

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 9 April 2010

TRIAL CHAMBER III

Before:

**Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO**

Public document

**Public redacted version of
"Decision on the Defence Request for disclosure of pre-interview assessments
and the consequences of non-disclosure" (ICC-01/05-01/08-750-Conf)**

No. ICC-01/05-01/08

1/19

9 April 2010

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
 Mr Nkwebe Liriss
 Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims
 Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
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 Ms Paolina Massidda

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

States Representatives

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure.

I. Overview

1. By way of a summary:

- i) the defence requests disclosure of, first, the notes, transcripts and other similar documents related to the pre-interview assessment of Witness 24; second, the records, notes and transcripts of the pre-interview assessments of all those spoken to in this context (including their names); and, third, the records, notes or transcripts of the pre-interview assessments of anyone interviewed by the Office of the Prosecutor (“prosecution”) who was not treated as a witness, along with the reasons for this approach; and
- ii) the defence requests that the prosecution is barred from calling those witnesses whose pre-interview assessments have not been served.

II. Background and Submissions

The original request concerning Witness 24

2. On 30 December 2009, the defence requested, by email, disclosure from the prosecution of the pre-interview assessment (otherwise referred to hereafter as the screening notes) of a meeting on 6 March 2008 that took place prior to

the substantive interview with Witness 24. It was submitted that the notes appear to have been omitted during pre-trial disclosure (since this meeting was referred to in the witness's disclosed statement of 17 March 2008¹). The defence noted that this witness was interviewed by the prosecution, *inter alia*, about his functions, and about other relevant matters concerning the Mouvement de Libération du Congo ("MLC").²

3. On 7 January 2010, the prosecution responded by email, refusing to disclose the pre-interview assessment, suggesting that it has discharged its obligations.³ The prosecution averred that the assessment on 6 March 2008 was "to determine whether that witness provides information relevant to its investigations".⁴ The prosecution concluded that he should be formally interviewed, and it argued the subsequent interviews "collectively" captured all of the issues raised on 6 March 2008, along with other matters, which have been disclosed to the defence in their entirety.

Defence

4. On 14 January 2010, the defence filed its "Requête en vue de la divulgation de toutes les interviews préliminaires d'évaluation de tous les témoins du Procureur en vertu de l'article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve" ("Request") with a confidential *ex parte* Annex A, which contains the exchange of emails of 30 December 2009 and 7 January 2010.⁵

¹ CAR-OTP-0008-0223-R01 (EVD-P-03120).

² ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 2. See also ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 10.

³ ICC-01/05-01/08-668-Conf-Exp-AnxA. See also ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 11.

⁴ *Ibid.*; ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 4.

⁵ ICC-01/05-01/08-668-Conf-Exp and confidential *ex parte* defence and prosecution only Annex A.

5. A public redacted version of the defence Request was filed on 24 February 2010.⁶ The Chamber notes that the portions redacted by the defence were not consistently replaced with “[EXPURGÉ]”. In addition, the numbering of the footnotes has changed,⁷ the defence has removed references to Article 67(2) of the Rome Statute (“Statute”) in two paragraphs,⁸ and it has rephrased or corrected some sentences.⁹ This is not an appropriate way to redact a document. In future, the defence is instructed to file redacted versions of its filings which reflect word for word the non-public version of the document, save for the redactions applied, which must be clearly highlighted by replacing the relevant portions with “[EXPURGÉ]” or “[REDACTED]”. The paragraph or footnote numbers should not be amended. As noted above, the defence, whether intentionally or inadvertently, has amended its initial submission by removing references to a relevant legal provision. Given the defence did not file a corrigendum to its original Request, the Chamber has relied on the confidential *ex parte* version of the Request.
6. Following the prosecution’s refusal to disclose the screening notes of Witness 24, the defence suggests that the prosecution has adopted an approach which prevents disclosure of all pre-interview assessments.¹⁰
7. The defence argues that the interests of justice require the prosecution to record all contacts with each witness in a format which allows for their disclosure,¹¹ and it seeks an order for disclosure of the pre-interview assessment for Witness 24. Indeed, it submits that there should be disclosure of the screening notes of all those interviewed by the prosecution pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and

⁶ ICC-01/05-01/08-668-Red. The Chamber, by way of email from the Legal Adviser to the Trial Division, instructed the parties to file public redacted versions of the relevant filings on 23 February 2010.

