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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio-Benito
Judge Joyce Aluoch

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

Public document

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 »

Source: The Office of the Prosecutor

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

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Introduction

1. During the status conference of 7 October 2009, Trial Chamber III (“the Chamber”) addressed the following issues: (i) Defence disclosure; (ii) manner of submission of evidence at trial; and (iii) victim participation at trial. The Chamber requested the parties and participants to review the existing jurisprudence of Trial Chamber I on these issues and submit proposals on whether it should adopt or depart from that jurisprudence.¹

2. The Office of the Prosecutor (“the Prosecution”) filed its observations on items (ii) and (iii) on 21 October and 4 November 2009.² The Chamber ordered the Prosecution to submit its observations on Defence disclosure, after substantive submissions by the Defence.³

3. On 26 November 2009, the Defence filed its « Observations de la Défense relatives à la jurisprudence de l’Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense » (“Defence Observations”).⁴ In its Observations, the Defence requested the following: (i) that the Chamber depart from Trial Chamber I’s jurisprudence on Defence disclosure; (ii) that the Chamber authorise the Defence, but not the Prosecution to contact and prepare its witnesses immediately prior to trial; (iii) that the Chamber authorise the Accused to meet directly with Defence witnesses; and (iv) that the Chamber orders the Prosecution to disclose application forms for victims with dual witness status. It also made other submissions with respect to the issue of victim participation at trial.

¹ ICC-01/05-01/08-T-14-ENG, p. 23, lines 6-11; p. 28, lines 17-24.

² ICC-01/05-01/08-594, ICC-01/05-01/08-569.

³ ICC-01/05-01/08-T-14-ENG, p. 24, line 9-13.

⁴ ICC-01/05-01/08-620 and ICC-01/05-01/08-620-Corr (both registered on 27/11/2009).

4. The Prosecution hereby submits its response to items (i) to (iv) contained in the Defence Observations because they raise issues which were not addressed in its various submissions filed with the Chamber.⁵ The Prosecution addressed the bulk of victim participation issues previously in its submissions filed on 4 November 2009,⁶ and submits those observations by reference in response to the recent Defence Observations.

5. In brief, the Prosecution submits that the Chamber reject the Defence arguments that disclosure infringes Defence rights and, where applicable, adhere to the practices on Defence disclosure enunciated by Trial Chamber I.

Prosecution Submissions in response to Defence Observations in relation to items (i) to (iv)

Submissions on Defence disclosure

6. The Defence submits that (i) it is not subject to any automatic disclosure obligations under Regulations 52 of the Regulations of the Registry and 54 of the Regulations of the Court ("RoC"); (ii) disclosure of its defences will infringe the Accused's right to silence and non-self incrimination; (iii) the Defence has no obligation to disclose documents which it intends to rely upon during cross-examination of Prosecution witnesses; (iv) the Defence has no obligation to disclose questions it intends to pose to witnesses; (v) the Defence has no duty to ensure that one or other aspect of the potentially incriminating testimony of a Defence witness is brought to the attention of the Court;⁷ and (vi) the Defence has no obligation to disclose witness statements particularly in view of its limited resources.

⁵ Some of the issues addressed by the Defence were not within the scope of the Chamber's instructions. As such, the Prosecution did not file substantive submissions on those issues at the time of submission of its observations.

⁶ ICC-01/05-01/08-594.

⁷ ICC-01/05-01/08-620-Corr, p.11-24.

