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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

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

Public Document

***Defence Response to the Prosecution's Submissions on the Modalities of
Disclosure Required for the Protection of Incriminating Witnesses***

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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Other

1. The Defence of Mr Germain Katanga (“the Defence”) hereby responds to the Prosecutor’s proposals for the disclosure of incriminating evidence provided by those witnesses requiring protective measures.¹ The criteria by which witnesses require protective measures are therefore not addressed here.
2. In respect of the proposal in paragraph 4 that, where the witness is at risk of identification and is awaiting induction into a protection programme, only summaries or verbatim extracts of the witness’s transcripts be provided, the Defence does not in principle object so long as the measure is strictly applied on a case by case basis, under the supervision of the Chamber, and for a very limited time. The Defence notes that the prosecution proposal imposes no time limit on the time such witnesses may remain anonymous. Care should be taken to ensure that such an exceptional and temporary status is of short duration, with effective limits imposed by the Chamber. The Defence is concerned that, at this comparatively late stage of the proceedings, the Prosecution is referring to induction of witnesses into protection programmes when, with the possible exception of the few new witnesses, such arrangements should already be in place.
3. The Defence objects to the proposals contained in paragraph 6, 7 and 8.
4. Firstly, the Defence objects to the introduction of a general rule that disclosure of the identity of all protected witnesses be withheld until 30 days before testimony. There is no basis for such a general rule. Article 67(1)(b) provides that the Defence has the right to have adequate time and facilities for the preparation of the defence, and Article 68(1) that any protective measures granted by the Court “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The right to prepare the defence in an effective manner, which necessarily includes access to the results of investigations, is, it is submitted, a paramount consideration for fair trial.² While both the rights of the accused and the protection of witnesses are both matters of great importance, it is the rights of the accused that are paramount.³

¹ ICC-01/04-01/07-882, Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses, 9 February 2009.

² See *Jespers v Belgium*, ECHR (1981) 27 DR 61.

³ *Prosecutor v. Milosevic*, Decision on prosecution motion for provisional protective measures pursuant to rule 69, 19 February 2002, para 23: “The measures which are appropriate should be determined after balancing the right of the accused to a fair and public trial and the protection of victims and witnesses. These propositions are uncontroversial. What is clear from the Statute and Rules of the Tribunal is that the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one.”

5. The identity of an incriminating witness is obviously one of the most significant matters that has to be disclosed to an accused.⁴ It is essential that an accused knows the identity of his accusers and has sufficient time to investigate and rebut the allegation. The two significant aspects of the investigation are, firstly, the capacity to investigate the credibility of the accuser and, secondly, the factual basis of the accusers testimony. Without the name of a witness neither process can be done. If the Defence does not know the identity of the witness, it is deprived of the very basis upon which it can discover and explore the prejudice, hostility, untruthfulness or unreliability of that witness.
6. Also, it is rare for a witness to give evidence that is wholly independent of the evidence of other witnesses. It follows that therefore investigations as well as ultimately cross-examination can not be done in isolation. For example, once the identity of a witness is known, it might be discovered that such witness was not where he claimed to have been. That information could determine the course of an investigation and what questions are put to other witnesses. The Defence requires as complete a picture as possible.
7. The Appeal Chamber has emphasised that the withholding of identity should only be granted on an exceptional basis⁵. There should not be a blanket, 'one size fits all' approach, as proposed by the Prosecutor. Rather, each protected witness should require careful examination as to his or her circumstances in order to determine the need for such an exceptional measure of protection. Non divulgation and its extent must be tailored to the particular circumstances of the witness. Also, the Prosecutor must demonstrate that alternative, lesser measures are unavailable⁶. In this respect it is to be observed that adequate time has elapsed in this case for the Prosecutor to have put in place alternative measures that do not intrude into the rights of the Defence. If the Prosecutor has failed to take advantage of the time available to him to put in place alternative measures then such prosecutorial delay should not be allowed to prejudice

⁴ *Kostovski v Netherlands*, ECHR Series A No. 166.

⁵ ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 13 May 2008.

⁶ ICC-01/04-01/07-475, para 72: the Chamber must consider whether an "alternative measure short of redaction is available and feasible in the circumstances".

the Defence⁷. The Prosecutor must also demonstrate why withholding disclosure of identity of witnesses to the Defence, with an accused in custody, imperils the witness⁸.