⁷ The Chamber also notes that footnote 9 is in French in the confidential *ex parte* version of the Request, whereas it appears in English in the public redacted Request (footnote 8).

⁸ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraphs 22 and 26(b).

⁹ See for instance ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraphs 9, 10, 15.

¹⁰ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 8.

¹¹ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 9.

Evidence (“Rules”), including the witnesses the prosecution intends to rely on at trial and those who were contacted but not further interviewed.¹²

8. The defence bases its request, *inter alia*, on the interests of justice, Article 67(2) of the Statute and Rules 76(1) and 77 of the Rules. The defence also refers to Regulation 36 of the Regulations of the Office of the Prosecutor, which addresses the process of selecting those who are to be questioned.¹³ The defence submits that this provision clearly supports its contention that the assessment of a witness recorded during a preliminary interview may contain valuable information which will potentially inform the defence as to the approach adopted by the prosecution when selecting witnesses.¹⁴
9. The defence submits that the information recorded in the screening notes is, *prima facie*, of relevance because:
 - it may reveal the basis on which an individual decided whether or not to cooperate with the prosecution, including by way of giving evidence;¹⁵
 - it will allow the defence to examine the conditions under which certain statements were obtained (e.g. under pressure or in exchange for advantage promised by the prosecution);¹⁶
 - disclosure of the identity of those who attended the preliminary interviews will enable the defence, if necessary, to call them as witnesses, to testify about their recollection of the meetings;¹⁷

¹² ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraphs 9, 22 and 26.

¹³ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraphs 9, 17, 19, 21, 22 and 26(b).

¹⁴ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 17.

¹⁵ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 11.

¹⁶ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 12.

¹⁷ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 14.

- it may better enable the defence and the Chamber to evaluate any contradictions between any prior statements or documents (including the pre-interview assessments) and the later *viva voce* testimony (most particularly, with hostile witnesses);¹⁸ and
 - it will ensure that no potentially exculpatory information was omitted by the prosecution.¹⁹
10. The defence takes issue with the prosecution argument that disclosing information contained in the screening notes of witnesses is unnecessary, because it will be captured and reflected automatically in any subsequent statements. The defence submits that it should, at a minimum, be able to verify that this has occurred. [REDACTED].²⁰
11. The defence also underlines that the prosecution, in its electronic response on 7 January 2010, did not argue that screening notes are to be treated as internal documents that are exempted from disclosure by Rule 81(1) of the Rules.²¹
12. The defence contends that the prosecution has applied an overly formalistic interpretation of Rules 111 and 112 of the Rules that has resulted in an inappropriately restrictive approach to the prosecution's disclosure obligations under Rule 76(1) of the Rules.²² It suggests that a broad interpretation of Rule 111 of the Rules is appropriate, by which – irrespective of the requirements of Rule 111 of the Rule which addresses the “record of questioning in general” – any document containing questions put to a witness and his or her answers should be disclosed, since it is, *largo sensu*, part of the

¹⁸ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 16.

¹⁹ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 23.

²⁰ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 18. The Chamber notes the example was removed from the public redacted version of the Request without being replaced with “[EXPURGÉ]”.

²¹ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 19.

²² *Ibid.*

record of questioning. Further, referring to case law of the International Criminal Tribunal for Rwanda (“ICTR”)²³ the defence submits that screening notes should be disclosed as they contain questions put by the investigators to witnesses as well their answers.²⁴

13. Finally, the defence seeks an order barring the prosecution from calling witnesses whose screening notes have not been disclosed.²⁵

Prosecution

14. On 8 February 2010, the prosecution filed the “Prosecution’s Response to Defence ‘Requête en vue de la divulgation de toutes les interviews préliminaires d’évaluation de tous les témoins du Procureur en vertu de l’article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve’” (“Response”), together with a confidential *ex parte* Annex A in which it provided the names of 2 incriminatory witnesses and 24 individuals who had been the subject of pre-interview assessments, whose screening notes were to be disclosed.²⁶

15. A public redacted version of the prosecution’s Response was filed on 26 February 2010.²⁷

16. On 10 February 2010, the “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 9 February 2010”²⁸ and the “Prosecution’s Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 9 February 2010”²⁹ were filed.

