



Original: **English**

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

Date: **27 April 2009**

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 the public version of Prosecution's "Requête aux fins de divulgation différée de l'identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d'un résumé de leur déclaration dans l'intervalle»

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. Katanga (“the Defence”) hereby files its Response to the Prosecution’s « *Requête aux fins de divulgation différée de l’identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d’un résumé de leur déclaration dans l’intervalle* », a public redacted version of which has been served to the Defence on 17 April 2009 (« Prosecution’s Request for late disclosure of identities »).¹
2. The Prosecution seeks the Trial Chamber’s permission to postpone disclosure of the identities of two incriminating witnesses until forty-five to thirty days prior to their testimony and to disclose summaries of their statements instead of the statements themselves until then. The Prosecution further requests that, upon disclosure of their identities, the Defence may only contact these witnesses with prior approval of the Chamber. The Defence objects to these Prosecution’s propositions on the grounds set forth in this Response. In addition, the Defence relies on its previous observations.²

The Law

3. Article 67(1)(b) of the ICC Statute grants the accused the minimum guarantee *inter alia* to have **adequate time for the preparation of the defence**. Pursuant to Rule 76(1) of the Rules of Procedure and Evidence (“Rules”), entitled “**Pre-trial** disclosure relating to prosecution witnesses”, the Prosecution is under an obligation to provide the Defence with “the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done **sufficiently in advance** to enable the adequate preparation of the defence” (emphasis added).
4. Based on these provisions, the Defence is entitled to receive the identities and statements of Prosecution witnesses sufficiently in advance to enable the adequate preparation of the defence. The minimum amount of time required for the adequate defence preparation is not indicated but the title of Rule 76 (**pre-trial** disclosure relating to prosecution witnesses) makes it clear that the identities and statements of

¹ ICC-01/04-01/07-1061, Version publique expurgée du document ICC-01/04-01/07-1044-Conf-Exp du 8 avril 2009, avec Annexes A à F confidentielles, ex parte, réservées à l’Accusation et à l’Unité d’aide aux victimes et aux témoins, dated 16 April 2009, but filing date is 17 April 2009.

² ICC-01/04-01/07-909 ; ICC-01/04-01/07-944 ; ICC-01/04-01/07-948 ; ICC-01/04-01/07-979-Conf ; ICC-01/04-01/07-1012-Conf ; ICC-01/04-01/07-1016 ; ICC-01/04-01/07-1024-Conf ; ICC-01/04-01/07-1028.

Prosecution witnesses must be disclosed at least prior to trial. The Prosecution's justification for seeking to depart from its general disclosure obligation under Rule 76 is founded on Articles 68(1) and 54(3)(f) of the Rome Statute and Rule 81(4) of the Rules.

5. The Defence concedes that the Prosecution's general disclosure obligation pursuant to Rule 76(1) is not absolute but can be made subject to "the protection and privacy of victims and witnesses and the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82" (Rule 76(4)). However, it is respectfully submitted that none of the Rules or statutory provisions the Prosecution relies on or any other provision permits the delay in disclosure sought.
6. In accordance with Article 54(3)(f), the Prosecution may "take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence". Article 68(1) mandates the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. However, these measures "**shall not be prejudicial to or inconsistent with the rights of the accused** and a fair and impartial trial". Rule 81(4) allows the Chamber to take the necessary steps to ensure the confidentiality of information to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity **prior to the commencement of the trial**" (emphasis added).
7. It is evident from those provisions that, where necessary to protect the safety of witnesses and victims or members of their families, the Prosecution may seek to withhold the identities of Prosecution witnesses prior to the commencement of the trial. However, once the trial has commenced, this option is no longer available to the Prosecution. Accordingly, the present application must fail on the ground that the ICC Statute and Rules do not authorise the Prosecution to withhold the identities of its witnesses after the trial has begun.

