



Original: **English**

No.: ICC-01/04-01/07  
Date: 16 December 2009

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte , Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

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

**Public Document**

**Defence Request for Leave to Reply regarding the Disclosure of Prosecution  
Witnesses' Identity to Third Party**

**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  
Mr Andreas O'Shea

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

Mr Jean-Pierre Kilenda Kakengi Basila  
Mr Jean-Pierre Fofé Djofia Malewa

**Legal Representatives of Victims**

Mr Jean-Louis Gilissen  
Mr Fidel Nsita Luvengika

**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**

1. On 8 December 2009, the Defence for Mr. Katanga (« Defence ») was notified of a public redacted version of the *Requête de la Défense en vue d'obtenir de la Chambre des instructions précises sur la manière d'approcher des tiers qui lui sont très utiles en vue du recueil des éléments à décharge et des éléments pouvant décrédibiliser certains témoins du Procureur*.<sup>1</sup>
2. On 11 December 2009, Mr Nsita filed on behalf of the victims, the *Observations du Représentant légal du groupe principal des victimes sur la requête de la Défense de Mathieu Ngudjolo Chui visant à obtenir de la Chambre des instructions sur la manière d'approcher des tiers quant à certains témoins à charge Articles 64(2) et 68 (1) et (3) du Statut*.<sup>2</sup> The same day, the Prosecution filed its *Observations regarding the disclosure of the identity of Prosecution witnesses to third parties*.<sup>3</sup> The Representative of victims and further the Prosecution, suggest very strict conditions to disclose the identity of Prosecution witnesses to third parties and request the involvement of both the Trial Chamber and the Victims and Witnesses Unit (“VWU”). While the Defence did not respond to the initial filing it is very concerned at the direction that is now being suggested by the Prosecution and Victim’s representatives.
3. While the Defence recognizes the importance of protecting Prosecution witnesses it submits that it is unnecessary to involve the Victims and Witnesses Unit and the Trial Chamber in the way suggested. The Chamber's existing directives on protective measures are sufficiently clear and counsel should know the boundaries. The Defence carries out its investigation with the utmost caution and would disclose the identity of a prosecution witness to a third party only when it would be ‘truly necessary for the preparation and presentation’ of the Defence case, as requested by the Chamber in the *Lubanga* case.<sup>4</sup> Similarly, the ICTY Chambers authorizes such disclosure when it is

---

<sup>1</sup> ICC-01/04-01/07-1702-Red, public redacted version of ICC-01/04-01/07-1702-Conf-Exp.

<sup>2</sup> ICC-01/04-01/07-1719.

<sup>3</sup> ICC-01/04-01/07-1720.

<sup>4</sup> ICC-01/04-01/06-1372, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 4 June 2008.

8. The provision of information, inter partes, of a non-public nature is governed by the twin requirements of necessity and witness-security. When the distribution of information to the public has been limited - for whatever reason - it is appropriate that its use should be carefully regulated so as to ensure compliance with those requirements.

9. Once information has been characterised as being non-public (whether it is characterised as "confidential", "ex parte" or "under seal"), its use should be limited to the strict purposes of the disclosure and members of the public should only be shown those parts of it that are truly necessary for the preparation and presentation of the case of a party or participant.

*‘directly and specifically necessary for the preparation and presentation of the case.’<sup>5</sup>*

Such occasions should be rare as it is unnecessary in most cases to refer specifically to any particular person being a witness. A difficulty arises in those cases where, though the person is not identified as a witness as such, the third party may deduce by the nature of the inquiry that the person is a witness. It is not practicable in those circumstances for the Defence to have to surmise that a third party may have deduced that fact – which is the logical direction of the submissions made by the Prosecution and the Victims Representative.

4. The Defence submits that a practical approach would include a duty on the part of the WVU, or any other party, to inform the parties, and in particular the Defence, of any particular witness that in its opinion is placed at high or exceptional risk. This would permit the Defence to be better informed of the vulnerability of a witness and to take even further steps to avoid disclosure of identity as a witness
5. Disclosure to the VWU and the Chamber of the identity of the third parties, as advocated by both the Representative of Victims and the Prosecution, violate the

---

12. The Chamber hereby orders that whenever information, which is characterised in manner more restrictive than "public", is provided to a party or participant by another party or participant, the party or participant receiving the material should make its content available to the public only to the extent that is truly necessary for the preparation of its case. Whenever information protected by this principle is made available to a member of the public, the party making the disclosure must keep a detailed record thereof. The information shall be made available to only identified members of the public, who shall give a written and signed undertaking not to reproduce or publicise its content, in whole or in part, or to show or disclose it to any other person. If written material covered by this principle is made available to a member of the public, it must be returned to the party or participant who disclosed it once that person no longer needs it for case-preparation. For the purposes of this order, the term "public" includes all persons, governments, organisations, entities, associations and groups. It does not include the judges of the Court, members of the Registry, the Prosecutor and his representatives, the Accused, the defence team, victims granted the right to participate in the proceedings and their legal representatives.

