Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **28 April 2008**

TRIAL CHAMBER I

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

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

ANNEX 3
Public
Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters

Decision/Order/Judgment 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
Mr Ekkerhard Withopf, Senior Trial Lawyer

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Catherine Bapita Buyangandu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massida

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit
Mr Simo Vaatainen

Detention Section

Victims Participation and Reparations Section

Other

1. On 24 April 2008 the Majority of Trial Chamber I issued its 'Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters'.[1] This decision considers matters concerning the disclosure of both inculpatory and exculpatory material by the prosecution, redactions and other protective measures with regard to the responsibilities of the Victims and Witnesses Unit and the prosecution for the protection of witnesses, and the date of trial which is impacted by the above issues.

2. While there are parts of the decision which I am in agreement with, I strongly dissent with portions of the reasoning as well as with some of the procedural conclusions drawn by the Majority. I specifically have reservations where decisions of the Chamber may impact upon the rights of the accused without granting the defence, previous to the implementation of those decisions, the right to be heard in regard to the substantive issues and the impact, if any, which could be felt by the defence. In particular, the aspects of the Majority Opinion which I feel may erroneously impact upon the rights of the accused include 1) the concession of facts by the prosecution as an alternative to full disclosure of the relevant evidence or material, 2) the sending of a representative of the Registry on behalf of the Trial Chamber on an investigative mission to explore the cooperation possibilities of reluctant witnesses to be called by the prosecution and 3) the Majority's interpretation of Article 67(2) with respect to disclosure of exculpatory materials by the prosecution.

3. Two other concerns I have include: 1) the issue of fairness to all parties and participants in the case, and the procedural mechanisms which the Trial Chamber puts into place in order to manage expeditious and fair proceedings and 2) the responsibility for protection of witnesses and the application of

[1] *Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters* (Majority Decision), ICC-01/04-01/06-1295-US-EXP, 24 April 2008.

Article 68(1). Each of these elements of the Majority Opinion are discussed in further detail below.

I. Responsibility for Protection of Witnesses

4. The Majority Opinion stresses that, "if the [Victims and Witnesses] Unit properly assesses and rejects referrals to its protection programme, thereafter it is for the referring party to decide whether to secure any other protective solution, as it considers appropriate".[2] I do not agree with the prosecution taking on a function which has been assigned to the Registry by the Statute and Rules of the ICC. Rather, my view on this issue is in line with that of Pre-Trial Chamber I.[3] As was noted by the prosecution and confirmed by Pre-Trial Chamber I:

> Under Article 68(1) of the Statute, the Court, including the Prosecution, bears the responsibility to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Under Article 43(6) of the Statute, the Registry through the establishment of the VWU, is mandated "to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses". The VWU is also empowered to "advise the Prosecutor and the Court on the appropriate protection measures." In accordance with those provisions, the Prosecution relies on the VWU to implement the measures required for the protection of its witnesses.[4]

5. The Single Judge of Pre-Trial Chamber I, noted in a decision of 21 April 2008 that, "...there is no provision in the Statute, the Rules, the Regulations or the RoR, which expressly confers upon the Prosecution the power to preventively

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[2] Majority Decision, 24 April 2008, paragraph 80.
[3] *See Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, ICC-01/04-01/07-428, 21 April 2008, paragraphs 11-40.
[4] *Ibid.*, paragraph 11.

relocate witnesses until they are included in the ICCPP".[5] Further, the Single Judge states:

> Article 68(1) of the Statute should be interpreted in a manner which is fully consistent with the attribution to the Registrar of the power to decide which witnesses of the Court can be included in the ICCPP and to implement their relocation. In this regard, the Prosecution's mandate, pursuant to article 68(1) of the Statute, is limited to, *inter alia*, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber.
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> Finally, the teleological interpretation of Article 68(1) of the Statute also requires that the Prosecution's mandate under this provision not be extended to the preventive relocation of witnesses. Article 68(1) of the Statute is a provision of a general nature, which aims at placing on all organs of the Court, including the Prosecution, the obligation to take "appropriate measures" for the protection of witnesses.

