

**Cour
Pénale
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**International
Criminal
Court**

Original : **English**

No.: **ICC-01/04-01/06**
Date: **28 March 2008**

APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public

**Prosecution's Response to Defence Document in Support of Appeal against
Oral Decision of Trial Chamber I rendered on 18 January 2008**

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Introduction

The Defence has filed an appeal against an oral decision rendered by the Trial Chamber on 18 January 2008, which confirmed an earlier 13 December 2007 oral decision on disclosure, and provided certain further guidance on the process of disclosure and inspection and on various Prosecution applications regarding redactions.

Two of the issues appealed by the Defence relate to potential, future implications discussed by the Trial Chamber in the impugned Decision if material is only identified as potentially exculpatory at a late stage in proceedings, due to a decision by the Defence not to provide information on its case or lines of defence. The Prosecution submits that the Trial Chamber was entirely correct in preserving a degree of flexibility in how to address such a situation, and its impact on the fairness of the proceedings, if and when it should arise. The Prosecution thus opposes the appeal on the first two issues.

The third issue relates to the interpretation of Rule 77, and whether it covers material relating to the recruitment and use of child soldiers by other armed groups in the DRC. In light of the particular circumstances of this case, the Prosecution has not opposed providing material on the recruitment and use of child soldiers by other armed groups in Ituri during the relevant period under Rule 77. The Prosecution thus does not oppose the appeal on this issue in these circumstances.

Procedural Background

1. On 13 December 2007, the Trial Chamber issued an oral decision on a number of Prosecution applications for the lifting, retention and imposition of redactions.¹
2. Between 12 December 2007 and 14 January 2008 the Prosecution made a series of further applications, in large part pursuant to the 13 December 2007 decision, to lift, make or maintain redactions, disclose certain material in summary form, and withhold certain information (in most cases on a temporary basis).²

¹ ICC-01/04-01/06-T-65-ENG. The principles from the 13 December 2007 decision which are relevant to the present Decision are summarised by the Trial Chamber in the Decision: ICC-01/04-01/06-T-71-ENG, 18 January 2007, p. 4, line 9 to p. 6, line 1.

² These applications are listed and summarised by the Trial Chamber in the Decision: ICC-01/04-01/06-T-71-ENG, 18 January 2007, p. 1, line 17 to p. 3, line 11.

3. On 18 January 2008, the Trial Chamber issued a further oral decision on these prosecution filings (“the Decision”).³
4. On 28 January 2008, the Defence sought leave to appeal the Decision.⁴ The Prosecution opposed the Application for Leave to Appeal in part, but did not oppose leave being granted for one issue (relating to the interpretation of Rule 77).⁵
5. On 6 March 2008, the Trial Chamber granted leave to appeal three issues.⁶
6. On 17 March 2008, the Defence filed the “Acte d’appel de la Défense relatif à la Décision relative aux expurgations et à l’obligation de communication rendue oralement le 18 janvier 2008”.⁷
7. The Prosecution hereby files its response to the Appeal Brief, pursuant to Regulation 65(5).

The Issues on Appeal

8. This appeal is based in particular on the findings of the Chamber that: ⁸

“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.”⁹

“if the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused. Accordingly, if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused.”¹⁰

³ ICC-01/04-01/06-T-71-ENG (“the Decision”).

⁴ ICC-01/04-01/06-1134 (“Application for Leave to Appeal”).

⁵ ICC-01/04-01/06-1153, 1 February 2008.

⁶ ICC-01/04-01/06-1210 (“Decision Granting Leave”).

⁷ ICC-01/04-01/06-1227 OA11 (“Appeal Brief”).

⁸ Appeal Brief, para. 4; see also Defence Application for Leave to Appeal, para. 6

⁹ Decision, p. 9, lines 4 to 10.

¹⁰ Decision, p. 9, lines 12 to 21; see also Decision Granting Leave to Appeal, paras. 10 and 18.

“The Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC.”¹¹

9. Based on those findings, the Trial Chamber granted leave to appeal three issues:

- i. “whether unnecessary and unjustified late disclosure by the defence can properly have an impact on prosecution disclosure”;¹²
- ii. whether the Trial Chamber erred in allegedly giving preference to the protection of a witness over the right of the defence to know the identity of those witnesses and concluding that this might not impair the fairness of the trial;¹³ and
- iii. the interpretation of “material to the preparation of the defence” in Rule 77, in holding that the Prosecution had no obligation to communicate material relating to the use of child soldiers by other armed groups.¹⁴

10. In relation to the first two issues, the Prosecution opposes the appeal. The Prosecution submits that the Trial Chamber did not err in recognising that late disclosure by the Defence of elements of its case strategy or lines of defence may affect the Prosecution’s ability to identify, and therefore disclose, certain evidence as potentially exculpatory. It is only proper that this is taken into account when considering any implications for the fair conduct of the proceedings. Similarly, if this late identification of evidence as exculpatory means that a witness cannot be afforded necessary protection, then this is likewise a factor which must be considered in determining whether the non-disclosure of the identity of that witness renders the trial unfair.

