

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

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

Public

**Decision on the scope of the prosecution's disclosure obligations as regards defence
witnesses**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

Trial Chamber 1 ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses:¹

I. Background and submissions

1. During the hearing on 5 March 2010, counsel for the accused raised the issue of the scope of the Office of the Prosecutor's ("prosecution") obligation to disclose documents and other information that are to be used during its questioning of defence witnesses. It was argued that during its examination of defence Witness DRC-D01-WWWW-0026 the prosecution had created the impression that its questions were based on undisclosed information, possibly including documents that were relevant to Witness DRC-D01-WWWW-0026.² The Chamber asked the parties to submit written filings on the issue.³
2. In its filing of 9 March 2010, the defence submitted that the prosecution has an obligation (1) to indicate clearly the evidence it intends to use when questioning defence witnesses; and (2) to disclose the entirety of the information it envisages using for this purpose.⁴ In broad terms, therefore, the defence seeks a ruling that the prosecution is obliged to disclose to the defence all the information that is relevant to the evidence presented by the parties, or which is of potential interest to the defence, as soon as it has knowledge of it.⁵

¹ Observations de la Défense sur l'étendue des obligations du Procureur en matière d'information et de divulgation, 9 March 2010, ICC-01/04-01/06-2324.

² Transcript of hearing on 5 March 2010, ICC-01/04-01/06-T-254-Red-ENG CT WT, page 21, lines 12 – 24.

³ ICC-01/04-01/06-T-254-Red-ENG CT WT, page 22, lines 1 – 25

⁴ ICC-01/04-01/06-2324, paragraphs 3 – 16.

⁵ ICC-01/04-01/06-2324, page 6.

3. The defence argues that notwithstanding the absence of a specific provision in the Rome Statute ("Statute") framework that reflects this disclosure request,⁶ the prosecution has an undoubted obligation to inform the defence about the evidence it intends to use when questioning defence witnesses.⁷ It is suggested that this step is necessary to ensure a fair and efficient trial, as it would allow the defence to advance informed objections to the use of this material or questions based on it (if appropriate) and it would enable the Chamber to deal with any challenge without delaying the trial.⁸ It is suggested that this information should have been disclosed to the defence on a regular basis and in a timely manner.⁹

4. The defence accepts that the prosecution is not obliged to reveal its strategy for the examination of defence witnesses or to reveal the manner in which it intends to use the information at its disposal.¹⁰ However, in view of the prosecution's obligation under Article 54(1) of the Statute to investigate incriminating and exonerating circumstances, the defence maintains that the prosecution's disclosure obligations described in Article 64(3)(c) and Article 67(2) of the Statute, and Rules 76 and 77 of the Rules of Procedure and Evidence ("Rules") should be widely interpreted.¹¹ The defence submits that the scope of Rule 77 of the Rules encompasses not only the documents in the prosecution's possession and any evidence coming from the witnesses, but also the information collected by the investigators, in particular when it concerns defence witnesses or may be used by the prosecution in its questioning.¹² It is suggested that this material should be recorded in reports prepared by the prosecution and disclosed to the defence.¹³ Finally, the

⁶ The defence refers to Regulation 52 of the Regulations of the Registry that deals with the presentation of evidence during the hearing as an exception responding to technical necessities.

⁷ ICC-01/04-01/06-2324, paragraphs 3 – 5.

⁸ ICC-01/04-01/06-2324, paragraph 4.

⁹ ICC-01/04-01/06-2324, paragraph 5.

¹⁰ ICC-01/04-01/06-2324, paragraph 6.

¹¹ ICC-01/04-01/06-2324, paragraphs 7 – 13.

¹² ICC-01/04-01/06-2324, paragraph 14.

¹³ ICC-01/04-01/06-2324, paragraph 15.

defence submits that it would be unfair if, due to the lack of defence investigative resources, the prosecution is able either to withhold relevant material of which the defence is unaware or to use it to examine defence witnesses without prior disclosure.¹⁴

5. On 11 March 2010, the prosecution, in its response, argued that it has complied with its disclosure obligations under the Statute and that it is not under a general obligation to disclose all the materials it may use in its questioning of defence witnesses.¹⁵
6. The prosecution suggests that this issue has already been decided.¹⁶ Essentially, the prosecution distinguishes between two situations, namely: (1) when documents or other material are to be used to challenge a witness's account on a particular issue, when, in principle, they should be disclosed (*i.e.* those items that it intends to show to the witness); and (2) when a party tests a witness's credibility, without introducing or referring to documents or other material, in which case it is suggested there is no obligation to disclose the underlying information, so long as the questions are put on a proper basis.¹⁷
7. The prosecution relies on an observation of the Chamber to the effect that the examination by the party not calling the witness is, to some extent, reactionary. Moreover, the prosecution maintains that the brief summaries provided by the accused in advance of the evidence of defence witnesses make it difficult to anticipate the materials that, in due course, may be referred to during, or which may inform, its examination of defence

¹⁴ ICC-01/04-01/06-2324, paragraph 16.

