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LA CHAMBRE PRÉLIMINAIRE I

Composée comme suit :
Mme la juge Sylvia Steiner

Greffier : **M. Bruno Cathala**

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

Public

Observations of the Defence relating to the system of disclosure in view of the Confirmation Hearing

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Background

A decision has been issued by Hon. Sylvia Steiner, single Judge of Pre-Trial Chamber I, providing for a hearing on disclosure related matters on 24 April 2006, according to an agenda which was distributed to the parties.

On the hearing of 24 April 2006 parties were given time until 2 May 2006 to submit written arguments as to the matters discussed on the hearing.

The Defence will follow the said agenda and comment, where it thinks needed, the points raised by the Chamber.

Observations

1. **Meaning of the expressions "within a reasonable time before the hearing" and" be informed" under art. 61.3 of the statute**

1.1.Within a reasonable time before the hearing.

The terms used in art. 61.3 are made still more precise in art. 67 of the Statute.

Art. 67.1 states:

"In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this statute, to a fair hearing conducted impartially, and to the following minimum guarantees, **in full equality** :

a) To be informed **promptly** and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
b) To have **adequate time** and **facilities** for the **preparation of the defence** and to communicate freely with counsel of the accused's choosing in confidence;
...."

Rule 121.1 states that any arrested person must be entitled to these (more specific) basic rights from first appearance in court onwards.

The "ratio legis" of this disposition is quite obvious and is double :

* first of all, any arrested person must have access to the file of the Prosecutor in its state at the moment of arrest, to be able to check the legality of the arrest and the causes of the charges brought against him or her.

This is even more the case that art. 66 states that anyone is presumed innocent until proved guilty and that the onus to prove the guilt of the accused is on the Prosecutor (art. 66§2).

Art. 54.1 requires that the Prosecutor, in doing so, must extend the investigation to cover all facts and evidence relevant to an assessment whether there is criminal responsibility under this statute, and investigate incriminating and exonerating circumstances **equally**.

When the Prosecutor, on the basis of the evidence thus gathered, request for a warrant of arrest to be delivered, he also must be ready to disclose to the accused immediately after his arrest the totality of the materials of evidence, without withholding anything, in order to establish the fulfilment of the requirements of the statute and to justify to the accused the causes of his arrest.

The Prosecutor, in his observations on 24/04/2006, left this crucial aspect at this stage of criminal proceedings, entirely and artificially out.

* secondly, art. 61.6 of the statute entitles the accused, on the Confirmation Hearing, to:

a) object to the charges
b) challenge the evidence presented by the Prosecutor, and
c) present evidence

In order to be enabled to exercise these complicated and basic rights, it is essential that the accused should be entitled to study the evidence gathered since a long time by the Prosecutor.

The "full equality" – that could not yet exist at this stage – demands that the Prosecutor would immediately ("promptly") disclose whatever materials gathered by him to the accused, in order to start creating equality.

The French text is still more clear where it says : "dans le **plus** court délai" (= "in the **shortest** time").

It is quite obvious that if the accused wants to exercise his rights as given to him by art. 61.6, he will need several months to study the evidence, to get an investigator appointed and trained, to discuss the evidence with him and counsel, to send him or her on the field, to study and discuss the evidence gathered, before being able to go to the confirmation hearing.

There is no reason whatsoever why the Prosecutor would be entitled to withhold the evidence gathered by him from the accused, once arrested.

This is even more the case that art. 67.1 provides that the accused must also have **adequate time** and **facilities** to **prepare his defense**.

How could this be the case if he would have to wait several weeks or even months before being able to study the evidence which will be brought against him.

1.2.Be informed

To be informed about the "nature, cause and content" of the charge implies that the accused should be able to get full disclosure both under rule 76 (witness – materials) as under rule 77 (other evidence "à charge").

Rule 76.1 mentions the names of the witnesses and a copy of their statements whereas rule 76.3 is still more precise and mentions that witness statements should be disclosed in **original / and** in a language the accused understands fully.

The same applies to the materials, other than testimonies, which will be used by the Prosecutor as mentioned in rule 77.

To be "informed" thus means that the accused should have **full access** to the materials held by the Prosecutor, in order to enable him to study them.

It is, in this sense, difficult to understand and disquieting that the Prosecutor takes the view that accused would already now "be informed about the main lines of the evidence of the Prosecution" (record of the hearing of 24.4.2006 p. 25/88).

The accused has at this point in time, meaning more than one month after his arrest, even not been disclosed a copy of the request for warrant of arrest, let alone that he would have been disclosed the evidence supporting it.

The Prosecutor admitted on the hearing of 24.4.2006 that he had not yet disclosed these elements of evidence (record p. 33/88 – top of the page).

It is equally not acceptable, as to the disclosure obligation under art. 67.2, that the Prosecutor takes the view "that he does **not** specifically disclose evidence of potentially exculpatory nature that forms part of the incriminatory evidence in terms, of art. 61.3 (b) (record p. 32/88).

The Prosecutor is, on the contrary, under obligation to disclose exculpatory materials "in a form which is sufficiently cohesive, understandable and useable, and not taken out of context". (Pros. V. Blagojevic – joint decision on motions related to prod. Of evidence 12/12/02).

"The word" 'evidence' in rule 68 must be interpreted very widely. It is not restricted to material which is in a form that would be admissible in evidence. It includes all information which in any way tends to **suggest** the innocence, or **mitigates** the guilt of the accused or which **may** effect the credibility of prosecution evidence. (Prosecutor v/ Brdjain and Talic – decision regarding request of Momir Talic for disclosure of evidence 27/6/2000).