7. The Prosecution recalls that Trial Chamber I issued comprehensive decisions regarding Defence disclosure. Generally, that Chamber determined that the limited disclosure obligations imposed on the Defence are essential in securing a fair and expeditious trial and in assisting that Chamber in its determination of the truth.⁸ In the Decision on Disclosure by the Defence, Trial Chamber I noted that the fundamental rights of the Accused not to incriminate himself and remain silent must not be undermined by any obligations on the Defence⁹ and that any disclosure the Chamber orders cannot “derogate from the accused’s right to a fair and impartial hearing in which his rights are fully safeguarded”.¹⁰ It added, however, that the Rome Statute (“the Statute”) defines obligations that do not infringe on those rights and can be imposed to secure a fair and expeditious trial and assist the Court in finding the truth.¹¹ They include the obligation to disclose defences of alibi or lack of criminal responsibility, and to disclose the particulars underlying the defence, sufficiently in advance to allow the Prosecution to prepare. Trial Chamber I also noted that Regulation 54(p) of the RoC confer on the Chamber the authority to order disclosure of defences, if any, raised by the Defence in the interests of justice.¹²

8. The Decision on Disclosure by the Defence recognized other disclosure obligations. In particular, Rule 78 of the Rules of procedure and evidence (“the Rules”) directs the Defence to permit inspection of tangible items it intends to use during trial; Rule 79(4) of the Rules allows the Chamber to order “disclosure of any other evidence”; Regulation 54 of the RoC allows the Chamber to issue order in the interests of justice; and under Regulation 52 of Regulations of the Registry, the Defence must provide its evidence to the Court Officer in advance.¹³

⁸ ICC-01/04-01/06-1235, para. 28.

⁹ ICC-01/04-01/06-1235, para. 27, citing Articles 55(1)(a), 61(6), 66(1), 66(2), 67(1)(g)(i).

¹⁰ *Ibid* at para. 33.

¹¹ *Ibid* at para. 28.

¹² *Ibid* at para. 29.

¹³ *Ibid* at para. 30.

9. Trial Chamber I explained, “[t]hus, 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 advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise”.¹⁴ It also explained that on certain discrete issues it might, on an exceptional basis, order advance disclosure of intended questions or lines of questions where disclosure implicated the Chamber’s obligations to protect victims and witnesses.¹⁵ And it rejected as “untenable” the Defence claim that the Court has no power to order disclosure of anything other than the affirmative defences of alibi and lack of criminal responsibility.¹⁶

10. Accordingly, Trial Chamber I ordered that the Defence “[f]urnish the Chamber, the prosecution and the participants three weeks in advance of trial with 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 (including ... an alibi or grounds for excluding criminal responsibility . . .)”; make known three weeks before trial any challenges to admissibility or relevance or other substantive points of law that need to be decided before trial; after the Prosecution rests, disclose to the Prosecution and the Chamber the name, address, and date of birth of Defence witnesses “to enable the prosecution to conduct appropriate enquiries”; and provide the Chamber, Prosecution and participants with any evidence intended for use by the Defence, other than oral testimony, three days in advance.¹⁷

¹⁴ *Ibid.* at para. 31. In addressing timing of disclosure, it spoke generally: “There 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. [...] 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.” *Ibid.* at para. 34.

¹⁵ *Ibid.* at para. 37.

¹⁶ *Ibid.* at para. 35.

¹⁷ *Ibid.* at para. 41.

11. Trial Chamber I again addressed some of these issues in its “Decision on the defence request for leave to appeal the ‘Decision on disclosure by the defence’”.¹⁸ It rejected the Defence claim that disclosure of the Defence three weeks in advance of trial implicated the right to silence, explaining that a defendant can waive the right by raising a positive case, and if he does so, disclosure has not interfered with that right.¹⁹ It added that the purpose of requiring Defence disclosure is to manage the case efficiently, with minimum delays, and to avoid adjournments,²⁰ and it rejected the claim that its rule would impede the ability of the Defence to question witnesses.²¹ Finally, it noted that there could be unforeseen events where the Defence is unable to anticipate three days in advance its need to use a particular piece of evidence in cross-examination, and thus allowed the possibility of an exception to the rule.²²

12. In the Prosecution’s submission, the previously identified decisions have a firm legal basis under the Statute and the Rules and should be followed here. They establish that the Defence has a duty to disclose the evidence upon which it intends to rely upon at trial and during cross-examination of Prosecution witnesses, its defences, any substantive factual or legal issues it intends to raise, and the identities of its witnesses and their respective statements or summaries thereof pursuant to Rule 79(4) of the Rules. They also recognize the Chamber’s authority to require disclosure for trial management purposes under Regulation 54 of the RoC.²³

13. All of these disclosure requirements serve to secure a fair and expeditious trial and to assist the Chamber in its determination of the truth. And none violates

¹⁸ ICC-01/04-01/06-1313 dated 8 May 2008.

