



Original: **English**

No.: ICC-01/04-01/07
Date: 13 October 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

Public Document

**Prosecution's Application Concerning Disclosure by the Defence Pursuant to
Rules 78 and 79(4)**

Source: Office of the Prosecutor

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

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Other

The Office of the Prosecutor (“Prosecution”) hereby seeks an order from Trial Chamber II for (1) the disclosure or permission of inspection of material in possession or control of the Defence, pursuant to Rule 78 of the Rules of Procedure and Evidence and (2) the disclosure of the evidence upon which the Defence intends to rely on for trial, including a document containing the defences the accused intend to rely on and any substantive factual or legal issues it intends to raise, the identities of the Defence’s witnesses and their respective statements, or summaries thereof, pursuant to Rule 79(4) and Regulation 54 of the Regulations of the Court.

The Prosecution submits that such a disclosure is necessary in order to secure a fair and expeditious trial and in order to aid the Chamber in the determination of the truth.

I. Rule 78: Inspection of material in possession or control of the Defence

The Prosecution submits that Rules 77 and 78 share a common objective: ensuring an efficient and fair trial through a reciprocal inspection regime. It follows that both articles should be interpreted in a uniform manner consistent with this objective.

A) Types of documents covered by Rule 78

1. A number of provisions within the Rome Statute’s framework¹ envisage that disclosure by the Defence may extend beyond the scope of the Defences found in Rule 79(1).² One such provision is Rule 78, covering “Inspection of material in possession or control of the defence”. The language of the Rule explicitly requires

¹ See, for instance, Rules 78 and 79(4) of the Rules and Regulations 52 and 54 of the Regulations of the Court.

² This fact has been emphasized by Trial Chamber I in ICC-01/04-01/06-1235 “Decision on Disclosure by the Defence” 20 March 2008, para. 30.

the Defence to permit the Prosecutor to inspect any “books, documents, photographs and other tangible objects” which the Defence intends to use “as evidence (...) at trial”.

2. Existing jurisprudence further clarifies that Rule 78 applies not only to the material which the Defence intends to use when questioning its own witnesses but also the material which it seeks to use when questioning³ Prosecution witnesses.⁴

B) Existence of a mandatory obligation on the Defence to provide the Prosecution with access to Rule 78 material

3. The Defence’s obligation to provide access to Rule 78 material is of a mandatory nature. This is made clear by the language of the Rule itself, which explicitly states that the Defence “shall” permit the Prosecutor to inspect such material, and is also confirmed by jurisprudence of this Court on this matter.⁵

C) The method of providing access to Rule 78 material

4. For the sake of efficiency the “Inspection” referred to in Rule 78 should be performed in the same manner as that which has been determined for the

³ This expression of Trial Chamber I is also known as the cross-examination of Prosecution witnesses.

⁴ ICC-01/04-01/06-1140 “Decision on various issues related to witness’ testimony during trial” 29 January 2008, para. 34. This position has been highlighted by Trial Chamber I when it upheld the view that “the disclosure of documents to be used in questioning a witness is governed by Rules 77 and 78 of the Rules” explaining that “the parties are required to provide for inspection, in advance of trial, those documents which they intend to use for this purpose”.

⁵ In the *Prosecutor v. Jean-Pierre Bemba Gombo* case, ICC-01/05-01/08-55 “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties” 31 July 2008, para. 31, Pre-Trial Chamber III pointed out that “if the defence intends to rely on certain evidence at the confirmation hearing pursuant to rule 78 of the Rules, it has an obligation to disclose it to the Prosecutor and to communicate it to the Chamber”. See also *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-18, “Decision scheduling a Hearing on issues relating to disclosure between the Parties” 30 May 2009, para. 6, in which the Single Judge confirmed the existence of this obligation by stating that “pursuant to rule 78 of the Rules, the Prosecutor has the right to inspect any material which the Defence intends to use as evidence at the confirmation hearing. The Defence has an obligation to provide the Prosecutor with copies of such material, in case the Prosecutor so requests during the inspection”.

application of Rule 77. The inspection process initially ordered in Lubanga⁶ was modified in a hearing held on 23 June 2006⁷, pursuant to a joint request by the Defence and Prosecution.⁸ As a result of that hearing, Rule 77 material was submitted to the Defence in electronic format, following a process resembling the normal disclosure procedure. This Court has adopted the Lubanga approach, to make the inspection of Rule 77 material as efficient as possible.

5. The system of electronic disclosure has also been followed by the Defence team in the *Prosecutor v. Jean-Pierre Bemba Gombo* case in complying with their obligations under Rule 78.⁹
6. The Prosecution submits that the Defence teams should provide it with access to material they intend to use as evidence at trial under Rule 78 in electronic form, in accordance with the system set out in the two paragraphs above.

D) When the obligation under Rule 78 is triggered

7. The obligation under Rule 78 need not be formally requested to become operational. In this regard it must be noted that the initial draft of Rule 77

⁶ ICC-01/04-01/06-102 “Decision on the Final System of Disclosure and the establishment of a timetable” 16 May 2006.