6. I am in complete agreement with the Decision of the Single Judge of Pre-Trial Chamber I in that I do not find any statutory support for the notion that the prosecution may consider relocation of witnesses as a possibility in their protection procedures. Thus, within the framework of the Majority Opinion of Trial Chamber I, I do not believe that the prosecution has the mandate to "secure any other protective solution, as it considers appropriate".[6] This places multiple organs of the Court in a position to be relocating witnesses and departs from the framework provided in the Rome Statute for responsibility of protection of witnesses. The prosecution must provide such

[5] *Ibid*, paragraph 23.
[6] Majority Decision, 24 April 2008, paragraph 80.

protection measures as are within its mandate which may include referral to the Victims and Witnesses Unit, and if necessary an application to the Trial Chamber for a review of a protection assessment which they feel is erroneous in application.

II. Aspects of the Majority Opinion which may affect the rights of the parties

7. With concern for all parties and participants of the case, as regards the Trial Chamber's working methodology, I am troubled that the Majority Opinion asserts that *de facto* working procedures have been established whereby upon oral submissions on a topic, the issue is thought to be closed and leave to make further submissions is required. In my opinion, there has been no such working methodology established. The Majority asserts that this working procedure has been established pursuant to Article 64(3)(a). As stated by the Appeals Chamber, "[t]he rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety".[7] Under Article 64(3)(a) the Trial Chamber shall: "**[c]onfer with the parties** and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. However, in this instance the parties and the Chamber did not confer, nor did the Chamber establish a working methodology. An assumption from the Trial Chamber that the parties must request leave to make further submissions before an issue has

[7] *Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-01/06-168, 13 July 2006, paragraph 33. *See also, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté proviso ire de Thomas Lubanga Dyilo"*, ICC-01/04-01/06-824, 13 February 2007, Separate Opinion of Judge Georghios M. Pikis, paragraph 15 which states, "The guide to the interpretation of the Statute is the language used to convey what is intended that the statutory provision should embody."

been closed by the Trial Chamber's decision is not, in my opinion, an established working procedure.

8. This is not to deny the Trial Chamber's need to establish efficient working procedures, pursuant to Article 64(3)(a). In fact, the Chamber has established working practices with the parties with regard to procedures in the past. However, in those instances the practices were established in accordance with Article 64(3)(a). On 15 November 2007 a joint submission from the parties requested the Trial Chamber to address 'practical aspects of the administration of justice' pertaining to what would become working methodology of the case.[8] These aspects were added to the agenda of the Status Conference of 20 November 2007.[9] The various aspects of working practices were discussed by the parties, participants and Trial Chamber at the Status Conference and a final procedure with regard to the particular working practices was established.[10]

9. In short, it is my opinion that the Trial Chamber has not established this working methodology as is asserted by the Majority Opinion, and in future, I believe that if the Trial Chamber is to adopt certain working procedures to ensure fair and expeditious trial practices, it is necessary to first confer with the parties and then to firmly establish the method which will be used going forward. An assumption by the Trial Chamber that the parties understand a working practice which has not been explicitly established by the Chamber does not, in fact, establish a trial procedure.

[8] *Joint Request of the Prosecution and the Defence to Add a Further Agenda Item to the Agenda of the Hearing on 20 November 2007*, ICC-01/04-01/06-1029, 15 November 2007.
[9] *Order on joint prosecution and defence request to add an agenda item to the agenda of the hearing of 20 November 2007*, ICC-01/04-01/06-1032, 26 November 2007.
[10] ICC 01/04-01/06-T-61-ENG, 20 November 2007, page 71-79.

