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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public Document

**Defence Appeal against the Decision on Redactions and Disclosure Issued
Orally on 18 January 2008**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

The Defence Team

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

**Counsel for Victims a/0001/06 to
a/0003/06 and a/0105/06**

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

BACKGROUND

1. On 21 December 2007, the Prosecutor filed the “Prosecution’s Application for Non-Disclosure of Information on the Basis of Article 54(3)(f)”,¹ by which he requested authorisation from the Trial Chamber to disclose only partially the statements of certain witnesses, to make redactions within certain portions of the extracts disclosed, and not to disclose the identity of the witnesses concerned.
2. On 4 January 2008, in its response to the “Prosecution’s Application for Non-Disclosure of Information on the Basis of Article 54(3)(f)”,² the Defence requested the Chamber to order the Prosecutor to disclose the identity of the witnesses concerned and their entire statements.
3. On 18 January 2008, the Trial Chamber issued an oral decision on certain issues relating to redactions to documents held by the Office of the Prosecutor and the disclosure of evidence.³
4. In that Decision, the Trial Chamber held that:

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

[...]

[I]f the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to

¹ ICC-01/04-01/06-1102 + Conf-Exp-Anx1-22.

² ICC-01/04-01/06-1112.

³ ICC-01/04-01/06-T-71-ENG, 18-01-2008.

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

[...]

The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC.⁴

5. On 28 January 2008, the Defence filed an application for leave to appeal.⁵

The following issues were raised:

- a. Whether the Trial Chamber erred in imposing an obligation on the Defence to disclose its lines of defence in advance.
 - b. Whether the Chamber was wrong to give precedence to the protection of certain defence witnesses over disclosure of their identities to the Defence, and whether it erred in concluding that this would not impair the fairness of the trial.
 - c. Whether the Chamber interpreted rule 77 of the *Rules of Procedure and Evidence* in an excessively restrictive manner in concluding that the Prosecution is not under an obligation to provide the Defence with the material in its possession relating to the general use of child soldiers in the Democratic Republic of the Congo.
6. On 1 February 2008, the Prosecutor filed his “Response to the ‘*Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008*’”.⁶

⁴ *Idem*, p. 9, line 4 to p. 10, line 13.

⁵ *Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008*, ICC-01/04-01/06-1134.

⁶ ICC-01/04-01/06-1153.

7. By Decision of 6 March 2008, the Trial Chamber granted the Defence leave to appeal the Oral Decision on the three issues it raised in its application of 28 January.⁷

OBSERVATIONS

A) Whether the Trial Chamber erred in imposing an obligation on the Defence to disclose its lines of defence in advance

8. As defined by the Trial Chamber, the issue raised reads as follows: “whether the prosecution has an inflexible obligation to disclose material, irrespective of whether or not the defence has acted unreasonably in revealing relevant aspects of the defence or the issues to be raised late in the case”.⁸
9. On this issue, the Trial Chamber responded that late disclosure by the Defence of its lines of defence could justify partial or complete non-disclosure by the Prosecutor of exculpatory evidence without impairing the fairness of the trial.
10. The Defence appeals the Chamber’s Decision on the following grounds:
- 1 – The Prosecutor’s obligations to investigate exonerating circumstances and disclose exculpatory material**
11. Under article 54(1)(a), the Prosecutor has a duty to investigate incriminating and exonerating circumstances. He bears full responsibility for investigating exonerating circumstances. The fact that the Defence is entitled to conduct its own investigations in no way affects the Prosecutor’s obligation to determine and collect all evidence

⁷ ICC-01/04-01/06-1210

⁸ *Idem*, para. 12.

which may exonerate the accused, mitigate his responsibility or, generally, be useful to his defence. One of the reasons for this obligation is the fact that the Defence does not have the financial, human and logistical resources which are available to the Prosecutor.