Jurisprudence of the ICTY and ICTR

8. The Prosecution refers to the jurisprudence at the ICTY and ICTR allowing disclosure of identities of Prosecution witnesses in the course of the trial rather than prior to trial. Both these Tribunals have determined that it falls within the discretion of the Chamber to determine on a case-to-case basis and in light of the rights of the accused whether disclosure of the identities of Prosecution witnesses can be delayed and, if so, until when.³

9. At the ICTR, disclosure of a witness's identity is exceptionally allowed on a rolling basis in the course of the trial. The applicable legal provisions at the ICTR, however, differ from the applicable legal provisions at the ICC. In contrast to the ICC legal provisions, while the ICTR legal provisions in Rule 67 (A)(i) explicitly require that the identities of Prosecution witnesses be disclosed to the Defence prior to trial, subject to protective measures, Rule 69(C) of the ICTR Rules, dealing with protective measures, states that "the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence". Accordingly, the ICTR Chambers are given a wider discretion than the ICC Chambers to determine the period necessary for the Defence to be in possession of the identities of the Prosecution witnesses in order to adequately prepare a defence. Notwithstanding this wider discretion, the Chambers will only allow disclosure after the trial has commenced on an exceptional basis where such is consistent with the right of the Accused to have adequate time for the preparation of his or her defence.⁴ Despite this wide discretion, the Chamber will often order that the identities of Prosecution witnesses be disclosed to the Defence prior to trial.⁵

10. The ICTY Chambers have been much more cautious in allowing disclosure of the identities of Prosecution witnesses to occur after the trial has commenced. In most cases, the Prosecution is ordered to disclose all un-redacted statements of its witnesses at least one month prior to trial. In *Brdanin & Talic*, the Trial Chamber expressed the view that it is not possible "to lay down in advance any particular period which would be applicable to all cases. Everything will depend upon the number of witnesses to be investigated, and the circumstances under which

³ *Prosecutor v. Brdanin & Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July, 2000, para. 34 ; *Prosecutor v. Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of December 5, 2001, 18 July, 2003, paras 13 and 15.

⁴ *Prosecutor v Bagosora et al*, Decision on Modification of Special Protective Measures for Witness BY, March 15, 2004.

⁵ *Prosecutor v Aloys Simba*, Decision on Prosecution Request for Protection of Witnesses, 4 March, 2004, para. 6; *Prosecutor v Setako*, Decision on Prosecution Motion for Protective Measures, 18 September, 2007, para. 6; *Prosecutor v Kalimanzira*, Decision on Prosecution Motion for Protective Measures, 8 November, 2007, para. 6.

that investigation will have to take place. Some accused may have better resources of their own than others, depending upon their position prior to their arrest. That period can only be determined after the protective measures are in place. However, from evidence given in other cases, the Trial Chamber accepts that the pre-trial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial.”⁶

11. Also in the case against *Mrksic*, the Chamber held that the disclosure of the identities of protected witnesses 30 days before the commencement of trial is in line with the ICTY practice.⁷

12. Whilst it is true that the Appeals Chamber in *Seselj* held that the disclosure of the identities of three witnesses 30 days prior to their testimony is not an abuse of discretion,⁸ this is no evidence of a new practice more easily allowing disclosure in the course of trial. It only demonstrates that, in limited exceptions, the Appeals Chamber will not intervene in situations where the Chamber has authorised disclosure of identities of Prosecution witnesses after the commencement of trial. As in any case, this case must be considered on its own merits. The Trial Chamber’s reasons for authorising the protective measures sought are confidential. However, given the allegations of a campaign of witness harassment allegedly coming directly from the Accused or his legal advisors which has eventually resulted in an adjournment of the proceedings and a contempt case against the Accused,⁹ it is not surprising that

⁶ *Prosecutor v. Brdanin & Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July, 2000, para. 38.

⁷ *Prosecutor v. Mrksic et al*, Decision on Confidential Prosecution Motions for Protective Measures and Non-Disclosure, 9 March, 2005, page 4.

⁸ *Prosecutor v. Seselj*, Decisions on Vojislav Seselj’s Appeal Against the Trial Chamber’s Oral Decision of 7 November 2007, 24 January, 2008, para. 16.