The jurisprudence of the ad hoc Tribunals is abundant on that issue of disclosure of supporting materials and must be quoted as illustration[1].

2. Scope of application to the disclosure process before the Confirmation Hearing of the right "to have adequate time and facilities for the preparation of the Defence", under art. 67.1b of the statute

The scope of the disclosure, in the view of the Defence, is that is should be full and **unredacted**.

Art. 68.5 of the statue provides that protection measures should be taken in such manner that they do not prejudice nor contradict rights of Defence and the principle of a fair trial.[2]

In the case Prosecutor v/ Brdjanin & Talic (decision on motion for protective measures 3 July 2000) Prosecution claimed that there was a conflict to be resolved between the obligation to disclose the supporting material to the accused within 30 days of his initial appearance and the protection afforded to victims and witnesses. The Trial Chamber did not accept that there is such a conflict. As already decided, rule 69 (A) does not provide the blanket protection asserted by the Prosecution.

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[1] TPIR, case n° ICTR-96-7-T, BAGASORA, 27 nov. 1997:"...Le Procureur doit remettre à la défense copie de toutes les pièces jointes à l'acte d'accusation; il doit permettre à la défense de prendre connaissance de toute autre pièce nécessaire à la défense de l'accusé, ou utilisée par le Procureur ou obtenue de l'accusé"; see also, TPIY,case n°IT-95-14-T, BLASKIC; production forcée de moyens de preuve, 27 janvier 1997, §37 : "...Les pièces à délivrer comprennent notamment ... toutes les déclarations préalables de l'accusé et des témoins à charges, même si elles ont été receuillies par d'autres sources que l'accusation..." and Id. BLASKIC,...,§50.1; TPIR, case n° ICTR-96-3-T, RUTAGANDA, 4 sept. 1998, §7, Rec. 1998, p 1440 : "...Les pièces à délivrer par l'accusation à la défense doivent inclure les éléments de preuve propres à disculper l'accusé » ; Id. BLASKIC , Decision on the Appellant's Motions for the Production of Material, Suspension, or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000,§ 26, the Trial Chamber held that: "The principle of a fair trial has the following implications ... First, the principle of a fair trial requires that disclosure of exculpatory material be made in sufficient time. Second, within the context of a fair trial the obligation to disclose exculpatory material implies the disclosure of the exculpatory material in its original form, and not in the form of a summary ».

[2] see case n°IT-03-69-PT Prosecutor v. STANISIC, , Decision on defence motions for access to ex parte supporting materials related to the Prosecution motion for leave to amend indictment; and request from the defence of Stanisic for leave to file a response exceeding the page limit to the Prosecution motion for leave to amend the amended indictment, 15 June 2005. The Trial Chamber decision is also of particular relevance because the Defence was granted disclosure relating to a proposed amendment to the indictment before the amendment was actually granted (is analogous to the pre-confirmation stage).

Before protective measures will be granted, rule 69 A requires the Prosecution **first** to establish **exceptional** circumstances.

This is in accordance with the balance carefully expressed in art. 20.1: that "proceedings are conducted … with full respect of the rights of the accused and due regard to the protection of victims and witnesses". As the prosecution correctly conceded, the right of the accused are made the **first consideration** and the **need to protect** victims and witnesses is a **secondary one**. The reference to "proceedings" in art. 20 is **not limited to the actual trial**; it includes every phase of the litigation which affects the determination of the mater in issue.

3. Questions related to the Prosecutor's obligation under art. 67.2 of the statute

a) Does the material content of this obligation depend on the evidence on which the Prosecutor decides to rely on at the confirmation hearing ?

The scope of the disclosure obligation under this article is far broader than the contents of the evidence which the Prosecutor intends to rely on during the confirmation hearing.

It does not belong to the Prosecutor to determine whether materials are exculpatory or not, only to the Court.[3]

He therefore is under obligation to disclose **all** materials which **might** be exculpatory in the broadest sense possible, to enable the accused to fully exercise his rights and to make decisions as to what materials he will use for his defence.[4]

In most "civil" law systems this right is given to the accused by simply disclosing to him the **entirety** of the file of the prosecutor or the investigating judge, without any limits[5]. This is the only way the concept of **full equality** can be looked at.

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[3] At the ICC – the Prosecutor bears an equal responsibility to find incriminating and exculpatory material. This burden with respect to the latter is heavier than that born by the respective prosecutors at the ICTY/ICTR. The jurisprudence of this tribunals should therefore be considered as the minimum standard applicable to the ICC prosecutor. It is therefore highly relevant that at the ICTY, even though the Prosecutor has a lesser burden to disclose exculpatory material, it has been decided that "while Rule 68 does not specifically require the Prosecution to identify the relevant material, but merely to disclose it (…) nonetheless, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence are in a better position to identify it".

[4] Therefore, the exculpatory material should be disclosed in a form which is ""sufficiently cohesive, understandable, and useable" and not taken out of context", case n° IT-02-6à-I , **BLAGOJEVIC et al,** Joint Decision on Motions Related to the Production of Evidence, 12 December 2002,§. 24

[5] Stavros STEPHANOS, The guarantees for accused persons under Article 6 of the European Convention on Human
Rights: an analysis of the application of the Convention and a comparison with other instruments, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 186

It is not for the Prosecution to decide which kind of defence the accused is going to bring nor could he be entitled to withhold **any** materials found, whatever they might be.

There could exist grounds for excluding criminal responsibility according the provisions of art. 31 of the statute which could be found in elements exterior to those concerning the charges.