III. Aspects of the Majority Opinion which may affect the rights of the accused

10. With regard to concerns of an impact upon the rights of the accused, it is worth noting that while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial.[11] As is stated in the Majority Opinion, "[t]he right of...the defendant to a fair trial [is] immutable".[12] Therefore, I believe that it is essential, at all times, to maintain the utmost respect and care for the rights of the accused in order to ensure that the result of the trial not be tainted.

Use and interpretation of Article 67(2) by the Trial Chamber

11. I do not find that the requirements under Article 67(2) have been fulfilled by the Majority's treatment of the Article. The Majority uses only partial language of Article 67(2) in its discussion by using the phrase "material that shows or tends to show the innocence of the accused or which affects the credibility of prosecution evidence" as that which is in full accord with the provision set out in Article 67(2).[13] I do not accept this approach as I note that the complete text of Article 67(2) reads, "In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable,

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[11] "Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.", *Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, 14 December 2006, pagraph 39. *See also*, Prosecutor v. Barayagwiza, *Appeals Chamber Decision*, 3 November 1999, paragraph 108 which states: "the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights." *See also, Barberá, Messegué and Jabardo v. Spain, European Court of Human Rights*, 10588/83 in which the original 6 December 1988 decision was set aside due to "the cumulative effect of a series of procedural shortcomings, which individually may be of minor significance, [but which] may compromise the person's right to a fair trial". (Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R., Mahoney, Paul, 2004, page 111).

[12] The full text of the sentence states: "The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests." Majority Decision, paragraph 94.

[13] Majority Decision, 24 April 2008, paragraph 91.

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. ..." Thus, in the Majority Opinion, a section of the sentence is omitted; by which it excludes as exculpatory, evidence which mitigates the guilt of the accused.

12. In my opinion, the Statute is clear as to what is to be considered as exculpatory material and how this material is to be treated. Article 67(2) clearly provides three categories of information as that which is exculpatory in nature; 1) evidence which may show the innocence of the accused, 2) evidence which may mitigate the guilt of the accused, and 3) evidence which may affect the credibility of prosecution evidence. Further, the Statute is clear that these categories of material, if found by the Prosecutor must be disclosed as soon as is practicable to the defence. This is the text of Article 67(2) and I do not believe that it can be deviated from. Further, I believe that selectively applying portions of the Statute violates the interpretation of treaties as governed by the Vienna Convention of the Law of Treaties (23 May 1969),[14] and should not be practiced in relation to any provision within the Statute.

13. Further indications of a concerning deviation from the text of Article 67(2) are found within the text of the Majority Opinion which I find to be an inappropriate application of the requirement to disclose exculpatory

[14] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose", Vienna Convention on the Law of Treaties, 23 May 1969, Article 31 *See also, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-01/06-168, 13 July 2006, paragraph 33 which states, "The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of article 31 and 32. The principle rule of interpretation is set out in article 31(1) that reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The Appeals Chamber shall not advert to the definition of good faith, save to mention that it is linked to what follows and that is the wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its object may be gathered from the chaper of the law in which the particular section is included and its purposes from the wider aims of the law as may be gaterhed from its preamble and general tenor of the treaty." (emphasis added)

materials. The Majority indicates that it is of the opinion that the obligation of the prosecution in accordance with Article 67(2) is to disclose material which may have a real, as opposed to minimal impact on the trial,[15] and that there may be alternatives to full disclosure of exculpatory materials.[16] I do not find the possibility of these variations to the Article in question in my reading and understanding of the Statute, and I cannot accept them as legal alternatives which the Statute of the ICC permits.

14. Another point which need only be touched upon briefly at this juncture is the Majority's suggestion that in the Trial Chamber's assessment of exculpatory disclosure under Article 67(2) of information provided by witnesses who may be at risk, but who either refuse protection or decline to cooperate further with the court, the Chamber will take into account whether such information has been sufficiently dealt with by other witnesses and whether any remaining information could be provided in permanent redacted form.[17] I need only reiterate that, in my opinion, the text of the Statute is quite clear that the defence must have full disclosure of all exculpatory materials. Further, these materials need to be provided in their full form in order that the defence have the possibility to use the exculpatory material in the appropriate way for their investigative purposes.