¹⁵ Prosecution's Response to the "Observations de la défense sur l'entendue des obligations du Procureur en matière d'information et de divulgation", 11 March 2010, ICC-01/04-01/06-2341, paragraph 2.

¹⁶ ICC-01/04-01/06-2341, paragraph 4.

¹⁷ ICC-01/04-01/06-2341, paragraphs 6 and 7.

witnesses.¹⁸ This may lead to late applications to introduce documents or other materials.¹⁹

8. The prosecution suggests that a party is entitled to develop any line of questioning that is advanced in good faith, provided there is a sustainable basis, and the examination by the party not calling the witness is not dependent on evidence that has been disclosed in advance, as opposed to reasonable conjecture or hypothesis.²⁰ It is argued that the “underlying information” used in questioning by the prosecution (but not introduced, for instance, in documentary form) is not governed by Article 67(2) of the Statute or Rule 77 of the Rules.²¹ It is suggested that the approach to disclosure advocated by the defence in this application would produce a result which is unfair to the prosecution and detrimental to establishing the truth.²² The prosecution observes that the defence has routinely questioned prosecution witnesses without effecting prior disclosure to the prosecution.²³
9. The legal representatives of victims did not submit observations on this application.

II. Relevant provisions

10. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered the following provisions:

Article 54 of the Statute

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

- (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal

¹⁸ ICC-01/04-01/06-2341, footnotes 6 and 10.

¹⁹ ICC-01/04-01/06-2341, footnotes 6 and 10.

²⁰ ICC-01/04-01/06-2341, paragraph 8.

²¹ ICC-01/04-01/06-2341, paragraphs 9 – 11.

²² ICC-01/04-01/06-2341, paragraph 11.

²³ ICC-01/04-01/06-2341, paragraph 11.

responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

[...]

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters.

[...]

Article 67 of the Statute

Rights of the accused

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or 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. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 77 of the Rules

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82 permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 78 of the Rules

Inspection of material in possession or control of the defence

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 for the purposes of the confirmation hearing or trial.

Rule 81 of the Rules

Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

[...]

III. Analysis

11. In determining this application, it is helpful to review the extent of the

prosecution's disclosure obligations under the Statute and the Rules.

12. First, pursuant to Article 67(2) of the Statute, the prosecution must disclose to the defence, as soon as is practicable, evidence which the prosecution believes i) shows or tends to show the innocence of the accused; ii) mitigates the guilt of the accused; or iii) may affect the credibility of the prosecution evidence. These three categories have been referred to generically as "(potentially) exculpatory evidence".

13. Second, under Rule 77 of the Rules, the prosecution is to permit the defence to inspect any books, documents, photographs and other tangible objects in its possession or control, which (1) are material to the preparation of the defence; (2) are intended for use by the prosecution as evidence for the purposes of the confirmation hearing or at trial; or (3) were obtained from or belonged to the person. It is self-evident that information concerning defence witnesses that is to be used during the prosecution's questioning of defence witnesses may come within the scope of information that is "material to the preparation of the defence" or which is "intended for use by the prosecution as evidence" during the trial.

14. The Chamber has already given guidance on the mechanics of the disclosure of documents that are to be used for questioning, as follows:

34. The Chamber accepts the prosecution's submission that the disclosure of documents to be used in questioning a witness is governed by Rules 77 and 78 of the Rules: the parties are required to provide for inspection, in advance of trial, those documents which they intend to use for this purpose. Furthermore, by Regulation 52 of the Regulations of the Registry, the parties and participants have the obligation to provide the Registry with the electronic version, whenever possible of any evidence they intend to use at a hearing at least three full working days in advance. However, the Chamber recognises that the questioning of a witness by a party not calling that witness is to some extent reactionary, and as such could entail on occasion the unanticipated use of documents.²⁴

²⁴ Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 34. Although Regulation 52 of the Regulations of the Registry deals with the provision of

15. More fundamentally, however, the Appeals Chamber, at an earlier stage in this trial, has considered what is meant by the expression "material to the preparation of the defence" for the purposes of Rule 77 of the Rules:²⁵

76. [...]Thus, according to the Trial Chamber's view, only material that relates to issues which would either directly undermine the "Prosecution case" or support a line of argument of the defence are material to the preparation of the defence.

77. [T]he Trial Chamber interpreted rule 77 of the Rules of Procedure and Evidence too narrowly because it excluded objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence. The wording of rule 77 of the Rules of Procedure and Evidence does not suggest that the term "material to the preparation of the defence" should be construed as narrowly as the Trial Chamber did. Rather, the term should be understood as referring to all objects that are relevant for the preparation of the defence.