Moreover, as the Lubanga-case makes part of a broader context, namely the situation in RDC, which constitutes a national context, and as this situation itself makes also part of a still broader context, due to important international implications – as are the roles played by several neighbouring countries – materials which the Prosecutor (as admitted by him on the hearing of 24th April 2006) would not consider as relevant, are clearly and on the contrary considered as relevant by the defence.

This relevance might also be constituted by grounds for exclusion of criminal responsibility or mitigating it.

Or it may, for instance, lie in the importance of explaining the causes of a conflict which could have been imposed on Ituri, and why and how, if proven, children have been brought to be mixed up in fighting.

The Prosecutor has already clearly stated that he intends to limit the extend of the debate in Court by excluding elements of historical, geographic, geopolitical and political nature, which is unacceptable, as it is not for him to determine how and to what extend a defence in Court is going to be brought.

Even in case of doubt the Prosecutor is under obligation to disclose, as the interpretation of the defence might be entirely different from his and as it is for the Court to decide upon the relevance and value of the materials brought.

The obligation of disclosure is moreover permanent and ongoing for the entire duration of the case, as the Prosecutor has already acknowledged.[6]

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[6] IT-95-14-T, BLASKIC, communications des pièces, 15 juillet 1998,§14 + production forcées des moyens de preuve, 27 janv 1997, §47 case. IT-96-21-T, Delalic et al., élément de preuve , 26 sept 1996, §§ 9-10 ; case n° ICTR-96-4-A, AKAYESU, 1st June 2001, § 160 ; BLASKIC **(Appeals Decision)** 'Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings,26 September 2000: " *The Appeals Chamber is of the view that..., the Prosecution is at all times required by Rule 68 to disclose exculpatory evidence. ...* " and *"also believes that the Prosecution is under a legal obligation to continually disclose exculpatory evidence under Rule 68 in proceedings before the Appeals Chamber"*.

Lastly and in subsidiary order, acting under the method as suggested in 3 a) of the agenda would leave it entirely to the Prosecutor to decide upon the scope and limits of the debate, as he would be the sole judge of what "depending on the evidence he is relying on" would mean.

This is a second reason why these limits as to the rights under art. 67.2 of the statute could not be accepted, as violating the right to a fair and impartial trial.

b) Time table of the Prosecution's discharge under art. 67.2

The use of the phrase "as soon as practicable" implies that, as soon as it is technically possible, the Prosecutor is obliged to provide the defence with the materials falling under art. 67.2, irrespective of the stage of the proceedings.

The hearing of confirmation of charges is not a formal one. The accused will be sent to trial only after exchange of evidence which has to be studied thoroughly, and after having determined that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.

It thus means that the Prosecution is under obligation to disclose as soon as he is in possession of the related materials.

As will be explained, the 30-days and 15-days time frames as provided by rules 121.3 & 4 have nothing to do with the obligation of the Prosecutor to disclose "promptly". It is thus not acceptable that the Prosecutor is taking the view that this is the case and that he could respond to his obligation by disclosing only on the very edge of the time limit set, this is 30 days before the Confirmation Hearing.

"The obligation is a continuing one which does not depend on the imposition of any time-limit. If the Prosecution knows of the existence of any such evidence **at the present time**, it must disclose to the accused "as soon as practicable". Prosecution's response that it is presently premature for it to do so, and that it should be permitted to wait until the decision in the Protective Measure Motion **has** been given, is rejected. (Prosecutor v/ Brdjain & Talic doc. 27/06/2000).

c) Whether when and how should the evidence be communicated to the Pre-Trial Chamber under art. 121.c of the Rules

The defence takes the view that this communication should be done simultaneously, in order to enable the Chamber to prepare for the confirmation hearing and to make the debate at that hearing more swift, thus avoiding delays.

As to points 3.d and 3.e the defence refers to the observations made to the Chamber on 6 April 2006.

The defence sees the role of the Registry as a very important one though and likes to compare it to that of a Notary.

As to the questions raised in 3.f of the agenda the defence would suggest the following adjustments:

i. to provide copies to the opponent simultaneously
ii. to create a third category
iii. to mention in the reference numbers a way of identifying the origin of the evidence, such as P (for prosecution)and D (for defence)

4. Questions related to the Prosecution's obligation under rule 76 to disclose the names of the witnesses it intends to call to testify at the confirmation hearing and the copies of prior statements of those witnesses.

a) Relationship between the obligation to inform "within a reasonable time" before the confirmation hearing under art. 61.3 and to provide "sufficiently in advance" under rule 76

The question of the construction of a defence in common law is not an easy one, certainly when it amounts to facts which have taken place in a region which happens to be still at war.

In this respect and in the present case, it can only be stated that at this point in time, as far as is known to the Defence, the Prosecutor has suspended his investigating activities in Ituri, due to the fierce fighting which is ongoing there. It means that the Defence, equally, will not be able to start investigating activities in the next coming months.

It is, among other things, necessary for counsel to review all relevant materials, go through them with his client (who is in detention with limited visiting hours), seek instructions from him, request the registry to assign an investigator, instruct the investigator on areas which need challenging, send the investigator to the field, allow him/her sufficient time to contact potential witnesses and take notes, review these with suspect and seek instructions as to defence position in light thereof.

Accordingly, the obligation of the Prosecution to provide the materials under art. 61.3 "in a reasonable time" should be construed in light of the practical requirements and impediments involved in preparing an adequate defence in relation to disclosed materials.

Due to the situation of an arrested person and the needed proximity of the hearing of confirmation in relation to this arrest, the obligation of the prosecutor should be **immediate**.[7]

This is even more so that he has had already to prepare evidence for his request for warrant of arrest, that he has been working on this evidence for months if not years, and that there could be no reason whatsoever to withhold it any longer from the person arrested.

