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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 Witnesses Providing Exculpatory Evidence or
Evidence of a Nature Material to the Preparation of the Defence***

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean-Chrisostome Mulamba
Nsokoloni
Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction – Prosecution’s submissions

1. The Trial Chamber requested the Prosecution to submit a report setting out suggested modalities for the protection of witnesses on whom the prosecution will not rely at trial and for whom statements or transcripts exist and which are either exculpatory or material to the preparation of the defence. The prosecution has now made its submissions on the modalities of such disclosure.
2. It filed its submissions in this respect on the 11th February 2009. The Prosecution submits that in fulfilling its obligation to provide the Defence with exculpatory material and evidence material to the preparation of the defence within its possession, certain blanket restrictions should be applied.
3. It is submitted that the Prosecution should, in such cases involving information from victims and witnesses, be in a position to provide the Defence with only ‘discrete contextual’ admissions, summaries and redactions with a view to concealing the identity of the ‘witness’ from the Defence. In the alternative, it is suggested that the identity of such witnesses should only be provided 30 days prior to the commencement of the trial.
4. The Defence opposes these measures for the following reasons.

General Principles on Prosecution’s Disclosure Obligations

5. At the core of the right to a fair trial is the principle, enshrined in Article 67(1)(b) of the Statute, that the accused be given adequate time and facilities for the preparation of the defence. Given that the Prosecution has been conducting investigations for some time and has greater facility to retrieve evidence, the disclosure obligations are an essential corollary of the principle enunciated in Article 67(1)(b).
6. Moreover, the Prosecution acts as a Minister of Justice and not merely an adversary with its only interest consisting of a successful prosecution. If it finds itself in possession of material which might mitigate the guilt or assist the defence it is under a

legal and moral duty to disclose that material in a manner which allows for its effective utilization by the Defence.

7. This obligation is reflected in Article 67(2) of the Statute, which provides that:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence or the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

8. This obligation of disclosure is distinctive from, and must be so treated, other provisions on disclosure of the case against the accused. The obligation here is to disclose such evidence as soon as practicable, which it is submitted means as soon as it is in a communicable form, having been discovered, with an onus on the Prosecution to take all reasonable steps to ensure that it is in such form as quickly as possible.
9. It should be noted that the Single Judge in the present proceedings observed that “a literal interpretation of article 67(2) of the Statute leaves no doubt as to the requirement for the Prosecution to discharge this obligation “as soon as practicable”. The fact that, as a result of the Defence's decision not to reveal its defence before the confirmation hearing, the Prosecution might identify some materials as exculpatory after such a hearing can only be the exception and not the general rule”.¹
10. If the prosecution only discloses the identities 30 days before trial, it will not in real terms equate to disclosure ‘as soon as practicable’. Unless the Defence is in a position to make effective use of such material then there is little point in the rule. Withholding the identity of individuals in the possession of exculpatory material withholds the Defence ability to make such evidence part of its case, and every delay increases the risk that such evidence and clues it might retain might be lost through disappearance, death or corruption of the witness.

¹ Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, issued on 15 May 2006, page 55 at para 125.

11. In this regard, the Defence respectfully submits that the obligation of the Prosecution to disclose material which is either exculpatory or of assistance to the preparation of the defence must be interpreted in a manner which is effective and not illusory. It can only be restricted by an express statutory provision to the contrary. The Appeals Chamber has referred to the Prosecutor's "ordinarily unfettered duty to disclose",² and has further held that the "Prosecutor is ordinarily obliged to make full disclosure, save for where specific provision is made for restrictions on disclosure to be permitted".³

12. As stated by the ICTY Trial Chamber in *Prosecutor v. Brdjanin* in connection with rule 68 – the equivalent of article 67(2):

*The Trial Chamber strongly believes that if a rule is created and intended to have some value, especially if it creates a right, then the remedy must be an effective one. The principle of a fair trial has the following implications with respect to the meaning of Rule 68. First, the principle of a fair trial requires that disclosure of exculpatory material be made in sufficient time. Thus, if the Prosecution has the statement of a person which contains exculpatory evidence and does not intend itself to call that person as a witness, disclosure as soon as practicably possible is a must to ensure that the Defence has an opportunity to subpoena that witness or to use that exculpatory material during the cross-examination of witnesses whom the Prosecution intends to call. It stands to reason that where disclosure is not made within sufficient time, the Defence should be in the position to recall witnesses who have already testified, if it establishes to the satisfaction of the Trial Chamber that the lateness of the disclosure prejudiced the preparation or presentation of his defence.*⁴

Protection of Victims and Witnesses

13. The Prosecution relies on its duty to protect victims and witnesses as an excuse for altering the spirit of Article 67(2). It has been unable to produce any persuasive authority where a court has limited the disclosure of exculpatory material to the Defence, despite more than ten years of experience in addressing the issue of the disclosure of exculpatory material before the ad hoc tribunals.

