International criminal law: A selected case

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Proceedings in the first trial before the International Criminal Court have been stayed on grounds of non-disclosure of exculpatory evidence by the Office of the Prosecutor, in circumstances described by the Trial Chamber as a 'wholesale and serious abuse'. On 13 June 2008, the judges of Trial Chamber I — Sir Adrian Fulford (United Kingdom), Elizabeth Odio Benito (Costa Rica) and René Blattmann (Bolivia) — rendered their 44-page *Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008* ('the Decision'). The Decision centres on the consistent misuse of Article 54(3)(*e*) of the Rome Statute of the International Criminal Court ('Rome Statute'), which permits the prosecution to obtain evidence from third

parties on condition of confidentiality, but solely for the purpose of generating new evidence.

The Decision will be of interest for its detailed appraisal of the scope of the prosecutorial duty of disclosure — particularly its relation to information obtained from international organisations and national intelligence services on condition of confidentiality — in the context of a mixed legal regime in which the prosecution service straddles a dual role as impartial investigator and adversarial party to trial proceedings, and in which victims' interests are represented in from the pre-trial phase. The Decision clarifies the respective roles of the prosecution and judiciary in evaluating the exculpatory value of evidence and deciding questions of non-disclosure. More broadly, the Decision may affect the ability of the Office to conduct effective investigations through cooperation with international organisations and national criminal justice systems, its primary mode of operation envisaged in the Rome Statute. Ironically, the very limitations of this mode of operation may at least explain — although not justify — the impugned conduct of the prosecution in this case.

The South African criminal lawyer will note that the question of disclosure of exculpatory material obtained on condition of confidentiality has not yet been specifically canvassed by our courts. The Bill of Rights does not explicitly provide for the right of an accused person to full disclosure of exculpatory evidence in the hands of the State. Some guidance appears in the landmark, unanimous judgment in *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC), where the Constitutional Court overturned the State's claim of blanket docket privilege on the basis of a purposive interpretation of the right to a fair trial, including the right to be informed with sufficient particularity of the charge, to be presumed innocent and to remain silent, and to adduce and challenge evidence (Interim Constitution, ss 25(3)(*b*)-(*d*)). In a recent judgment, *S v Crossberg* 2008 ZASCA 13 (20 March 2008), the Supreme Court of Appeal affirmed that the principles governing disclosure developed in *Shabalala* 'remain the same under the present Constitution' (at para [74]). The holding in *Crossberg* turned on the State's failure to discharge its burden of proof in a murder trial; thus, the treatment of disclosure should properly be considered *obiter dicta*. Writing for the majority, Navsa JA cited with approval *R v Stinchcombe* [1991] 3 SCR 326, where the Supreme Court of Canada was unequivocal: 'All relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.' (at 20-21).

The court in *Stinchcombe*'s case was careful to emphasise that

the obligation to disclose is 'not absolute' (at 16); that an exercise of prosecutorial discretion is involved; and that justifiable limitations can operate on *scope of disclosure* (for example, in cases of privileged information or risk of serious harm to an informant) as well as the *timing of disclosure* (for example, where an ongoing investigation may be jeopardised). As the line of Canadian jurisprudence cited in *Crossberg* makes clear, the discretion to disclose is subject to judicial review; and while the prosecution is afforded latitude as a 'minister of justice', non-disclosure should be rare — while delayed or partial disclosure may be justified on a case-by-case basis, the absolute withholding of relevant information can only be justified on the basis of a legal privilege, and an unjustifiable failure to disclose will constitute 'a very serious breach of legal ethics' (see *Stinchcombe*; see at 16-18). A retrial is the appropriate remedy, in the interests of justice, where the court of review finds a 'reasonable possibility that such failure or refusal has affected the outcome or impacted on an accused's rights to a fair trial' (*Crossberg* at para [75]). This jurisprudence provides a helpful comparative backdrop for a critical appraisal of the stay of proceedings in *Lubanga*'s case.

The impugned prosecution of Thomas Lubanga Dyilo, erstwhile head of the *Union des patriotes congolais*, focused on charges of recruitment of child soldiers in the armed conflict in the Democratic Republic of Congo. Investigations began in 2003; a warrant of arrest was issued for in March 2006 and charges confirmed against the accused in early 2007. While pre-trial proceedings have already established substantial grounds to believe that Lubanga committed the crimes charged, an abuse of process by the prosecution — without evidence of bad faith — has met with a stay of proceedings and now obliges the Trial Chamber to consider the release of the accused. The potentially wasted costs associated with the *Lubanga* investigation are not readily discernible from the budgets and reports of the Court, which are function-specific rather than situation-specific. It is noteworthy that the total budget for the Court in 2007 amounted to almost €90m (R1.1bn), covering investigations in four situations across Africa. In its financial estimates, the Court has projected the cost of trial proceedings in the *Lubanga* case at almost €4m (R50m) per year, from 2008.