11. In relation to the third issue, the Prosecution does not oppose the appeal. While the Prosecution maintains that information regarding the recruitment of child soldiers by other armed groups is not exculpatory, and thus does not fall under Article 67(2), it recognises that in the circumstances of this case such information may be material to the preparation of the defence and therefore properly be the subject of inspection under Rule 77.

12. The Prosecution finally opposes the application for suspensive effect. The Appellant will suffer no prejudice, nor will the implementation of the impugned terms of the Decision

¹¹ Decision, p. 10, lines 11 to 13.

¹² Decision Granting Leave to Appeal, para. 14; see generally paras. 9-15.

¹³ Decision Granting Leave to Appeal, paras. 16-20; see also Application for Leave to Appeal, paras. 7(b), 15-22. This possibility was mentioned in the context of the non-disclosure of the identity of an individual whose statement contains potentially exculpatory material, which was only identified as such at a late stage due to late revelation by the Defence of their proposed lines of defence, which in turn prevents their necessary protection - Decision, p. 9, lines 12 to 21.

¹⁴ Decision Granting Leave to Appeal, paras. 21-24; see also Application for Leave to Appeal, paras. 7(c), 23-28.

render the object of the appeal moot. The orderly and efficient preparation for trial is, in this instance, best served by maintaining the current status and schedule.

The First Issue – the Trial Chamber did not impose on the Defence any obligation to disclose its lines of defence or relieve the Prosecution of any burden placed upon it

13. The Prosecution submits that the Appellant has demonstrated no error in the Decision, appellable or otherwise, in respect of the first issue. Rather, the Appellant misconstrues or mischaracterises the relevant portions of the Decision.
14. The Trial Chamber itself stresses that the Decision does not impose any obligations on the Defence.¹⁵ Further, nothing in the Decision justifies the total or partial non-disclosure of potentially exculpatory information.¹⁶ Under the Decision, the Prosecution will continue to fulfil its ongoing obligation to identify and disclose any information which it considers to be potentially exculpatory. The Prosecution submits that the Decision merely recognises that if the Defence only identifies certain lines of defence at a late stage (and in particular where the late disclosure by the Defence is unnecessary, unjustified or unreasonable),¹⁷ then this will necessarily affect the Prosecution's ability to identify and disclose such information in a timely manner,¹⁸ and that this may in turn be taken into account by the Chamber in assessing the impact on the fairness of the trial.
15. In this regard, the Prosecution submits that none of the provisions of the Statute and Rules cited by the Appellant demonstrate any error in the Decision. Article 54(1)(a) is irrelevant to the present discussion: it does not impose any additional disclosure obligations on the Prosecution; rather, it imposes on the Prosecutor, "in order to establish the truth" a duty to conduct objective (as opposed to partisan) investigations,¹⁹ and to do so by placing equal investigative emphasis on incriminating and exonerating

¹⁵ Quite to the contrary, the Decision explicitly recognises that the Defence was entitled not to set out the defences on which it is likely to rely or the anticipated issues (Decision, p. 9, lines 4-7), and the Decision Granting Leave to Appeal confirms that the Decision did not impose any duty of disclosure on the accused, but rather dealt with the consequences of late revelations on the Prosecution's duty of disclosure (para. 12).

¹⁶ As alleged by the Appellant in Appeal Brief, para. 9. The Prosecution will address the question of the non-disclosure of the identity of a witness, where the exculpatory evidence from the statement of that witness has been disclosed, in the context of the second issue on appeal (see paras. 21-30, below) which specifically addresses this particular aspect.

¹⁷ Decision, p. 9, lines 8, 13-14 and 20; Decision Granting Leave, paras. 12 and 14.

¹⁸ As the Decision Granting Leave to Appeal expressly clarifies, "the Chamber addressed the practical consequences **for prosecution disclosure** if the accused reveals, at an unnecessarily and unjustifiably late stage in proceedings, that particular material is potentially exculpatory" (para. 12, emphasis in original).