⁹ There have been a number of attempts to initiate contempt proceedings against the accused or his legal advisors and to adjourn the proceedings because of alleged interference with witnesses or leaking of confidential information. See, for instance, *Prosecutor v. Seselj*, Redacted Version of the “Decision on Motions by the Prosecution and the Accused to instigate contempt proceedings against Ms. Dahl (from the Office of the Prosecutor) and Mr Vucic (Associate of the Accused)”, dated 10 June 2008, 8 July 2008. Whilst contempt proceedings were not initiated, a warning was given and concern was expressed. On 21 January 2009, Mr. Seselj was charged with contempt of court for allegedly disclosing the names of protected witnesses in a book he published. See: *Prosecutor v. Seselj*, Decision on Allegations of Contempt, 21 January 2009. This case is still pending. Whilst on 16 September 2008, the Appeals Chamber confirmed the Trial Chamber’s decision not to grant adjournment to investigate the numerous claims of witness interference and manipulation because the Prosecution was still in a position to bring witnesses not part of the alleged campaign of witness harassment (*Prosecutor v. Vojislav Seselj*, Decision on the Prosecution’s Appeal Against the Trial Chamber’s Order Regarding the Resumption of Proceedings”, 16 September 2008), on 11 February 2009, the Prosecution’s re-initiated request for an adjournment was granted. See *Prosecutor v. Seselj*, Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti in Annex, 11 February 2009.

Prosecution witnesses were given a higher level of protection than is normally given. It is in light of those specific circumstances that the Appeals Chamber held that

“[t]he purpose of Rule 69(C) is to allow a Trial Chamber to grant those protective measures that are necessary to protect the integrity of its victims and witnesses, subject to the caveat that such measures are consistent with the right of the accused to have adequate time for the preparation of his defence. There is no rule that the rights of the defence to have adequate time for preparation mandate that delayed disclosure be granted only with reference to the beginning of the trial. The matter rather falls under the discretion of the Trial Chamber.”¹⁰

13. In a more recent Decision in *Karadzic*, the Trial Chamber considered that the appropriate time to disclose the identities of Prosecution witnesses is prior to trial. It held that, in line with persuasive Tribunal jurisprudence, “the appropriate length of time to delay is that before the anticipated commencement of the trial, not before the giving of testimony”.¹¹ Thus, the rule at the ICTY remains that disclosure should take place prior to trial notwithstanding the *Seselj* Appeals Chamber’s decision.

Exceptional circumstances

14. If the Chamber is of the view that, notwithstanding the clear wording particularly of Rule 81(4), the ICC legal provisions do not *per se* preclude disclosure of the identities of Prosecution witnesses after the start of the trial, this can only be authorised as an exceptional measure where it is demonstrated that the witnesses have a genuine fear which is objectively justified. In line with this Court’s jurisprudence, as well as the jurisprudence of the ICTY and ICTR, delayed disclosure may be justified only when there is an objective likelihood of interference resulting from disclosure to the accused. For this, the Prosecution must demonstrate that:

“there is a likelihood that the particular witness will be interfered with or intimidated once their identity is made known *to the accused* and his defence team, notwithstanding the obligations on the accused and his defence team in relation to disclosure to third parties. It is not sufficient to show that the witness is put at risk of interference resulting from disclosure of his identity to the public or the media. The likelihood of interference must be objective: while the witness may personally feel that he or she may be at risk, any subjective fears expressed by the witness “are *not in themselves* sufficient to establish any real *likelihood* that they may be in

¹⁰ *Prosecutor v Seselj*, Decisions on Vojislav Seselj’s Appeal Against the Trial Chamber’s Oral Decision of 7 November 2007, 24 January, 2008, para. 15.

¹¹ *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision Protective Measures for Witnesses, October 30, 2008, para. 32; also see para. 19(c).

danger or at risk". In order to warrant an interference with the rights of the accused, those fears must be well-founded in fact."¹²

15. The Prosecution must further provide "specific evidence of such a risk relating to particular witnesses", rather than an indeterminate risk relating to witnesses in general. The Trial Chamber must be satisfied that the Prosecution's request is made in order to protect individual victims and witnesses in the particular trial, rather than generally to encourage potential witnesses to come forward and testify, thus making it easier to bring prosecutions against other persons in the future."¹³ Allowing a request on this latter justification "would tilt the balance too far in favour of expediency for future prosecutions at the expense of a fair trial for the accused."¹⁴

Application to the present Prosecution's Request

16. The Prosecution erroneously states that the witnesses would be put at risk by disclosure to the Defence because the Defence relies on persons on the ground who are not subject to any confidentiality agreement.¹⁵ The Defence is professional and ethical and has not, and will not, disclose the identities of protected Prosecution witnesses to anyone who is not bound by any confidentiality agreement. The Defence works with one investigator on the ground in whom it has full confidence, who has been screened by the ICC and who has signed a confidentiality agreement.