²³ ICTR, *The Prosecutor v. Eliézer Niyitegeka*, Case Number IT-96-14-A, Judgment, 9 July 2004, paragraph 34.

²⁴ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red, paragraph 20.

²⁵ ICC-01/05-01/08-668-Conf-Exp and ICC-01/05-01/08-668-Red paragraphs 24 and 26(d).

²⁶ ICC-01/05-01/08-688-Conf-Exp with confidential *ex parte* prosecution and defence only Annex A.

²⁷ ICC-01/05-01/08-688-Red.

²⁸ ICC-01/05-01/08-690 and confidential *ex parte* prosecution and defence only Annex A.

²⁹ ICC-01/05-01/08-691 and confidential *ex parte* prosecution and defence only Annex A.

17. The prosecution submits the defence Request is unfounded.³⁰ It acknowledges its disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules,³¹ and it argues that pursuant to Rule 81(1) of the Rules the screening notes or pre-interview assessments are the internal documents of the prosecution, thus exempted from disclosure.³²
18. Pursuant to Article 54 of the Statute, the prosecution argues that conducting a pre-interview assessment with a witness is a strategic, prosecutorial undertaking that should not be subject to scrutiny by the defence. The prosecution argues that the defence has failed to demonstrate that the prosecution had exercised its discretion inappropriately.³³
19. The prosecution submitted some general observations on the definition of screening notes. It takes issue with the defence argument that it has conducted its disclosure obligations under Rule 76(1) of the Rules in a restrictive manner. It argues that pre-interview assessments are not comparable to the records of formal statements under Rule 111 of the Rules.³⁴ It cited an excerpt from a hearing before Trial Chamber I, which, it submits, supports the prosecution's interpretation,³⁵ and it argues that screening notes should be treated as an investigator's documents rather than a formal statement. It submits that these notes in the present case form "an organizational tool utilized by the Prosecution to determine whether the witness could provide information relevant to the Prosecution's mission to

³⁰ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 9.

³¹ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 4.

³² ICC-01/05-01/08-688-Conf-exp and ICC-01/05-01/08-688-Red, paragraph 3.

³³ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 7, 8, 9 and 21.

³⁴ ICC-01/05-01/08-688-Conf-Exp, and ICC-01/05-01/08-688-Red, paragraphs 14 and 15.

³⁵ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 14 and footnote 11, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG ET WT, pages 24-25.

uncover the truth regarding the crimes committed in the Central African Republic (“CAR”).³⁶

20. The prosecution addressed three particular categories of evidence that are engaged by the defence request for disclosure: i) the witnesses that it intends to call at trial; ii) witnesses it does not intend to rely upon, including those for whom it has disclosed material to the defence under Article 67(2) of the Statute or Rule 77 of the Rules; and iii) those individuals who were the subject of pre-interview assessments, but who were not further interviewed or used as witnesses (“pre-interview only individuals”).³⁷

21. With regard to Witness 24, it has not disclosed the relevant screening notes, arguing that what occurred was “purely a pre-interview assessment to determine whether the witness had relevant information to offer”,³⁸ and that this did not meet the mandatory requirements of Rule 111 of the Rules. In addition, the prosecution submits that the disclosed statement of Witness 24 captured all of the issues addressed on 6 March 2008, along with additional information. The prosecution has again reviewed the notes of the pre-interview assessment of Witness 24 and it concluded that it does not contain any exculpatory evidence or information material for the preparation of the defence.³⁹

22. For the witnesses it intends to call, as a general approach, the prosecution has not disclosed their screening notes because, it submits, pursuant to Rule 76(1) and (2) of the Rules, these are not “prior statements made by those witnesses”, but rather the investigator’s opinion of the type of information witnesses can provide”.⁴⁰ However, by way of an exception, it has disclosed

³⁶ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 15.