¹⁹ *Ibid* at para. 13

²⁰ *Ibid* at paras. 14-16.

²¹ *Ibid* at para. 29. It also noted that the since the Prosecution cannot proof its witnesses or forewarn them of cross-examination, disclosure of the evidence for use in cross-examination would not deprive the Defence unfairly of a tactical advantage. *Ibid* at para. 31.

²² *Ibid* at para. 29.

²³ For the same purposes of efficient trial management, both parties – the Prosecution and the defence -- are obligated under Regulation 52 of the Regulations of the Registry to provide their evidence in advance.

protected Defence rights. Notwithstanding the Defence argument, there is no contradiction between Article 67 of the Statute, which protects the rights of the Accused, on the one hand, and the disclosure obligations outlined herein, on the other

Defence disclosure pursuant to Rule 79(4) of the Rules and Regulation 54 of the RoC

14. Pursuant to Rule 79(4) of the Rules and Regulation 54 of the RoC, the Chamber has a discretionary power to order the disclosure of all the evidence that the Accused intends to rely on for trial and that is not within the scope of Rules 78 and 79(1) of the Rules.²⁴ Included here are the defences upon which the Accused intends to rely and any substantive factual or legal issues that he intends to raise²⁵ as well as information pertaining to the identification of the Defence witnesses²⁶ and their statements or summaries thereof. Such disclosure would enable the parties to identify the issues to be tried and would accordingly ensure a fair and expeditious trial.²⁷ The Prosecution submits that a reciprocal obligation of this nature will assist the Chamber in its truth searching functions.”²⁸

²⁴ 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 without those defences the accused intends to rely on”, adding that “[t]his interpretation is supported by the provisions of regulation 54”.

²⁵ *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.

²⁶ 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.

²⁷ See ICC-01/04-01/06-1235, “Decision on Disclosure by the Defence” 20 March 2008, para. 28.

²⁸ This reciprocal obligation to disclose evidence was indirectly underscored in the *Lubanga* case where it was held 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. See *Ibid*, para. 34.

15. The Prosecution also recalls that in the *Lubanga* case, Trial Chamber I ordered the Defence to disclose, *inter alia*: (1) the name, address and date of birth of its witnesses;²⁹ (2) any evidence intended for use by the Defence, other than the oral testimony of the witness;³⁰ and (3) “(...) a document setting out in general terms the defences the Accused intends to rely on and any substantive factual or legal issue that he intends to raise.”

Inspection of material in the possession or control of the Defence pursuant to Rule 78 of the Rules

16. Rule 78 of the Rules provides that the “defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence [...] at trial”. It largely parallels Rule 77 of the Rules and the two provisions share a common objective, namely to ensure an efficient and fair trial through a reciprocal inspection regime. Existing jurisprudence clarifies that Rule 78 of the Rules 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 questioning Prosecution witnesses.³¹ Moreover, the Defence obligation to provide access to Rule 78 material is mandatory; the language of the Rule expressly states that the Defence “*shall*” permit the Prosecutor to inspect such material.³²

²⁹ *Ibid*, para. 41 (d). According to the decision this was to be provided “after the presentation of the evidence of the Prosecution is completed.”

³⁰ *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.

³¹ 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”.

³² The peremptory nature of this provision has been further affirmed by Pre-Trial Chamber III. In 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-

17. The Prosecution submits that the Defence obligation under Rule 78 of the Rules does not require a formal Prosecution request and the obligation under Rule 78 of the Rules need not be formally requested and judicially approved to become operational. In any event, the Prosecution would request access to inspect under the Rule. This request will obviate any claim that disclosure is not required because the Prosecution did not expressly seek it.

