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**International
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Court**

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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

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

Public Document

Decision on defence disclosure and related issues

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Petra Kneuer

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Registrar

Ms Silvana Arbia

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* (“Bemba case”) issues the following Decision on defence disclosure and related issues.

I. Background and submissions

1. At a status conference held on 7 October 2009, the Trial Chamber requested the parties to submit observations on whether the practices of Trial Chamber I with regard to defence disclosure should be adopted in the *Bemba* case.¹
2. On 21 October 2009, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Submission on whether the Chamber should adopt or depart from the jurisprudence of Trial Chamber I on the manner of submission of evidence by the parties and participants at trial” (“prosecution Submission”).² In its Submission, the prosecution argued that the Chamber should “adop[t] and appl[y] the jurisprudence developed by Trial Chamber I in the *Lubanga* case on the manner of submission of evidence by the parties and participants at trial.”³
3. On 26 November 2009, the defence of Mr Jean-Pierre Bemba (“defence”) filed its “Corrigendum Observations de la Défense relatives à la jurisprudence de l’Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense”.⁴ The defence argued that it would not be appropriate to apply all of Trial Chamber I’s practices in the present

¹ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 23 line 21 to page 24, line 13.

² Prosecution’s Submission on whether the Chamber should adopt or depart from the jurisprudence of Trial Chamber I on the manner of submission of evidence by the parties and participants at trial, 21 October 2009, ICC-01/05-01/08-569.

³ ICC-01/05-01/08-569, paragraph 4.

⁴ Corrigendum Observations de la Défense relatives à la jurisprudence de l’Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 November 2009, ICC-01/05-01/08-620.

case,⁵ in particular, those related to matters pertaining to defence disclosure obligations.⁶ In this regard, the defence developed five main arguments:

- a. First, the defence submitted that its position on the issues related to disclosure would be subject to whether the defence would be allowed to proof its witnesses, and that any prohibition of witness proofing should not be imposed on the defence in a restrictive manner.⁷
- b. Second, the defence submitted that Trial Chamber I's jurisprudence does not impose on the defence a general obligation to disclose its evidence.⁸ More specifically, the defence argued that it should not be imposed disclosure obligations equivalent to those of the prosecution, in accordance with international jurisprudence and with the Rome Statute ("Statute").⁹
- c. Third, the defence argued that it should not be obliged to disclose the outline of its defence, or the content of the questions it intends to put to witnesses.¹⁰ Alternatively, the defence contended that if it is required to disclose the defence's outline, such forced disclosure would only be of a very general nature, and should only happen at the end of the prosecution's case.¹¹
- d. Fourth, the defence argued that it should not be compelled to disclose the statements of its witnesses, save exceptionally. The

⁵ ICC-01/05-01/08-620, paragraph 2.

⁶ ICC-01/05-01/08-620, paragraphs 4-72.

⁷ ICC-01/05-01/08-620, paragraphs 4 and 9-10. However, the Majority of the Chamber, composed of Judge Steiner and Judge Aluoch, later found that "the issue raised by the defence in its filing dated 26 November 2009, relating to the contact and preparation of witnesses for trial, which was not reiterated in its observations on the Unified Protocol, may be considered as having been withdrawn by the defence", and thus rejected the submission *in limine*. See Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016, paragraph 35.

⁸ ICC-01/05-01/08-620, paragraphs 32-39.

⁹ ICC-01/05-01/08-620, paragraphs 40-46.

¹⁰ ICC-01/05-01/08-620, paragraphs 47-49. The defence's argument in relation to the content of the questions to witnesses appears to only be directed to the case where the defence did not call the witnesses. As such, this argument is irrelevant to the present Decision and will not be examined further.