The concession of facts by the prosecution as an alternative to full disclosure of the relevant evidence or material

15. The Majority Opinion provides as an alternative to full disclosure that the prosecution should serve to the defence a document setting out relevant exculpatory facts that it would concede to, from witnesses who require

[15] Majority Decision, 24 April 2008, paragraph 94 which states, "...if the prosecution has in its possession potentially exculpatory evidence which in accordance with Article 67(2) of the Statute may have a real, as opposed to minimal, impact on the trial in favour of the accused, he has an absolute entitlement to receive it, albeit in an appropriate form."
[16] Majority Decision, 24 April 2008, paragraph 90 which states, "This would provide an alternative to full disclos[ur]e of the relevant evidence or material."
[17] Majority Decision, 24 April 2008, paragraphs 98-99.

protective measures such that their identity not be revealed. [18] The decision orders that "final admissions which reflect the detail of the potentially exculpatory material provided by these witnesses or information-providers should be drafted and served on the defence not later than 6 May 2008."[19] Further, the decision states, "[w]here this occurs and the relevant facts are admitted, unless substantive issues are raised hereafter by the defence, it is unnecessary to serve the underlying material or to reveal the identity of the witness or the information-provider."[20] It is also important to note that both instances where this suggestion was canvassed were in oral *ex parte*, confidential hearings to which the defence was not privy. Thus, they have been unable to raise any objections or concerns to this alternative to disclosure.

16. The purpose behind the disclosure of material to the defence, and especially potentially exculpatory material, is that it may be effectively utilized in the investigation and preparation of the defence of the accused.[21] This cannot be effectively done without the ability to use the material in its original form. This position has been confirmed in the jurisprudence of the ICTY in that "...if the exculpatory material is enclosed in a statement, it is the statement that needs to be disclosed" and that "in order to make real use of material, the [d]efence is entitled to be provided with the exculpatory material in its original form...".[22] Further, the concession of facts without the ability to

[18] Majority Decision, 24 April 2008, paragraph 90.
[19] *Ibid*
[20] *Ibid*
[21] The purpose of disclosure is confirmed in article 64(3)(c) which confirms the duty of the Trial Chamber to 'provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'. Relevant commentaries provided in: Otto Triffterer, Commentary on the Rome Statute of the ICC – Observers' Notes Article by Article, Commentary on article 67 of the Rome Statute by William A. Schabas – Rights of the Accused, p. 864. *See also, Decision on "Motion for relief from Rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved", Prosecutor v. Radoslav Brdjanin* (Case No, IT-99-36-T), Trial Chamber II, ICTY, 30 October 2002, paragraph 26.
[22] *Prosecutor v. Blaskic*, IT-95-14-T, *Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence"*, 29 April 1998, paragraph 19; *Prosecutor v. Brdjanin*, IT-99-36-T, *Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved"*, 30 October 2002, paragraph 26.

investigate those facts does not contribute to the finding of the truth which is a main object and purpose of the trial as such.

17. I do not believe that there can be an alternative to full disclosure as provided for in the Statute, and I certainly do not think that an alternative can be devised without allowing submissions from the defence on an issue which so directly affects it.

18. Thus, I dissent with the Majority Opinion in that I believe that the defence should have an opportunity to have knowledge of, and make submissions on, any alternative procedures to that of full disclosure of potentially exculpatory materials. Further, if the defence were to have any objection to the concession of facts by the prosecution as an alternative to full disclosure, I believe that it should receive any potentially exculpatory material in its full form within the original document or statement in which it was provided, in order to allow the defence the ability to fully utilize the information.