8. Secondly, the Prosecutor's proposal of 'rolling' disclosure, thirty days prior to *testimony*, is unacceptable as it leaves insufficient time for effective investigation. It is risible to suggest, as stated by the Prosecutor, that it "will give the defence maximum flexibility in the preparation of its case". 30 days is insufficient time to permit proper investigation of an incriminating witness and a 'rolling' disclosure, determined by when a witness testifies, fails to take into account its practical and prejudicial effects.
9. It is misleading to suggest that such a mode of disclosure is a practice universally accepted at International Tribunals as it is contentious and varies from case to case. The ICTY has leaned away from a generic approach to witnesses and rolling disclosure.⁹ The practice of the ICTR has been a little diverse. Thus, In *Prosecutor v Kanyabashi*, the Trial Chamber ordered that 'the identity the said protected victims and witnesses as well as their non-redacted statements within thirty days prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself'.¹⁰
10. It is to be noted that the funding for investigations by the Defence at the ad hoc Tribunals is more generous and than that provided by the ICC. The capacity to react to disclosure, and more so at short notice, is effected by the financial means available to investigate the case.
11. 'Rolling disclosure' will have an adverse effect on the capacity of the Defence to make investigations, as the Defence lacks the capacity to make repeated

⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, para 20.

⁸ ICC-01/04-01/07-475, para 71: "the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, inter alia whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, inter alia, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions".

⁹ The defence refers to the findings of the Trial Chamber in *Prosecutor v. Milosevic*, to the effect that "28. The Trial Chamber notes with regret that the granting of such protective measures, which started out as an exceptional practice, has become almost the norm in proceedings before the Tribunal. Nonetheless, this practice has followed individual applications for protective measures, not for blanket orders suppressing the identity of witnesses from the accused. Whilst it is extremely important to provide adequately for the protection of victims and witnesses, the requirement that the accused be given a fair trial dictates that Trial Chambers only grant protective measures where it is properly shown in the circumstances of each such witness that the protective measures sought meet the standards set out in the Statute and Rules of the Tribunal, and expanded in its jurisprudence. The Prosecution is under an obligation at this early stage of the proceedings to justify redaction of a witness's identifying information from statements disclosed pursuant to Rule 66 (A)(i) with respect to each such witness". Decision on prosecution motion for provisional protective measures pursuant to rule 69, 19 February 2002, para 28.

¹⁰ *Prosecutor v Kanyabashi*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 6 March 1997, para. 7 of the disposition.

investigations, particularly in DRC. There are obvious difficulties in making investigations in a country so far from the seat of the court, with the difficulties of communication, insecurity, poor governance, and expense. Investigations at the ad hoc Tribunals do not generally confront such marked difficulties. The Sierra Leone cases largely concern witnesses living within that country. Rwanda, a small country with good communications, is adjacent to Tanzania where the ICTR has its seat. The Yugoslav Tribunal is similarly well placed for investigations. All are relatively stable countries with good communications.

12. Staggered disclosure thirty days before testimony will prejudice the Defence as it will complicate its investigations which will also have to be on a 'rolling' basis. Such delayed disclosure will necessarily lead to some witness identities being provided during the trial itself. Once trial is underway the Defence will be occupied with other matters and will find it difficult to take time off to participate in or to organise investigations. Nor would it be feasible for Counsel to delegate all investigative tasks to support staff. As recognized by the ICTY, some potential witnesses/information providers might only agree to provide evidence to counsel, or it might be necessary for counsel to render a first hand assessment of the credibility of the source of the information before deciding whether to use such information as evidence in cross-examination.¹¹

13. That disclosure of identity should be provided prior to the commencement of trial is given support by the plain meaning of Rule 81(4) which authorises the Chamber to order the "non-disclosure of their identity prior to the commencement of the trial". In this connection, the Appeals Chamber has endorsed the proposition that the protective measures set out in rule 81 are limited to the pre-trial stage, by stating "victims as well as witnesses may move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy as foreseen inter alia in article 68 (1) and (2) of the Statute and rules 87 and 88 of the Rules. The protection of victims and witnesses and that of members of their families may justify the nondisclosure of

¹¹ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para 36: "There can be no assumption by counsel for the accused that these witnesses will be telling the truth. There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were, or have subsequently retracted their evidence. The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence. Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials".

their identity prior to the trial, as provided in rule 81 of the Rules.”¹² While it may be possible to conceive that there could be wholly exceptional circumstances that could permit a Chamber to order a later disclosure, it is submitted that such circumstances must be rare in the extreme.

