



Original: English

No.: ICC-01/04-01/07

Date: 28th April 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

Request for leave to appeal the 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

Source: Defence for Mr Germain Katanga

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

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Introduction

1. The Defence for Mr Germain Katanga (“Defence”) requests leave to appeal the Single Judge’s *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*¹ (“impugned Decision”). The Defence submits that this Decision contains one error warranting the Appeals Chamber’s consideration: the Single Judge’s system for article 67(2) and rule 77 material violates the rights of the Defence under article 67(1) because of the shift of burden post confirmation.

Threshold Criteria for Leave to Appeal

2. The Defence files this *Defence Motion for Leave to Appeal the Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12* (“Defence Motion”) pursuant to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
3. Pre-Trial Chambers I and II have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²

The issue, which derives from the Impugned decision:

4. In the impugned Decision, the Single Judge addresses the category of statements, interview notes and interview transcripts of potential witnesses which contain materials which fall under article 67(2) or rule 77.

¹ ICC-01/04-01/07-433-Conf.

² ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

5. The OTP has chosen not to rely on these potential witnesses for the purposes of the confirmation hearing; and it has not provided positive confirmation that it will rely on these witnesses and materials for the purposes of the trial.³ Indeed, the Single Judge further clarifies that the material extends to information derived from “individuals who have been interviewed by the Prosecution in relation to the present case, or in relation to any other investigation and/or case, and on whom the Prosecution does not intend to rely at the confirmation hearing because they are not part of the “core evidence” of the present case”.⁴
6. Nonetheless, the OTP has sought relief from disclosure on the basis that “they live in the Ituri district and [redacted]”.⁵ The OTP requested to be exempted from the requirement of seeking prior judicial approval for redactions relating to article 67(2) and rule 77 materials.⁶
7. The Single Judge observed that in light of the fact that the OTP had chosen not to call these persons as witnesses for the confirmation hearing, this information would not form “part of the evidentiary debate held at the confirmation hearing”, and as “a consequence, the Defence need not challenge their credibility”.⁷
8. The Single Judge further considered it appropriate to allow the Prosecution to redact article 67(2) or rule 77 materials *proprio motu* without prior leave of the Pre-Trial Chamber in order to avoid excessive delays and be able to proceed with the confirmation hearing⁸ now scheduled for the 27th of June 2008.
9. For the same reasons, Counsel for Katanga did not object to the procedure proposed by the Prosecution at the Status Conference of the 1st of April 2008.⁹ However, the Defence for Katanga was of the understanding that this procedure would apply prior to the confirmation hearing only and that the redactions be sustained until the date of confirmation only. The Defence for Katanga assumed that, post confirmation, the Prosecution would have to request leave from the Trial Chamber to maintain those redactions.

³ Impugned decision at para. 96.

⁴ Impugned decision at footnote 111.

⁵ Impugned decision at para 98.

⁶ Impugned decision at para 98.

⁷ Impugned decision at para 100.

⁸ Impugned Decision at para. 106.

⁹ ICC-01/04-04/07-T-21-ENG ET WT 01-04-2008 1-44 NB PT, p. 34, l. 10-24.

10. This understanding finds support in the jurisprudence of the Trial Chamber in *Lubanga*, which has held that redactions to material disclosed to the Defence must be authorized by the Trial Chamber.¹⁰
11. However, having carefully reviewed the impugned Decision, it seems that the Single Judge considers it appropriate that these unauthorized redactions stay even after confirmation, unless the Defence requests the Trial Chamber for them to be disclosed.¹¹ The Defence for Katanga understands this to mean that the burden for redactions has been reversed in the sense that rather than the Prosecution being required to seek redactions, the Defence is required to seek judicial intervention from the Trial Chamber to obtain the information which has been withheld. The defence are here only concerned with the position post confirmation. On the basis of this understanding, namely that the burden for redactions has been reversed even post confirmation, the Defence for Katanga seeks leave to appeal. Alternatively, if the Defence have incorrectly interpreted the impugned Decision, it hereby seeks clarification.