The sending of a representative of the Registry on behalf of the Trial Chamber on an investigative mission to explore the cooperation possibilities of reluctant witnesses to be called by the prosecution

19. In another possible solution to the difficult aspects of exculpatory disclosure faced by the prosecution, the Majority Opinion provides, as a solution to witnesses who have provided potentially exculpatory materials but who are no longer available or refuse to cooperate further with the Court, that the Trial Chamber will send a representative from the Registry to consult further with these persons with regard to their willingness to cooperate with the Court. While the Majority Opinion remains unclear on the implementation of this directive, the transcripts of the trial proceedings may provide an indication. The Presiding Judge discusses with the prosecution in an *ex parte* hearing:

> "A possible solution for this problem is to turn those five and any others who come in the same category into Court witnesses, for the Court to establish independently

> of the Prosecution as to whether or not the witnesses will cooperate at all in the judicial process. If they will not, then that means that all that exists is a statement to which the witness is not prepared to come and speak to, thereby reducing its evidential value very significantly, and it may be, and I underline those words 'may be,' it may be in those circumstances that would be sufficient to secure fairness for the defendant to deliver the materials with suitable redactions so that identity is protected.
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> If the witness on mature reflection, having been approached by the Court agrees to participate, then it may be, and again I underline those words, that the witness could be called having implemented the kind of protective measures within this courtroom which would enable the witness to give the evidence but with his or her identity concealed by using screens, distortion, and the like."[23]

The prosecution response during the oral hearing with regard to this subject is also telling:

> "Our preliminary view is that the suggestion of the Trial Chamber is one that we would be very much in favour of. As a means of having a witness provide the relevant information in a form that is somewhat more neutral than having been called by one party or another, which would address some of their own concerns about the view of the outside of the participation obviously in the proceeding.
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> ...
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> To the extent that we've canvassed, to put it rather broadly, the idea of them being court witnesses, with at least several we know it hasn't found particular favour, but that is only because the witnesses in our view don't feel secure enough to participate in the proceeding."[24]

20. It is also helpful to keep in mind that this possibility was, once again, discussed in a confidential *ex parte* hearing without the defence present.

21. In my opinion this solution is flawed in a number of ways, including placing the Trial Chamber in a position closer akin to a party and taking on a role which should be maintained for the prosecution rather than the Trial

[23] ICC 01/04-01/06-T-82-CONF-EXP-ENG, 9 April 2008, page 7, line 16 – page 8, line 6.
[24] *Ibid.*, page8, line 21 – page 9, line 20.

Chamber. Further, providing the only discussion concerning this possibility during an *ex parte* closed session hearing which does not involve the defence goes against the fundamental principle of *principe du contradictiore*.

22. The right of every party to be in a position to discuss any factual or legal issue put forward, or the *principe du contradictoire*, is a fundamental tenant in the criminal justice system of the major legal systems of the world. This solution was, once again, canvassed at an *ex parte* closed session hearing without the defence present and therefore the order of the Majority Opinion is to be implemented without submissions from the defence ever being heard on the matter, though the prosecution has had ample time to respond with regard to the suggestion. Maintaining the important balance enshrined in the *principe du contradictiore* within the proceedings goes directly to the very essence of fairness and it must be preserved at all cost.

23. While the Trial Chamber has clearly expressed in a previous decision[25] that there are no prosecution or defence witnesses *per se*, and that in fact, all witnesses are to be considered court witnesses, taking these actions, in the manner which the Majority suggests tends to suggest that the Trial Chamber is assuming a role comparable to the role that a party would play in the proceedings. This is further asserted by the Presiding Judge's comment to the prosecution on the implementation of this concept, "It has the great benefit for the prosecution in that it removes responsibility from your shoulders and places it fairly on ours".[26] I do not believe that it is the duty or role of the Trial Chamber to ease the burden which fairly rests upon the prosecution where witnesses which they have interviewed are concerned. Further, nowhere in the Statute do I find any support for the Trial Chamber to take on a role which is assigned to the prosecution.

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[25] *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, ICC-01/04-01/06-1049, 30 November 2007, paragraph 34.
[26] *Ibid.*, page 10, lines 3-5.