17. The Prosecution further alleges that the risk for witnesses 0267 and 0353 has increased because other witnesses have been threatened.¹⁶ However, a risk for other witnesses does not automatically translate into a risk for the witnesses in question. Therefore, unless additional information unknown to the Defence demonstrates a connection between the alleged threats to others and the alleged likelihood of risk for

¹² *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision Protective Measures for Witnesses, October 30, 2008, para. 32; also see para. 19(a) (footnotes omitted, emphasis copied from the Decision). Also see 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, in particular, paras. 70-73, 97; ICC-01/04-01/07-476, para. 57; ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 1, 7, 8, 9, 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, p. 60, p. 80; ICC-01/04-01/06-568, para. 37; ICC-01/04-01/06-773, para. 33.

¹³ *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision Protective Measures for Witnesses, October 30, 2008, para. 32; also see para. 19(b) (footnotes omitted); for ICC jurisprudence, see *ibid*.

¹⁴ *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision Protective Measures for Witnesses, October 30, 2008, para. 32; also see para. 19(b) (footnotes omitted).

¹⁵ Prosecution's Request for late disclosure of identities, paras. 20-21.

¹⁶ Prosecution's Request for late disclosure of identities, para. 23.

witnesses 0267 and 0353, the evidence is not specific enough to warrant late disclosure of their identities. Moreover, unless such threats can be reasonably attributed to the accused, the accused should not be prejudiced in his ability to prepare his defence by delayed disclosure.

18. The Prosecution also asserts that recent clashes between the FPJC and the FARDC as well as the general security problem in Ituri further add to the likelihood that witnesses 0267 and 0353 will be interfered with if their identities are disclosed to the Defence prior to the trial.¹⁷ In this regard, the Defence reiterates that no link has been established between the FPJC and the accused.¹⁸ Accordingly, any potential danger caused by these recent clashes has no bearing on the accused and can, therefore, not be a factor in assessing the need for delaying disclosure of the identities of particular Prosecution witnesses. As also aforementioned and confirmed by the Appeals Chamber, the fact that Ituri is generally an unsafe place does not justify delay in disclosure of the identities of particular witnesses.¹⁹

19. If any of the redacted information or information provided in the confidential annexes includes concrete evidence demonstrating why witnesses 0267 and 0353 genuinely need protection from the Defence, the Defence is precluded from assessing it because it is not privy to the redacted information. It is only in a position to urge the Chamber to carefully consider the evidence presented by the Prosecution in *ex parte* annexes in light of the above requirements and the rights of the accused. If the evidence is of a general nature and does not link any potential danger to the accused, the Defence requests the Chamber to order non-disclosure to the public only without extending it to the accused.

Prejudice to the Defence

20. Indeed, any potential risk to the witnesses must be considered in light of the right of the Defence to have adequate time to prepare a defence. As previously indicated,²⁰ the Defence would be severely hampered by disclosure of Prosecution witnesses after commencement of trial. The Defence consists of a small team with limited resources.

¹⁷ Prosecution's Request for late disclosure of identities, para. 24.

¹⁸ Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008, ICC-01/04-01/07-794-tENG, para. 13; ICC-01/04-01/07-830-Conf-Exp, issued on 14 January 2009.

¹⁹ Prosecutor v. Lubanga, ICC-01/04-01/06-773, 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, 14 December 2006, at para 21.

²⁰ ICC-01/04-01/07-909, paras. 4-18.