14. In the case of *Prosecutor v Brdjanin and Talic*, the Trial Chamber held that:

If the prosecution knows of the existence of any such evidence at the present time, it must disclose it to the accused as soon as practicable. The prosecution's

²Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008 11 July 2008, ICC-01-04-01-06-1433 at para 36.

³ At para 45.

⁴ *Prosecutor v. Brdjanin*, 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, at para 26.

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 Measures Motion has been given, is rejected.

15. It is submitted that the obligation under Article 67(2) is absolute and not a question of balance. This submission is consistent with the ICTR Appeals Chamber's jurisprudence, holding that, once a document has been defined as including 'exculpatory' components, rule 68, which is the equivalent of article 67(2), "imposes a categorical obligation to disclose any document or witness statement that contains exculpatory material. Consequently, this obligation is not subject to a balancing test."⁵
16. It is suggested that a heavy onus is placed upon the Prosecution to demonstrate in any specific instance why it is necessary to put in place specific measures for the protection of others which would necessarily lead to withholding information of importance to the defence of the accused.
17. The ICTR has recently rejected Prosecution arguments that the disclosure of redacted statements had been necessary due to preserve the security of prosecution witnesses (presumably in other cases) and cause prejudice to ongoing investigations, stating that "the purpose of disclosure of exculpatory material is to permit the Accused to make effective use of it. This purpose will be defeated if the Prosecution is allowed to redact the statement so extensively as to conceal its exculpatory content or otherwise render it useless for the purposes of the defence".⁶
18. Similarly, an ICTY Chamber held that "[w]hilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia*, interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration. It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases."⁷ In a later decision issued

⁵ Prosecutor v. Karemera, Decision On 'Joseph Nzirerera's Appeal From Decision On Tenth Rule 68 Motion', 14 May 2008 decision at para 12.

⁶ Prosecutor v. Ndindiliyimana et al (Military II), Decision on Defence Motions Alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, at para 23.

⁷ Prosecutor v. Brdjanin and Talic, Decision on motion by prosecution for protective measures 3 July 2000 at para 29, cited with approval in *inter alia* Prosecutor v. Milošević, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-02-54-T, 3 May 2002, para 30.

in the same case, the Trial Chamber held that the prosecution's need to preserve confidentiality with respect to prosecution interviews and statements prepared for one case is ultimately subordinate to the prosecution's obligation to disclose exculpatory materials to the defence in another case.⁸

19. Similarly in the instant case, it is submitted that redactions in exculpatory material supposedly to protect the makers of the statements, cannot be dealt with in a general manner with a blanket rule. Once the prosecution is in the possession of material which should be in the hands of the Defence because of its exculpatory nature, if the Prosecution then feels that there is reason to believe individuals might be placed in danger with the disclosure of all relevant factors connected to the exculpatory evidence, then the prosecution must, in the Defence submission, demonstrate to the Trial Chamber in the individual case that special measures are necessary which infringe upon the preparation of the defence.

20. In any event, under the Statute and Rules, the Prosecution is not entitled to withhold the identities of the makers of exonerating statements without leave of the Court on a case-by-case application. In contrast to Article 54(3)(e), in accordance with which the Appeals Chamber has recognized that the Chamber does not possess the power to order the Prosecutor to disclose the documents in question without the consent of the information provider, Rule 81(2) does not create such a privilege for the Prosecutor. In accordance with the plain wording of Rule 81(2), the "Prosecutor may apply to the Chamber for a ruling as to whether the material or information must be disclosed to the defence". The rule imposes no obligation on the Chamber to grant such requests. Indeed, the ICC Appeals Chamber has expressly recognized that "In circumstances in which the redaction sought would involve withholding exculpatory information which was required to be disclosed, or would result in "a manifest inequality of arms, with little, if any prospect for fair proceedings "the Pre-Trial Chamber would, no doubt, reject the application".⁹

⁸ Prosecutor v. Brdjanin, 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, at para 29.

⁹ 13.05.2008 - 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 ICC-01/04-01/07-475 at para 62.

21. The Defence would add that, in principle, if a person is not a witness which the prosecution intends to call as part of its case then no question of protective measures arises for it. The Defence is equally under a duty to ensure the protection of witnesses and if the witness is not one for the prosecution it might be one for the Defence.
22. Accordingly, the Defence proposes that there be no blanket modification of the obligations in terms of Article 67(2) and that the Prosecution must approach the Chamber on a case by case basis in the event that it has reasonable and justifiable concerns for the security of *its* witnesses.

Insufficient details

23. Furthermore, in any specific application to temper its obligations in terms of Article 67(2) of the Statute, the Prosecution must provide sufficient details to the Defence and the Chamber of the factors which give rise to reasonable grounds for believing that disclosure of identity of a person might lead to danger or prejudice, and give adequate elements of the nature of the exculpatory evidence so that the Defence is in a proper position to be heard, and the Chamber is in the proper position to make an assessment, on the level of importance of the evidence.
24. In this regard, the Defence respectfully draws the attention of the Honourable Trial Chamber to the fact that the Prosecution has completely failed to set out the legal basis for the measures requested in its filing of 11 February 2009. As the Trial Chamber has repeatedly held, the burden of requesting redactions falls on the Prosecution. Part of this burden is comprised of a duty to make the legal basis for the application clear to both the Defence and the Chamber – the fact that certain elements of the request may need to be filed on an *ex parte* basis does not exempt either the prosecution or the Chamber from elaborating on the legal basis for the request in a filing which is available to the defence.¹⁰

Alternative proposed solutions

25. It is further submitted that the proposed alternatives, that is, disclosure of analogous information or summaries in the meantime, are wholly inadequate.