¹¹ ICC-01/05-01/08-620, paragraph 50.

defence specified that while it did not contest that a Chamber may request the disclosure of evidence when it is in the interest of justice, (Rule 79(4) of the Rules of Procedure and Evidence (“Rules”)), such disclosure may only be imposed on the defence when it is demonstrated that it would not be in violation of the accused’s right to not have imposed on him any reversal of the burden of proof or any onus of rebuttal (Article 67(1)(i) of the Statute).¹² The defence concluded its argument on this matter by specifying that at most, the defence can only be requested to disclose the statements of its witnesses when such statements are in its possession.¹³

- e. Fifth and last, the defence argued that in relation to its obligations of disclosure and inspection of material under Rule 78 of the Rules, a deadline should not be imposed any earlier than seven days before the commencement of the presentation of its evidence.¹⁴ The defence further argued that it should not be imposed to communicate in advance the documents which it intends to use in the conduct of witness’ examination.¹⁵

- 4. On 18 December 2009, the legal representatives of victims authorised to participate in the trial proceedings filed their “Réponse conjointe des représentants légaux des victimes aux Observations de la Défense relatives à la jurisprudence de l’Affaire *Lubanga*”,¹⁶ arguing, *inter alia*, that the Chamber should adopt Trial Chamber’s I practices with regard to the disclosure regime imposed on the defence.¹⁷

¹² ICC-01/05-01/08-620, paragraphs 55-56.

¹³ ICC-01/05-01/08-620, paragraph 61.

¹⁴ ICC-01/05-01/08-620, paragraphs 62-63.

¹⁵ ICC-01/05-01/08-620, paragraphs 64-72.

¹⁶ Réponse conjointe des représentants légaux des victimes aux Observations de la Défense relatives à la jurisprudence de l’Affaire *Lubanga*, 18 December 2009, ICC-01/05-01/08-657.

¹⁷ ICC-01/05-01/08-657, paragraphs 23-24.

5. On 21 December 2009, the prosecution filed its “Prosecution’s Response to Defence’s « Observations de la Défense relatives à la jurisprudence de l’Affaire *Lubanga* »”.¹⁸ The prosecution recalled the relevant decisions of Trial Chamber I, and argued that these decisions “have a firm legal basis under the Statute and the Rules and should be followed here.”¹⁹ The prosecution further argued that the “disclosure requirements serve to secure a fair and expeditious trial”, without violating the accused’s rights.²⁰ The prosecution moreover asserted that: (1) defence disclosure obligations pursuant to Rule 79(4) of the Rules and Regulation 54 of the Regulations of the Court will assist the Chamber in its determination of the truth;²¹ and (2) defence disclosure pursuant to Rule 78 of the Rules is mandatory and must be done in a timely fashion and without the need for a prior request from the prosecution to that effect.²²

6. On 18 November 2010, the Chamber issued its “Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” (“Decision on witness familiarisation”),²³ wherein the Majority of the Chamber, Judge Ozaki dissenting, decided that “no proofing or preparation of witnesses for trial by the parties shall be allowed.”²⁴ The Majority of the Chamber further held that “the issue raised by the defence in its filing dated 26 November 2009 [defence Submission], relating to the contact and preparation of witnesses for trial, which was not reiterated in its observations on the Unified Protocol, may

¹⁸ Prosecution’s Response to Defence’s « Observations de la Défense relatives à la jurisprudence de l’Affaire *Lubanga* sur les questions procédurales se rapportant aux droits de la Défense », 21 December 2009, ICC-01/05-01/08-661.

¹⁹ ICC-01/05-01/08-661, paragraph 12.

²⁰ ICC-01/05-01/08-661, paragraph 13.

²¹ ICC-01/05-01/08-661, paragraph 14.

²² ICC-01/05-01/08-661, paragraphs 16-18.

²³ Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016.

²⁴ ICC-01/05-01/08-1016, paragraph 34.

be considered as having been withdrawn by the defence, and it is therefore rejected *in limine*.”²⁵

7. On 19 November 2010, the Chamber issued its “Decision on Directions for the Conduct of the Proceedings” (“Decision on Rule 140”), in which it determined the modalities of the presentation of evidence at trial, but deferred “some matters relating to the issue of disclosure and associated deadlines for the presentation of evidence by the defence”.²⁶
8. On 22 November 2010, the hearing on the merits in the *Bemba* case started before the Chamber.
9. On 31 May 2011, the Chamber issued its “Order on the procedure relating to the submission of evidence” (“Order for the submission of evidence”), in which it determined the modalities of submission into evidence of materials by the parties for the remainder of the trial.²⁷
10. By an oral ruling on 8 December 2011,²⁸ the Chamber requested the defence to provide a “preliminary indication on the duration of the Defence’s presentation of evidence.”²⁹ The Chamber stressed that the information requested was “preliminary in nature and [could] not bind the defence in any way.”³⁰
11. Accordingly, on 14 December 2011, the defence filed a confidential *ex parte* defence only “Filing on Preliminary Information on the Defence Case”.³¹

²⁵ ICC-01/05-01/08-1016, paragraph 35.