12. This duty to investigate exonerating circumstances reinforces the overall and absolute obligation incumbent on the Prosecutor to disclose to the Defence the evidence gathered in his investigations which may show the innocence of the accused, mitigate his or her responsibility (article 67(2)) or, generally, which is likely to be material to his or her defence (rule 77).
13. With regard to this dual obligation to investigate and disclose, the Prosecutor has the duty to assess the nature of the material in his possession and, in particular, its exculpatory nature. The jurisprudence of the Ad Hoc Tribunals in this regard confirms that the onus is on the Prosecutor alone to determine, on the basis of the facts at issue, which material tends to show the innocence of the accused or to mitigate his or her guilt.⁹
14. The importance of this obligation was emphasised by the Trial Chamber in its Decision of 9 November 2007, where it held that “[i]f the prosecution has in its possession any exculpatory material which it is unable to disclose and which may materially impact on the Court's determination of guilt or innocence, it will be under an obligation to

⁹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, *Judgement*, 29 July 2004, para. 264; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36/1-T, *Decision on ‘Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved’*, 30 October 2002, para. 30; *The Prosecutor v. Bagosora et al.*, Case No. IT-98-41-A, *Decision on Ntabakuze Motion for Disclosure of Specific Exculpatory Evidence*, 20 November 2006, para. 3; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, *Judgement*, 17 December 2004, par. 183.

withdraw any charges which the non-disclosed exculpatory material impacts upon".¹⁰ [emphasis added]

15. The Appeals Chamber of the Ad Hoc Tribunals has, on many occasions, applied a broad interpretation to the scope of the Prosecutor's obligations to disclose exculpatory evidence,¹¹ even though the Prosecutor of the Ad Hoc Tribunals is not vested with the duty to conduct exculpatory investigations, unlike the situation at the International Criminal Court.
16. Compliance with this duty to disclose can in no way be contingent upon any prior action on the part of the Defence. It follows that the Trial Chamber had erred in law in considering that the Prosecutor's failure to comply with his duty to disclose could be justified by a lack of information attributable to the Defence.

2 – Right to silence

17. The Defence has an absolute right to silence guaranteed by article 67(1)(g). The exercise of this right cannot be taken into account by the Chamber, either to restrict the obligations incumbent on the Prosecutor or to limit the rights of the accused under the Statute and the *Rules of Procedure and Evidence*.
18. By considering that late disclosure by the accused of his lines of defence might be grounds for infringing one of the essential guarantees of a fair

¹⁰ ICC-01/04-01/06-1019, para. 28.

¹¹ With regard to Rule 68 of the *Rules of Procedure and Evidence* of the ICTY: *Prosecutor v. Blaškić*, IT-95-14-A, *Judgement*, 29 July 2004, para. 265; *Prosecutor v. Krstić*, Case No. IT-98-33-A, *Judgement*, 19 April 2004, para. 180; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations*, 20 June 2006, para. 9.

trial,¹² the Chamber presupposes a disclosure obligation on the part of the accused, and this directly affects the exercise of his right to remain silent.

19. Such an obligation does not feature in any of the texts, and distorting the Prosecutor's disclosure obligation is a breach of the fundamental rights of the accused. The Defence cannot contravene an obligation which does not exist.

B) Whether the Chamber was wrong to give precedence to the protection of certain defence witnesses over disclosure of their identities to the Defence, and whether it erred in concluding that this would not impair the fairness of the trial

20. The Trial Chamber erred in concluding that the rights of the accused may be restricted by the application of protective measures to defence witnesses. Moreover, non-disclosure of the identity of a witness, as well as his or her entire statement, prevents the Defence from effectively using the information disclosed by the Prosecutor.
21. It should be emphasised that, contrary to what the Trial Chamber stated,¹³ the statements which are the subject of the instant appeal were made by persons whom the Prosecutor does not intend to call as witnesses.¹⁴

¹² ICC-01/04-01/06-T-71-ENG, 18-01-08, p. 9, lines 8 to 10.

¹³ See *Corrigendum*, ICC-01/04-01/06-1224.

¹⁴ ICC-01/04-01/06-1102, para. 5.

1 – Precedence of the rights of the Defence over the protection of defence witnesses

22. Disclosure of exculpatory material is a fundamental right of the accused guaranteed by article 67(2). Non-disclosure of such material would seriously impair the fairness of the trial.
23. The Trial Chamber cannot give precedence to the protection of witnesses to the detriment of the right of the accused to a fair trial. Article 68(1) *in fine* specifically states that protective measures granted to a victim “*shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*”.¹⁵
24. The Appeals Chamber of the ICTR recalled that the existence of protective measures for a witness in a case does not exempt the Prosecutor from complying with his obligation to disclose exculpatory evidence concerning that witness to another accused person.¹⁶
25. Furthermore, it is unrealistic to think that disclosure to the accused of the identity of potentially exculpatory witnesses would be likely to endanger the safety of those witnesses.