³⁷ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 6 and 16 to 25.

³⁸ ICC-01/05-01/08-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 16.

³⁹ ICC-01/08-01/05-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 16 and 17.

⁴⁰ ICC-01/08-01/05-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraph 26.

the screening notes of two witnesses in this category because they contain potentially exculpatory evidence or information material for the preparation of the defence.⁴¹

23. The prosecution generally submits that it has complied with its disclosure obligations, having disclosed the relevant potentially exculpatory material pursuant to Article 67(2) and Rule 77, and that it will continue to do so.⁴²

24. As regards the “pre-interview only individuals”, it disclosed 24 screening notes because they contain potentially exculpatory evidence or information material for the preparation of the defence.⁴³

25. The prosecution submits that it has acted in good faith in effecting the disclosure regime described above,⁴⁴ and it resists the suggestion that it should be barred from calling witnesses whose screening notes have not been disclosed.⁴⁵ It is argued that the defence has not advanced a compelling basis such as to justify this intervention by the Chamber.⁴⁶

Legal representatives of victims

26. On 5 March 2010, Principal Counsel for the Office of Public Counsel for Victims, in her role as one of the legal representatives for victims, filed the “Réponse du Représentant légal des victimes a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08 à la requête de la Défense en vue de divulgation de toutes les rencontres préliminaires d’évaluation de tous les

⁴¹ ICC-01/08-01/05-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 18 to 20.

⁴² ICC-01/08-01/05-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 24 and 27.

⁴³ ICC-01/08-01/05-688-Conf-Exp, and ICC-01/05-01/08-688-Red, paragraphs 21 to 24.

⁴⁴ ICC-01/08-01/05-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 9, 24, 25 and 27.

⁴⁵ ICC-01/08-01/05-688-Conf-Exp, and ICC-01/05-01/08-688-Red, paragraphs 20, 22 and 25.

⁴⁶ ICC-01/08-01/05-688-Conf-Exp and ICC-01/05-01/08-688-Red, paragraphs 9 and 24.

témoins du Procureur".⁴⁷ She argues that four of the victims she represents have dual status and thus have a direct interest in this issue.⁴⁸ The response addresses the Request as well as the prosecution submissions, following notification of the public redacted versions of these documents. She suggests the defence approach is excessive and ill-founded⁴⁹ and she endorses the prosecution's submissions that screening notes, by their nature, are internal, non-disclosable documents under Rule 81(1) of the Rules⁵⁰ and that they should not be compared with witness statements, under Rule 111 of the Rules.⁵¹ The legal representative argues for the principle of the independence of the prosecution, which, it is averred, includes its entitlement to conduct pre-interview assessments.⁵² However, the prosecution's interpretation of Rule 81(1) of the Rules is not supported by Principal Counsel, since she submits the prosecution's suggested approach is incompatible and contradictory: on the one hand the prosecution treats the screening notes as internal documents which are exempt from disclosure, whilst on the other hand it clearly accepts that some of the screening notes may fall to be disclosed as exculpatory or Rule 77 material. In this regard the legal representative expresses concern about the 24 screening notes identified by the prosecution which have been included in the confidential, *ex parte* Annex A to which the legal representative does not have access. The legal representative additionally argues that a meeting between the prosecution and someone who may become a witness falls within the category of professionally privileged communications pursuant to Rule 73(2) and the details are therefore exempt from disclosure.⁵³ The legal representative suggests the prosecution, in its approach, has erroneously conflated Rules 77 and 81 of the Rules. Finally, she contends that Rule 77 of the Rules does not

⁴⁷ ICC-01/05-01/08-718.

⁴⁸ ICC-01/05-01/08-718, paragraph 7.

⁴⁹ ICC-01/05-01/08-718, paragraph 35.

⁵⁰ ICC-01/05-01/08-718, paragraph 8.

⁵¹ ICC-01/05-01/08-718, paragraphs 11 to 15.