The defence refers to what has been said earlier under 1.1., which, mutatis mutandis, applies also here. It refers more specifically to the very clear and specific provisions of art. 67.1 of the statute which have to be considered as the basic and minimal rights of the accused.

The urgent concern of the accused is double:

- to check the legality of this arrest
- to prepare his defence for the confirmation hearing.

There is no reason whatsoever for the Prosecution not to abide to these rules.

The Prosecutor has acknowledged his obligation, and has started disclosing a very limited amount of materials.

It is impossible to understand for the defence why **all** materials are not disclosed at the same time.

The defence is under the impression that, by splitting up evidence under rule 76, the Prosecution wants to hinder its task ("divide et impera").

The evidence gathered by the prosecution is a construction which should be disclosed immediately **in its totality**, and not in an ongoing process which could last for weeks and even months.

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[7] The question as to when the Prosecutor's obligation to disclose exculpatory material is triggered was considered in case the Prosecutor v. BRDANIN and TALIC, Decision regarding Request of Momir Talic for Disclosure of Evidence, 27 June 2000. The Trial Chamber held as follows: *The obligation of the prosecution to disclose to the accused the existence of any evidence known to it which in any way tends to suggest the innocence of, or mitigates the guilt of, the accused or which may affect the credibility of prosecution evidence must be discharged "as soon as practicable".*
"The obligation is a continuing one, and one which does not depend upon the imposition of any time-limit".

Defence can only be started building once **everything** existing has been disclosed. It cannot be based on a fragmentary and partial disclosure, which could make Defence spending efforts in wrong directions.

b) Implications of the 30-day and 15-day deadlines provided for in rule 121.3 & 4

Rule 121.2 determines a process of communication between parties and to the Chamber.

Rule 121.1 explicitly refers to art. 67 and makes it applicable to the present status of proceedings, namely this in view of the Confirmation Hearing.

Earlier has been argued that art. 67 should be read as imposing on the Prosecutor an **immediate** obligation which could not be consistent with any delay.

The 30-days and 15-day deadlines must thus be read as **ultimate** delays after which the Prosecutor shall not be entitled any more to bring new evidence or to modify the charges.

They do, however, not permit to the Prosecutor to wait until the very end of the delays for disclosure[8], as he has, as said, already de facto acknowledged.

c) When and how the evidence disclosed under rule 76 for the purpose of the confirmation hearing is to be communicated to the pre-trial Chamber under rule 121 2 c

This disclosure obligation should obviously be seen as immediate and simultaneous with the disclosure to the defence.

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[8] Case *n° ICTR-2001-65-A* ,Prosecutor v. Jean MPAMBARA,requête aux fins de communication de dossier, 28 février 2002 : the Chamber considered that « il va de soi, enfin, qu'afin de permettre à la Défense de comprendre au mieux la thèse de l'Accusation et de se préparer efficacement et en temps, le Procureur ne saurait attendre le soixantième jour » (provided in article 66 A of the Rules) « avant le début du procès pour transmettre les déclarations des témoins qu'il appellera à la barre. Au contraire, le Procureur doit s'efforcer de divulguer les déclarations de ses témoins à la Défense « *le plus tôt possible avant l'ouverture du procès* (…), même si cela devait impliquer une communication établie dans le temps et la communication de déclarations de témoins qui finalement ne seront pas appelés à témoigner en l'espèce »
TPIY, case No. IT-95-14/2, the *Prosecutor v. DarioKORDICc et Mario CERKEZ*,
See also, TPIR, case No. ICTR 97-36-I, *the Prosecutor v. BAGAMPIKIi, IMANISHIMWE and MUNYAKAZI*, , "Decision on the Defence Motion for Disclosure in respect of Samuel Imanishimwe", 21Octobre 1998 : "as a general principle, the Prosecutor should not necessarily wait for the arrival of the 60th day before the commencement of trial, to fulfill its disclosure obligation". See also on the same issue ,case *n° ICTR-96-70-14-A* , the *Prosecutor v. Éliézer NIYITEGEKA*, "Decision on the Defence Motion for Disclosure of Evidence", 4 February 2000, §18. on the Prosecutor's disclosure obligation of the witnesses statements under Article 66 A) ii) and its ongoing nature ; see TPIR, case No. ICTR-97-21-T , the *Prosecutor v. Arsène Shalom NTAHOBALI and Pauline NYIRAMASUHUKO*, , « Décision relative à la Requête de la Défense en communication de preuves », 1st Novembre 2000, §§39 à 40

d) Scope of the prosecution's disclosure under rule 76 should it decide to rely on summary evidence of a witness statement as opposed to calling that witness to testify at the confirmation hearing.

The obligations resting on the prosecution under rule 76 are very clear and do not need any interpretation. Prosecution has agreed that if a text is clear, there is no need to interprete it.

Rule 76.3 mentions the disclosure of the **statements** of prosecution witnesses without any restriction and does not make a difference whether the Prosecutor wants to call a witness or not.

The Prosecutor is thus under obligation to disclose all statements of prosecution witnesses in original and translation.

The scope of this disclosure is that it should be unredacted.

Protective measures under rule 81 mean that defence has to abide by protective orders but not that protective orders should be applied **against the defence itself**.

The argument for this position lies clearly in art. 68.1 of the statue.

> " *These measures shall not be prejudicial to or inconsistent with the rights of the accused on a fair and impartial trial."*

It is obvious that the accused cannot defend himself against "redacted" evidence. How could he, for example, challenge the credibility of a witness, whose identity, origins and whereabouts remain hidden ?[9]

Decide otherwise would mean that the rights of the accused under art. 61.6 b and c of the statute do not exist.