¹⁹ See e.g. Turone, "Powers and Duties of the Prosecutor" in Cassese (et al) (eds) *The Rome Statute of the International Criminal Court* (2002) pp. 1164-65.

circumstances. Disclosure of potentially exculpatory evidence, in contrast, is governed by Article 67(2), which requires that the Prosecution disclose any evidence in its possession which it considers to be of such character, regardless of whether that evidence was collected by the Prosecution in the framework of its investigation.²⁰

16. The two provisions thus deal with separate activities and functions. The Prosecution does not agree with the Appellant's submissions on the scope and implications of Article 54(1)(a).²¹ But beyond that, and more importantly, its role under this provision is independent of the obligation on the Prosecution to "disclose to the defence evidence in the Prosecutor's 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."²²
17. Nothing in the impugned Decision contradicts this framework or otherwise misconstrues the principles and mechanisms relating to the disclosure and inspection of material in the Prosecution's possession and control. In particular, nothing in the Decision suggests that the duties of disclosure by the Prosecution are being subordinated to a preliminary approach ("*demarche préalable*") by the Defence.²³ In conformity with the Statute, including the Appellant's interpretation thereof,²⁴ the terms of the Decision do not alter the role of the Prosecution, which continues to bear the responsibility for assessing

²⁰ For example, the evidence may have been received by the Prosecution from third parties prior to the commencement of its investigation. In addition, Rule 77 (to which the Appellant makes passing reference, see Appeal Brief, para. 12) differs again. This Rule aims to assist the defence in the investigation and preparation of its case. However it does not allow for the defence to conduct fishing expeditions through the Prosecution's files, but rather to access specific material on the basis of its materiality – see e.g. *Nahimana et al v The Prosecutor*, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 at para 11; *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 30.

²¹ Appeal Brief, para. 11. This obligation has been interpreted to mean that "[t]he Prosecutor must investigate all aspects of the case" and "must conduct the investigation with complete integrity" (Bergsmo and Kruger, "Article 54" in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 718); see also Turone, "Powers and Duties of the Prosecutor" in Cassese (et al) (eds) *The Rome Statute of the International Criminal Court* (2002) pp. 1164-65.

In particular, Article 54(1)(a) does not impose on the Prosecution an obligation to assume the entirety of the responsibility of investigating the Defence's case. To do so would in fact be contrary to the rights of the defence, as it would mean that the Prosecution defined the possible case-theories or lines of defence which they could present (see e.g. *Prosecutor v Blagojevic et al*, IT-02-60-PT, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 21).

²² Article 67(2). As affirmed by the ICTY, "Rule 68 [which is mirrors Article 67(2)] is not intended to serve as means through which the Prosecution is forced to replace the Defence in conducting investigations ... The primary responsibility for investigating the charges against an accused, including seeking and gathering information related to those charges, lies with his or her defence counsel" – *Prosecutor v Blagojevic et al*, IT-02-60-PT, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 26.

²³ As alleged by the Appellant in Appeal Brief, para. 16.

²⁴ Appeal Brief, paras. 12-13.

whether evidence is potentially exculpatory, and will continue to review and analyse the evidence in its possession in order to comply with its obligations. Those obligations are to disclose the information “as soon as practicable”; and the Prosecution cannot in be expected to disclose evidence which it could not practicably have been expected to identify as potentially exculpatory.

18. In this regard, the Decision merely emphasizes that the Prosecution can only discharge its duties under Article 67(2) on the basis of the prosecution case, its best understanding of the defence case, and the main exonerating hypotheses that can reasonably be identified in advance; and that timely provision by the Defence of the parameters of the information that it considers to be of an exonerating nature or its proposed lines of defence will obviously assist the Prosecution and enhance the process of disclosure.²⁵ Conversely, lack of timely input by the Defence can lead to inadvertent omissions or gaps in the search for and identification of exculpatory material, despite the Prosecution acting at all times in good faith and with the utmost diligence. Where, as a result, potentially exculpatory information is identified only at a late stage in the trial, then it is proper and reasonable that in determining how to address this, and its impact on the fairness of the proceedings,²⁶ the Trial Chamber may consider amongst other things: (1) the degree to which the late identification of the evidence was the result of the Defence only belatedly identifying a particular line of defence or an additional and unforeseen dimension of the Defence case; and (2) whether that late disclosure by the Defence was, or was not, reasonable or justified.
19. Thus the Decision does not alleviate in any manner the burden placed by the Statute on the Prosecution, or impose a duty of cooperation on the Defence or otherwise subordinate the Prosecution’s obligations. Rather, as stated above, it merely recognises that detrimental consequences for the completeness of the disclosure process may ensue