18. Last, the Prosecution submits that Defence disclosure and inspection should proceed in a timely manner. The Defence cannot avoid its obligation to disclose on the ground that it will not know until the very last moment whether it will put on a defence or what evidence it will offer. It would be contrary to reasonable expectations of good faith if the Defence were to withhold evidence even after a decision is taken on the ground that there is always the possibility that counsel might change his mind. If the Defence feels that, despite having taken the decision to offer a particular item as evidence, there are good reasons to avoid disclosure, it should seek a particular exemption from the Chamber. Absent a protective order from the Court, the Defence must comply with its obligation to disclose or the statutory balance of the interests of the parties and the Court in the discovery of the truth will be distorted.

19. The Defence argues against Trial Chamber I's decisions with respect to Defence disclosure obligations, instead relying heavily on decisions and practices of the international *ad hoc* tribunals. In one of these decisions, Trial Chamber I rejected

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". The system of electronic disclosure was also followed by the Defence before confirmation in the *Prosecutor v. Jean Pierre Bemba Gombo* case in complying with its obligations under Rule 78 of the Rules 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 also on this matter ICC-01/05-01/08-199 « Decision setting the date of the Confirmation Hearing » 31 October 2008, para. 5.

arguments that the practices of other national or international tribunals required adoption of certain procedures in this Court.³³ As Trial Chamber I enunciated, with respect specifically to disclosure, the framework of this Court is different from that of the other tribunals. The Statute and the Rules set up a process that strives to determine the truth while protecting the interest and right of the Defence to a fair and expeditious trial. Thus, that other courts or tribunals reach different conclusions based on their different statutes and rules is irrelevant.

20. The Prosecution thus submits that all disclosure obligations recognized by Trial Chamber I are consistent with the regulatory framework of the Court. Accordingly, it would urge that, contrary to the Defence argument, the Court follow the lead of Trial Chamber I on Defence disclosure issues.

Submission on Defence Request to be allowed to prepare Defence witnesses for trial.

21. The Defence requests permission to contact and prepare its witnesses prior to trial.³⁴ It urges the Chamber to accord the Defence alone this right.³⁵

22. The Defence contends that a fundamental distinction between the parties stems from Article 54(1) of Statute which requires the Prosecution to perform a dual role: an obligation to establish the truth and to examine incriminating and exonerating circumstances equally.³⁶ The Defence argues that the Prosecution, because it is obligated to establish the *truth*, has the burden to disclose information to the Defence that might be exculpatory or impeaching, whereas the Defence has no

³³ ICC-01/04-01/06-1049, para. 45.

³⁴ ICC-01/05-01/08-620-Corr, p.4-5.

³⁵ *Ibid*, p. 5, para 9.

³⁶ *Ibid*, p. 6, para 13.

similar obligation.³⁷ From that proposition, the Defence argues that when the Prosecution prepares its witness in advance it reduces the possibility that the witness may give testimony that could be challenged by the Defence as inconsistent and therefore incredible. Such a result, the Defence suggests, violates the Prosecution's duty to provide exculpatory or impeaching evidence. Since the Defence does not have a similar obligation, it may prepare its witnesses to avoid presenting inculpatory or less credible testimony, so long as it adheres to some general obligation to not manipulate or influence the witness's testimony. The Defence further suggests that its request is not remarkable, since Trial Chamber I permitted limited exceptions to the ban against proofing with respect to expert witnesses and with respect to Legal Representatives who may meet with their own clients if the clients are also witnesses.³⁸ Finally, the Defence argues that for logistical, financial, and scheduling reasons, it will not have identified its witnesses until after the Prosecution rests its case and thus may not be able to meet with prospective witnesses until the "proofing" stage. It argues that the alternative, an adjournment to permit counsel to meet with the witnesses, would undermine the Accused's right to a trial without undue delay.³⁹

23. The Prosecution acknowledges the jurisprudence of both Pre-Trial and Trial Chamber I in the *Lubanga* case⁴⁰, which collectively limit contact in The Hague with the witnesses immediately prior to trial to the Victims and Witnesses Unit ("VWU") for what the Court describes as "witness familiarisation". In the Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for giving Testimony at trial,⁴¹ Trial Chamber I reaffirmed the principle set earlier by Pre-Trial Chamber I

³⁷ *Ibid* at paras. 14-15.

