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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

Defence Response to Prosecution's "Requête aux fins d'admission de faits et de non communication de l'identité de neuf témoins (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) ayant fourni des éléments de preuve relevant de la Règle 77 »

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. On 26 March 2009, the Prosecution filed its *Requête aux fins d'admission de faits et de non communication de l'identité de neuf témoins* (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) *ayant fourni des éléments de preuve relevant de la Règle 77*¹ ("Prosecution Request for Admission of Facts »), in which it proposes to admit facts alleged by nine witnesses who give evidence within the scope of Rule 77 in lieu of their statements.
2. The Defence opposes the Request on the following grounds :
 - (1) this is not a suitable procedure and time to admit facts;
 - (2) the admission of facts in lieu of disclosure as a proposed protective measure is not justified in the circumstances;
 - (3) less intrusive protective measures are available;
 - (4) the alleged precedent in Lubanga does not apply.

(1) Procedure and time not suitable to admit facts

3. The Prosecution seeks to be relieved of its obligation to disclose Rule 77 material to the Defence by offering to admit unilaterally facts that have been asserted by witnesses in statements they gave to the Prosecution. Instead of disclosing these statements, which the Prosecution has classified as Rule 77 material, the Prosecution seeks to disclose a list of factual propositions derived from those statements. The Defence submits that it would be unfair to the Defence to allow the admission of facts in lieu of disclosure of the witness statements which are the sources of the facts proposed for admission.
4. The Prosecution cites a number of economic advantages to the admission of facts.² The Defence concedes that there may be advantages to admitting facts. However, unless the Defence agrees with the factual propositions, there is no added value to admitting facts. Unilaterally admitted facts that are not agreed by the other side are no more than assertions. There is no difference between the Prosecution's proposal to admit facts instead of statements and a proposal to provide summaries of statements. The lists of facts proposed to be admitted appear, in effect, to be summaries of the statements. All the more so, given that the Prosecution has stated that, in certain cases, it does not accept the proposed admitted facts as such, but merely that the witness has made a certain factual proposition.³

¹ ICC-01/04-01/07-991, version publique expurgée du document ICC-01/04-01/07-986-Conf-Exp du 23 mars 2009, PUBLIC Avec 9 Annexes confidentielles, ex parte, réservées à l'Accusation (1A-9A), 9 Annexes confidentielles, ex parte, réservées à la Défense et à l'Accusation (1B-9B) et 9 Annexes publiques (1C-9C).

² Prosecution Request for Admission of Facts, para. 27.

³ Prosecution Request for Admission of Facts, footnote 3.

5. The Defence raises similar objections to the Prosecution's proposal to admit facts as were raised in respect of the Prosecution's proposal to submit summaries.⁴
6. Moreover, the Prosecution concedes that the facts proposed for admission may contradict assertions in other documents. Accordingly, the Defence may wish to challenge the admitted facts, which is difficult if the underlying statements are undisclosed. It is further submitted that any factual proposition presented by the Prosecution that is subject to challenge must be supported by evidence. Contrary to the Prosecution's submission,⁵ these facts cannot be said to be 'established' at the end of trial in the absence of evidence.
7. Only if facts are capable of being admitted jointly by the parties can there be any value to this procedure. The Defence is currently preparing this complex case and is not yet in a position to agree facts. As previously made clear, the Defence is willing to enter into discussions with the Prosecution regarding the admission of facts at an appropriate time.
8. The proposed facts are not straightforward and provide insufficient context and detail to support a positive defence case. Without further context and investigations, the Defence cannot agree to the proposed facts.
9. For instance, Annex 2C (W-033) provides that "In March 2003, a combined force of FNI, UPDF and FAPC attacked UPC positions in Mongbwalu".⁶ It would be necessary for the Defence to investigate how the witness was in a position to provide this information and, further, to consider whether to make additional inquiries with the witness in relation to the alleged attack pattern and the command structure between the three different groups.
10. Another example of a proposed fact which cannot presently be utilised by the Defence, is as follows: "It has been said that when LUBANGA and his militia had to leave Bunia and Rwanda sent troops, the FNI received the support of the government of Kinshasa in the form of parachuting of weapons. It has been said that the plane left to parachute weapons on top of FNI positions, having obtained fresh supplies at the base of Lulingo held by the Mai Mai" (W0-47).⁷ These are not marginal or irrelevant matters, but indeed crucial to the defence case. However, in order to make effective use of this information, it would be necessary for the Defence to know the date of the support from the Kinshasa government, the purpose of the support, who was allegedly involved in liaising with the Kinshasa government, and the reliability of the source of this information.

