

DISSENTING OPINION OF JUDGE HENDERSON

1. This request for leave to appeal raises a significant point of principle. This issue clearly arises from the Impugned Decision and I believe it deserves immediate appellate attention.

2. In my view, the main reason why the Defence cannot be compelled to reveal its investigation strategy to the Prosecutor is because the accused enjoys the right to remain silent.¹ It is only *if and when* the Defence has decided to present evidence that it has an obligation to disclose anything to the Prosecutor. The only partial exception to this principle is found in Rules 79(1) and 80, which oblige the Defence to notify the Prosecutor “sufficiently in advance” of its intention to raise an alibi or certain grounds for excluding criminal responsibility. The rationale for this exception is readily apparent: if the accused plans to invoke an alibi or ground for excluding criminal responsibility, the Prosecutor should have sufficient time to investigate and submit relevant evidence on this during the presentation of its case. Despite the adversarial nature of our trials, parties are not permitted to ‘ambush’ the other side by springing evidence on their opponents at the last moment in order to make it more difficult for them to respond.

3. A similar rationale underlies Rule 78, which obliges the Defence to give notice to the Trial Chamber and the Prosecutor of all the evidence which is “intended for use by the defence as evidence [...] at trial.” In order to allow the Prosecutor to meaningfully prepare its (cross-) examination of the evidence proffered by the Defence, it should have reasonable notice so as to have sufficient time to prepare. However, this obligation only applies once the Defence has made the formal decision to present the evidence in question. The Defence is under no

¹ Article 67(1)(g)

obligation whatsoever to reveal to the Prosecutor that it is *contemplating* relying on certain evidence, much less to explain the different strands it plans to explore during its investigation.

4. It is worth noting that the Prosecution also has no obligation to reveal their investigation strategy or its preliminary ruminations about which evidence to present at trial. This is obvious from Rule 81(1) and (2) of the Rules of Procedure and Evidence. The latter even permits the Prosecutor to delay disclosure of evidence, which it otherwise has an obligation to disclose, in order to protect its ongoing investigations. It would be absurd to suggest that the Defence has more far-reaching disclosure obligations than the Prosecutor.

5. The fact that the information provided by the Defence in filing 1041 may or may not reveal details of the Defence's strategy is neither here nor there. No accused should ever have to reveal their investigatory strategy to the Prosecutor. The Impugned Decision in effect punishes the Defence for being open with the Chamber. This is likely to have an impact on the conduct of future proceedings, where Defence teams may well see no alternative but to delay disclosure to the Chamber until the very last moment. This ultimately may prove unhelpful as it may well hinder the Chamber in its duties to manage the trial proceedings. For these reasons I cannot agree with either the Impugned or the present decision.


Judge Geoffrey Henderson

Dated 9 November 2017

At The Hague, The Netherlands