⁵² ICC-01/05-01/08-718, paragraphs 27 to 30.

⁵³ ICC-01/05-01/08-718, paragraphs 17-18.

apply to these screening notes, because they cannot properly be considered as evidence and as a result they are excluded from the prosecution's disclosure obligations.⁵⁴

III. Relevant provisions

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

Article 54 of the Statute

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

[...]

Article 64(3)(c) of the Statute

Functions and powers of the Trial Chamber

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

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

Article 67(2) of the Statute

Rights of the accused

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide

Rule 76 of the Rules

Pre-trial disclosure relating to prosecution witnesses

⁵⁴ ICC-01/05-01/08-718, paragraphs 20-26.

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 77 of the Rules

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 81(1) of the Rules

Restrictions on disclosure

Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

Rule 111 of the Rules

Record of questioning in general

1. A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.
2. When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record.

Rule 112 of the Rules

Recording of questioning in particular cases

1. Whenever the Prosecutor questions a person to whom article 55, paragraph 2, applies, or for whom a warrant of arrest or a summons to appear has been issued under article 58, paragraph 7, the questioning shall be audio- or video-recorded, in accordance with the following procedure:

[...]

28. In addition, Regulation 36 of the Regulations of the Office of the Prosecutor provides:

Selection of persons to be questioned

1. In selecting persons to be questioned in connection with an investigation, the Office shall assess *inter alia* the person's reliability and shall give due consideration to his or her safety and well-being, including all aspects relevant to the risks of re-traumatisation.

2. Prior to contacting a person to be questioned in connection with an investigation, the Office shall collect as much information as possible on the level of risk involved for that person as well as for others who may be at risk on account of such questioning, including those who facilitated contact between the Office and the person to be questioned. Based upon its determination of the level of risk, the Office may consider alternatives to questioning as well as the possibility of additional security measures, in consultation with the Victims and Witnesses Unit (VWU) as appropriate.

3. The physical and psychological well-being of persons who are questioned by the Office and are considered vulnerable (in particular children, persons with disabilities and victims of gender and sexual crimes) shall be assessed by a psychology, psycho-social or other expert during a face-to-face interview prior to questioning. This assessment shall determine whether the person's condition at that particular time allows him or her to be questioned without risk of re-traumatisation.

IV. Analysis and Conclusions

29. As relevant to this Decision, the prosecution's duty is to disclose or provide for inspection:

- i) evidence which tends to show the innocence of the accused or that mitigates his guilt, or which may affect the credibility of the prosecution evidence (Article 67(2) of the Statute);
- ii) copies of any prior statements made by the witnesses whom the prosecution intends to call, sufficiently in advance of the proceedings to enable adequate preparation (Article 64(3)(c) and Rule 76 of the Rules); and
- iii) any documents *etc.* that are material to the preparation of the defence or which the prosecution intends to use as evidence or which were obtained from the accused (Rule 77 of the Rules).

30. Therefore, the disclosure regime created by the Rome Statute framework places responsibility on the prosecution to disclose any evidence or material

coming within these provisions, and the Chamber's role is essentially limited to that of resolving instances of "doubt" (see, for instance, Article 67(2)). Given the dispute in this instance, the Chamber needs to investigate whether there are grounds for doubting whether the prosecution has effected appropriate disclosure of any of the screening notes.

31. Pre-assessment interviews (which are compiled prior to taking a statement from a witness) are self-evidently not "statements" for the purpose of Rule 76(1) of the Rules, given particularly the terms of Rule 111 of the Rules. By the latter provision, which is significantly headed "record of questioning in general", a record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record is to be signed by the person who records and conducts the questioning, and by the person who is questioned and his or her counsel, if present. If someone has not signed the record, this is to be noted, along with the reasons (Rule 111(1) of the Rules). Screening notes, on the other hand, are the result of a preliminary procedure, conducted prior to taking a statement, during which the individual is assessed so that a decision can be made as to whether or not a statement is to be taken. There are no requirements in any of the Regulations that any record made during this initial process is to be signed by the potential interviewee. In other words, pre-interview assessments are a stage precedent to an interview when a formal statement is taken for the purposes of Rule 76(1) and Rule 111 of the Rules.