³⁸ *Ibid* at paras. 16-18.

³⁹ *Ibid* at para. 23-30.

⁴⁰ *Prosecutor v Lubanga* "Decision on the Practices of Witness Familiarisation and Witness Proofing" (ICC-01/04-01/06-679), Pre-Trial Chamber I of 8 November 2006; *Prosecutor v Lubanga* "Decision regarding the Practices used to prepare and familiarise witnesses for giving testimony at trial" (ICC-01/04-01/06-1049), Trial Chamber I, 30 November 2007.

⁴¹ ICC-01/04-01/06-1049.

with respect to witness proofing.⁴² In particular, it agreed with the distinction between witness familiarisation, which includes allowing the witness to read or listen to his or her prior statements, and “substantive preparation of a witness for their in-court testimony”.⁴³ It authorized the former, but rejected the latter by either side.

24. The Prosecution submits that, if the Chamber is persuaded to either follow or relax the proofing regime, it must be in respect of both the Prosecution and the Defence having regard to the principle of parity and equality of arms. The purpose of prohibiting witness proofing, according to Trial Chamber I, is to avoid preparation that “could lead to a distortion of the truth” or constitute “a rehearsal of in-court testimony”. Preparation also “may diminish what would otherwise be spontaneity during the giving of evidence by a witness”, which “can be of paramount importance to the Court’s ability to find the truth”.⁴⁴ That being the underlying rationale, the Prosecution would disagree that the Defence is alone entitled to proof its witnesses because it – unlike the Prosecution – has no duty to present objective truth. If witness proofing affirmatively impedes the discovery of truth, as Trial Chamber I concluded, then there is no justification for a rule that permits one party affirmatively to interfere with the truth-finding function.

Submission on Defence Request for the Accused to directly meet with witnesses prior to their testimony

25. Finally, the Defence has sought the authorisation of the Chamber to enable the Accused to meet directly with certain Defence witnesses to ensure that its arguments are correctly and completely prepared.⁴⁵ The Defence maintains that it will not

⁴² ICC-01/04-01/06-679.

⁴³ ICC-01/04-01/06-1049 at para. 28.

⁴⁴ ICC-01/04-01/06-1049 at paras. 51-52.

⁴⁵ ICC-01/05-01/08-620-Corr at para. 30.

manipulate or influence the testimony of its witnesses during these meetings.⁴⁶ It also maintains that this is consistent with a practice in the ICTY.

26. The Prosecution opposes the Accused's request.

27. First, the Accused has voluntarily elected to be represented by counsel, who has a mandate to prepare his defence, including conduct of the investigations and defence in Court. It is not improper in such a situation to set limits on the accused's assumption of tasks that are ordinarily done by his lawyer. The accused does not perform the role of investigator and advocate if he has chosen to have counsel. For example, a represented person does not have the absolute right to question witnesses, offer evidence, or take on other tasks on his own behalf. This was highlighted in the case of *Prosecutor v Charles Taylor*.⁴⁷ Nor would he/she have the right to be released from custody to conduct investigations in furtherance of his/her defence.

28. The Accused's right to some measure of participation in the preparation of his own defence does not extend to having the right to personally engage with a witness. The Defence's analogy with an accused who is exercising the right to self-representation, a procedure that has been used in the *ad hoc* tribunals, is inapposite. The position is different when an accused voluntarily elects to be represented by Counsel.

