

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/05-01/08**

Date: **29 July 2011**

TRIAL CHAMBER III

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

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

Public

**Redacted Version of Decision on the “Defence Motion for Disclosure Pursuant
to Rule 77”**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", filed on 26 May 2011.¹

I. Background

1. On this motion, the Chamber is called to resolve a dispute between the parties over the scope of the prosecution's obligations under Rule 77 of the Rules of Procedure and Evidence ("Rules"). The relevant facts are as follows.
2. Witness 63 is a [REDACTED] during the 2002-2003 conflict in the Central African Republic.² He provided the Office of the Prosecutor ("prosecution") with 895 [REDACTED] and one [REDACTED] in connection with its investigation of this case.³
3. On 10 November 2009, the prosecution disclosed Witness 63's redacted statement, along with the [REDACTED] and 50 of [REDACTED], to the defence.⁴ On 20 July 2010, the prosecution disclosed a less redacted form of Witness 63's statement to the defence, along with two additional [REDACTED].⁵ Thus, the defence received a total of 52 [REDACTED] and

¹ Defence Motion for Disclosure Pursuant to Rule 77, 26 May 2011, ICC-01/05-01/08-1460-Conf.

² Transcript of hearing on 11 May 2011, ICC-01/05-01/08-T-108-ENG ET, page 31, lines 17 to 22.

³ Prosecution's Response to "Defence Motion for Disclosure Pursuant to Rule 77", 20 June 2011, ICC-01/05-01/08-1554-Conf, paragraphs 5 and 8.

⁴ ICC-01/05-01/08-1554-Conf, paragraph 5 (citing (i) Confidential *ex parte* Annex A to Prosecution's Communication of Incriminatory Evidence (Items on List of Evidence attached to "Prosecution's Summary of Presentation of Evidence") Disclosed to the Defence on 10 November 2009, 11 November 2009, ICC-01/05-01/08-605-Conf-Exp-AnxA; and (ii) Confidential *ex parte* Annex A to Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence pursuant to the Chamber's order on disclosure of evidence by the Office of the Prosecutor of 4 November 2009, 11 November 2009, ICC-01/05-01/08-606-Conf-Exp-AnxA).

⁵ ICC-01/05-01/08-1554-Conf, paragraph 5 (citing Confidential *ex parte* Annex A to Prosecution's Communication of Incriminatory, Potentially Exculpatory and Rule 77 Evidence Disclosed to the Defence on 20 July 2010, 21 July 2010, ICC-01/05-01/08-838-Conf-Exp-AnxA).

one [REDACTED]. The prosecution did not disclose the remaining 843 [REDACTED] that it had received from Witness 63.⁶

4. Witness 63 testified in Court on 11-13, 17-20 and 24-25 May 2011 as a prosecution witness. During the examination by the defence on 23 May 2011, the following exchange occurred:⁷

Q. I want you to help us with what exactly it was you handed over to the Office of the Prosecutor three years or so ago. How many [REDACTED] did you actually hand over to the Prosecutor?

A. As far as I know, I gave several [REDACTED] to them; several, many. Now, even the [REDACTED] that were [REDACTED] here in court are only a part of the total number.

Q. That's what I'm trying to establish, you see. As I understand the position, you handed over [REDACTED]; do you agree with that?

A. Yes, I believe that I handed over several [REDACTED], but I don't know the exact number. All I know is that there were many [REDACTED].

Q. Thank you. You see, during the course of your evidence you've looked at [REDACTED]; is that a very small fraction of the number of [REDACTED] you handed over to the Office of the Prosecutor when you were interviewed?

A. Yes, a very small fraction, indeed.

Q. Do you know what's happened to all the other [REDACTED] that you handed to the Office of the Prosecutor?

A. I am not in a position to know but that is what they did. And that is what was presented.

Q. You didn't get them back; they kept them. Is that correct?

A. Yes.

5. Shortly after the exchange above, the defence sent an email to the Chamber, requesting "the assistance of the Chamber in directing the Prosecution to provide the Defence with a complete set of [REDACTED] and any [REDACTED] given by the witness to the Office of the Prosecutor, which has not already been disclosed to the Defence."⁸

⁶ ICC-01/05-01/08-1554-Conf, paragraph 8.

⁷ Transcript of hearing on 23 May 2011, ICC-01/05-01/08-T-114-CONF-ENG-ET, page 17, line 16 to page 18, line 9.

⁸ Email from the defence to the Chamber's Legal Officer, copying the prosecution, 23 May 2011 at 13:01.

