby ensuring that the prosecution is able to establish the identity of the accused's witnesses in order to conduct proper investigations. It is suggested that photographs will provide additional assistance to the prosecution in confirming the identities of these defence witnesses, particularly because "the use of names in DRC is not straightforward" and some of the defence witnesses may be known by different names.<sup>67</sup>

44. The prosecution observes that certain individuals will be called by the defence to contradict or otherwise undermine the evidence given by some of the prosecution's witnesses, and their evidence may include, *inter alia*, the suggestion that they had a close relationship. In those circumstances, the prosecution wishes to show these photographs to particular individuals who may know the defence witnesses, in order to establish whether the latter have provided their true identity and whether, in fact, the prosecution's witnesses

<sup>64</sup> Prosecution's Application for an Order directing the Defence to provide photographs of the witnesses they intend to call, 29 October 2009, ICC-01/04-01/06-2181.

<sup>65</sup> ICC-01/04-01/06-2181, paragraph 2.

<sup>66</sup> ICC-01/04-01/06-1235-Corr-Anx1, paragraph 41 d).

<sup>67</sup> ICC-01/04-01/06-2181, paragraphs 6 and 7.

know them.<sup>68</sup> Although the names, addresses and dates of birth of the defence witnesses have been disclosed to the prosecution, it is suggested that the photographs will assist with identification and in establishing other relevant information.<sup>69</sup>

45. Furthermore, the prosecution argues that the witnesses involved will not be exposed to any additional risks if these photographs are disclosed because their identities are already known to the prosecution. As regards potential confidentiality concerns, the prosecution undertakes to implement such measures as are necessary to ensure that the identities of the witnesses are not disclosed, save within the context of legitimate enquiries.<sup>70</sup>

#### K. The submissions of the defence on providing photographs of the defence witnesses

46. The defence suggests that this request should be rejected.<sup>71</sup> It is argued, first, that the defence disclosure obligation, pursuant to Rule 78 of the Rules, is limited to those items that the defence intends to use in evidence. Given that the defence does not intend to rely on the photographs during the trial, it is submitted they should not form part of the subject-matter of a disclosure order.<sup>72</sup> Second, the defence contends that the Chamber, in its Decision on disclosure by the defence, limited the defence obligation in this regard to disclosure of the name, address and date of birth of any witness.<sup>73</sup> Third, the defence disputes it has been “established”, as suggested by the prosecution, that individuals living in the DRC are sometimes known by different names.<sup>74</sup>

<sup>68</sup> ICC-01/04-01/06-2181, paragraphs 3 and 4.

<sup>69</sup> ICC-01/04-01/06-2181, paragraphs 3 to 5.

<sup>70</sup> ICC-01/04-01/06-2181, paragraph 8.

<sup>71</sup> Réponse de la Défense à la “Prosecution’s Application for an Order directing the Defence to provide photographs of the witnesses they intend to call”, datée du 29 octobre 2009, 5 November 2009, ICC-01/04-01/06-2184, paragraph 2 and page 6.

<sup>72</sup> ICC-01/04-01/06-2184, paragraphs 3 to 7.

<sup>73</sup> ICC-01/04-01/06-2184, paragraphs 8 to 11.

<sup>74</sup> ICC-01/04-01/06-2184, paragraph 12.

Fourth, the defence suggests the photographs in its possession were obtained expressly subject to confidentiality restrictions, and in particular that they should not be disclosed without the witnesses' consent.<sup>75</sup> Finally, the defence contends that as with prosecution witnesses, those called for the accused may be subject to security risks. For instance, the defence intends to demonstrate that some intermediaries have played a part in securing the attendance of false witnesses, and it is concerned that intermediaries whose identities are unknown to the defence may have an interest in discouraging defence witnesses from giving evidence on this issue.<sup>76</sup>

## II) Analysis and Conclusions

### A. Contact by the prosecution with defence witnesses

47. The governing jurisprudence on this issue is the Chamber's "Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses".<sup>77</sup> At paragraph 11, the Chamber set out the following:

11. With regard to permitting contact between a party or a participant and the witnesses to be called by the other party or a participant, the overarching consideration is the consent of the witness. Once a witness consents, unless the Chamber rules otherwise, contact should be facilitated. If the party or participant who intends to call a witness objects to the meeting, it shall raise the matter with the Chamber by way of an application in advance of the interview. The party or participant calling the witness is entitled to have a representative present during the interview, unless - again, following an application - the Chamber rules otherwise.