²⁵ See for example *Prosecutor v Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera’s Motion to Compel Inspection and Disclosure Rules 54, 66(B) and 68 of the Rules of Procedure and Evidence, 5 July 2005, para. 15, where the defence’s request to be provided with materials by the Prosecution was denied, as the defence did “not indicate how the materials are exculpatory or potentially exculpatory”. See also *Prosecutor v Brdanin*, IT-99-36-T, Decision on Motion by the Defence of Milan Martić for Access to Confidential Transcripts and Documents, 1 March 2004, where the Trial Chamber held that for the defence to be provided access of the requested material by the Prosecution, the defence must (i) identify or describe the materials by its general nature as clearly as possible; and (ii) show a legitimate forensic purpose for such access. In this context, see also Rule 67(A) of the ICTY, which has been amended recently to expand the duties of the Defence to provide the Prosecution with information pertaining to its case.

²⁶ For example, whether the trial should be delayed as a result of the late disclosure of the relevant evidence by the Prosecution, and if so whether any such delay is inconsistent with the rights of the defence.

in the absence of such communication from the Defence to the Prosecution.²⁷ This observation in no way constitutes an appellable error.

20. The Prosecution further submits that, for the same reasons, the arguments raised by the Appellant in relation to this issue based on the right to silence²⁸ are misplaced. The right of the accused to remain silent is not touched at all by the Decision, which explicitly confirms this right and, as stated, places no obligations on the Defence. No adverse inferences are drawn, as a matter of law, in the Decision from a failure by the Defence to furnish the Prosecution with any supplementary information that may assist the Prosecution in the timely and efficient discharge of its duties under Article 67(2); nor are the rights of the accused or the obligations on the Prosecution diminished in any way. As demonstrated, the Decision merely foreshadows certain practical negative consequences that may ensue from a decision from the Defence not to actively engage in the disclosure process, and that these consequences and their cause would have to be taken into consideration when assessing the fairness of the proceedings.

The Second Issue – the Trial Chamber committed no error in allowing for the possibility of continuing a trial without disclosing the identity of a witness whose statement contained potentially exculpatory information in certain limited circumstances

21. This issue arose in the Decision in a highly contingent and circumscribed manner.²⁹ The Trial Chamber merely foreshadowed that where information is only identified as exculpatory at a late stage in proceedings due to a decision of the Defence not to provide any indication of its proposed lines of defence,³⁰ without any justification, and this late notice prevents proper protection of the relevant witnesses, then the possibility exists that in a subset of those limited circumstances, the fairness of the trial may be

²⁷ As the Decision Granting Leave to Appeal expressly clarifies, “the Chamber addressed the practical consequences **for prosecution disclosure** if the accused reveals, at an unnecessarily and unjustifiably late stage in proceedings, that particular material is potentially exculpatory” (para. 12, emphasis in original).

²⁸ Appeal Brief, paras. 17-19.

²⁹ The Appellant does not specifically identify the portion of the Decision on which it bases its appeal in respect of this issue in either the Appeal Brief (paras. 21-31) or in the prior Application for Leave to Appeal (paras. 7(b), 15-22). Based on the portions of the Decision which the Defence stated that it was challenging in particular, the nature of the arguments raised, and the Decision Granting Leave (para. 18), the Prosecution understands that the appeal in respect of this issue relates to p. 9, lines 12-18 of the Decision, which provides that “if the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused.”

³⁰ Such a tactical decision of the Defence may well be legitimate, and the Trial Chamber expressly recognized the right to silence of the accused (Decision, p. 9, lines 6-7). However decisions by parties regarding the conduct of their case at trial may have implications on the management of the trial and on subsequent determinations regarding what is required for a fair trial, as elaborated below (see para. 27 below).

maintained despite the fact that the potentially exculpatory information was disclosed without the identity of the witness.³¹

22. The Appellant fails to identify any specific error on the part of the Trial Chamber in relation to this aspect of the appeal,³² and the Prosecution submits that the Trial Chamber made no error in the Decision in relation to this issue.
23. At the outset, the Prosecution notes that the Decision appears to be based on the premise that the identity of the witness shall generally be disclosed when disclosing potentially exculpatory evidence.³³ However the Prosecution submits that this general rule does not exclude the possibility that, in certain circumstances, the identity of a particular individual may be withheld without compromising the fairness of the trial.³⁴ Such determinations cannot be made in the abstract, but must be made by the Chamber on a case-by-case basis, as provided for in Article 67(2) and Rule 83.³⁵
24. The Prosecution notes that the Appellant has suffered no prejudice from the Decision in relation to this issue. The Decision does not authorise non-disclosure in relation to the identity of any individual whose statement contains an element which may be potentially exculpatory, and the Trial Chamber itself states that this situation may well

³¹ As the Trial Chamber noted in granting leave to appeal, “the impugned decision does not provide for the non-disclosure of the identity of any specific witnesses”, “it remains possible that the issue may not arise at all in the course of the proceedings”, and “a late referral to the Court’s protection programme during the course of a trial could significantly delay the proceedings” - Decision Granting Leave to Appeal, para. 18.