²⁶ Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, paragraph 6.

²⁷ Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470.

²⁸ Transcript of hearing on 8 December 2011, ICC-01/05-01/08-T-199-CONF-ENG ET.

²⁹ ICC-01/05-01/08-T-199-CONF-ENG ET, page 64, lines 1-2.

³⁰ ICC-01/05-01/08-T-199-CONF-ENG ET, page 64, line 10.

³¹ Filing on Preliminary Information on the Defence Case, 14 December 2011, ICC-01/05-01/08-2005-Conf-Exp.

The defence submitted, *inter alia*, that it was unable to provide an estimate of the length of a potential defence presentation of evidence at this stage.³²

II. Relevant provisions

12. In accordance with Article 21(1) of the Statute, the Chamber, in making its determination has considered Articles 31, 64(2), (3)(c), (6)(c), (6)(e), (6)(f), (8)(b) and (10), Article 67(1)(b), (c), (e), (g), (i) and (2), Article 68(1) and (3) and Article 69 of the Statute, Rules 63, 77, 78, 79, 81(1), (3), (4) and (6), Rules 82(5), 84, 134(3) and 140 of the Rules, Regulation 43 of the Regulations of the Court, and Regulations 52, 54 and 55 of the Regulations of the Registry.

III. Analysis

13. At the outset, the Chamber notes that as a number of matters were dealt with in the Decision on witness familiarisation, the Decision on Rule 140 and in the Order for the submission of evidence, the rulings made in these decisions stand, *mutatis mutandis*, for all issues not addressed in the present Decision.

Disclosure and/or inspection of materials under Rule 78 of the Rules

14. The Chamber notes that in relation to the deadline for disclosure under Rule 78 of the Rules, Trial Chamber I held that:

[...] 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, [...] 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.

³² The Chamber notes that while the present decision is classified as “public” in the present paragraph there is a reference to the existence and, to a limited extent, the content of a document filed confidential and *ex parte*. The Chamber considers that the information set out does not warrant confidential and *ex parte* treatment at this time.

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 [...].³³

15. However, Trial Chamber I added that:

[...] 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.³⁴

16. As for Trial Chamber II, it determined that:

[...] the Defence has to disclose the material only when a decision has been made that it will be used at trial. For reasons of fairness and efficiency in the proceedings, disclosure should be made within a reasonable time prior to the hearing during which it will be presented, in order to allow the Prosecution an opportunity to adequately prepare. The Chamber therefore encourages the Defence to permit the Prosecution to inspect documents or other tangible objects falling under Rule 78, as soon as it makes a decision to use them at trial.

51. In any case, the Chamber considers that the Defence shall permit the Prosecution to inspect all material in its possession or control, which it intends to use at trial pursuant to Rule 78, not less than two weeks prior to the scheduled commencement of the Defence case.³⁵

17. The Chamber first notes that the defence has thus far disclosed, and permitted the inspection by the prosecution of, materials in its possession or control prior to the commencement of the presentation of its evidence.³⁶

³³ Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 64.

³⁴ ICC-01/04-01/06-2192-Red, paragraph 65.

³⁵ Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, ICC-01/04-01/07-2388, paragraphs 50-51

³⁶ See *inter alia*, Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 23 November 2010, ICC-01/05-01/08-1029 with one annex; Communication par la Défense du Corrigendum de l'Annexe confidentielle A de ses écritures référencées, ICC-01/05-01/08-1029+Conf-AnxA notifiées le 24 Novembre 2010, 25 November 2010, ICC-01/05-01/08-1044 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 4 February 2011, ICC-01/05-01/08-1190 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 14 March 2011, ICC-01/05-01/08-1324 with one annex; Communication par la Défense des documents

The Chamber commends this practice, and will aim to establish a regime which is the natural continuity of this practice. Having carefully reviewed the Court's jurisprudence and considered the submissions of the parties, the Chamber decides that the defence should disclose and permit the inspection by the prosecution of any Rule 78 materials as soon as the defence makes a decision to use an item as evidence, and in any event, no later than two weeks before the start of the defence presentation of its evidence.