If the Prosecutor were, under art. 68.5 of the statute, entitled to rely on summary evidence it is clear that the defence, in order to challenge it, must be provided with a full and unredacted version of it, according rule 76.3.

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[9]The arugment which has based the rule favourable to the disclosure of the witness identity is stated in case *KOSTOVSKI v / Netherlands « Si la Défense ne connaît pas l'identité de la personne qu'elle veut interroger, elle peut être ainsi privée des détails qui lui permettraient précisément de démontrer que la personne est partiale, réfractaire ou sujette à caution. Il ne peut être exclu qu'un témoignage ou tout autre déclaration incriminant l'accusé soit délibérément faussé ou tout simplement erroné, ce que la Défense aura les plus grandes difficultés à mettre en lumière si lui font défaut les informations permettant de s'assurer de la bonne foi de la personne ou de mettre en doute sa crédibilité »*
(1990) 12 European Human Rights Reports/EHRR 434

The thrust of art. 68 and rule 81 is the avoidance of **publicity** of documents and hearings – thus the prosecutor may withhold the information from the public proceedings – but the fact that that was made subject to art. 67 emphasises that it should not be hidden from the accused.

Also art. 61.5 provides that "at the hearing … the Prosecutor may rely on summary evidence …". The use of the term "hearing" supports the thesis that the use of summaries is intended to protect disclosure of details form the public during the hearing and not from the accused.[10] The exception in art. 68 is an exception to the principle of **publicity** and not of fair trial

As to items 4e to g the defence refers to what has already been said and applies, mutatis mutandis, here.

5. Questions related to the Prosecution's obligation under rule 77 to permit the Defence to inspect any books, documents, photographs, and other tangible objects in the possession or control of the Prosecutor which the latter intends to use at the confirmation hearing

a) Relationship between the Prosecution's obligation to inform within a reasonable time before the confirmation hearing under art. 61.3 of the statute and the prosecution's obligation under rule 77 to permit inspection by the Defence of the evidence the prosecution intends to use at the confirmation hearing

The Defence does certainly not agree with the Prosecution where the latter tries to restrict the meaning of "disclosure" in relation to the term "inspection".

Rule 77 has been issued under "section II: **disclosure**". The term "inspection" (meaning : "look **closely** into, **examine** officially – Oxford Dictionary) is thus to be seen as a specific way of **disclosure** meant for such items which are not capable to being transcribed / copied such as weapons, clothing, etc.

Rule 77 however also relates to documentary evidence as opposed to the testimonial evidence mentioned in rule 76.

It would be absurd to suppose that the wording of "inspection" would restrict the right of disclosure of documentary evidence in this sense that defence would only have the right to "look shortly" at it in the office of the prosecutor.

[10] See the relevant jurisprudence of the ad hoc Tribunals : Id, case n° IT-95-14-T, BLASKIC, witnesses protection, 20 October 1996, p8 : The Chamber stated « que le droit de l'accusé à un procès équitable a préséance et exige que soit levé en sa faveur le voile de l'anonymat » et le Règlement n'autorise la non-divulgation qu'au public et non pas à l'accusé ou à sa défense (See also decision of the Chambre in the Prosecutor v. Jean MPAMBARA, 28 Feb. 2002)

Especially documentary evidence demands a thorough study which can only be done on copies and after the classical disclosure which is known in any legal system.

This is much clearer in the French text where not the word "inspecter" is used but "prendre connaissance de ..", which refers to the defendant's side of the disclosure, namely the action of getting to know evidence and study it.

How could an accused or his defence "prendre connaissance de ..." evidence without being provided with copies of it?

To use the word "inspect" as a tool to defeat the right of defence to be disclosed evidence would defeat the right of the accused to be able to examine the evidence against him.

In order to challenge the Prosecution's evidence both as to contents and authenticity, it is imperative that the Defence be able to consult and seek instructions from the accused and it is thus necessary to be provided with actual copies in order to do so.

b) Implications of the 30-day and 15-day deadlines provided for in rule 121.3 & 4 with regard to discharge by the Prosecution of its obligation under rule

The defence refers to what has been said earlier under question 4.b and that applies, mutatis mutandis, here.

c) Differences between the content of the Prosecutor's obligation to disclose under rule 76 and the context of the Prosecutor's obligation to permit inspection under rule 77 in relation to the evidence the prosecutor intends to use at the confirmation hearing

Both obligations relate to the same and one "disclosure" under section II.

In the classic theories about disclosure and communication there are not a lot of different ways to fulfil the obligation.

It is clear that a party could not be deemed to respond to her obligation by inviting the opponent to her office and permit him / her to look at the evidence.

A party is supposed to actively "disclose" which means providing copies in order to enable the opponent to study evidence.

In this sense there is no reason to make a difference between the techniques of disclosure to be used under rule 76 (witness material) and rule 77 (documentary and other materials).[11]

The French wording "prendre connaissance de" under rule 77 underlines this.

The use of "communiquer" under rule 76 means that the French text emphasizes the active side of the one who is under the obligation, whereas the wording "prendre connaissance de" under rule 77 emphasizes the passive side of the beneficiary.

It is clear however that both actions make part of the same process, namely that of disclosure. The text under rule 77 is emphasizing the (passive) side of the process because it may be impossible for the Prosecutor to deliver copies of **objects**, such as, weapons, clothes and other physical items.