6. The Chamber informed the defence via email that the defence should address its request to the prosecution in the first instance.⁹ The defence then sent the prosecution an email requesting “the disclosure of all [REDACTED] and all other [REDACTED] provided by the present witness to the Office of the Prosecutor, which has not already been provided to the Defence” (together, the “Requested Items”).¹⁰
7. Following some back and forth regarding the legal basis of the defence request¹¹ and brief oral submissions to the Chamber,¹² the prosecution denied the defence request on 24 May 2011.¹³ In doing so, the prosecution took the position that “[e]ven under an expansive reading of Rule 77 and the Appeals Chamber’s Judgement [in the *Lubanga* case] the Prosecution fails to see how these items upon which the Prosecution will not rely are material to the preparation of the Defence.”¹⁴
8. On 26 May 2011, the defence filed a motion to obtain disclosure of the Requested Items pursuant to Rule 77 of the Rules.¹⁵ The prosecution filed its response on 20 June 2011.¹⁶

⁹ Email from the Chamber, through a Legal Officer, to the defence, 23 May 2011 at 15:12.

¹⁰ Email from the defence to the prosecution, copying the Chamber’s Legal Officer, 23 May 2011 at 15:40.

¹¹ Email from the prosecution to the defence, copying the Chamber’s Legal Officer, 23 May 2011 at 18:11; email from the defence to the prosecution, copying the Chamber’s Legal Officer, 24 May 2011 at 15:39.

¹² Transcript of hearing on 24 May 2011, ICC-01/05-01/08-T-115-CONF-ENG-ET, page 50, line 16 to page 53, line 13.

¹³ Email from the prosecution to the defence, copying the Chamber’s Legal Officer, 24 May 2011 at 21:47.

¹⁴ *Ibid.*

¹⁵ ICC-01/05-01/08-1460-Conf.

¹⁶ ICC-01/05-01/08-1554-Conf.

II. Submissions

9. The parties agree that Rule 77 governs the dispute and that its outcome turns on the meaning of the phrase “material to the preparation of the defence”, which is found in that Rule.¹⁷

Defence submissions

10. The defence argues that the concept of “materiality” under Rule 77 is subject to a “broad interpretation” and relies upon a ruling of the Appeals Chamber in *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”),¹⁸ as well as jurisprudence from the International Criminal Tribunals for the former Yugoslavia and Rwanda (“ICTY” and “ICTR”), in support.¹⁹ The defence further submits that a broad interpretation of Rule 77 is warranted on a policy level because it would “assist in reducing th[e] disparity” between the resources available to the prosecution and those available to the defence.²⁰
11. In the defence’s view, the Requested Items fall within the broad ambit of Rule 77’s materiality requirement because they are “a [REDACTED] confirmation of the witness’ own recollection of events” and are therefore “directly relevant to the Defence’s ability to effectively assess, test or make final submissions on his evidence and credibility”.²¹ The defence also asserts that the Requested Items are material not only to the examination of Witness 63, but also to “Defence investigations and preparations more generally, and may also be relevant to the examination of subsequent witnesses”.²² In sum, says the defence, the Requested Items are “precisely

¹⁷ ICC-01/05-01/08-1460-Conf, paragraph 13; ICC-01/05-01/08-1554-Conf, paragraph 10.

¹⁸ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433.

¹⁹ ICC-01/05-01/08-1460-Conf, paragraphs 10-12.

²⁰ ICC-01/05-01/08-1460-Conf, paragraph 12.

²¹ ICC-01/05-01/08-1460-Conf, paragraph 15.

²² ICC-01/05-01/08-1460-Conf, paragraph 16.

th[e] kind of material which is relevant to Defence preparations, namely, [REDACTED] which were created contemporaneously with the relevant events and which claim to [REDACTED] which are at the heart of the Revised Second Amended Document Concerning the Charges.”²³

Prosecution submissions

12. The prosecution concedes that “Rule 77 of the Rules should be interpreted broadly”, but argues the defence’s reading of Rule 77 would “effectively eliminate[] the requirement of materiality altogether” and lead to a regime where “anything and everything must be disclosed”.²⁴ Moreover, says the prosecution, the “Defence does not factually substantiate its claim” of materiality and instead offers “unsubstantiated and conclusory speculation supported only by legal platitudes”.²⁵ Asserting that “the 52 disclosed [REDACTED] are a fair sample of all of the [REDACTED]” obtained from Witness 63, and that the Requested Items are “repetitive and cumulative to the 52 disclosed and incriminatory [REDACTED]”, the prosecution asserts that “the additional [REDACTED] would produce no added value for the preparation of the defence.”²⁶

13. The prosecution further submits that “the Defence’s delay in submitting the motion to the Chamber, despite the fact that it has been on notice for 18 months of the existence of the [REDACTED], also belies, substantially weakens, and even waives its materiality claim.”²⁷ Finally, the prosecution argues that the “substantial added burden” of disclosing the Requested Items outweighs the lack of “discernible benefit” that their disclosure would provide to the defence.²⁸

²³ ICC-01/05-01/08-1460-Conf, paragraph 16.