48. By way of procedure, the Chamber ordered:

14. A party or a participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or the participant of the

<sup>75</sup> ICC-01/04-01/06-2184, paragraphs 13 and 14.

<sup>76</sup> ICC-01/04-01/06-2184, paragraphs 15 and 16.

<sup>77</sup> Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372.

proposal, setting out the suggested time and location of the interview. If the witness consents, the party or participant shall make such contact through the Victims and Witnesses Unit, which shall make the necessary arrangements for the interview. A representative of the Victims and Witnesses Unit shall be present during the interview and the party or participant intending to call the witness may also attend the interview, unless the Chamber has, on an application, ruled otherwise.

49. Although there may be important practical differences that the Chamber must take into account between the positions of the prosecution and the defence in the implementation of this rule (as discussed below), there are no sustainable reasons in principle for distinguishing between prosecution and defence witnesses for these purposes: neither party “owns” the witnesses it intends to call, and there are many reasons why a discussion with some individuals in advance of their testimony may assist in the efficient management of the proceedings, and assist the Chamber in its determination of the truth.<sup>78</sup> For instance, irrelevant lines of questioning may be identified and discarded; lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence; and the opposing party may decide that the witness’s evidence is not in dispute and, in consequence, it may be possible to agree his or her statement, along with any relevant documents (thereby obviating the need to bring the witness to court). Important considerations of this kind apply whoever is calling the witness, such as to justify, in principle, discussions in advance of a witness’s evidence, so long as the latter consents. Additionally, it is open to the party calling the witness to raise any discrete objections with the Chamber.

50. Although the position “in principle” is, therefore, relatively easy to explain, its application “in practice” will be infinitely various. Whenever a request of this kind is made, and if the witness consents to the meeting, the party calling him or her will have to consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the

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<sup>78</sup> Rome Statute, Article 69(3).

individual witness's mental or emotional stability; and it will need to assess the resource implications of the proposal. It follows there must be close liaison between the party calling the witness, the party seeking the meeting and the VWU, and, on occasion, it may be necessary to ask the Chamber to rule on specific requests, or aspects of them.

51. In the present circumstances, the prosecution must identify each of the witnesses it seeks to meet; it must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from the prosecution and which the defence is obliged to meet.

52. Particular difficulties that cannot be resolved through sensible discussions, along with any objections to proposed meetings with particular witnesses, are to be raised with the Chamber (save in situations of emergency) by way of written applications.

#### B. Disclosure by the defence

53. The present obligation on the defence as regards disclosure, once the prosecution's evidence is complete, is to furnish the prosecution and the Chamber with the names, addresses and dates of birth of any witness it intends to call to enable the prosecution to conduct appropriate enquiries. Further, it is to disclose any evidence, other than the oral testimony of its



witnesses, three days in advance of its presentation.<sup>79</sup> As rehearsed above, the prosecution seeks an order extending this obligation on the defence, by way of supplemental summaries or witness statements, and it is argued that without this information the prosecution will be unable to engage in meaningful preparation.

54. The overall positions of the prosecution and the defence are not the same – there are self-evident differences in their roles, in the length of their respective investigative involvement in the case and in the resources available to each of them. Although this divergence does not *ipso facto* lead to unequal or different disclosure obligations, it is an important factor that the Court must bear in mind, so as to ensure that the requirements which a Chamber imposes are fair and proportionate.
55. The tension between the irreducible elements necessary for a fair trial (which include the right to silence) on the one hand, and the appropriate obligations of disclosure by the defence on the other, is not always easy to resolve. The Chamber has hitherto addressed this issue in some detail in its “Decision on disclosure by the defence”.<sup>80</sup> As regards the protections afforded to the accused, the Chamber observed:

27. The starting-point for consideration of this issue (*viz.* defence disclosure) is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way. The Chamber has a critical duty to uphold these protections, which are enshrined in the Statute. Article 55(1)(a) provides that a person under investigation shall not be compelled to incriminate himself or herself or to confess guilt. At the Confirmation of Charges, the accused does not have to participate actively: the provisions of Article 61(6), which permit him to object to the charges, challenge evidence or present evidence are permissive rather than mandatory. For the purposes of the trial, by Article 66(1), he is presumed innocent until proven guilty; by Article 66(2) the onus of proof rests with the prosecution; and by Article 67(1)(i) he is not to bear a reverse burden of proof or an onus of rebuttal. Finally, by

<sup>79</sup> Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 34.