³² In contrast, the Appellant identifies alleged errors of law in relation to the first and third issues – see Appeal Brief, paras. 16 and 40.

³³ The Prosecution further notes that the broader issue of whether the identities of individuals whose statements contained potentially exculpatory excerpts must be disclosed at this stage is currently pending before the Trial Chamber – see ICC-01/04-01/06-1102, 21 December 2007 (Prosecution application); ICC-01/04-01/06-1112, 10 January 2008 (Defence response).

³⁴ See e.g. *Prosecutor v Tadic*, IT-94-01-T, Separation Opinion of Judge Stephens on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 (is relied upon in Appeal Brief, footnote 15), which recognises that the importance of the identity of a witness to understanding and addressing their testimony will vary, and in some cases will not be required. The Prosecution stresses that the current discussion only relates to the identities of witnesses who will not be called to testify at trial.

As the ECHR has repeatedly held, “the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual” – see e.g. *Jasper v. UK*, ECHR Judgement, Application no. 27052/95, 16 February 2000, para. 52; *P.G. and J. H. v. UK*, ECHR Judgement, Application no. 44787/98, 25 September 2001, para 68; *P.S. v. Germany*, ECHR Judgement, Application no. 33900/96, 4 September 2002, at paras. 22-23.

³⁵ The Prosecution notes that such a case-by-case determination would be consistent with the approach endorsed by the Appeals Chamber in relation to redactions under Article 81(4) prior to the confirmation hearing – see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 36, 39.

never arise.³⁶ In effect, this appeal is premature.³⁷ To succeed at this point, the Appellant would have to demonstrate either (1) that the Trial Chamber could never have the power to authorise non-disclosure of the identity of an individual whose statement contains an element which may be potentially exculpatory, regardless of the circumstances; or (2) that it would never be reasonable for a Trial Chamber to determine that a fair trial could be maintained if such an identity was not disclosed, again regardless of the circumstances.³⁸

25. The Appellant has failed to demonstrate either of these possible bases for the Appeals Chamber to overturn the Decision regarding this issue: firstly, Article 67(2) and Rule 83 expressly grant the Trial Chamber the authority to supervise the application of disclosure under Article 67(2); and secondly, the assessment of whether particular and exceptional circumstances may still allow a fair trial notwithstanding the non-disclosure of the identity of a witness who provided potentially exculpatory information is a determination which can only be made on a case-by-case basis. Such assessments may require consideration of a number of different factors,³⁹ and it would be impossible for

³⁶ Decision Granting Leave, para. 19.

³⁷ As the Prosecution noted in its response to the Application for Leave to Appeal, nothing precludes the Defence from seeking leave to appeal if, in due course, the Trial Chamber does authorise non-disclosure of the identity of a witness who had provided exculpatory information (without prejudice to the Prosecution's position on any such future application for leave to appeal or substantive appeal – see ICC-01/04-01/06-1153, 1 February 2008, footnote 19).

³⁸ The Prosecution submits that determinations of what is required to maintain the fairness of the trial will generally be discretionary, taken in the overall context of the trial proceedings. Such determinations should thus be afforded a degree of deference by the Appeals Chamber, which should only overturn such decisions if they are unreasonable – see e.g. *Prosecutor v Bagosora et al.*, IT-98-41-A, “Decision on Interlocutory Appeals on Decision on Witness Protection Orders”, 6 October 2005, para. 3; see further ICC-01/04-01/07-215-Anx, 20 February 2008, para. 30 and authorities cited therein.

³⁹ The Prosecution submits that factors which may need to be considered include:

- the degree to which the relevant evidence is exculpatory;
- whether, and the degree to which, the evidence is duplicative of other evidence;
- the relevance of the evidence, including in light of the stage of the trial;
- the degree to which the evidence can be used by the Defence in the absence of the identity of the witness;
- the severity of the risk to the witness (including in comparison to the relevance of the evidence);
- the role of the conduct of the Defence in arriving at the situation where it is not possible to secure the protection of the witness other than by withholding their identity; and
- the availability of other measures to ensure the fairness of the proceedings (see further, para. 28, below).