⁴ See earlier objections raised to summaries instead of full statements: ICC-01/04-01/07-1016, Defence Response to Prosecution's Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253-, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 282 and Witness 90 pursuant to Article 53(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rules 81(4) of the Rules, 1 April 2009, paras 11-24, 26, 29.

⁵ Prosecution Request for Admission of Facts, para. 4.

⁶ ICC-01/04-01/07-991-Anx2C, (v).

⁷ ICC-01/04-01/07-991-Anx5C, (viii).

11. The Defence emphasises that it does have a significant interest in much of the material that is reflected in the proposed 'admissions'. It would not be in the interests of justice for the Prosecutor to proceed with the material in the manner proposed because that would have the effect that the Defence receives these important materials second-hand and second-best.
12. In this regard, the fact that the Trial Chamber has been given an opportunity to view the material does not in itself satisfy the requirements of open, adversarial justice if the defence is deprived of the ability to access materials relevant to their case: "The judge is [...] not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet."⁸ The Chamber does not benefit from instructions from the defendant and cannot anticipate all potential defence lines of argument.⁹ The Chamber is not presently in the position to make an informed and authoritative decision as to whether material could support the defence case.
13. Accordingly, the Defence is currently not in a position to agree or disagree with the facts the Prosecution seeks to admit on the basis of and in lieu of the statements of the nine witnesses mentioned in the title of the Prosecution's Request.

(2) The admission of facts as a protective measure is not justified in the circumstances

14. The Defence submits that the proposition of the Prosecution to withhold statements in their entirety from the Defence and to disclose a list of facts asserted therein is excessive. As was held by the Appeals Chamber and previously cited by the Defence: "The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule."¹⁰ This general rule can be limited only on an exceptional basis¹¹ and "as an absolute last resort".¹²

⁸ Charkaoui v Minister of Citizenship and Immigration [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, para 64

⁹ Given the temporal scope of the case and the fact that the defence has not been informed of the identity of the information providers, it is not feasible for the Chamber to require the Defence to submit potential defence lines of inquiry which could be based on the withheld material: As Lord Bingham observed in the *Torture Evidence* case, 'it is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.', *A (FC) and others v Secretary of State for the Home Department*, [2004] UKHL 56, para 59.

¹⁰ 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, 13 May 2008, para. 70.

¹¹ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 1 & 12 ; ICC-01/04-01/07-946, (TCII) Décision sur la requête du Procureur aux fins d'autorisation d'interjeter appel de la décision relative aux expurgations rendue le 10 février 2009, 6 March 2009, para. 13; Status Conference held by Trial Chamber II, T-27.11.2008, p. 55 lines 4-10 & p. 60 line 4.

¹² Status Conference held by Trial Chamber II, T-27.11.2008, p. 60 line 6 & p. 80 lines 22-25.

15. Accordingly, the Prosecution is obliged to disclose the statements of the nine Rule 77 witnesses. In proposing to admit facts as an alternative to disclosure the Prosecution relies on the grounds that: (1) some of those witnesses have not consented to disclosure or cannot be traced; (2) elements in Zumbe and Aveba are actively searching for the identities of persons who have cooperated with the ICC and (3) analogous information has been made available to the Defence.

(1) Consent of witnesses

16. The Defence has previously submitted that it is irrelevant whether or not a witness consents to the disclosure of his or her identity to the Defence.¹³ It is important that the Prosecution is transparent and open with the person it intends to interview. Prior to interview the Prosecution must inform the person that his or her statement may have to be disclosed to the Defence. Any promise of non-disclosure would be improper. Only in situations where information has been provided solely for the purpose of generating new evidence may the Prosecution agree not to disclose the material to the Defence pursuant to Article 54(3)(e).