⁷ ICC-01/04-01/06-T-9-EN, 23 June 2006 hearing, pages 49-51. During this hearing, the Single Judge proposed the following procedure for the inspection of Rule 77 documents: “The Prosecution submits the relevant documents to the Defence in electronic format. Secondly, every time the Prosecution submits the relevant documents to the Defence in this electronic format the Prosecution files with the Registry a pre-inspection note signed by both the Prosecution and the Defence in which the list of these documents that have been submitted by the Prosecution and received by the Defence and the reference numbers shall be included. 3. The Defence identifies the documents, if any, that it wishes to inspect physically. 4. The Prosecutor makes available for physical inspection the originals of the documents identified by the Defence and files the corresponding inspection report. And, finally, in the case of documents on which the Prosecution intends to rely at the confirmation hearing, the Prosecution, as soon as practicable after the defence declines to inspect the originals, or after the act of inspection has taken place, shall file with the Registry the originals and electronic copies of such documents containing the details required by the draft protocol on the presentation of evidence as it stood on 15 May 2006”.

⁸ ICC-01/04-01/06-143 “Submission of Inspection Report and Request” 8 June 2006, paras 3-4.

⁹ ICC-01/05-01/08-290 “Communication par la Défense du rapport de pré-inspection des Eléments de preuve divulgués au Bureau du Procureur en vertu de la Règle 78 du Règlement de Preuve et de Procédure » 25 November 2008. See on this matter ICC-01/05-01/08-199 « Decision setting the date of the Confirmation Hearing » 31 October 2008, para. 5.

provided for a right of inspection to be triggered “on request” of the Defence¹⁰. This was deliberately removed during the drafting process due to a strong view that it was inappropriate that the right should “require a request from the defence” to become operational.¹¹ Given the parallel wording of the two Rules, it must be understood that there is no requirement for the Prosecution to “request” access to Rule 78 material in order to trigger the obligation of the Defence under this Rule. This interpretation is supported by a decision of Pre-Trial Chamber I, “the system of inspection provided for under rule 78 of the Rules must follow the system (...) for inspection under rule 77 of the Rules”.¹²

8. However, as has been observed in *Lubanga*, “[t]here is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other”.¹³ In this regard, the Prosecution draws the attention of the Chamber to the facts that (a) the Defence has had access to its List of Witnesses and to its List of Evidence since 27 May 2009;¹⁴ (b) except for a limited amount of evidence, the Prosecution has disclosed the entirety of its evidence to the Defence; and (c) the trial is scheduled to start on 24 November 2009 – less than two months from the filing of this Application.

II. Disclosure by the Defence pursuant to Rule 79(4) and Regulation 54

¹⁰ PCNICC/1999/L.3/Rev.1 (25 Feb 1999) Appendix, Discussion Papers Proposed by the Coordinator for Part 5 of the Rome Statute: Investigation and Prosecution, Rule 5.16 Inspection of material in possession or control of the Prosecutor (<http://www.iccnw.org/documents/Proceedingpcnicc1999l3rev1e.pdf>).

¹¹ PCNICC/1999/WGRPE/RT.6 (5 August 1999), Rule 5.29 in Brady H. “Disclosure of Evidence” in Lee, R.S. (ed.), “The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence” (2001), 403-426, 411.

¹² ICC-01/04-01/06-102 “Decision on the Final System of Disclosure and the establishment of a timetable” 16 May 2006, para. 134.

¹³ ICC-01/04-01/06-1235 “Decision on Disclosure by the Defence” 20 March 2008, para. 34.

¹⁴ ICC-01/04-01/07-1174-Conf-Exp « Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge » 27 May 2009.

9. The Prosecution contends that Pursuant to Rule 79(4) and Regulation 54,¹⁵ the Chamber has a discretionary power to order the disclosure of all the evidence that the accused intends to rely on for trial and which is not covered by the scope of Rules 78 and 79(1).¹⁶ This would include the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise¹⁷ as well as information pertaining to the identification of the Defence witnesses¹⁸, their statements or a summary thereof.
10. Such a disclosure would enable the parties to identify the issues to be tried and would therefore ensure a fair and expeditious trial through the equality of arms and the avoidance of interlocutory delays.¹⁹ In addition to this, the Prosecution submits that a reciprocal obligation of this nature will assist the Chamber in its determination of the truth.
11. The principle of a reciprocal obligation to disclose evidence is supported by jurisprudence of this Court, which states that “In order to ensure the trial process is fair, only proportionate disclosure obligations should be imposed on the accused in relation to the evidence he intends to advance.”²⁰ In this regard, Trial Chamber I in *Lubanga* ordered the Defence to disclose, *inter alia*, (1) the name, address and date of birth of their witnesses;²¹ (2) any evidence intended for use

¹⁵ Regulation 54 (f) indicates that at a Status conference, the Trial Chamber has the authority to issue an order on the “(...) production and disclosure of the statements of the witnesses on which the participants intend to rely”. In addition to this, Regulation 54 (j) authorizes the trial Chamber to order the presentation of evidence in summary form.