There may be combinations of these factors capable of properly leading to an assessment by the Trial Chamber, in limited circumstances, that the non-disclosure of the identity of a witness who had provided potentially exculpatory information will not (potentially in combination with other measures) render the trial unfair.

In this context, the Prosecution disputes the submission that it is unrealistic to think that potentially exculpatory witnesses could ever be placed at risk by the revelation of their identity to the accused (Appeal Brief, para. 25). In many cases, the information in question will likely constitute only one or two discrete elements in a statement which is otherwise largely incriminatory, either in relation to the accused, or to another suspect or accused (with whom the accused may or may not consider himself to have allied interests). This will not always be the case, but nor can it be ignored – rather, it is a factor to be considered on a case-by-case basis.

the Chamber or the parties to foresee at this stage the range of circumstances that may arise.

26. The Prosecution notes that the majority of the arguments raised by the Appellant relate to the general obligation on the Prosecution to disclose the identity of a witness who has provided potentially exculpatory evidence.⁴⁰ As noted above, nothing in the Decision contradicts this. To the contrary, the cautious and contingent manner in which the Trial Chamber addressed even any possibility of non-disclosure demonstrates the importance that it placed on this general principle. The arguments presented by the Appellant do not, however, demonstrate that no derogation from this principle is ever permitted.⁴¹ Rather, the Statute itself recognises that questions regarding the application of Article 67(2) may arise, and Rule 83 establishes the Chamber as the ultimate arbiter, foreseeing rulings on a case-by-case basis regarding the application of Article 67(2).
27. In considering the application of this provision, and the conduct of the parties regarding the management and conduct of the proceedings, the Statute imposes obligations on the Court regarding the protection of witnesses and victims, most notably through Article 68(1). In this regard, the Appellant is correct to note that measures taken for the protection of witnesses must not be inconsistent with the rights of the defence or a fair trial.⁴² However the Prosecution emphasises that the Decision did not contemplate withholding the identity of a witness where this would be inconsistent with a fair trial. Rather, the Decision recognised that in certain, limited circumstances there exists a

⁴⁰ Appeal Brief, paras. 26-31.

⁴¹ In relation to the first reference cited by the Appellant, *Prosecutor v Brdjanin and Talic* decision of 20 October 2002 (Appeal Brief, footnote 17), the “Chamber underline[d] once again that only the sections that contain the exculpatory material should be provided to the Defence, not the whole document” (para. 26), and focused on the issue of putting the Defence in “a position to assess the real value of the exculpatory material for itself” (para. 27). In this context, the Prosecution recalls that Judge Stephens of the ICTY, in his Separation Opinion on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses (*Prosecutor v Tadic*, IT-94-01-T, 10 August 1995), which is relied upon by the Appellant (Appeal Brief, footnote 15), recognises that the importance of the identity of a witness to understanding and addressing their testimony will vary, and in some cases will not be required.

Considering the further authorities cited, the reference to *Prosecutor v Brdjanin and Talic* decision of 27 October 2000 (Appeal Brief, footnote 19) only refers to potentially exculpatory information in one footnote which was *obiter dicta*, the main issue being access to identities of witness whose statements were relied upon in seeking confirmation of the indictment, but refused to testify and “whether the prosecution has established that the interests of justice require that denial of those rights of the accused” (para. 30); the reference to *Prosecutor v Bagosora* decision of 24 May 2006 (Appeal Brief, footnote 18), the Chamber held that in that case, the identity of the witness was inextricably connected with the substance of the statement, such that the statement cannot be properly understood without knowing the identity (para. 5 – in this context see also the Separate Opinion of Judge Stephens, referred to above), and further did not deal with arguments relating to non-disclosure of exculpatory information (paras. 7-10); the reference to the *Prosecutor v Blaskic* Appeal Judgement (Appeal Brief, footnote 19) does not appear to be relevant to the present proceedings, referring to the continuous nature of disclosure obligations.

⁴² Appeal Brief, para. 23.

possibility that the continued trial may be fair notwithstanding the non-disclosure of the identity of an individual who provided the potentially exculpatory information which was itself disclosed.