¹⁰ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 ICC-01/04-01/06-773 14 December 2006.

26. The ICTY Appeals Chamber has recognized that the Prosecution cannot meet its disclosure obligation by disclosing analogous information. It held that “[i]n line with this broad interpretation of Rule 68, the Appeals Chamber reiterates that it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for in Rule 68 if there exists other information of a generally similar nature.”¹¹ Similarly, the ICTY Appeals Chamber has concluded that the Prosecutor does not fulfil its obligation to establish the truth by merely collecting exculpatory evidence, even if it alerts the Defence to the fact that such evidence exists; in order to preserve the fairness of adversarial proceedings, the Prosecution must actually put the Defence in a position to use that information in court.¹²

27. The Defence is also somewhat concerned that the prosecution has submitted that it will search for analogous material in order to compensate for information which has been withheld, rather than as a matter of course. Under the clear terms of article 54(1) and article 67(2), is under a continuous obligation to search for any exculpatory material, even if it is cumulative in nature to that which has already been disclosed. The obligation to search for and disclose such cumulative information therefore exists independently of the Prosecutor’s obligation to disclose other information.

28. As for the proposition of disclosing the exonerating in summary form for the time being, the Defence respectfully informs the Trial Chamber that the use of summaries for exculpatory materials has been firmly rejected by the ad hoc Tribunals and the Special Court for Sierra-Leone.¹³ The ad hoc Tribunals have also held that the

¹¹ Prosecutor v. Blaskic, Appeals Judgement, 29 July 2004, at para 266. <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>

¹² “[I]t does not make sense that the Prosecution can stop short of providing exculpatory evidence in its possession, having pointed out to the Defence that it possesses such evidence. If the evidence is in the sole possession of the Prosecution, it is obvious that if the fourth reason were upheld, the Defence would be hindered from discovering it, thus frustrating the principle of a fair trial” Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Prosecutor v. Blaskic, Decision of the Appeals Chamber dated 26 September 2000, at para. 41 < <http://www.un.org/icty/blaskic/appeal/decision-e/00926PN313780.htm> >

¹³ Prosecutor v. Sesay et al., Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Case No. SCSL-04-15-T, T. Ch. I, 9 July 2004, para. 34; Prosecutor v. Blagojević et al., Joint Decision on Motions Related to Production of Evidence, Case No. IT-02-60-PT, T. Ch. II, 12 December 2002, para. 24; Prosecutor v. Brđanin and Talić, Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved”, Case No. IT-99-36-T, T. Ch. II, 30 October 2002, para. 26; Prosecutor v. Blaškić, Decision on the Defence Motion for “Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence”, Case No. IT-95-14-T, T. Ch. I, 29 April 1998, para. 19

Prosecutor cannot simply disclose ‘extracts’ of exculpatory information: the Prosecutor is obliged to provide sufficient information to enable the defence to examine the context and authenticity of the information in question.¹⁴ As noted by the Trial Chamber in Prosecutor v. Blaskic, the “proceedings before the Tribunal are supported by the principles of an adversarial system and a balanced trial. According to the aforementioned Decision, it is, of course, the responsibility of the Prosecution to disclose all potentially exculpatory evidence. In this view, an established extraction of the said evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope.”¹⁵

29. Rule 77 deals with a broader range of scenarios than Article 67(2) and given the potential scope of this provision, it is certainly not an appropriate candidate for any kind of blanket ruling. It is submitted that *a fortiori* this provision, as with Article 67(2), the Prosecution must request leave for the implementation of special restrictions on a case by case basis placing specific information regarding security concerns before the Trial Chamber and justifying why it is necessary to inhibit the progress of the defence case.

Conclusion

FOR THE FOREGOING reasons the Defence opposes the position taken by the Prosecution and submits that these matters be dealt with, if and when necessary, on a case by case basis. Further, that the Chamber re-emphasises the importance of, immediately or as soon as practicable, disclosing any material in the possession of the Prosecution which shows the innocence of the accused, or mitigates his guilt The Defence submits that a wide interpretation be given to these principles having regard to the fact that the Defence is in a better position to make these determinations, in the light of instructions from the accused.

¹⁴ Prosecutor v. Blaskic, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, Case No. IT-95-14-T, T. Ch. I, 30 January 1998, para. 15

¹⁵ Prosecutor v. Blaskic, ‘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, at para 16.

Respectfully submitted,



David HOOPER

Dated this 23 February 2009

At London