17. The Prosecution is entitled to take measures under Article 54(3)(f) to ensure the confidentiality of information, but this is subject to the Prosecution's obligation to respect the right of the defence to receive exculpatory evidence under article 67(2) (see Article 54(1)(c)). Rule 81(3) provides that where the Prosecution has taken confidentiality measures under article 54 and 68, if subsequent disclosure would create a risk for the safety of the witness in question, "the Court shall take measures to inform the witness in advance". This underscores the point that while the Court might be obliged to notify the witness that their identity/statement will be disclosed, the Court is not obliged to seek their consent to such disclosure.

18. Such an interpretation of Rule 81(3) would be consistent with ICTY jurisprudence. In *Stanisic*, the Chamber was asked to interpret a similar provision, found in Rule 75(C) of the ICTY Rules, that the Victims and Witnesses Unit should inform witnesses in advance that their testimony may be disclosed in another case. The Chamber held that this reference to informing the witness was "the most compelling indication that the consent of the witness is not required for disclosure to the defence in another case".¹⁴ The Chamber further noted that even if the witnesses had informed the Prosecutor that they did not consent to the disclosure of their identity to the Defence, non-disclosure would "compromise the right of the Defence of the two Accused to adequately prepare the defence and as a consequence, could result in a significant delay of the proceedings",¹⁵ and as such, the disclosure of their identities was required.

¹³ ICC-01/04-01/07-1016, para. 10.

¹⁴ Prosecutor v. Stanisic, Decision Reconsidering Conditions for the Defence Access to Confidential Testimony and Documents from the Slobodan Milosevic Case, 4 February 2008, para 9.

¹⁵ Ibid, para 10.

(2) Threats to persons who have cooperated with the ICC

19. Provided that the information given at paragraph 17 of the Prosecution Request for Admission of Facts is accurate, the Defence shares the Prosecution's concern for the safety of witnesses. The Defence is, unfortunately, not in a position to verify the accuracy of the information because the source has been redacted.
20. The witnesses whose protection is being sought in the Prosecution Request seem to provide predominantly exculpatory evidence. It appears from the lists of proposed facts that the accused are not directly implicated. If persons who have cooperated with the ICC are being threatened at all, persons who offer evidence predominantly incriminating external forces, such as Uganda and Rwanda, are highly unlikely to be interfered with. The Defence is not convinced by the Prosecution's submission that no distinction is being made between those who give exonerating evidence and those who give incriminating evidence.¹⁶ The Defence notes that the Prosecution does not cite any source in support of this submission.
21. Be it as it may, the reality is that the identities of incriminating witnesses must be disclosed to the Defence while the Prosecution seeks to be exempted from a similar duty in respect of exonerating witnesses. This unequal treatment of incriminating and exonerating witnesses may create an unfairness, given that the Defence is not given the opportunity to contact the exonerating witnesses in order to challenge the incriminating elements and to support its defence case.
22. Assuming that the Prosecution's information is accurate and that it equally applies to persons who are not witnesses as such, and who have mainly given exonerating evidence, the Defence accepts that care must be taken that their identities not be revealed to the local population in Ituri. The alleged danger does, however, not justify non-disclosure of their identities to the accused. The allegations are not addressed against the accused or anyone allegedly acting on their behalf. As previously submitted,¹⁷ non-disclosure to the Defence cannot be justified unless the alleged potential harm is rooted in the accused, which is clearly not the case here.
23. Accordingly, there is no reason to withhold the identities of the witnesses concerned from the accused. Given that these witnesses do not incriminate the accused but may rather offer viable and exonerating information, the accused have no motive to interfere with them. Even if they did have some motive, their conditions of imprisonment significantly reduces risk of interference.

(4) Analogous information

24. The Defence submits that the Prosecution's reference to the availability of analogous material is unhelpful as it does not compensate the proposed non-disclosure of witness

¹⁶ Prosecution Request for Admission of Facts, para. 19.

¹⁷ Cf. ICC-01/04-01/07-1016, paras 9, 26.

statements. Analogous information may strengthen the information directly addressed by witnesses, but can certainly not replace it. Such analogous material may not have the same weight or credibility as the material which has been withheld. Information provided by a first-hand witness to the events has, for instance, greater weight than information set out in a public report or newspaper article.