18. However, the Chamber finds that in exceptional circumstances, where the need to use a particular item as evidence only becomes apparent after the deadline set above, the defence may still disclose or permit the inspection by the prosecution of the item, provided that (i) the disclosure or inspection takes place no later than seven days before its intended use; (ii) the defence files a written submission explaining the reasons why the item was disclosed late and why the defence believes it should be permitted to use the item despite its untimely disclosure; and (iii) the Chamber, after hearing the prosecution, rules that the defence should be permitted to use the item.

19. As the Chamber has previously held, the presumption is that disclosable material shall be served in full. Redactions need to be authorised by the Chamber and individually justified under the provisions of the Statute

divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 30 May 2011, ICC-01/05-01/08-1467 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 6 June 2011, ICC-01/05-01/08-1485 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 27 July 2011, ICC-01/05-01/08-1614 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 8 September 2011, ICC-01/05-01/08-1719 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 12 September 2011, ICC-01/05-01/08-1735 with one annex; Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 19 September 2011, ICC-01/05-01/08-1767 with one annex.

and the Rules.³⁷ Therefore, if materials subject to disclosure by the defence under Rule 78 of the Rules fall within the scope of Rules 81(3), 81(4), 81(6) or 82(5) and should be redacted, the defence must seek the Chamber's authorisation no later than four weeks before the defence starts the presentation of its evidence.

20. The defence is reminded that the disclosure of any material needs to comply with the procedures established in the E-Court Protocol.³⁸

Use of documents during questioning

21. Consistent with the Chamber's Decision on Rule 140 and the Order for the submission of evidence, should the parties intend to rely upon documents during the questioning of a witness called by the defence, they shall do so in accordance with the following guidelines:

- a. The defence shall, at least seven working days before the testimony of the witness, provide a list of the documents it intends to use during the questioning. Such documents shall be made available to the Trial Chamber, the prosecution and the legal representatives. The list shall identify the specific material intended to be submitted as evidence during the questioning of the witness and the level of confidentiality of each document.
- b. If the prosecution wishes to use documents when questioning a witness called by the defence, it must, at least three working days before questioning the witness, provide the Trial Chamber, the defence and the legal representatives with a list of the documents it intends to use. The list shall identify the specific material intended

³⁷ Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, ICC-01/05-01/08-813-Conf, paragraph 61; see also Decision on the lifting of redactions in witness statements, 27 October 2010, ICC-01/05-01/08-977, paragraph 6.

³⁸ Registration of eCourt Protocol in the Record of the Case, 22 October 2010, ICC-01/05-01/08-971 and Annex I.

to be submitted as evidence during the questioning of the witness and the level of confidentiality of each document.

This information may be communicated by way of email sent to the Legal Adviser to the Trial Division.

List of defence witnesses and length of questioning

22. The Chamber notes the different approaches adopted by Trial Chambers I and II with regard to the necessity for the defence to submit a list of its witnesses and an estimation of the length of their questioning. While Trial Chamber I broadly requested the defence to communicate the identity of prospective witnesses “after the presentation of the evidence of the prosecution is completed”,³⁹ Trial Chamber II adopted a seemingly stricter regime, and requested the defence to provide the complete identity of the prospective defence witnesses, their anticipated order of appearance as well as the length of their questioning, after the completion of the prosecution case, and no less than two weeks before the start of the defence case.⁴⁰

23. In the interest of efficiency and expeditiousness of the proceedings, the Chamber is of the view that adopting Trial Chamber II’s approach is warranted in the present case and therefore, orders the defence to provide the complete identity of its prospective witnesses, their anticipated order of appearance as well as their estimated length of questioning, no less than two weeks before the start of the defence presentation of evidence. However, if subsequent to the communication of its list of witnesses, the

³⁹ Corrigendum to “Decision on disclosure by the defence”, 11 June 2008, ICC-01/04-01/06-1235-Corr-Anx1, paragraph 41(d).