Issue of Appeal: the Single Judge's system for article 67(2) and rule 77 material violates the rights of the Defence under article 67(1) because of the shift of burden post confirmation.

The issue significantly impacts on the fairness

12. The Defence firstly observes that the "Prosecution's obligation to disclose exculpatory material is essential to a fair trial".¹² As such, any decision which affects the modalities or parameters of this obligation necessarily significantly impacts on the fairness of the proceedings. In addition, it has been commented that Article 67 should be considered to

¹⁰ "Redactions to material disclosed to the defence must be authorised by the Chamber" : ICC-01/04-01/06-1172, Order on Prosecution's application for redactions pursuant to Rule 81 (2) filed on 14 February 2008, 15 February 2008, at para. 5.

¹¹ See, for instance, Impugned Decision at para. 138.

¹² *Prosecutor v. Karemara*, 'Decision On Interlocutory Appeal Regarding The Role Of The Prosecutor's Electronic Disclosure Suite In Discharging Disclosure Obligations,' 30 June 2006, at para 9. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44 ("*Bagosora* Appeal Decision"); *The Prosecutor v. Dario Kordic and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242 ("*Kordic and Čerkez* Appeal Judgement"); *The Prosecutor v. Tihomir Blaškic*, Case No. IT-95-14-A, Judgement, 20 July 2004, para. 264 ("*Blaškic* Appeal Judgement"); *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 180 ("*Krstic* Appeal Judgement"); *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3 ("*Brđanin* Appeal Decision").

possess “hierarchically superior status within the Statute” such that that “the Court may be required to declare provisions within the Statute inoperative because they conflict with article 67”.¹³

13. The Defence further submits that the fairness of the proceedings has been affected by the fact that the Single judge has extended the lack of judicial supervision in respect of redactions in exculpatory material to the period post confirmation. The Defence considers that it is not prejudiced by those redactions in these initial stages, given that the Prosecution does not intend to rely on the redacted summaries for confirmation. On the other hand, the Defence considers that it will be greatly prejudiced if those redactions are not lifted – unless good cause to keep those redactions is shown by the Prosecution – post confirmation. Disclosure of the identities of the makers of the statements in question become of significant importance as the trial is getting closer. If the Prosecution intends to rely on these statements at trial, the identities of the makers thereof need to be disclosed in compliance with the disclosure regime. If, on the other hand, the Prosecution decides not to rely on them at trial, the Defence may still need disclosure of the identities of the makers of the statement.
14. The identities and identifying information of persons who have made submissions in favour or against Mr. Katanga qualify as exonerating material. The Defence may wish to contact those persons. They may have valuable information to discredit the credibility of witnesses being relied on by the Prosecution at trial, or they may assist the Defence in evaluating the credibility of evidence the Defence intends to introduce in the defence case.¹⁴
15. It is the Prosecution’s duty to disclose such materials. It should not be for the Defence to demonstrate that disclosure of those identities is necessary but for the Prosecution to demonstrate that there is good cause not to disclose these identities to the Defence, in compliance with the Statute and Rules.
16. The Pre-Trial and Trial Chambers are tasked with providing assistance to the Defence, and ensuring equality of arms through regulation of the disclosure process. This includes ensuring that the Defence is in a position to expeditiously prepare its case for trial in the

¹³ W. Schabas, ‘Article 67 Rights of the Accused’ Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 1999) pp. 845-867.

¹⁴ See *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, ‘Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence’: “In accord with the plain meaning of Rule 66(B) of the Rules, the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence [...] Indeed [...] these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence. [...] There are few tasks more relevant to the preparation of the defence case than selecting witnesses.” (at para 9).

event that the charges are confirmed. The Statute and Rules emphasize the need for the Chamber to exercise supervision over the prosecution's implementation of its disclosure obligations, in particular, its obligations under article 67(2) and rule 77. The burden is not on the Defence to request such oversight: the rule is disclosure and the onus is on the Prosecution to seek exemption.