25. In this regard, it should be noted that the Single Judge allowed the Prosecution to disclose analogous information of exonerating information that could not be disclosed pursuant to Article 54(3)(e). The Single Judge, however, clearly distinguished the confirmation hearing and the trial and emphasised that the disclosure of analogous information as a replacement of the actual exonerating information was allowed for the purposes of the confirmation only, not for the trial itself. The Single Judge stressed the importance of disclosure of potentially exculpatory information and that the disclosure of summaries or analogous information instead of the actual underlying statement may give rise to unfairness to the Defence.¹⁸

(3) Less intrusive measures are available

26. It is submitted that less intrusive measures are available. The identities of the witnesses concerned may not be disclosed to the public. In that way, nobody among the local population in Ituri needs to find out who these witnesses are. If the Chamber is persuaded that disclosure of the identity of the witnesses to the Defence would put them at risk, then at least the full statements may be disclosed to the Defence, be it temporarily redacted to withhold identifying information. The Defence will then be in a position to assess the importance of the information and whether the maker of the statement needs to be contacted. The Defence objects to the proposal for permanent redactions.¹⁹

27. It is further submitted that if the security situation in Ituri ever escalates to such an extent that there is no alternative but to guarantee their complete anonymity, the appropriate response would be to stay the proceedings until such time that security issues can be resolved. It would not be appropriate for the Chamber to order the trial to proceed in a manner which does not fully respect the rights of the Defence.

(4) The alleged precedent in Lubanga does not apply

28. The Prosecution relies on the fact that the Trial Chamber in the Lubanga case permitted the Prosecution to rely on alternative methods of disclosure in lieu of full disclosure of materials protected by Article 54(3)(e). It is respectfully submitted that the circumstances in the Lubanga case were so different to those in the present case that the comparison is not helpful to the Prosecution. Most importantly, the Chamber in Lubanga held that the admission of facts in lieu of disclosure of witness identities in

¹⁸ The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-621, (PTC1 SJ) Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, paras. 65-86.

¹⁹ Cf. ICC-01/04-01/07-1016, paras 4-9.

certain situations was not unfair to the Defence because the essential elements that needed to be covered by evidence were not in dispute.²⁰ In the present case the Defence is currently not in a position to confirm whether the essential elements that need to be covered are not in dispute (see above, section 1).

29. The Defence further observes that in delineating the procedure for resolving the tension between the Prosecution's duty to disclose exculpatory and Rule 77 material, and its obligations under Article 54(3)(e), the Appeals Chamber held that if the Chamber has determined that the material does indeed fall within the scope of Article 67(2), and Rule 77, the Prosecutor must endeavour to seek the consent of the information provider to lift the article 54(3)(e) agreement and consent to disclosure to the Defence.²¹ It is only when the Prosecutor cannot obtain the consent of the information providers that the Chamber should proceed to considering whether it is possible to implement counterbalancing measures to protect the rights of the Defence.²² It therefore follows that in situations where the Prosecution can in principle effect disclosure of the material in question, it is inappropriate to resort to alternative methods of disclosure.
30. In contrast to Article 54(3)(e), in respect of which the Appeals Chamber has recognised that the Chamber does not possess the power to order the Prosecution to disclose the documents in question without the consent of the information provider, Rule 81(2) does not create such a privilege for the Prosecution. 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 recognised that "[i]n 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".²³ Similarly, Rule 81(4) expressly envisages that protective measures concerning the identity of a victim or witness must eventually give way to the defendant's right to access this information at the trial stage.
31. The Defence therefore submits that since there is no legal impediment to disclosing the material in question, the Prosecution's suggestion of providing alternative documents, summaries, or conceded facts is not applicable within this context.

²⁰ Prosecutor v. Lubanga, Reasons for Oral Decision lifting the stay of proceedings, 23 January 2009, ICC-01/04-01/06-1644, para. 58.

²¹ Prosecutor v. Lubanga, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "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", 21 October 2008, para. 48.

²² *Ibid.*, para. 48.

²³ Prosecution v. Katanga and Ngudjolo, 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, ICC-01/04-01/07-475, para. 62.

Conclusion

32. On the grounds set forth in this Response to the Prosecution Request for the Admission of Facts, the Defence requests the Chamber to reject the Prosecution's proposition to admit a number of identified facts asserted by the witnesses concerned in lieu of disclosure of their statements. The Defence requests that the Chamber order the Prosecution to disclose the statements instead.

Respectfully submitted,



David HOOPER

Dated this 3rd April 2009

At London