⁴⁰ ICC-01/04-01/07-2388, page 23, paragraphs (b)(ii) and (iv).

defence wishes to make amendments thereto, it must first seek leave from the Chamber.

24. In addition, should the defence consider that its witnesses need to be granted in-court protective measures, the Chamber orders the defence to file any related request at least two weeks before the start of the defence presentation of evidence. With regard to witnesses who may need to be included in the ICC Protection Programme ("ICCPP"), the defence is reminded that any request for referral to the ICCPP requires additional time for the Victims and Witnesses Unit to process, including making a security assessment.

Information on the scheduling of witnesses

25. Consistent with the Chamber's Decision on Rule 140, and in order to ensure the efficient and smooth conduct of the proceedings, the Chamber instructs the defence to inform the prosecution, legal representatives and the Chamber, of the witness schedule on a weekly basis. In addition, a schedule should be provided each month. This information may be communicated by way of email sent to the Legal Adviser to the Trial Division.

Disclosure of defence witness statements and/or summaries thereof

26. On the issue of whether the defence should disclose statements or summaries of statements of the witnesses it intends to call to testify, Trial Chambers I and II have adopted slightly different approaches. While Trial Chamber I required that the defence disclose summaries of its witness statements, but denied the prosecution's request for disclosure of formal

witness statements,⁴¹ Trial Chamber II required the defence to provide statements for the witnesses it intended to call, or a summary of the key elements of the witnesses' testimony, no later than two weeks before the opening of the defence case.⁴²

27. In order to facilitate the conduct of the defence's presentation of evidence, the Chamber is of the view that at least some essential information on the content of witnesses' testimony should be disclosed to the prosecution, and communicated to the legal representatives and the Chamber. Such disclosure will allow the Chamber to prepare for and understand the witnesses' testimony, and allow the prosecution to adequately prepare its examination of the witnesses called by the defence.

28. Therefore, the Chamber decides that the defence should provide summaries of its witnesses' testimony, or alternatively, full witness statements, no later than two weeks prior to the start of the defence's presentation of its evidence. The summaries should contain sufficient detail to enable (i) the prosecution, legal representatives and the Chamber to understand the nature of the witnesses' testimony and how it relates to the charges; and (ii) the prosecution to prepare a meaningful questioning of the witnesses.

29. At a minimum, the witness summaries must contain the following information: (i) basic identifying information such as the witness' name, pseudonym, aliases, date and place of birth; (ii) the witness' occupation at the time of the relevant events; (iii) the witness' physical location at the time of the events; (iv) the witness' relationship to the accused, if any; (v) whether the witness has previously provided sworn testimony or formal

⁴¹ ICC-01/04-01/06-2192-Red, paragraphs 58-59.

⁴² ICC-01/04-01/07-2388, page 23, paragraphs (b)(iii).

statements in relation to the events at issue in the *Bemba* case, and if so, to whom and in which context; and (vi) the issues upon which the witness is expected to testify and how those issues relate to the charges.

30. As already stated, the presumption is that disclosable material shall be served in full; redactions need to be authorised by the Chamber and individually justified under the provisions of the Statute and the Rules.⁴³ Therefore, if the defence intends to apply redactions to the summaries or actual statements of the witnesses it intends to call to testify, it must seek the Chamber's authorisation no later than four weeks before the commencement of the presentation of its evidence.

Disclosure and/or inspection of materials pursuant to Article 67(2) of the Statute and Rule 77 of the Rules

31. The Chamber recalls that under Article 67(2) of the Statute and Rule 77 of the Rules, the prosecution is required to disclose and/or permit the inspection to the defence of any item in its possession or control which (i) shows or tends to show the innocence of the accused; (ii) mitigate the guilt of the accused; (iii) may affect the credibility of prosecution evidence; (iv) is material to the preparation of the defence; or (v) was obtained from or belong to the accused. As the Chamber has already held, disclosure and inspection under these provisions is an ongoing obligation.⁴⁴ The Chamber therefore instructs the prosecution to disclose any items that are identified for disclosure or inspection during the defence presentation of evidence promptly upon their identification.

Outline of defence strategy

⁴³ See paragraph 19 above.