²⁴ ICC-01/05-01/08-1554-Conf, paragraphs 15-16.

²⁵ ICC-01/05-01/08-1554-Conf, paragraphs 11-12.

²⁶ ICC-01/05-01/08-1554-Conf, paragraph 20.

²⁷ ICC-01/05-01/08-1554-Conf, paragraph 17.

²⁸ ICC-01/05-01/08-1554-Conf, paragraphs 18 and 20.

III. Relevant provisions

14. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered Articles 64(6) and 67(2) of the Statute and Rules 77 and 81(2)-(5) of the Rules.

IV. Analysis

15. Under Rule 77 of the Rules, the prosecution is required to permit the defence to inspect any books, documents, photographs and other tangible objects in its possession or control that (i) are material to the preparation of the defence; (ii) are intended for use by the prosecution as evidence for the purposes of the confirmation hearing or at trial; or (iii) were obtained from or belonged to the person. Here, the Requested Items did not come from the accused and the prosecution does not intend to submit them as evidence in the trial.²⁹ Thus, the question for the Chamber is whether the Requested Items are "material to the preparation of the defence".

16. To this end, the Chamber begins by reviewing the relevant jurisprudence on the scope of Rule 77's materiality requirement.

17. The Chamber is guided first and foremost by the Appeals Chamber's judgment in the *Lubanga* case.³⁰ The Appeals Chamber held in that case that "material relating to the general use of child soldiers in the DRC [was] material to the preparation of [the accused's] defence", and was therefore

²⁹ See ICC-01/05-01/08-1554-Conf, paragraph 8 (prosecution representing that it "does not intend to rely on any of the undisclosed [REDACTED] as incriminatory evidence in these proceedings").

³⁰ ICC-01/04-01/06-1433.

subject to disclosure under Rule 77.³¹ Relying on jurisprudence from the ICTY and ICTR,³² the Appeals Chamber also delineated the scope of Rule 77's materiality requirement, holding that "the term ['material to the preparation of the defence'] should be understood as referring to all objects that are relevant for the preparation of the defence."³³

18. Also instructive are decisions of Trial Chamber I in the *Lubanga* case and Trial Chamber II in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo* ("Katanga and Ngudjolo case").³⁴

19. In the *Lubanga* case, Trial Chamber I ordered the prosecution to disclose any material in its possession that "is relevant and concerns defence witnesses", including material that the prosecution intended to use in the questioning of defence witnesses.³⁵ In doing so, Trial Chamber I discussed the scope of Rule 77's materiality requirement in the following terms:

[...] 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

³¹ ICC-01/04-01/06-1433, paragraph 82.

³² ICTR, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Appeals Chamber, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 26 September 2006, paragraphs 2-4 and 9-14 (holding that the ICTR's disclosure rules require the prosecution to disclose items related to the credibility of potential defence witnesses); ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Trial Chamber, 26 September 1996, paragraph 10 and disposition (page 9) (holding that the ICTY's disclosure rules do not entitle the defence to inspect *all* documents in the prosecution's possession). See also ICTR, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Appeals Chamber, Decision on Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, paragraph 14 (holding that the ICTR's disclosure rules require the prosecution to disclose all statements made by potential defence witness); ICTY, *Prosecutor v. Ljube Boškoski et al.*, Case No. IT-04-82-T, Trial Chamber, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008, paragraphs 1 and 10-12 (rejecting defence request to inspect all material in the prosecution's possession related to the defence's proposed witnesses and holding that the defence request was insufficiently specific).

³³ ICC-01/04-01/06-1433, paragraph 77.

³⁴ Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624; Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219, 30 August 2010, ICC-01/04-01/07-2309-Red-tENG.