24. The Trial Chamber must maintain an impartial role within the proceedings in order to ensure fairness. This neutral role is also essential for the Registry to maintain within the proceedings, and requiring the Registry to take on a function which should be the prosecutions alone puts the Registry in a difficult position, endangering its neutrality. For all of the above reasons, I respectfully dissent from the Majority's position that the Trial Chamber may send a representative from the Registry on behalf of the Chamber to ascertain a witness' willingness to participate in the proceedings, as I believe that to be solely a function reserved for the parties.

II. Alternative exculpatory disclosure process to ensure the rights of the accused

25. Along with the above mentioned principled difficulties with the Trial Chamber taking on a role analogous to a party, I also find it a costly one in terms of time and resources. In order to facilitate the disclosure of potentially exculpatory material while maintaining the integrity of the proceedings as well as facilitating practical solutions, I would suggest a two step approach.

26. I would first suggest that disclosure on a redacted basis be provided to the defence of the exculpatory material in its original form with redactions made strictly to ensure protection of individual witnesses. If the defence felt that it was not able to utilize the material contained in the statements provided in the redacted form, it could then, as a second step request from the Chamber any lifting of redactions which might be necessary in order to fully explore and utilize the information contained within the statements. This approach is similar to that of Pre-Trial Chamber I.[27]

[27] *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, ICC-01/04-01/07-428, 21 April 2008, Paragraphs 139-146.

27. This solution maintains proper roles for each separate and distinct entity within the trial structure while providing the defence to view any exculpatory material which it may be assisted by and further will provide the Chamber with an understanding of whether further disclosure is necessary.

III. Conclusion

28. Ultimately, I agree with these sections of the Majority opinion:

- I agree with the Majority that the trial will commence on Monday 23 June 2008 providing that all incriminatory and exculpatory disclosure obligations are found to have been met, according to the timeframe set out by the Chamber in its 9 November 2007 decision.

- I agree with the Majority's order that the prosecution may not add witnesses or documents to its trial evidence without the leave of the Chamber.

- I agree with the Majority granting the "Prosecution's application for authorization to add a further expert report on age determination to the evidence to be relied on at trial" filed on 3 April 2008, and its authorization of the prosecution to add the expert report disclosed late.

- I agree with the Majority's reiteration that in future *ex parte* filings shall be notified in accordance with the terms of the Chamber's decision of 6 December 2007.

- I agree with the Majority order to the Registrar to notify the confidential decision of 21 November 2007 to the Office of Public Counsel for Victims.

- I agree with the Majority order that the prosecution must provide the relevant witness statements and video footage to the Office of Public

Counsel for Victims, to the extent that those materials relate to victims the Office is currently representing.

29. However, there are significant portions of the Majority Opinion which I do not agree with and must dissent from, for the reason which I have given above. These include:

- I respectfully dissent with the Majority Opinion that there is a *de facto* working procedure established whereby upon oral submissions on a topic, the issue is thought to be closed and leave to make further submissions is required.

- I respectfully dissent with the Majority Opinion that as an alternative to full disclosure of the relevant evidence or material the prosecution may concede exculpatory facts which can be taken out of a witness statement and placed in a separate document to be served upon the defence.

- I respectfully dissent from the Majority Opinion to order a representative from the Registry to consult further with persons who will no longer cooperate with the prosecution with regard to their willingness to cooperate with the Court.

- I respectfully dissent from the Majority Opinion that the prosecutions responsibility under Article 67(2) to disclose exculpatory material only includes materials which show or tend to show the innocence of the accused or which affect the credibility of the prosecution evidence.

- Finally, I respectfully dissent from the Majority approach in which matters which may directly infringe upon the rights of the accused are considered in *ex parte* submissions without the defence and are further decided upon without allowing submissions from the defence.

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

Judge René Blattmann

Dated this 28 April 2008

At The Hague, The Netherlands