2 – Usefulness of the witness statements to the Defence

26. The purpose of article 67(2) is to ensure that the accused obtains all of the evidence which may show his innocence or mitigate his guilt, or which may affect the credibility of prosecution evidence.

¹⁵ See also, at the ICTY: *Prosecutor v. Tadić*, Case No. IT-94-01-T, *Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses*, 10 August 1995, Separate Opinion of Judge Stephen.

¹⁶ *The Prosecutor v. Bagosora et al.*, Case No IT-98-41-A, *Decision on Interlocutory Appeals on Decision on Witness Protection Orders*, 6 October 2005, paras. 45 and 46.

27. In the instant case, the extracts disclosed to the Defence are only useful if the Defence is in a position to contact the persons concerned in order to assess the appropriateness of their appearance.
28. Indeed, the Trial Chamber of the ICTY affirmed that the manner in which evidence is disclosed to the accused must enable him or her to use it effectively.¹⁷ The Trial Chamber of the ICTR also emphasised that the identity of a witness is inextricably connected with the substance of his or her statement.¹⁸
29. Accordingly, the Prosecutor's obligation to disclose exculpatory evidence concerns not only the content of the relevant witness statement or documents, but also the identity of the authors and any other information which would enable the Defence to determine whether or not it would like to use the exculpatory evidence.
30. The Defence's stance is supported by the Trial Chamber of the ICTY in *Brđanin and Talic*:

Under Rule 68 [...], the prosecution is obliged to disclose to the defence the existence of any material known to it which "in any way tends to suggest the innocence or mitigate the guilt of the accused or [which] may affect the credibility of prosecution evidence". [...] If any of those statements fall within the description quoted, the prosecution is obliged by Rule 68 to reveal to the accused the identity of the person who made it.¹⁹ [emphasis added]

¹⁷ *Prosecutor v. Brđanin and Talic*, Case No. IT-99-36-T, *Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved"*, 30 October 2002, para. 26.

¹⁸ *The Prosecutor v. Bagosora*, Case No. IT-98-41-T, *Decision on Disclosure of Identity of Prosecution Informant*, 24 May 2006, para. 5.

¹⁹ *Prosecutor v. Brđanin and Talic*, *Decision on second motion by Prosecution for protective measures*, 27 October 2000, footnote 62; *Prosecutor v. Blaškić*, IT-95-14-A, *Judgement*, 29 July 2004, para. 267.

31. It follows that in respect of witness statements containing exculpatory material, the Prosecutor's disclosure obligation necessarily extends to the identity of the witnesses and the entire statement.
- C) Whether the Chamber interpreted rule 77 of the *Rules of Procedure and Evidence* in an excessively restrictive manner in concluding that the Prosecution is not under an obligation to provide the Defence with the material in its possession relating to the general use of child soldiers in the Democratic Republic of the Congo**
32. The Defence submits that the Prosecutor has an obligation under rule 77 to disclose to it material in his possession relating to the use of child soldiers by other armed groups in the Democratic Republic of the Congo.
33. It is worth emphasising that the Prosecutor did not object to the disclosure to the Defence of material relating to the use of child soldiers by other armed groups. He voluntarily disclosed that material until the Chamber issued its Oral Decision of 18 January 2008. Moreover, the Prosecutor has never requested the Chamber to render a decision on the matter.²⁰

1 – Inspection, pursuant to rule 77, of material in possession of the Prosecutor

34. The purpose of rule 77 is to bring to the attention of the Defence material necessary for the preparation of the defence. The preparation of the defence involves various aspects, including analysing the evidence disclosed by the Prosecutor, conducting investigations in the field and gaining a sufficient understanding of the context in which the crimes charged are alleged to have been committed.

²⁰ The Prosecutor made reference thereto at the hearing of 10 January 2008; see: ICC-01/04-01/06-T-69-ENG, p. 59, lines 18 ff.