⁴⁴ Decision on the Defence request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Red, paragraph 34.

32. The Chamber notes that both Trial Chambers I and II required the defence to submit a document outlining the factual and legal issues it intended to raise during the defence's presentation of evidence in the respective cases.⁴⁵ The Chamber sees no reason to adopt a different approach in the *Bemba* case. Such outline will provide, *inter alia*, the prosecution with the context in which to prepare its questioning of the defence's witnesses, increasing the efficiency of the procedures as a whole. Further, it will enable the Chamber to understand the thrust of the defence case from its outset and provide the Chamber with the necessary context in which to consider the testimony of the defence witnesses and to assess its relevance, as well as the relevance of other evidence presented by the defence. The Chamber is also of the view that the filing of an outline by the defence will not contravene the right of the accused to remain silent pursuant to Article 67(1)(g) of the Statute, since the accused – at least in part – waives that right if he chooses to present evidence.

33. For the reasons set out above, the Chamber orders the defence to provide a document outlining the legal and factual issues that it intends to raise during the presentation of its evidence, as well as the possible affirmative defences that it intends to advance. This includes the defence's intent to raise the existence of an alibi or a ground for excluding criminal responsibility, pursuant to Article 31 of the Statute and Rule 79(1) of the Rules. The Chamber acknowledges the defence's right not to be obliged to disclose its strategy before the conclusion of the prosecution's presentation of evidence and any potential evidence from the victims.⁴⁶ The document should therefore only be provided after the conclusion of the prosecution's

⁴⁵ ICC-01/04-01/06-1235-Corr-Anx1, paragraph 41; ICC-01/04-01/07-2388, page 23, paragraph (b)(i). See also Decision on the defence request for leave to appeal the "Decision on disclosure by the defence", 8 May 2008, ICC-01/04-01/06-1313.

⁴⁶ ICC-01/05-01/08-620, paragraphs 47-49.

presentation of evidence and any evidence presented by the legal representatives of victims, but no later than two weeks before the start of the defence's presentation of evidence.

34. In addition, the Chamber decides that no later than two weeks prior to the start of the defence's presentation of evidence, the defence should file a list of all the documents it intends to rely upon as evidence, indicating (i) whether the Chamber has already admitted every given item as evidence; and (ii) the level of confidentiality of each item.

IV. Conclusion

35. In view of the foregoing, and subject to any further decision on the matter, the Chamber reiterates its rulings made in the Decision on witness familiarisation, the Decision on Rule 140 (relevant paragraphs of parts B to H) and in the Order for the submission of evidence:

36. The Chamber orders the defence to:

- a) file with the Chamber not less than four weeks prior to the commencement of the defence presentation of its evidence, any request for redactions to material the defence intends to use at trial, if applicable;
- b) permit the prosecution to inspect any material in the defence possession or control which is intended for use by the defence at trial not less than two weeks prior to the commencement of the defence presentation of its evidence. Whenever possible, the defence shall facilitate this process in accordance with the E-court Protocol.

c) provide the prosecution, the legal representatives and the Chamber, not less than two weeks prior to the commencement of the defence presentation of its evidence, with:

i) a list of witnesses containing the names or pseudonyms, where applicable, of all witnesses whom it intends to call to testify at trial, in their anticipated order of appearance as well as the estimated length of questioning of each witness;

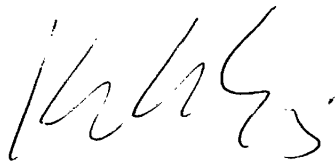
ii) if applicable, any request for in-court protective measures stating the legal and factual basis for such a request;

iii) a list of all the documents it intends to rely upon as evidence, indicating (1) the ones that have already been admitted as evidence; and (2) the level of confidentiality of each item;

iv) the statements of the witnesses whom it intends to call to testify, or a summary of the key elements that each witness will address during his or her testimony as prescribed in paragraph 29 above; and

v) a document outlining the legal and factual issues that it intends to raise during its presentation of evidence as well as the defences to be advanced by the accused, if any.

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


Judge Sylvia Steiner
Judge Joyce Aluoch
Judge Kuniko Ozaki

Dated this 24 February 2012

At The Hague, The Netherlands