17. Brady observes in connection with rule 77 materials that "A previous draft of Rule 77 obliged the Prosecutor to disclose such material and permit inspection only "on request by the defence". However a strong view emerged during the debates that it was inappropriate to require a request from the Defence to "trigger" this right".¹⁵ Similarly, "Rule 83 [...] clarifies that the Prosecutor and not the defense brings an application for a ruling under article 67, paragraph 2" (although there is nothing preventing the defence from filing an application to the chamber).¹⁶
18. On those grounds, Mr. Katanga's right to a fair trial is clearly implicated by the impugned Decision.

The Issue significantly impacts on the expeditiousness of the proceedings

19. The Appeals Chamber has confirmed that in ascertaining the impact of an issue on the proceedings, the term proceedings "is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto".¹⁷ The Defence submits therefore that it is appropriate to seek leave to appeal the impugned Decision to the extent that it covers post confirmation. If this issue cannot be clarified and resolved now, the Defence would make similar objections to the Trial Chamber, which may be the cause for delay at a later stage.
20. Moreover, it is obvious that the ability of the Defence to expeditiously prepare its case would be better facilitated by receiving unredacted statements, than summaries. Since redactions should be the exception rather than the rule, a system of judicial oversight post confirmation is likely to result in more material than a system in which the Prosecutor simply provides summaries.
21. The Trial Chamber in *Lubanga* has ruled that the Prosecutor must disclose statements in unredacted form at least three months before the trial.¹⁸ If this Decision is followed in the present case, the Defence will only possess the summary redacted version of this exculpatory material until three months before the trial, unless the Defence expressly

¹⁵ H. Brady, 'Disclosure of Evidence' The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Roy Lee ed., 2001) at p. 411.

¹⁶ H. Brady *ibid* at p. 412.

¹⁷ ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, at para 12.

¹⁸ Oral decision of 18 January 2008, ICC-01/04-01/06-T-71-ENG at p. 4.

requests the Trial Chamber to revise the summaries and order the Prosecution to disclose unredacted versions of this material. If, at this point, it has become evident that the material warrants further investigation, it may be necessary for the Defence to request to postpone the commencement of the trial.

22. In this regard, the Defence observes that a Working Group established by the ICTY to investigate measures to expedite trials identified late disclosure of evidence, in particular exculpatory evidence under ICTY Rule 68, as being one of the main factors which contributed to trial delays and unduly lengthy trial proceedings. The Working Group therefore recommended that the judges strictly monitor the Prosecutor's compliance with its obligation to disclose exculpatory materials, and consider sanctioning the Prosecutor if appropriate.¹⁹

A decision of the Appeals Chamber would materially advance the proceedings

23. Provided that the Defence has correctly interpreted the impugned Decision to reverse the burden in relation to redactions even post confirmation, a Decision of the Appeals Chamber would materially advance the proceedings, given that this position contradicts that expressed by the current Trial Chamber.²⁰ In an attempt to promote harmony and consistency in the jurisprudence created before the ICC, a clarification on this matter by the Appeals Chamber would be helpful.
24. An immediate decision of the Appeals Chamber would further ensure that the defence does not face irremediable prejudice in terms of its ability to secure vital evidence and testimony in a timely manner.

Conclusion

25. On these grounds, the Defence requests the Single Judge to grant leave to appeal the *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* pursuant to Article

¹⁹ "One of the fundamental areas, which has negatively impacted on expeditiousness of proceedings at the International Tribunal, concerns problems surrounding the efficient disclosure of evidence. The Working Group recommended that greater use should be made of the power to sanction a party for failure to comply with its disclosure obligations pursuant to Rule 68bis where that failure hampers the pre-trial process. This should ensure that the parties and their counsel understand that time limits are to be strictly adhered to. The Judges agree that, wherever necessary, full use will be made of the power to sanction parties for failures to comply with time limits." Assessment and Report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Council Resolution 1534 (2004), S/2006/353, 31 May 2006, at para. 25.

²⁰ "Redactions to material disclosed to the defence must be authorised by the Chamber": ICC-01/04-01/06-1172, Order on Prosecution's application for redactions pursuant to Rule 81 (2) filed on 14 February 2008, 15 February 2008, at para. 5.

82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.



David HOOPER

Dated this 28th April 2008

At London