29. In addition, the sole ICTY authority cited for this proposition does not support the argument that an accused is entitled to meet directly with Defence witnesses in advance of their testimony. In *Prosecutor v. Milan Lukic*, the Accused appealed an

⁴⁶ *Ibid*, p. 7, para 15.

⁴⁷ *Prosecutor v Taylor*, SCSL-03-01-PT, Transcript, Initial Appearance, 3 April 2006, pp 17-128, where it was stated: "We will lay this rule right now, that if an accused is represented by counsel, then it is counsel who will put the accused's case to the court. There are some very good reasons for that, which I'm sure all counsel here today know. That is the way it is going to be in this court."

administrative decision of the Registrar suspending the accused's telephone privileges because he had improperly sought information about a Prosecution witness with the anticipated purpose of intimidating the witness. The Vice-President of the Tribunal, to whom the Registry's decision was appealed, concluded that the restriction was excessive and hampered the ability of the accused to prepare his defence.⁴⁸ The decision simply acknowledges that an accused may participate in the preparation of his defence, but it does not hold that he therefore has the right to meet witnesses.

30. Second, contact between the Accused and Defence witnesses would be inappropriate as there arises a real risk and possibility that this could lead to the undue influence of witnesses. This is particularly the case in circumstances where, as the Pre-Trial Chamber III in this matter has noted on several occasions,⁴⁹ the Accused is a man of influence, specifically noting his past and present political position, his international contacts and networks and his financial and professional background.

31. Accordingly, the Defence's request should be rejected.

Submission on Defence request for disclosure of victims' application forms in respect of victims with dual witness/victims status

32. The Defence requests that the Prosecution be ordered to disclose victims' application forms in respect of dual status victims pursuant to Rule 76(1) of the Rules.⁵⁰

⁴⁸ *Prosecutor v. Lukic*, IT-98-32/1-T p.6581, cited in Submission n.31.

⁴⁹ Decision of 10 June 2008, Decision of 20 August 2008, Decision of 16 December 2008, and the Decision of 14 April 2009.

⁵⁰ ICC-01/05-01/08- 620, paras. 89 to 93.

33. The Prosecution submits that it has no obligation to disclose the application forms under the normal disclosure mode. Both the Prosecution and the Defence have the same level of access to the forms in this case.⁵¹ The Prosecution is therefore not in possession or control⁵² of additional information or different versions of the forms which are not also in the possession of the Defence. The Defence is also aware of the identities of all victims who will provide evidence as Prosecution witnesses. The Prosecution proposes to identify for the Defence those application forms which relate to the dual status victims. As such, the Defence will be in a position to identify the prior statements of Prosecution witnesses. Given that the forms are court records, and are already in the possession of the Defence, the Prosecution considers that there are no outstanding disclosure obligations. If the Defence considers that it requires additional information or unredacted versions of the forms, then it can apply to the Chamber to have the forms re-classified.⁵³

Conclusion

34. In light of the foregoing, the Prosecution requests the following:

- i. That the Chamber adopt the provisions for Defence disclosure first enunciated by Trial Chamber I;
- ii. That should the Chamber be persuaded to reconsider either jurisprudence or practice in relation to contact with witnesses immediately prior to trial, it does so on the same terms for both parties ;
- iii. That the Accused should not be granted access to Defence witnesses before they testify at trial; and

⁵¹ In this case, the application forms have generally been served on the parties by the Registry in the same redacted format: see e.g. ICC-01/05-01/08-103-tENG-Corr; ICC-01/05-01/08-184.

⁵² Article 67(2), Rule 77.

⁵³ The process of reclassification and provision of the court record application form by the Registry was adopted in the case of *Prosecutor v Abu Garda*, ICC-02/05-02/09-121, para. 102 and dispositif.

iv. That the Chamber reject the Defence mode of disclosure with respect to victim application forms.



Luis Moreno-Ocampo, Prosecutor

Dated this 21st day of December 2009

At The Hague, The Netherlands