³⁵ ICC-01/04-01/06-2624, paragraph 18.

assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case.³⁶

20. In the *Katanga* and *Ngudjolo* case, Trial Chamber II was called upon to resolve a dispute with facts analogous to those now before this Chamber. The defence sought, for the purpose of preparing its questioning of a prosecution witness, the disclosure of audio recordings of the prosecution's interviews of that witness.³⁷ Trial Chamber II ordered disclosure of the recordings, reasoning that:

preparing the cross-examination of a witness will inevitably prompt speculation as to his or her credibility or to any inconsistencies, and access to the audio records of the interview, in addition to the record of the statement, can only facilitate that task.³⁸

21. As is apparent from the above jurisprudence, the prosecution's disclosure obligations under Rule 77's materiality prong are broad. Those obligations are not, however, unlimited. An item will be considered material for Rule 77 purposes only if it is "relevant for the preparation of the defence"³⁹ in the sense that it would "undermine the prosecution case or support a line of argument of the defence" or "significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case".⁴⁰

22. In this case, the prosecution chose not to disclose [REDACTED] obtained from one of its own witnesses. This, in the Chamber's view, appears to have been incompatible with the requirements of Rule 77. In most situations, information obtained from a prosecution witness will be material to the preparation of the defence because it will provide the defence with the foundation for its questioning of the witness. That is particularly true of [REDACTED] contemporaneously with the relevant

³⁶ ICC-01/04-01/06-2624, paragraph 16.

³⁷ ICC-01/04-01/07-2309-Red-tENG, paragraph 1.

³⁸ ICC-01/04-01/07-2309-Red-tENG, paragraph 4.

³⁹ ICC-01/04-01/06-1433, paragraph 77.

⁴⁰ ICC-01/04-01/06-2624, paragraph 16.

events. As the defence correctly points out, [REDACTED] “represent[] a [REDACTED] confirmation of the witness’ own recollection of events” and therefore have particular relevance to testing the veracity of the witness’ testimony.⁴¹ For this reason, the Chamber starts from the premise that the Requested Items – with two possible exceptions set out in the next paragraph – were presumptively material to the preparation of the defence, in the sense that they may have assisted the defence to prepare its questioning of Witness 63, among other things.

23. The Chamber is unpersuaded by the prosecution’s argument that the Requested Items need not have been disclosed because the 52 disclosed [REDACTED] constitute “a fair sample” of the 895 [REDACTED] that the prosecution obtained from Witness 63.⁴² Taking the prosecution’s representations at face value – as the Chamber must – the Chamber concludes that the “fair sample” standard advanced by the prosecution is overly subjective. An assessment of what is cumulative and what is not will almost inevitably require an exercise of judgment,⁴³ and there is an unacceptable risk that the defence may be deprived of materials to which it is entitled as a result of incorrect judgment calls. This risk is heightened due to the fact that the prosecution will seldom know the precise contours of the defence strategy. Thus, items obtained from a prosecution witness will presumptively be material to the defence’s preparation for that witness’ testimony – and possibly for other purposes as well – unless those items (i) are truly repetitive in the sense that they are duplicates; or (ii) bear no connection to the events relevant to the charges, such as items of a purely personal nature.

⁴¹ ICC-01/05-01/08-1460-Conf, paragraph 15.

⁴² ICC-01/05-01/08-1554-Conf, paragraph 8.

⁴³ An obvious exception being a situation involving exact duplicates.

24. The prosecution's argument regarding the tardiness of the defence request is more persuasive.⁴⁴ As the prosecution observes, the defence was on notice from the time it received Witness 63's statement in November 2009 that the prosecution possessed more of [REDACTED] than it had disclosed.⁴⁵ This is evident from the first transcript page of Witness 63's 13 November 2008 statement, which reveals that the prosecution received "[REDACTED]" from Witness 63.⁴⁶ Because [REDACTED], the defence was in a position to determine that the prosecution had not disclosed all that it had received from Witness 63.⁴⁷

25. In principle, the defence's failure to request the undisclosed [REDACTED] in advance of Witness 63's testimony undermines its materiality argument because those [REDACTED] can now add no value to the examination of Witness 63 given that his testimony has already been completed. The Chamber is not persuaded by the defence's attempt to remedy this problem by asserting that the defence may "seize the Chamber with a request to recall the witness following a review of the disclosed [REDACTED]".⁴⁸ While the Chamber will give due consideration to any request to recall a witness, it is not minded to recall a witness simply because a party has obtained material after completion of the witness' testimony that it could have obtained through the exercise of reasonable diligence before the testimony.

⁴⁴ ICC-01/05-01/08-1554-Conf, paragraph 17.

⁴⁵ ICC-01/05-01/08-1554-Conf, paragraph 17.

⁴⁶ CAR-OTP-0034-0403-R01 at 0405 ("Inv: OK, today [REDACTED] we will look through the [REDACTED] which you have provided to us. For the record there are [REDACTED] ...").