Once the trial starts, it is logistically difficult to conduct adequate investigations. The presence of the legal members of the team is required in The Hague during trial. However, the presence of at least one of the legal team members is also required in conducting investigations. The distance to DRC is too great to participate in the trial and conduct investigations in the same period.

21. It is further the case that investigations cannot be conducted in isolation, particularly because frequently the testimonies of witnesses are inter-related. In order to conduct efficient investigations and cross-examinations, the Defence must have a full picture of the totality of the evidence prior to the presentation of the evidence. It would assist defence investigations if the Defence can compare different incriminating witnesses and investigate their backgrounds simultaneously. The Defence reiterates its example that, 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.²¹ Only if the Defence is in possession of the complete information regarding all incriminating evidence prior to trial and has fully investigated their backgrounds and anticipated testimonies, can it be fully ready to conduct their cross-examinations and contrast conflicting incriminating evidence.

22. Accordingly, the prejudice caused to the Defence by disclosure of the identities of incriminating witnesses after the start of the trial is real, not merely academic. Against this background, the Defence reiterates that the minimum time for disclosure of the identities of incriminating witnesses should be at least 45 days before trial. Given the difficulties that confront the Defence in making investigations in the DRC, “it is submitted that this minimum 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.”²²

Summaries

23. The Defence has already expressed its views on disclosure of summaries instead of statements.²³ The Pre-Trial Chamber authorised the use of summaries of a number of incriminating witnesses for the purpose of the confirmation only, but not for the trial

²¹ ICC-01/04-01/07-909, para. 6.

²² ICC-01/04-01/07-909, para. 18.

²³ ICC-01/04-01/07-1016, paras 11-24, 26, 29; ICC-01/04-01/07-1028, para. 5.

and recognised that the disclosure of summaries instead of the underlying statements may cause unfairness to the Defence.²⁴

24. Additionally, it should be noted that the requirement in the rules is to provide statements. Summaries would not fulfil the same function for preparation of the defence case and would effectively deprive the defence of all ability to investigate and seek contradiction of specific assertions of a witness, because unless the Defence has sight of the words of the witness it will be difficult to be sure of the exact nature of an assertion and may even lead to the Defence wasting its resources on a misunderstanding of the claims of the witness.

25. Therefore, the Defence requests that, at least, the statements be disclosed as soon as possible, even if redacted. The Defence fails to see why it is not possible to redact the statements to the extent that no identifying information is revealed. A heavily redacted statement is far from ideal, but nonetheless preferable to a summary.

Contact with the Witnesses

26. The Defence opposes the Prosecution's proposition that prior approval from the Chamber is required for the Defence to contact the witnesses once their identities have been disclosed. There is no ownership in a witness. Accordingly, both parties should be free to contact the other party's witnesses, with their consent and subject to prior reasonable notification to the other party of an intention to speak to a witness. A witness may refuse to speak to the Defence, which the Defence will immediately accept, but there is no reason why the Chamber or Prosecution would make that decision on behalf of that particular witness.

27. The Defence is willing to agree to inform the Prosecution in case it intends to contact the witnesses in question. The Defence is also prepared to discuss the modalities of such contact in a subsequent filing, as suggested by the Prosecution. The modalities adopted by the Pre-Trial Chamber in *Lubanga* may provide guidance on this issue.²⁵

²⁴ ICC-01/04-01/07-621, paras. 65-86.

²⁵ ICC-01/04-01/06-447, 19 September 2006. Here it was decided that the parties were allowed to contact each other's witnesses without prior authorization of the Chamber where such witnesses were not in the witness protection program, provided that the party wishing to contact the witness would inform the other party and that the party intending to rely on the witness would first contact the witness to find out whether he or she would agree to meet the other party and that the party intending to rely on the witness is offered an opportunity to be present at the beginning of the interview with the witness.

Conclusion

28. On the grounds set forth in this Response to the Prosecution's Request for late disclosure of identities, the Defence prays the Chamber not to grant the Prosecution's Request and to order the Prosecution to disclose the un-redacted statements of the witnesses 0267 and 0353 at the latest 45 days prior to the commencement of the trial.

Respectfully submitted,



David HOOPER

Dated this 27th April 2009
At The Hague, Netherlands