The International Criminal Court is a fully-fledged international judicial institution operating within a world order that displays only embryonic international executive authority. For instance, the Office of the Prosecutor has minimal direct enforcement powers on State territory and depends largely upon a detailed cooperation regime provided in the Rome Statute, implemented through domestic legislation such as the Implementation of the Rome Statute of the International Criminal Court Act (Act 27 of 2002). While States Parties to the Rome Statute have a general obligation to cooperate with requests for assistance from

the Court (Article 87), including the Office of the Prosecutor, almost all information relevant to the investigation must be obtained through requests to States. States with sophisticated intelligence capabilities will usually be the custodians of the most relevant, in-depth and up-to-date information concerning the alleged activities and whereabouts of potential targets for investigation and prosecution. Such information is highly relevant to the Prosecutor from the pre-investigative *analysis phase* governed by Article 15 of the Rome Statute, through to the *investigation phase*, eventual requests for warrants of arrest and confirmation of charges before trial. Information is initially sought from open sources, but as analysis and investigation intensifies, nothing in the Rome Statute prevents the Prosecutor from seeking information from confidential sources. In this context, Article 54(3)(*e*) sets out a key prosecutorial power:

> **Duties and powers of the Prosecutor with respect to investigations [...]**
> 3. The Prosecutor may: [...]
> (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;

The procedural history of the Decision establishes that the Office of the Prosecutor entered Article 54(3)(*e*) confidentiality agreements covering some 1632 documents relevant to the charges confirmed against Lubanga, which concerned only one attack against one village on a single day (at para [74]). Of these, 207 documents comprised two categories of evidence subject to disclosure: (i) potentially exculpatory information; and (ii) information material to the preparation of the defence (at para [63]). 156 documents were provided by the United Nations; the other 51 were presumably provided by State sources. None of these documents were disclosed to the defence, and only 32 were provided to the Trial Chamber itself, albeit in redacted form and without identification of the information-provider (at para [64]).

The Trial Chamber rightly notes that but for the confidentiality agreements routinely entered by the Office of the Prosecutor when seeking information, the 207 exculpatory or otherwise material documents would have been fully disclosed. The Trial Chamber finds that the prosecution has given Article 54(3)(*e*) 'a broad and incorrect interpretation' (at para [72]):

> '[...] the prosecution's general approach has been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information provider's consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents which are not for use at trial but which

> are instead intended to "lead" to new evidence. The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances' (para [73]).

The Rome Statute is subject to a rule of interpretation requiring consistency with internationally-recognised human rights (Art 21(3)). After canvassing provisions of international human rights instruments and European jurisprudence on the right to a fair trial, the Trial Chamber 'unhesitatingly' concludes that the fundamental right to a fair trial includes an 'entitlement to disclosure of exculpatory material' (at para [77]). Given the significance of the *Lubanga* case for Africa, it is regrettable that the Chamber's analysis does not draw on the broad 'right to defence' provided in Article 7(1)(*c*) of the African Charter on Human and Peoples' Rights. Consistent with the jurisprudence of the ad hoc Tribunal for the former Yugoslavia, the Chamber finds that even if the public interest favours limiting access to certain types of material, that 'the public interest […] is excluded where its application would deny to the accused the opportunity to establish his or her innocence' (*Prosecutor v Brđanin and Talić*, Case No. IT-99-36-T, *Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002* (23 May 2002), at para [19]; Decision, at para [80]).

In defining the scope of the duty of disclosure, the Trial Chamber is rightly guided by the explicit language of Article 67(2) of the Rome Statute, concerning rights of the accused. The Chamber classifies as 'exculpatory material' subject to disclosure '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' (at para [59]). This is in addition to the right of the accused to inspect 'any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence…', as provided in Rule 77 of the Rules of Procedure and Evidence of the Court.