<sup>80</sup> ICC-01/04-01/06-1235-Corr-Anx1.

Article 67(1)(g), he may not be compelled to testify or to confess guilt, and he is entitled to remain silent without that latter stance having any impact on the court's determination of his guilt or innocence. These rights are inviolable.

56. That said, the Chamber accepted that the Rome Statute framework contains “[...] important provisions [...] which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial and to assist the Chamber in its determination of the truth”.<sup>81</sup>

57. As the prosecution highlighted during its submissions, the Chamber has observed in this context that, “(t)he critical issue is the appropriate use of these powers. It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case. At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded”.<sup>82</sup> This approach is as applicable today as it was on 20 March 2008.

58. The Chamber considers it is necessary to highlight two elements of the factual background to this application. First, the defence – partly for resource reasons – has had limited time to spend with each of the witnesses it proposes to call (precluding, the Chamber is told, any adequate opportunity to take a formal

<sup>81</sup> ICC-01/04-01/06-1235-Corr-Anx1, paragraph 28; these are relatively numerous, and include any relevant details and evidence in support of an alibi (Rule 79(1)(a) of the Rules); the details of a defence that criminal responsibility is excluded under Article 31(1) of the Statute and the evidence in support; and by Regulation 54(p) of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice concerning the defences to be raised by the accused. Additionally, by Rule 78 of the Rules, the defence shall permit the prosecution to inspect any documents or other tangible materials which are intended for use by the defence during the trial; by Rule 79(4) of the Rules, the Chamber can order the disclosure of any (other) evidence; by Regulation 54 of the Regulations of the Court, the Chamber is empowered to make any order in the interests of justice during a status conference concerning a summary of the evidence on which the accused relies (54(b)), the length of questioning (54(d)), the number and identity of witnesses (54(e)), the production and disclosure of the statements of the witnesses the accused intends to call (54(f)), the issues the accused intends to raise (54(h)) and the disclosure of evidence (54(1)). Finally, by Regulation 52 of the Regulations of the Registry, the parties and participants shall provide the court officer, at least three working days before the hearing, the evidence they intend to use (in an electronic form if possible).

<sup>82</sup> ICC-01/04-01/06-1235-Corr-Anx1, paragraph 33.

witness statement); second, the prosecution has already been provided with a courtesy document from the defence, containing summaries of the main aspects of the matters which will be addressed by 12 of its witnesses (with similar summaries to follow for those that are outstanding). Unless the defence intends to ask supplementary questions on important issues that are not revealed by these summaries (which the Chamber assumes is not the case), they appear to provide a clear guide to the areas that will be covered by each witness; indeed, the Chamber finds the document to be, *prima facie*, extremely helpful. Therefore, given the limited resources (*viz.* time and personnel) of the defence team, the Chamber is of the view that it would be disproportionate, and in any event unnecessary, to order the accused to provide more extensive information.

59. In the judgment of the bench, the only caveat to this general conclusion – given the distance between the Netherlands and central Africa, together with the potential problems associated with interviewing witnesses and accessing documents at short notice – is that there is merit in the suggestion that certain limited and specific additional details should be provided at this stage, to enable the prosecution to investigate important elements of the anticipated testimony of these witnesses that the prosecution has identified in its submissions (see above). Importantly, this should avoid any delay resulting from well-founded applications to adjourn to enable relevant information to be identified or checked. In these circumstances, the Chamber is sympathetic to the prosecution's request for further information on:

- the name or identity of the person who allegedly [REDACTED] to concoct a story for the prosecution;<sup>83</sup>
- the suggested location, and the dates, when [REDACTED];<sup>84</sup>

<sup>83</sup> ICC-01/04-01/06-2144-Conf, paragraph 15.

<sup>84</sup> ICC-01/04-01/06-2144-Conf, paragraph 16.

- the suggested location, and the dates, [REDACTED];<sup>85</sup>
- the dates when the [REDACTED] operated, the identity of those who established and coordinated [REDACTED], where in Ituri it functioned and the dates of the events in Ituri referred to by the relevant prospective witness;<sup>86</sup> and
- the date and place of the accused's demobilisation activities, as alleged by [REDACTED].<sup>87</sup>

60. However, the prosecution must exercise great caution in its investigations; it must ensure that by its actions it does not deter or destabilise any of the defence witnesses, and that it does not impair the opportunity for the Chamber to consider all the relevant and available evidence. Therefore, it is critical that it demonstrates circumspection and caution in taking these or other investigative steps as regards the defence witnesses.