(Quoted in the Prosecution’s response, ICC-01/04-01/07-1720, para. 7.)

<sup>5</sup> See, for instance, *Prosecutor v. Djordjevic*, IT-05-87/1-PT, “Decision on Vlastimir Djordjevic’s Motion for Access to Transcripts, Exhibits and Documents in Prosecutor v. Slobodan Milosevic, Case No. IT-02-54”, 6 February 2008, para. 19(f):

“f. ORDERS that the Accused, his Defence team, and any employees who have been instructed or authorised by the Accused shall not disclose to the public, or to any third Party, any confidential or non-public material disclosed from the Slobodan Milos case, including witness identities, statements, or transcripts, except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the Accused’s case. If any confidential or non-public material is disclosed to the public where directly and specifically necessary, any person to whom disclosure is made shall be informed that he or she is forbidden to copy, reproduce, or publicise confidential or non-public information or to disclose it to any person, and that he or she must return the material to the Accused as soon as it is no longer needed for the preparation of the Accused’s case. For the purpose of this Decision, “the public” means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, and the Accused, his counsel, and any employees who have been instructed or authorised by the Accused’s counsel to have access to the confidential material. “The public” also includes, without limitation, families, friends, and associates of the Accused; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.”

confidentiality of the Defence investigations<sup>6</sup> and is a wholly unacceptable to the Defence. It may also dissuade third parties from talking to the Defence.

6. While Trial Chamber I decided that whenever confidential and protected information “is made available to a member of the public, the party making the disclosure must keep a detailed record thereof”,<sup>7</sup> that decision was taken without argument and without submissions by the Defence in that case. The present Defence disputes the necessity of such a record. Such a record would be an improper intrusion into the Defence right to freely investigate the case. Details concerning meetings between the defence and potential witnesses are in any event privileged under rule 81(1) of the Rule of Procedure and Evidence. Further, the suggestion is impracticable. The ICTY, which has great experience in this area, rejected prosecution requests that the defence maintain such a log, on the grounds that it was not useful<sup>8</sup> and/or that “such information is confidential, and the accused should not ordinarily be requested to divulge it.”<sup>9</sup> Further, in the *Brdjanin and Talic* case, the ICTY Chamber held that the underlying rationale for such a log would be to assist the Prosecution to verify potential violations of confidentiality with a view to investigating contempt proceedings against the defence; but since the defence could not be compelled to incriminate itself by handing over evidence against itself, ultimately, the log would serve no purpose in this instance.<sup>10</sup> If the confidential information in question was

---

<sup>6</sup> See *Prosecutor v. Brdjanin and Talic*, ‘Decision on Motion by Prosecution for Protective Measures’ 3 July 2000 at para 46, <http://www.icty.org/x/cases/brdanin/tdec/en/00703PM213035.htm>.

“46. The accused Talic objects to such an order upon the basis that it infringes the confidentiality of his defence team’s investigations, in that (a) it will permit both the prosecution and the Tribunal to know those whom his defence team is meeting in order to organise his defence, and (b) it will permit the prosecution to prosecute those persons “secretly”. The prosecution denies that legal professional privilege applies to that information. Again, it is unnecessary for the Trial Chamber to determine whether the confidentiality as to the identity of persons to whom the defence team have spoken in the preparation of the case for the accused stems from legal professional privilege, as it is sufficient to say that such information is confidential, and the accused should not ordinarily be requested to divulge it.”

<sup>7</sup> ICC-01/04-01/06-1372, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 4 June 2008, para. 12.

<sup>8</sup> See, *inter alia*, *Prosecutor v. Milosevic*, IT-02-54-T, “Decision on Prosecution Motion for Protective Measures for Victims and Witnesses”, 19 March 2002, para. 12:

“[...] the Trial Chamber does not believe that it is useful to impose on the *amici curiae* and the accused the orders sought concerning the signing of disclosure agreements and keeping records of disclosure.”