14. Moreover, if names are disclosed only on a ‘rolling’ basis, then when the first prosecution witnesses testify, the defence will not have had the benefit of knowing the identity of those witnesses due to give evidence later in the proceedings. The Defence will not be in a position to make an informed decision as to defence strategy. In this regard, the ICTY has held that the parties may test the credibility of a witness by questioning the witness in relation to allegations contained within other witness statements.¹³ However, since the Defence will not have been disclosed identifying information concerning several prosecution witnesses, it will be handicapped in its effective preparation of the case.
15. Rule 76(1), which is titled ‘Pre-trial disclosure’ further provides that the Prosecutor must disclose to the Defence the identities of prosecution witnesses and copies of prior statements “sufficiently in advance to enable the adequate preparation of the defence”. If this phrase is read in conjunction with the heading of rule 76 (pre-trial disclosure), it is clear that full disclosure must take place sufficiently in advance of the trial so as to enable the adequate preparation of the Defence.
16. The Defence submits that it is fairer by far to have disclosure of witness identities at a set time before the trial, rather than before each witness gives evidence.
17. If all disclosure of identities is made before the trial the Defence will be able to prepare more efficiently and economically. It will enable defence investigations of the named witnesses to take place in respect of several witnesses in one place and over one period of time, rather than by disjointed investigations, over a wider period of time, reacting to what will otherwise amount to a trickle of disclosure.
18. The minimum time for such disclosure in the present case should, the Defence submits, be at least 45 days before trial. However, given the difficulties that confront the Defence in making investigations in the DRC, it is submitted that this minimum

¹² (emphasis added) ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, para 50.

¹³ See *Prosecutor v. Prlic et al*, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, Trial Chamber, 28 April 2006; *Prosecutor v. Boskoski and Tarculovski*, Transcript. 5191-5192: 18 September 2007, Transcript 6343-6345: 17 October 2007.

time for disclosure be viewed as the very minimum, to be authorised by the Chamber only when the Prosecutor has fully satisfied his burden of proving that such delayed disclosure is strictly necessary. There will be many occasions when the minimum period is unnecessary and disclosure can take place earlier. The Defence submits that it is for the Chamber to supervise and regulate such disclosure to ensure that the minimum of 45 days before trial is applied only in cases where it is strictly necessary.

19. The Defence disputes the Prosecution assertion in paragraph 7 that more limited disclosure is justified because of the security situation in Ituri. For protected witnesses in a witness protection programme there is the benefit and protection of such a programme. It is understood that such witnesses may be in Kinshasa, several thousands of kilometers away from Ituri. Further, the Chamber is aware of the existence of reports on the security situation in Ituri and the Defence need not particularize further. Mr Katanga has been in custody for four years.
20. In respect of paragraph 8 the Defence is unclear as to when entry into the familiarisation process is deemed to start, and would be assisted by the Prosecutor, clarifying what exactly is meant, to better assess the implications.
21. The proposal in paragraph 9 is of concern to the Defence. Rule 87(3) (b) of the Rules of Procedure and Evidence refers to the 'defence', which necessarily includes the accused person. The Prosecution proposal refers more narrowly to 'Defence counsel'. What is meant by 'third party' in the Prosecutor's proposal? If the Prosecutor intends to include the accused himself, then the Defence is opposed to such a proposal. It would be an improper imposition on the open and frank relationship between counsel and client.
22. The Prosecutor's proposal in paragraph 9 is too widely drawn and is too restrictive of the Defence's right to investigate the case effectively. It is unclear how widely restrictive the proposal is. The ICTR Appeals Chamber has held that protective measures are designed to prevent the parties from publicly disclosing the identity of the person as a prosecution or defence witness, as opposed to referring to the identity of the person in isolation from this fact. Protective measures should not prohibit the parties from making inquiries in relation to persons and to do so by name. It would not be necessary to identify the person investigated as a Prosecution witness. The modalities of such contact may require more exact definition and are not specifically addressed here.

Respectfully submitted,



David HOOPER

Dated this 20 February 2009

At The Hague