28. As noted above, one factor which the Trial Chamber may take into consideration in its case-by-case analysis, should this issue ever arise at trial, is whether there are other means by which the fairness of the trial can be maintained. In this context, the Prosecution recalls that human rights jurisprudence recognises that an apparent limitation of the rights of the defence does not necessarily render the trial unfair, but that all the circumstances must be considered.⁴³ The European Court of Human Rights has repeatedly held that “in order to ensure that an accused receives a fair trial, any difficulties caused to the defence by limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities”.⁴⁴
29. The Prosecution finally submits that the maintenance of fair and expeditious proceedings, including proceedings which respect the legitimate concerns of witnesses and victims, requires a degree of commitment from all parties and participants.⁴⁵ In particular where the conduct of one party, “without any proper justification”,⁴⁶ has resulted in a situation where a witness cannot be afforded necessary protection,⁴⁷ then the Prosecution submits that some element of balancing of rights and interests may be appropriate.⁴⁸ Especially in light of the potential disparity between the impact of

⁴³ See authorities cited at footnote 34, above.

⁴⁴ See *Doorsen v Netherlands* (1996) 22 E.H.R.R. 330; *Van Mechelen v. Netherlands* (1997) 25 E.H.R.R. 647, paras. 54 and 72; see also *Rowe and Davis v. UK* (2000) Crim LR 584, para. 54; ECHR Judgement, Application no. 28901/95, 16 February 2000, at para. 61

⁴⁵ In the context of the practical implications of disclosure by the Defence of the details of its case at a very late stage in proceedings, which arises in relation to both this issue and the first issue, the Prosecution notes that the ICTY recently amended its Rules of Procedure and Evidence to enhance the obligations on the Defence to disclose the evidence on which it intends to rely prior to the commencement of the defence case (see amendments to Rule 67, 3 March 2008), bringing it into line with the practice and jurisprudence of the ICTR.

⁴⁶ Decision, p. 9 lines 13-14.

⁴⁷ Decision, p. 9 lines 15-16.

⁴⁸ This notion of balancing the competing rights and interests, rather than one trumping the other, was further recognized during the drafting of the Rules of Procedure and Evidence – see Brady, “Protective and Special Measures for Victims and Witnesses”, Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 436, 438, 440. See also Gilbert Bitti, *Functions and powers of the Trial Chamber*, in Triffterer, O. (Editor), “Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article” (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 813.

Such a balancing of interests is entirely consistent with human rights principles. As noted above, the ECHR has repeatedly held that “the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of criminal investigation, which must be weighed against the rights of the accused ... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual”, see authorities cited at footnote 34 above (emphasis added).

disclosure on a witness, who may face severe risks, and the additional utility of the identity of that witness to the Defence, the Prosecution submits that there cannot be an absolute and immutable rule that disclosure of identity is the only way to maintain the fairness of the proceedings.

30. Thus, in the context of a Decision which implicitly recognises that disclosure of the identity of a witness whose statement contains potentially exculpatory information is the general rule, the Trial Chamber made no reversible error in properly noting that a small degree of flexibility must be maintained for the Chamber to deal with exceptional circumstances in which a potential conflict between the protection of a witness whose statement contains some (often limited) potentially exculpatory information and the fairness of the proceedings may be resolved by means other than disclosure of that witness's identity in addition to the information itself.

The Third Issue – the Trial Chamber may have interpreted “material to the preparation of the defence” in too narrow a manner

31. The Appellant argues that the Decision interpreted Rule 77 too restrictively in holding that the Prosecution did not have an obligation to provide to the Defence inspection of material relating to the use of child soldiers by other armed groups in the DRC. The Trial Chamber held that, on the basis of the arguments before it, it was unpersuaded that evidence relating to this issue was relevant to the charges; it would not undermine the Prosecution case; nor would it support any defence line of argument; it did not relate to any live issue in the case;⁴⁹ and that therefore the “Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC.”⁵⁰

Even in the context of the ICTY and ICTR, in which victims and witnesses are assigned a lesser role than under Article 68(1) of the ICC Statute, “A balancing exercise is required in each case” - *Prosecutor v Brdjanin and Talic*, IT-99-36, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 18. See also *Prosecutor v Bagosora et al.*, IT-98-41-A, “Decision on Interlocutory Appeals on Decision on Witness Protection Orders”, 6 October 2005, para. 3, such “decisions require a complex balancing of intangibles”; *Prosecutor v Delalic et al*, IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997, paras. 15 and 18, “Article 20(1) of the Statute strike[s] the appropriate balance by stating that ‘full respect’ must be given to the rights of the accused and ‘due regard’ for the protection of victims and witnesses. ... The provisions of Rule 75 are such that the privacy and protection of the witnesses may be taken into account by the Trial Chamber and weighed against the rights of the accused.”