35. Furthermore, the Appeals Chamber of the ICTR noted in *Bagosora* that “[p]reparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence”.²¹
36. Rule 77, which permits the Defence to inspect evidence material to the defence of the accused, is an essential component of the principle of equality of arms. Since the Defence has fewer resources than the Prosecutor for its preparation, the Prosecutor’s disclosure obligations must therefore be interpreted broadly in order to offset this obvious imbalance.²² Moreover, in case of doubt, the rule must be interpreted in favour of the accused.²³

2 – Need for the Defence to obtain this material

37. The Trial Chamber, while emphasising that the Defence was under no obligation to provide assistance to the Chamber on the matter, asked the Defence how the use of child soldiers by other armed groups could assist it in its preparation.²⁴
38. In order to assist the Chamber, the Defence noted that:

It doesn’t seem to us certainly that these factual elements, the use by other armed groups of child soldiers is part, for example, of a specific reasons for excluding criminal responsibility, et cetera. As the Prosecutor indicated in a clear way, it appeared necessary to us in the preparation of the defence to be able to inspect a maximum amount of information with regards to the phenomenon of the use of child soldiers in Ituri during this period. Before

²¹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, *Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence*, 25 September 2006, para. 9 (referring to *United States v. Marshall*, 132 P.3d 63, 68 (D.C. Cir. 1998)).

²² In relation to Rule 68 of the *Rules of Procedure and Evidence* of the ICTY: *Prosecutor v. Blaškić*, IT-95-14-A, *Judgement*, 29 July 2004, para. 265; *Prosecutor v. Krstić*, IT-98-33-A, *Judgement*, 19 April 2004, para. 180.

²³ Recognized criminal law principle: “*pro reo de dubio*”.

²⁴ ICC-01/04-01/06-T-69-ENG, p. 61, lines 18 ff.

setting a defence line, it's necessary to understand the situation, and it appeared to us that this information was useful to us and even necessary to us to be able to understand the situation in Ituri at that time [...].²⁵ [emphasis added]

39. The Chamber held that, due to the fact that the material was not in itself sufficient to exonerate the accused, it did not have to be disclosed to the Defence under rule 77.²⁶
40. The Trial Chamber erred in law in holding that material which is not exonerating is not necessary for the preparation of the accused's defence.
41. It is necessary for the Defence to understand the circumstances surrounding the events in order to conduct investigations meaningfully. The material for which the Defence is seeking disclosure covers the same geographical and temporal scope and the same criminal conduct as the charges brought against the accused.
42. Since the Defence has very limited investigative resources, it would be unfair to require it to devote part of its scarce resources to obtaining information which the Prosecutor has already collected in the course of his investigations.
43. Information about the use of child soldiers by other armed groups might, for example, assist the accused in the preparation of his defence by collecting information on, *inter alia*, these three (3) key areas of investigation: 1) the direct and indirect causes of the presence of child soldiers in the armed forces, 2) the circumstances of their participation, if any, in the hostilities, and 3) the policies implemented for their demobilisation.

²⁵ ICC-01/04-01/06-T-69-ENG, p. 66, lines 3 ff.

²⁶ ICC-01/04-01/06-T-71-ENG, 18-01-2008, p. 8, lines 11 to 20.

Stay of the proceedings

44. Given the importance of the issues raised herein, and more specifically the impact they will have on the course of the trial, the Defence requests that the proceedings be stayed for the duration of the appeal.

45. Were the trial to commence on the basis of unfair rules, the Defence would find itself in a situation which might be impossible to remedy, even if its appeal were to be allowed by the Appeals Chamber.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

ORDER an immediate stay of the proceedings for the duration of the appeal;

ALLOW this appeal;

SET ASIDE the Oral Decision of 18 January 2008 in respect of the issues raised in this appeal;

FIND AND RULE that the Trial Chamber cannot order the Defence to disclose its lines of defence in advance;

FIND AND RULE that non-disclosure of defence evidence by the accused cannot have any impact on the Prosecutor's obligations to disclose and inform;

ORDER the Prosecutor to immediately disclose to the Defence all of the witness statements including exculpatory material and the identity of the persons concerned in those statements;

ORDER the Prosecutor to disclose to the Defence material in his possession relating to the general use of child soldiers in the DRC.

[signed]
Ms Catherine Mabile, Principal Counsel

Dated this 17 March 2008, at The Hague