¹⁶ ICC-01/04-01/06-1235 “Decision on Disclosure by the Defence” 20 March 2008, paras. 32 and 35. This view was supported by Trial Chamber I when it considered that “an order may be made for the disclosure of evidence that is unrelated to either an alleged alibi or a defence based on lack of criminal responsibility”. Moreover, the Chamber also stated that “Rule 79(4) reveals the Chamber has power to order advance disclosure of any evidence outwith those defences the accused intends to rely on”, adding that “[t]his interpretation is supported by the provisions of regulation 54”.

¹⁷ See *Infra* note 23.

¹⁸ This would include all personal information regarding the witness that would allow the Prosecution to conduct appropriate enquiries: i.e their name, address, date of birth and current whereabouts.

¹⁹ See ICC-01/04-01/06-1235, “Decision on Disclosure by the Defence” 20 March 2008, para. 28.

²⁰ *Ibid*, para. 34.

²¹ *Ibid*, para. 41 (d). According to the decision this was to be provided “after the presentation of the evidence of the Prosecution is completed.”

by the Defence, other than the oral testimony of the witness²² and (3) “(...) a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise.”²³

12. On this matter, ad hoc Tribunals have also similar Rules requiring the Defence to disclose the summaries of witnesses they intend to rely on.²⁴

III. The obligations imposed pursuant to Rules 78 and 79(4) do not infringe upon the Accused’s right to a fair trial

13. The Prosecution submits that the aforementioned disclosure requests to the Defence, at this moment, do not compromise the accused’s right to a fair trial. This position was upheld with regard to both Rule 78 and 79(4), when Trial Chamber I confirmed that: “it seems clear that under the Rome Statute framework it is envisaged that an accused’s right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in

²² *Ibid*, para. 41 (e). According to the decision the Defence had to comply with this order “three days in advance of its [the evidence] presentation. See also ICC-01/04-01/06-1313, paras 26-32, where the Defence’s request for leave to appeal this order was refused. On this note the Prosecution submits that the exclusion of the Oral testimony from this order should not be interpreted as a rejection by the Trial Chamber of the principle of reciprocal disclosure. In fact, the Prosecution maintains that this exclusion was directly linked to the fact that that disclosure of a “material element” of the Prosecution’s evidence was still outstanding at the time the Prosecution made its submissions regarding the Defence’s disclosure obligations. Consequently, in order to ensure a fair trial, the Chamber could only impose proportionate disclosure obligations on the Defence: *See* ICC-01/04-01/06-1235, para. 34.

²³ *Ibid*, para. 41 (b). In accordance with paragraph 13 of Trial Chamber I’s “Decision on the defence request for leave to appeal the “Decision on disclosure by the defence”, the Prosecution submits that the ambit of this order “(...) is limited to disclosure of information only if the accused decides to advance a positive case (thereby waiving his right to silence)”. According to the decision the Defence had to comply with this order “ three weeks in advance of the trial.” *see* ICC-01/04-01/06-1313, para. 13.

²⁴. *See* Rule 65 (g) (*bis*) of the Rules of Procedure and Evidence of the ICTY, in which it is stated that the after the Prosecution’s case and before the commencement of the Defence case, the pre-trial judge orders the Defence to file, inter alia, the name of the witnesses and a summary of the facts on which each witness will testify. *See also Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, “Decision on the Prosecution’s Motion for defence Compliance with Rule 65 *ter* (g)”, 26 June 2007 and *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case”, 30 October 2006.

advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise”.²⁵

14. In essence, the obligations imposed on the Defence through Rules 78 and 79 (4) in conjunction with Regulation 54 are essential in securing a fair and expeditious trial and in assisting the Chamber in its determination of the truth.²⁶

Conclusion

15. Pursuant to the reasoning laid out in this submission, the Prosecution seeks Trial Chamber II to order the Defence to:

- i) Provide disclosure, in electronic form, of material in possession or control of the Defence, pursuant to Rule 78, three weeks before the commencement of the trial;
- ii) Provide disclosure of a document setting out in general terms the defences the accused intend to rely on and any substantive factual or legal issues that they intend to raise, three weeks before the commencement of the trial;
- iii) Provide disclosure of all the evidence the Defence intends to rely on for trial, including information regarding the identification of witnesses, their statements, or summaries thereof before the commencement of the Defence’s case.

²⁵ ICC-01/04-01/06-1235, “Decision on Disclosure by the Defence” 20 March 2008, para. 31.

²⁶ ICC-01/04-01/06-1235, “Decision on Disclosure by the Defence” 20 March 2008, para. 28.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', with a long horizontal stroke extending to the left.

Luis Moreno-Ocampo, Prosecutor

Dated this 13th day of October 2009

At The Hague, The Netherlands