The Decision also clarifies significantly the respective roles of the prosecution and the judiciary in assessing the evidentiary value of exculpatory material and its potential non-disclosure. Although the prosecution is expected to 'make the initial decision as to the exculpatory value or effect of any piece of evidence…once this threshold is passed and it is accepted that the material *has*, potentially, an exculpatory effect, only the Chamber can make a decision on non-disclosure if exceptional circumstances so require' (at para [88]) [emphasis in original]. This approach appears similar to that of the Supreme Court of Canada in *Stinchcombe*: 'The initial obligation to separate "the wheat from the

chaff" must therefore rest with Crown counsel', noted Sopinka J for that Court, while emphasising that this exercise of discretion remains subject to judicial review (at 16). As mentioned, the approach in *Stinchcombe* has been approved by the Constitutional Court in *Shabalala* and, applying the Final Constitution, by the Supreme Court of Appeal in *Crossberg*.

In *Lubanga's* case, the Trial Chamber dismisses out of hand submissions that the prosecution has discretion to decide whether or not potentially exculpatory evidence will only impact *in principle* on the Chamber's decision, rather than having a material impact *in fact* on the Chamber's determination of the guilt or innocence of the accused (at para [87]), holding that this is a matter for the Court to decide, in accordance with the explicit provisions of Article 67(2) the Rome Statute. The rather creative suggestion that alternate, similar evidence in the hands of the accused relieves the prosecution of the duty to disclose a particular piece of exculpatory evidence is also dismissed — 'the right of the accused', observes the Chamber, 'is to both items' (at para [60]).

It is here that the prosecution would seem to trip on the drafting of its own confidentiality agreements. Although the text of the specific agreements is not in the public domain, the language would presumably mirror that of Article 18(3) of the Relationship Agreement between the Court and the United Nations, an instrument subordinate to the Rome Statute, which provides:

> The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations (Decision, para. 65) [emphasis added].

An obligation not to disclose information to 'other organs of the Court' effectively bars the prosecution from disclosing such information to Chambers from appraisal or review, even *ex parte*., which amounts to an unjustifiable extension of Article 54(3)(*e*) and a violation of the rights of the accused enshrined in the Rome Statute. In line with international human rights jurisprudence and consistent with the general approach favoured by the South African courts, it is the judges, not the prosecution, who are 'solely competent' to permit the exceptional non-disclosure of evidence, even on public interest immunity grounds (Decision, at para [84]). Failure to lay such evidence before the trial judge for assessment will amount to a violation of the fair trial rights of the accused (see e.g., *Rowe and Davis v United Kingdom*, European Court of Human Rights, Case No. 28901/95 (16 February 2000), at para [66]); Decision, at para [82]-[84]). The Chamber finds that 'each

individual document purporting to contain potentially exculpatory material' must be 'individually examined' by the trial judges in order to assess whether non-disclosure amounts to a breach of the rights of the accused (at para [89], [92]) — to which the prosecution could only offer the possibility that the Chamber 'may be provided at some stage in the future with no more than incomplete or insufficient materials' (at para [91]).

The choice facing the prosecution, which the Chamber describes as 'clear and stark', is also singularly unenviable: disclose the full contents of the relevant documents and undermine crucial information flow and working relationships with organisations in the field (particularly the United Nations), potentially triggering the international responsibility of the Office of the Prosecutor, or safeguard the integrity of confidentiality agreements and commit an abuse of process by negating what the Chamber characterises and 'one of the essential preconditions of a fair trial' (at para [91]).

A number of victims of Lubanga's acts were granted leave to participate in the proceedings and, through their legal representatives, opposed a stay of proceedings as a remedy within the jurisdiction of the Pre-Trial Chamber only, and nonetheless available only in cases of inadmissibility or lack of jurisdiction (at para [55]). It is troubling that the Chamber does not engage at all with the merits of these submissions, presumably accepting as common cause between prosecution and defence that the power to grant a stay of proceedings is indeed an inherent power of the Trial Chamber (see at para [53]-[54]). Serious engagement with the arguments raised by victims would have lent greater credence to the expression of 'great reluctance' with which the Chamber concludes its Decision, noting that 'victims will be denied an opportunity to participate in a public forum, in which their views and concerns were to have been presented and their right to receive reparations will be affected'; and that victims have 'in this sense, been excluded from justice' (at para [95]).

Indeed, one wonders whether a stay of proceedings was necessary in the circumstances. An order compelling the Office of the Prosecutor to disclose potentially exculpatory material to the Trial Chamber *ex parte* would seem the appropriate remedy in the first instance, engaging a protective mechanism for the rights of the accused, minimising the impact of the rights and interests of victims while perhaps lending greater impetus to the efforts of the prosecution to renegotiate the terms of its impugned confidentiality agreements in line with the Rome Statute and international human rights law. *In medio stat virtus*.