⁴⁹ Decision, p. 8, line 13 to p. 9, line 3. The Prosecution recalls that it has previously accepted that other groups were also using child soldiers in the relevant area and at the relevant time – see ICC-01/04-01/06-T-69-ENG, 10 January 2008, p. 62, line 24 to p. 63, line 3.

⁵⁰ Decision, p. 10 lines 11 to 13.

32. The Prosecution had opposed the characterisation of *tu quoque* as a valid defence.⁵¹ However in light of the specific circumstances of this case and the particular nature of the information in question,⁵² the Prosecution was prepared to provide access to the material in question, relating to the recruitment and use of child soldiers by other armed groups in Ituri during the relevant time period, under Rule 77.⁵³
33. Given that the issue in this appeal relates solely to Rule 77,⁵⁴ and not to the validity of any defence of *tu quoque* or the characterisation of the relevant material as exculpatory under Article 67(2), the Prosecution does not oppose the appeal in relation to this issue.

Suspensive Effect is Not Required in this Instance

34. The Prosecution finally opposes the Appellant's request for suspensive effect. The Prosecution notes that the Appellant appears to be asking for more than the suspension of the impugned terms of the Decision, but is in effect seeking a suspension (or stay) of all proceedings.⁵⁵
35. The Prosecution submits that the Appellant will not suffer any prejudice by the implementation of the impugned aspects of the Decision. The first and second issues on appeal, which the Prosecution opposes, refer to possible implications on disclosure of late revelation by the Defence regarding its lines of defence, and how the fairness of the trial may be maintained. These issues relate to events which may, or may not, take place at a much later stage of the proceedings. The continued operation of the Decision, and other preparation for trial, at this stage will not adversely impact on the Appellant while the appeal is resolved, nor will it render the outcome of the Appeal moot.
36. In relation to the third issue, if the appeal succeeds then the Appellant will be formally entitled to a wider access to information, i.e. there will be no irreparable prejudice as might be caused if the Appellant was seeking to restrict access to material, the purpose of which would be defeated if that same material was disclosed pending the outcome of the appeal. Furthermore, in practical terms the Prosecution is continuing to provide the

⁵¹ See ICC-01/04-01/06-T-69-ENG, 10 January 2008, p. 59, lines 13-25 and p. 60, lines 8-9.

⁵² See e.g. Appeal Brief, paras. 41, 43.

⁵³ See ICC-01/04-01/06-T-69-ENG, 10 January 2008, p. 60, lines 1-15. This was based on the Prosecution's assessment that the category of material in question, in the circumstances of this case, fell within the terms of Rule 77.

⁵⁴ See e.g. Appeal Brief, paras. 34-36, 39-40.

⁵⁵ The Defence appears to have sought suspension of all proceedings in preparation for trial until the outcome of the appeal, referring to "la suspension de l'instance" and "le procès" – Appeal Brief, paras. 44 and 45.

Appellant with the material in question, regarding the recruitment and use of child soldiers by other armed groups in Ituri at the relevant times, pursuant to Rule 77, pending the outcome of the appeal. Thus there is no prejudice at all suffered by the Appellant pending the outcome of this appeal.

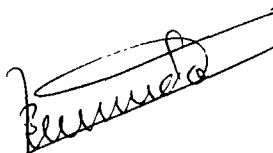
37. In contrast to the lack of any prejudice to the Appellant or risk that the outcome of the appeal would be rendered moot, the Prosecution submits that it would be disruptive to the preparation of the parties for trial, scheduled to commence on 23 June 2008, if either this Decision or all proceedings were suspended.⁵⁶

38. The Prosecution notes that should any aspect of the appeal succeed, and the Appellant has suffered prejudice by the lapse of time or conduct of proceedings under the reversed terms of the Decision, the Appeals Chamber or Trial Chamber could consider making consequential orders to address any such prejudice.⁵⁷

Conclusion

39. For the above mentioned reasons, the Prosecution respectfully requests that the Appeals Chamber:

- i. reject the appeal and uphold the Decision in relation to the first two issues; and
- ii. reject the request for suspensive effect.



 Luis Moreno-Ocampo
 Prosecutor

Dated this 28th day of March, 2008
 At The Hague, The Netherlands

⁵⁶ Any such delay would, in turn, likely prolong the period of pre-trial detention.

⁵⁷ As outlined in its Response to the Application for Leave to Appeal, the Prosecution submits that this would be the most appropriate course in the current circumstances, as such an order could be tailored to the specific nature of any resulting prejudice, which would be preferable to imposing a blanket stay or suspension on a hypothetical basis (see ICC-01/04-01/06-1153, 1 February 2008, para. 23).