This is however only the exception. The rule is to provide **copies**. "Inspection" is only the last resort where "**copies**" would not be possible. Even there however the prosecutor would be under obligation to disclose by providing photographs of the "objects" alongside the obligation to show the original material objects and items and permit "inspection".

d) Communication to the Pre-Trial Chamber under rule 121.c

Art. 121.2.c makes no distinction and mentions "**all** evidence **disclosed**". The parties have both already emphasized that what **has** been disclosed ("**ayant** fait l'objet d'un échange) should be communicated to the Pre-Trial Chamber.

Clearly art. 121.2.c refers to everything "disclosed" under section II and not only under rule 76.

There is no reason whatsoever why the Pre-Trial Chamber could be supposed to be cut off from documentary and other evidence under rule 77. How would she otherwise be enabled to judge about the relevance and the contents of the evidence brought by the Prosecutor.

The Defence takes the view that the Pre-Trial Chamber should be provided, generally speaking, with copies and, if and where needed, with photographs of non copiable materials.

[11] According to the jurisprudence of the ICTR Appeals Chamber, it is not limited to objects but can include witness statements: In an oral decision issued during the hearings in case n°ICTR-96-5-T, *Prosecutor v. RUTUGANDA* on 4 July 2002 , the Appeals Chamber ruled that the written statements by witnesses should be considered as being included within the scope of documents to be disclosed by the Prosecutor to the Defence as provided for under Rule 66(B) (Judges Jorda and Shabuddeen dissented).

The Pre-Trial Chamber will of course have to be shown the originals of the documents when needed and asked and the originals of the objects and materials on the confirmation hearing.

As said earlier, the communication to the Pre-Trial Chamber should be **immediate**, alongside with the disclosure to the defence.

6. **Questions related to the Prosecution's obligation under rule 77 to permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the prosecution which are material to the preparation of the defence at the confirmation hearing or have been abstained form or belong to Mr. Thomas Lubanga Dyilo.**

a) **Is the Prosecution's obligation related to either art. 61.3 (b) or art. 67.1 (b) of the statute or does it stand on its own?**

Art. 61.3 (b) of the Statute concerns the evidence the Prosecutor is going to rely on at the confirmation hearing.

The obligation of the prosecutor under rule 77, as far as possible defence-material is concerned, is definitely not related to his evidence but is much broader, as it does not belong to him to determine the scope of the defence or to limit it.

Art. 67.1 (b) of the Statute is much broader and concerns the defence in the most extended sense. It means that the defence must be given a liberty without any limit to bring to the Court whatever it thinks fit or important. The wide-spread concept of freedom of speech and "immunity of pleadings" is there to protect the defence from any threats or barriers another party would try to formulate or build against certain kind of defence.

If that were to be allowed, there would not be any freedom of speech and no fair trial, because the defence would be under constant "control" and even "threat" of being charged for what it advances. This would be unacceptable.

To be able to build such a defence, the accused and his counsel must be given access to the totality of materials and evidence gathered by the prosecutor both in the concerned "situation" and particular "case".

This is the reason why, before both ICTR and ICTY, Prosecution has constantly given access to defences to its total electronic data-base, thus allowing defence free reign to search for any documents which **might** be of assistance, without prejudice however to the obligation of the Prosecutor to search for and provide copies of exculpatory documents.

In this much broader sense it has to be stated that the concerned provisions of rule 77 stand on their own and relate to any materials whatsoever, in the broadest possible sense, which **may** be relevant to the preparation of the defence even if they are not, strictly speaking, incriminating or exculpatory.

In this broadest possible sense, there should be a lot of caution as to the communication of a list of "key-words" by the prosecution, as was done.

Key-words" are to be considered a limitation of the means to search on a data-base in so far they would limit any other way to search. Prosecution is well aware that the modern and performant search-engines available do not work with "key-words" any more and give an unlimited and free access in so far they permit to search without a prior determined list of entry-ways ("keys").

Prosecution, who has itself been working that way, should give to defence the most modern available technique to access to its data-base of the situation in RDC and the Lubanga-case.

The Registrar has clearly been indicating on the hearing of 24/04/06[12] that these performant technical tools are available at the registry. Parties should thus be given access to them.

Due to the regional proximity it should also give access to the defence to the data-bases concerning the situations relating to the Sudan and Uganda.

b) Type of materials and evidence which might not fall within the category of potentially exculpatory evidence but might fall within the category of evidence which is material for the defence's preparation for the confirmation hearing.

" *The expression of 'evidence' is intended to include any material which may put the accused on notice that material exists which may assist him in his defence, and is not limited to material which is itself admissible in evidence."*

Archbold – International Criminal Courts – practice, procedure & evidence, p. 197/7.85
Prosec. V/ Krnojelac, record of rulings made in status conference 14/9/99, p.2

This is to say that nothing could be excluded from the obligations under rule 77 as it is for the Defence itself to judge on the relevance of the materials it is going to use and eventually submit to the Court.

[12] Transcript 24-04-2006, p 77-78

The Defence has already earlier indicated, by way of example, materials of historic, political, geopolitical, geographic, military nature.

Reference must be made to the extensive jurisprudence available in his respect.

c) Do the materials and evidence which are material for the preparation of the confirmation hearing by the Defence depend on the evidence selected by the Prosecution to rely on at that hearing?

The answer on this question is definitely negative. The evidence may, for example, be relevant because it relates to exculpatory actions of suspect in a different region or timeframe than the Prosecution's evidence relates to, as the material may assist the defence to focus or narrow its investigations, or the evidence may relate to other trials and disclose materials brought there and that are in contradiction with materials brought in the present trial.[13]

d) Communication to the Pre-Trial Chamber under rule 121.2 (c) of the rules

In the view of the defence it would be absurd to burden the case-file with the entire data-base of the Prosecutor because it is "inspected" and searched by the Defence.