78. Given that the wording of rule 77 of the Rules of Procedure and Evidence is based on the wording of rule 66(B) of the Rules of Procedure and Evidence of the ICTY, it is useful to consider the relevant jurisprudence of the ICTY and the ICTR on the corresponding provisions in the ICTY and ICTR Rules of Procedure and Evidence. This jurisprudence confirms that the term "material to the preparation of the defence" must be interpreted broadly.

79. The appellant has referred the Appeals Chamber to the decision of the ICTR Appeals Chamber of 25 September 2006 in the case of *Bagosora et al.* (hereinafter: "Bagosora Decision"). The ICTR Appeals Chamber explained at paragraph 9 of the decision that

In accord with the plain meaning of Rule 66 (B) of the Rules [of Procedure and Evidence of the ICTR], the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution case.

80. While it must be noted that the context of the Bagosora Decision was different from the present case - the ICTR Appeals Chamber had to decide whether material held by the ICTR Prosecutor that was related to the credibility of potential defence witnesses had to be disclosed - the decision indicates that an interpretation of the disclosure obligation that is too narrow must be avoided.

81. A broader interpretation of the disclosure obligations is also supported by the decision of 26 September 1996 of a Trial Chamber of the ICTY in the case of *Delalić et al.* At paragraph 7 of that decision, the ICTY Trial Chamber cited case law of U.S. federal jurisdictions that the "requested evidence must be 'significantly helpful to an understanding of important inculpatory or exculpatory evidence'" (emphasis added).

evidence by the parties to the Registry, the Chamber notes that it is not part of the disclosure regime as it only addresses a requirement for the presentation of evidence in electronic form during the hearing.

²⁵ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, (Judge Pikis and Judge Song dissenting), ICC-01/04-01/06-1433, paragraphs 76 – 82.

This formulation of the ICTY Trial Chamber was cited with approval by a commentator on the disclosure regime established by rule 77 of the Rules of Procedure and Evidence.

82. The Appeals Chamber finds that in the present case, the appellant has sufficiently demonstrated that material relating to the general use of child soldiers in the DRC is material to the preparation of his defence: at the status conference of 10 January 2008, counsel for the appellant explained that such material will be relevant because "[b]efore setting a defence line, it's necessary to understand the situation, and it appeared to us that this information was useful to us and even necessary to us able to understand the situation in Ituri at that time." In his Document in Support of the Appeal, the appellant further specified that the requested material might be relevant, for example, to understand the phenomenon of the use of child soldiers and their demobilisation in the DRC. In addition to this, the International Criminal Bar observes that information relating to the general use of child soldiers might be relevant at the sentencing phase of the proceedings, if any, and that counsel for the defence will have to prepare herself for such a phase.

16. It follows from this Decision of the Appeals Chamber that the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, *inter alia*, any item that is relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation. This means that the prosecution is to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case.

17. This obligation has been further explored in jurisprudence from the ICTY, which, as referred to above, was cited favourably by the ICC's Appeals Chamber. The ICTY indicated that information is material to the preparation of the defence if there "is a strong indication that ... it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'"²⁶

²⁶ ICTY, *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, paragraph 7, citing *United States v. Jackson*, 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan 1994).

18. In all the circumstances, the information, in the sense described above, that is relevant and concerns defence witnesses who are to be called, is to be disclosed to the defence for preparation, not least because it will enable the accused to decide whether or not to call them. Therefore, information that undermines or supports the evidence, or the credibility, of proposed defence witnesses falls within the scope of Rule 77 of the Rules. This is likely to assist trial efficiency, because it will increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible and reliable. The prosecution is not obliged to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the defence witnesses.

19. The decisions made by the prosecution on disclosure are based, *inter alia*, on the summaries of the anticipated defence witnesses. The Chamber has already addressed the sufficiency of these summaries, as follows:

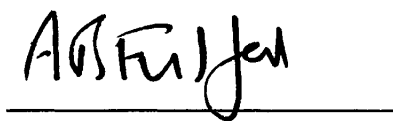
58. (...) they appear to provide a clear guide to the areas that will be covered by each witness; indeed, the Chamber finds the document to be, *prima facie*, extremely helpful.²⁷

20. Although appropriate summaries have been provided, questioning, as the Chamber has previously underlined, may to some extent be reactionary,²⁸ and the answers from witnesses may reveal additional material that is relevant and disclosable. The prosecution's disclosure obligations continue throughout the trial, and once fresh items are identified that should be provided to the defence, this is to be effected expeditiously.

²⁷ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Conf, redacted version issued on 20 January 2010, ICC-01/04-01/06-2192-Red, para 58.

²⁸ ICC-01/04-01/06-1140, paragraph 34.

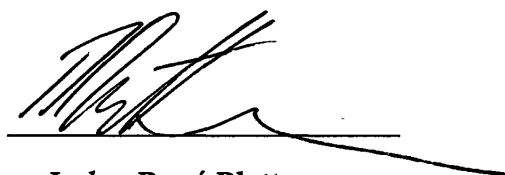
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 12 November 2010

At The Hague, The Netherlands