⁴⁷ There can be no suggestion that the prosecution's decision not to disclose the Requested Items became apparent only during the defence's examination of Witness 63. Witness 63's testimony simply confirmed what was evident from the only reasonable inference that could be drawn from his statement – that the prosecution possessed more [REDACTED] than it had disclosed to the defence. Compare CAR-OTP-0034-0403-R01 at 0405 with Transcript of hearing on 23 May 2011, ICC-01/05-01/08-T-114-CONF-ENG-ET, page 17, line 16 to page 18, line 9.

⁴⁸ ICC-01/05-01/08-1460-Conf, paragraph 20.

26. Despite the tardiness of the defence request, the Chamber nevertheless finds that the defence has demonstrated that the Requested Items remain material to its preparation, even though Witness 63 has completed his testimony.

27. The defence is able to make this showing only because of the nature of the Requested Items themselves. Because the Requested Items are [REDACTED] contemporaneously with the events at issue, they may, even at this late stage, increase the defence's "ability to effectively assess, test or make final submissions on [Witness 63's] evidence and credibility".⁴⁹ Moreover, because the Requested Items [REDACTED] some of the individuals and actions at the heart of this case, they may significantly assist the defence to understand the prosecution's evidence as a whole and to prepare the presentation of its own. Thus, the Requested Items have been shown to be "relevant for the preparation of the defence"⁵⁰ in the sense that they will assist the defence in understanding and challenging the evidence the prosecution has presented.⁵¹ On this basis, the Chamber concludes that the defence must be permitted to inspect the Requested Items, with the exception of those [REDACTED] that fall within either of the two categories enumerated in paragraph 23, above.

28. In light of the foregoing, the Chamber will grant the prosecution's request for permission to communicate with Witness 63 to discuss any redactions that may be appropriate before the Requested Items are inspected by the defence.⁵² Such communication shall be limited to that issue.⁵³

⁴⁹ ICC-01/05-01/08-1460-Conf, paragraph 15.

⁵⁰ ICC-01/04-01/06-1433, paragraph 77.

⁵¹ See ICC-01/04-01/06-2624, paragraph 16.

⁵² ICC-01/05-01/08-1554-Conf, paragraph 21.

⁵³ See Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, paragraphs 85-86.

29. As far as potential redactions of the [REDACTED] are concerned, [REDACTED]⁵⁴

30. If the prosecution believes that good cause exists for redacting some or all of the Requested Items, it must, pursuant to Rule 81 of the Rules, seek leave from the Chamber in advance, specifying why the prosecution believes that redactions (i) are warranted; and (ii) will not be inimical to a fair trial. The prosecution will not be required to permit the defence to inspect any of the Requested Items covered by an application for redactions until the Chamber has ruled on the application.

31. The Chamber rejects the prosecution's request "that the Chamber emplace sufficient safeguards on the use of the [REDACTED] to ensure the protected status of Witness 63 and others"⁵⁵ because the Chamber had already adjudicated this issue.⁵⁶ The prosecution may, in accordance with the usual practice in this case, designate some or all of the Requested Items as confidential if they fulfil the requisite criteria. If the prosecution believes that additional measures are required, it may address the Chamber with a specific request for relief.

V. Conclusion

32. For the reasons above, the Chamber:

- a. GRANTS the defence motion insofar as it seeks the inspection of the Requested Items that are not (i) of a purely personal nature; or (ii) duplicates of [REDACTED] that have already been disclosed;
- b. ORDERS the prosecution to permit the defence to inspect the Requested Items, with the exception of any [REDACTED] of a

⁵⁴ [REDACTED].

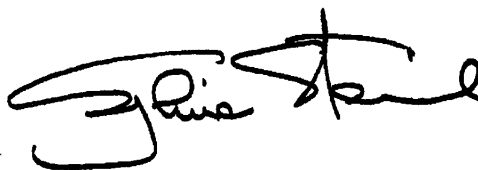
⁵⁵ ICC-01/05-01/08-1554-Conf, paragraph 21.

⁵⁶ [REDACTED].

purely personal nature or duplicates of [REDACTED] that have already been disclosed, no later than Friday, 19 August 2011, subject to paragraph 30, above;

- c. GRANTS the prosecution leave to communicate with Witness 63 to discuss any redactions that may be appropriate before the Requested Items are inspected by the defence; and
- d. INVITES the prosecution, should it determine that good cause exists for redacting some or all of the Requested Items, to submit its application for leave to redact no later than Monday, 15 August 2011.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 29 July 2011

At The Hague, The Netherlands