The word "inspection" used in rule 77 again here indicates another specific action of "passive" disclosure as it relates to the search-actions permitted to the Defence as to **possible** materials or documents to be used.

In so far parts of the database are not used by the defence (nor by Prosecution), the defence takes the view that these materials should not be communicated to the Pre-Trial Chamber.

[13] The jurisprudence of the ad hoc Tribunal is of the same opinion. See :case IT-01-47, HADZIHASANOVIC and al, Decision On Motion By Mario Cerkez For Access To Confidential Supporting Material, 10 October 2001, §13: the Chamber ruled that " The prosecution does *not* control the access which a party may have to material available within the Tribunal; Nor, unfortunately, has the prosecution always complied with its obligations under Rule 68 in a timely manner. In any event, the range of material within the Tribunal to which a party may legitimately seek access may well be wider in the particular case than the class of documents which must be disclosed pursuant to Rule 68. It is certainly not for the prosecution to attempt to categorise them in a way which avoids its obligation, as a Minister of Justice, to assist the defence to present its case where a legitimate forensic purpose has been established"; see also case n° ICTY-IT-99-36, Prosecutor *v BRDANIN and TALIC*, Decision on Motion by Momir Talic for Access to Confidential Documents, 31 July 2000, par 6

The answers on questions 6 e to g are, in the opinion of the defence, irrelevant, given the answers given to the other questions under 6. In subsidiary order reference is made to what has been said earlier as to those items.

7. **Questions related to the defence's obligation to permit the Prosecution to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence which the latter intends to use at the confirmation hearing**

a) **Scope of the obligation**

Rule 78 is very clear as to the scope of the obligation. It only relates to books, documents, photographs and other "objects".

It means that defence should be under no obligation to reveal any documents considered work-products or anything covered by legal professional privilege.

b) **Does the obligation include disclosure of prior statements of those witnesses the defence intends to call at the Confirmation Hearing? What if the defence decides to rely on summary evidence of a witness statement as apposed to calling that witness to testify at the confirmation hearing?**

The Defence takes the view that the obligation should definitely not extend to witness "statements" if any.[14]

The use of the words "and other tangible objects" implies that rule 78 was intended to encompass potential **exhibits** and not witness statements.

This is even more the case that rule 76 has mentioned clearly and specifically the disclosure of witness statements by the Prosecutor in a separate rule from that relating to the same materials as mentioned in rule 78 (rule 77).

A contrario it must be stated that the same obligation has been left out as to Defence, relating to witness statements.

By lack of legal provision as to this, the obligation could not be presumed nor could the extend of rule 78 be widened.

[14] The jurisprudence of the ad hoc Tribunals is illuminating. See the **Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Witness Statements** in case n° ICTY-IT-94-1, Prosecutor v. TADIC, 27 November 1996 at page 7; TPIR, case n° ICTR-95-15-T, KANYABASHI, 25 Nov 1997: The Chamber ruled that :" « *l'accusé ne doit pas communiquer l'identité de ses témoins à l'accusation, sauf dans le cas d'une défense d'alibi ou de toute autre défense particulière* », see also TPIY, case n° ICTY-IT-96-21, Prosecutor v. CELEBICI, Decision relative à la requête de l'accusation aux fins de communication à l'avance de l'identité des témoins à décharge, 4 Feb. 1998, §§ 44-50

c) When is the defence obligation under rule 78 triggered?

There is no obligation under the statute and rules to provide disclosure in advance.[15]

While the Prosecutor has a duty to prove his case, the accused has not to prove his defence. Until the end of the Prosecution case therefore the Prosecutor needs to establish the case independently, without requiring the Defence to reveal anything.

d) What are the implications of the time limits provided for in rule 121.6 of the rules with regard to discharge by the Defence of its obligation under rule 78?

The Defence takes the view that this time limit could not be seen as decisive and excluding the defence to present new evidence which may still arise.

Such a strict statutory construction should be avoided.

A lot will depend on the size and complexity of the charges and of the evidence "à charge". It is obvious that the defence is in the weaker position at this stage of the proceedings.

It spends a lot of time in getting organised, in discussing proceedings as at the present time, which keeps it away from the real defence issues, in waiting for full disclosure as at the present time, etc.

Defence should thus be permitted to bring evidence up to the moment of the Confirmation Hearing itself and sees an argument for this in rule 121.7, that permits the Chamber to postpone the hearing on its own motion.

It is moreover a general principle in criminal proceedings that an accused may at any time bring new elements which have until then remained hidden for him and which are important for the revelation of the truth.

e) Whether, when and how the evidence subject to inspection under rule 78 has to be communicated to the Pre-Trial Chamber under rule 121.2.c

To the view of the defence this has to happen simultaneously with the communication to the Prosecution, by way of copies of the exhibits used.

[15] There is no obligation under the Statute and Rules to provide in advance. Decision on 9 May 2005, case n) IT-01-48, Prosecutor v. HALILOVIC : Decision On Motion For Prosecution Access To Defence Documents Used In Cross-Examination Of Prosecution Witnesses, §9. The Prosecutor filed a motion requesting advance access to the documents which the Defence intended to use in cross-examination,: "The Trial Chamber therefore observes that until the end of the Prosecution's case, the Defence is not under any obligation to provide the Prosecution with any information that could reveal the strategy of its case – except for, as mentioned above, " *in general terms*, the nature of the accused's defence"

The defence refers to what has already been said, regarding items 7 f to h.

8. **Defence disclosure obligations under rule 79**

a) **For the purpose of the Confirmation Hearing until when may the defence raise the existence of an alibi on ground for excluding criminal responsibility provided for in art. 31.1 of the statue?**

The defence takes the view that there is no strict time-frame set by the rules as to this right.