### C. Rule 78 inspection and disclosure

61. In essence, the prosecution submits that the defence should disclose or permit inspection of any materials ("the totality of the evidence") it intends to introduce at trial, no later than three weeks in advance of its case. Additionally, the prosecution suggests that the defence should be ordered to notify the prosecution seven days in advance of each witness as to the evidence that is to be tendered during their testimony. In support of this argument, the prosecution equates Rules 77 and 78 of the Rules and submits that a uniform approach should be applied by the Chamber to the two provisions.

<sup>85</sup> ICC-01/04-01/06-2144-Conf, paragraph 17.

<sup>86</sup> ICC-01/04-01/06-2144-Conf, paragraph 18.

<sup>87</sup> ICC-01/04-01/06-2144-Conf, paragraph 19.

62. The Chamber has already noted that in the defence submissions it was highlighted that the accused has been providing the prosecution with the Rule 78 documents in its possession, once a decision has been made by counsel to utilise them at trial.

63. Turning to the merits of the matter, the Chamber considers that the main proposal advanced by the prosecution in this application is significantly too broad in its suggested scope – that the defence should provide the totality of its evidence for inspection three weeks before the commencement of the defence case. Whilst there are certain clear apparent similarities between Rules 77 and 78, there are also undoubted differences<sup>88</sup> and these provisions have to be applied in the context of the divergent positions of the prosecution and the defence, addressed above. The prosecution (which bears the burden of proof) is obliged to investigate incriminating and exonerating evidence (“circumstances”) under Article 54(1)(a) of the Statute, and it was required by the Chamber to disclose all its evidence (incriminating, exonerating and Rule 77) three months before the start of the trial,<sup>89</sup> duties which the defence does not share. Although the three-month requirement imposed on the prosecution has been subject to variation for particular good reasons (*e.g.* for witnesses referred to the Victims and Witnesses Unit),<sup>90</sup> this overarching approach adopted by the Chamber has defined, to a critical extent, the opportunity for the defence to “inspect” the prosecution’s evidence and the material relevant to the preparation of the defence under Rule 77 of the Rules.

<sup>88</sup> The prosecution’s obligations under Rule 77 are more extensive, and particularly as regards providing the opportunity for inspection of items that are material to the preparation of the defence, which is not mirrored in Rule 78.

<sup>89</sup> Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, paragraph 21.

<sup>90</sup> Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG-ET, page 10, line 12 to page 11, line 9.

64. In the absence of a similar requirement imposed on the defence, to disclose its evidence three months in advance of trial, the Chamber is of the view that the obligation on the accused to reveal the documents and other materials that are to be relied on by his witnesses pursuant to Rule 78 of the Rules should be implemented in conformity with the current approach voluntarily adopted by the defence, coupled with the secondary disclosure requirements that have been imposed on the prosecution<sup>91</sup> and those contained in Regulation 52 of the Regulations of the Registry. This will secure a fair and proportionate result for both parties, together with effective trial management. Therefore, once a decision has been taken by counsel that a book, document, photograph or other tangible object is to be used by the defence during the trial, it should be served forthwith on the prosecution. Further, once the trial resumes, the defence is to provide the Chamber, the prosecution and the participating victims with a list of the witnesses to be called seven days in advance of their testimony, together with their anticipated order. Simultaneously, the defence shall provide the Chamber, the prosecution and the participating victims with a list of the documents (and any other tangible objects) that are going to arise during the course of the evidence of the witnesses who are to be called, together with a list of any relevant material that the defence seeks to introduce from the bar table (therefore, also at least seven days in advance). Furthermore, the terms of Regulation 52(2) of the Regulations of the Registry must be strictly followed: whenever possible, the defence should provide the court officer with the evidence they intend to use at least three days before the scheduled hearing. The prosecution should be notified by the defence immediately whenever this happens.

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<sup>91</sup> Transcript of hearing on 5 February 2009, ICC-01/04-01/06-T-119- ENG-WT, page 1, line 24 to page 2, line 16: the prosecution is to send its list of witnesses and the material relevant to each of them seven days in advance of their testimony.