32. As referred to by the prosecution (see paragraph 19 above), Trial Chamber I has observed that screening notes or investigator's notes "are not the same as a signed witness statement or an electronic recording of an interview, both of which provide a certain record of the witness's evidence approved by or coming from the witness. Screening notes and investigator's notes will be a

personal record - not the witness's - of what the latter said."⁵⁵ Although this comment was made in a different context, namely witness familiarization, it is of assistance when considering these issues.

33. Since Rule 76(1) of the Rules is thus not engaged by these applications, the prosecution's duties are those set out in Article 67(2) of the Statute and Rule 77 of the Rules: put generally, it must disclose exculpatory evidence and documents *etc.* that are material to the preparation of the defence case. This will involve fact-specific decisions for each pre-interview assessment, and critically the prosecution must ensure that if there has been a later formal statement, all the exculpatory material in the screening notes has been disclosed within the statement, along with any information that is material to defence preparation. If this has not occurred, the prosecution must disclose the screening notes, or the relevant information.

34. There is good reason to conclude the prosecution has applied the above approach in this case, notwithstanding its suggested reliance on Rule 81(1) of the Rules. In fulfillment of its duties, it has disclosed the pre-interview assessments of 2 witnesses it intends to call, and the pre-interview assessments of 24 "pre-interview only individuals". It follows that it has seemingly reviewed the entirety of this material, and it has served any relevant information for the purposes of Article 67(2) of the Statute and Rule 77 of the Rules. Disclosure under these provisions is an ongoing obligation, and the prosecution will review the material in its possession as the issues and the evidence in the case develop.⁵⁶

35. Addressing the suggestion that these records come within Rule 81(1) of the Rules (*viz.* they are purely internal, preparatory documents), this will depend

⁵⁵ ICC-01/04-01/06-T-104-ENG ET WT, page 24, line 19 to page 25, line 2.

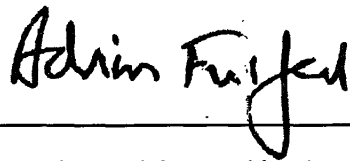
⁵⁶ See also oral ruling delivered on 29 March 2010, ICC-01/05-01/08-T-21-ENG ET WT, page 50, line 22 to page 51, line 4.

critically on the content of the record and the matters that are addressed during the screening process. By its own actions – namely, the disclosure referred to in the preceding paragraph – the prosecution recognises that the content of the pre-interview assessments may fall outside any of the restrictions on disclosure afforded by Rule 81(1) of the Rules, and instead on occasion some of the content will be disclosable under Article 67(2) of the Statute and Rule 77 of the Rules. This, again, will be a fact-specific decision, and on the material available to the Chamber, notwithstanding the prosecution’s somewhat inconsistent submissions, there are no grounds for impeaching its approach to Rule 81(1) of the Rules as applied to the documents relevant to the instant application.

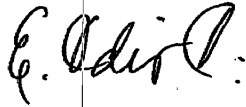
36. The Chamber is unpersuaded by Principal Counsel’s arguments based on the concept of privileged communications under Rule 73(2) of the Rules, because the relationship between the prosecution and a potential witness it speaks with in the context of a criminal trial is not one that is arguably protected by this rule, because no reasonable expectation of privacy can exist; nor is confidentiality essential to the relationship between the Prosecutor and a potential witness. The opposite is the position: the presumption is that the details of what is said by the witness may well be disclosed, subject to certain particular considerations, such as relevance and the witness’s security. Recognizing privilege in this context would not further the objectives of the Statute and the Rules, under Rule 73(2) of the Rules, not least because of the prosecution’s disclosure obligations to the accused.

37. Given there are no *prima facie* reasons to doubt the prosecution’s disclosure decisions within the context of these applications, the Chamber refuses the defence application for disclosure of the screening notes; and it refuses the application for a bar to be applied to the witnesses whose screening notes have not been disclosed.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 9 April 2010

At The Hague, The Netherlands