It is thus possible to raise the said existence until the very moment of the hearing.

Rule 79.3 specifically provides that failure to provide notice under this rule shall not limit the right to raise matters dealt with in sub-rule 1 and to present evidence.[16]

As a possible time-frame ("sufficiently in advance") has only been set for the notification as such, one must, a contrario, conclude that no time-frame has been set for the exercise of the right in itself.

One can also refer to the possibility under rule 79.3 for the Chamber to grant the Prosecutor an adjournment to address the issue raised by the defence.

b) **What is the exact content of the defence's obligation under rule 79.1.a & b of the rules**

The defence should only notify its intention as such under rule 79, the names of the witnesses it intends to rely on and a list of exhibits it intends to use in relation to its said intention.

c) **Whether, when and how the evidence disclosed under rule 79 is to be communicated to the Pre-Trial Chamber under rule 121.2.c.**

A copy of the notification under rule 79.1 a & b should be communicated simultaneously to the Chamber.

Defence refers to what has been said earlier as to items 8 d – f, applying, mutatis mutandis, here.

[16] As Mrs LA ROSA mentioned : « l'obligation conséquente de la charge de la preuve qui découle de la présomption d'innocence rend nécessairement asymétrique cette obligation de communication qui incombe au procureur ». LA ROSA, ***"La preuve"***, in Hervé ASCENSIO, Emmanuel DECAUX, Alain PELLET (sous la dir.), *Droit International Pénal*, Editions PEDONE, Paris, 2000,p 124

9. Prosecution's request for ex parte hearing under rule 81

The Prosecutor requests to have an "ex parte hearing" to discuss protective measures.

This application implies that the accused and his defence will be excluded from the courtroom during the proceedings in respect to the Prosecutor's application.

ICTY jurisprudence has decided that such a request deviated from the accused's right to be present at his trial, a right which the International Covenant on Civil and Political Rights (art. 14) and the statute of the Tribunal itself (art. 21.4) both proclaim.

Prosecutor V. Blaskic, Decision of 2 October 1996 (Decision of Trial Chamber I on The applications of the Prosecutor dated 24 June and 30 August 1996 in respect of the protection of witnesses):

The Prosecutor requested to have an ex parte hearing to discuss protective measures. This application would have implied that the accused and his counsel would be excluded from the courtroom during the proceedings in respect of the Prosecutor's application.

The Chamber held that this request deviated from the accused's right to be present at his trial, a right which the accused intended to invoke and which the International Covenant on Civil and Political Rights (article 14) and the Statue of Tribunal itself (article 21§4) both proclaim.

At the hearing of 18 September, the Prosecutor attempted to circumvent this right by defending the following submission (provisional transcript, page 10, line 31):

"There is an accused's right to be present at the trial, but there is no accused's right to be present at every aspect of that trial".

The Chamber held in response that this distinction is totally artificial, and this Trial Chamber has had no difficulty in setting it aside. The right of the accused to be present at his trial obviously includes every one of its stages, commences from the time the indictment is served, and must be respected both during the preliminary proceedings and the trial itself before the appropriate court.

Prosecutor v. Brdjanin and Talic Decision on Prosecutor's Application for protective measures, 3 July 2000:

Another decision analysed the practice of the Prosecution in filing ex parte motions, without the prior approval of the Chamber.

Whilst the Chamber accepted that motions pertaining to the issuance of arrest warrants, pre-indictment investigations and sealed indictments were by nature, ex parte, the Chamber clearly differentiated motions for protective measures from this category. In setting out the distinction between public/confidential/ and confidential ex parte filings, the Chamber ruled that motions for protective measures would be filed **inter** partes, unless the Chamber expressly granted the Prosecution leave to file on an ex parte basis.

The imposition of protective measures necessarily impacts upon the right of the accused to have access to evidence and to prepare his defence. Even if the defence is not provided with the identity of the witness, it is essential that they be informed of the fact and an application has been filed and bases for the request so that the defence can, if appropriate, contest the Prosecution's application. In order to justify filing a motion for protective measures on an entirely ex parte basis, the Defence submits that the prosecution should first establish that it is not possible to file the motion on a confidential basis, with ex parte annex.

10. Issues non covered by the agenda

10.1.Way of disclosure by the Prosecution

The few items having been disclosed by the Prosecutor up to now were communicated by way of CD-roms.

However no index nor inventory has been added either on the CD-rom or in another way. The Prosecutor should be bound to additionally disclose an index with reference to each disclosed item, its contents and its reference number, in order to facilitate searches, study and identification.

10.2.Communication to the Accused directly

Alongside with any communication made to the Defence, either by the Prosecution or by Court-management, a direct communication should be made to the accused in prison, in French language.

It would be much too time consuming and complicated for Defence, for every communication done, to make copies, to ask for access for visit in prison and to hand items over to client, before even being able to discuss them with him.

The Registrar has clearly indicated on the hearing of 24/04/2006 that Court-management had elaborated and purchased a very modern electronic system that would permit access rapidly to all parties.

He also indicated that it was perfectly possibly to make this access available directly to the accused. Defence thus requests the Pre-Trial Chamber that this would be ordered and that the accused should be made available a computer and access to the court-file in its broadest sense, also that he will be given proper training to use these tools.

Defence indicates that, apart from the notification done alongside with the warrant of arrest, nothing has been communicated to the accused, nor as to decisions or motions, nor as to evidence.

For Mr. Lubabanga,

Jean FLAMME,

Defence counsel

Fait le 2d of May 2006

À Gent