65. However, the Chamber voices one strong note of caution: if the defence is intending to introduce books, documents, photographs or other tangible objects or other material the authenticity or reliability of which may be disputed by the prosecution, it is critical that they are provided for inspection under Rule 78 of the Rules in sufficient time to enable reasonable investigations to be undertaken (which may well be considerably in advance of three full working days). The defence has a clear responsibility to avoid the delays that otherwise may well result from well-founded applications to adjourn, to enable investigation of defence material following a tardy approach to Rule 78 of the Rules by the accused.

D. Additional contact by the prosecution with the witnesses it called

66. This application is not resisted by the defence; indeed, it is suggested that there is a positive obligation on the prosecution to confront its witnesses with any fresh information provided by the defence. In all the circumstances, the Chamber is persuaded that it is appropriate for the prosecution to meet again with witnesses 0007, 0008 and 0010, for the purposes identified in the application. These meetings should be recorded by audio or video equipment, and the prosecution must apply its disclosure obligations following any re-interview. If it becomes necessary to use this procedure with other witnesses, the same approach is to be followed (once the Court and the defence have been given adequate notice).

E. The prosecution's Application for an Order directing the defence to provide photographs of the witnesses they intend to call

67. As already rehearsed above, the Rome Statute framework contains several provisions which describe the obligations that can be imposed on the defence in order to secure a fair and expeditious trial, and to the assist the Chamber in

its determination of the truth.<sup>92</sup> In particular, Rule 78 of the Rules enables the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the trial, and Regulation 52 of the Regulations of the Registry requires items to be provided to the Registry three days in advance of their use.

68. That said, the fundamental protections for the accused include the presumption of innocence until his or her guilt is proved before the Court (Article 66(1) of the Statute) and the onus that rests on the Prosecutor throughout to establish the guilt of the accused (Article 66(2) of the Statute). Furthermore, he or she cannot “be compelled to testify or to confess guilt”, and the accused has the right to remain silent, without the exercise of that right becoming a factor in the determination of his or her guilt or innocence (Article 67(1)(g) of the Statute). Critically, he also has the right not to incriminate himself.<sup>93</sup>

69. As set out above, the prosecution seeks disclosure of photographs of particular defence witnesses, in order to use them when interviewing certain individuals who may have met them. The prosecution particularly wishes to investigate the identities of these defence witnesses and to establish whether the relevant prosecution witnesses know them,<sup>94</sup> along with other relevant information. These witnesses are to be called by the accused to contradict or otherwise undermine the evidence given by some of the prosecution’s

<sup>92</sup> ICC-01/04-01/06-1235-Corr-Anx1, paragraph 28.

<sup>93</sup> The European Court on Human Rights has concluded that the right for an accused not to incriminate himself constitutes part of the right to fair trial; see *Funke v. France* (Application no. 10828/84), 25 February 1993, paragraph 44. Article 55 (1)(a) of the Statute provides that a person is not to be compelled to incriminate himself during an investigation.

<sup>94</sup> ICC-01/04-01/06-2181, paragraphs 3 and 4.



witnesses, and their evidence may include, *inter alia*, the suggestion that they had a close relationship.<sup>95</sup>

70. There is a clear and important dividing line between, on the one hand, the legitimate obligation that can be imposed by a Chamber on the accused to disclose in advance the summaries of the evidence of the witnesses he intends to call and to afford inspection of the other evidence he anticipates using during the trial, and, on the other, the accused's right to remain silent and not to incriminate himself.

71. The Chamber is of the view that the defence, subject to the caveats set out in paragraph 55 of this decision, has been ordered to disclose sufficient information to enable the prosecution to identify, and conduct appropriate enquiries about, the defence witnesses.


72. Given the defence disclosure and inspection obligations relate to evidence and materials that are to be introduced during the trial, it is critical for this application that the defence does not intend to utilise these photographs as part of the evidence for the accused, and in the result the Chamber is of the view that there is no proper basis under the Rome Statute framework that would justify an order for their disclosure to the prosecution. They are simply part of the defence background preparatory materials, which are ordinarily protected from inspection.

73. In all the circumstances, the prosecution's application for photographs of the witnesses to be called by the defence is refused.

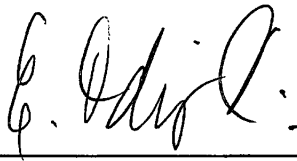
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<sup>95</sup> ICC-01/04-01/06-2181, paragraph 5.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 20 January 2010

At The Hague, The Netherlands