<sup>9</sup> *Prosecutor v. Brdjanin and Talic*, ‘Decision on Motion by Prosecution for Protective Measures’ 3 July 2000, para 46, <http://www.icty.org/x/cases/brdanin/tdec/en/00703PM213035.htm>.

<sup>10</sup> *Ibid*, para. 48.

48. If, however, any member of the defence team is to be prosecuted for contempt, it is perhaps disingenuous of the prosecution to assert that the log will not be disclosed to it, as it would be the prosecution to which the Trial Chamber would necessarily have to turn for assistance in proceedings for contempt pursuant to Rule 77. Again,

disclosed by a member of the public to whom access to confidential information had been granted, the Chamber would have no power to sanction these persons since they were not directly bound by the protective measures issued by the Court.<sup>11</sup> The Chamber therefore confirmed that the log would serve no useful purpose in any of these scenarios and rejected the Prosecution request.<sup>12</sup>

7. Furthermore, it is wholly impracticable to request that the Defence inform the VWU and the Chamber *in advance* of the disclosure of a Prosecution witness' identity to third parties and to wait for their approval. The suggestion takes no account of the realities of the way investigations are conducted on the ground. The conditions of the investigations in the field do not allow the Defence to anticipate exactly when circumstances may arise when it may become necessary to disclose the identity of prosecution witnesses or, in particular, to disclose that a named person about whom it is conducting enquiries is in fact a Prosecution witness. The Defence emphasises that in its experience the latter is a situation very rarely met. There is generally no need to state that a particular person is in fact a witness and any inquiry in that regard can be turned away by the person making the investigation.
8. The Prosecution also requests that the Defence be directed to inform the Prosecution of the fact that they have disclosed a Prosecution witness's identity to third parties. The Defence equally objects to such order which would be in violation of the confidentiality of the Defence investigation and strategy.

---

if any member of the defence team is to be prosecuted for contempt, he or she is entitled to the same presumption of innocence and right to silence which any other accused person has. The obligation to keep the log upon which such a prosecution is to be based would require that accused person to provide evidence against him or herself, contrary to Article 21 of the Tribunal's Statute. Such a procedure could be justified only where the situation were so grave that substantial damage was being caused by improper disclosures.<sup>(70)</sup> The Trial Chamber is not satisfied that such a situation exists here.

<sup>11</sup> *Ibid*, para. 49.

49. A requirement that such a log be kept so that any improper disclosure could be traced to a person to whom the defence team has quite properly disclosed the identity of the witness (in its investigation into the background of that witness) would not give rise to these problems, but the non-disclosure order is not binding upon those other persons, and the Tribunal is powerless to take any action against them if such a disclosure by them does occur. The Trial Chamber does not accept that it is appropriate to require such a log to be maintained by the defence team for the purpose contemplated by Order (4). The order is refused.

<sup>12</sup> *Ibid*, para. 49.

9. While the Defence agrees that in principle it should never inform a third party that a Prosecution witness will appear before the International Criminal Court,<sup>13</sup> the Defence wants to underline that there may be a time where it may, exceptionally, become necessary. For example, if the Defence were to decide that a third party should appear as a Defence witness to testify substantially about a particular prosecution witness, then it may be necessary to inform the third party that the person they will give evidence about will themselves have appeared before the ICC as a prosecution witness. It would be unreal to do otherwise without straining a fiction.
10. Therefore the Defence objects to the proposed measures and requests leave to submit a reply to the Responses of the Representative of the Victims and of the Prosecution, in which it could, *inter alia*, develop further the legal grounds and case law in support of its objections. Given the importance and the novelty of the issue before the ICC, and the unexpected direction of the submissions from the Prosecution and Victims Representatives, the Defence considers that it warrants further consideration.

Respectfully submitted,




---

David HOOPER

Dated this 16 December 2009

At The Hague

---

<sup>13</sup> Cf., *inter alia*, Chambre d'appel du TPIR, *Le Procureur c. Bagosora et consorts*, ICTR-98-41-AR73 et ICTR-98-41-AR73(B), « Decision on Interlocutory Appeals of Decision on Witness Protection Orders », 6 octobre 2005, para. 21:

« Certainly, some inquiries by their very nature would lead a reasonable person to conclude that the subject of the inquiry is a witness to a case before the Tribunal, and such inquiries are prohibited by the Impugned Decision. The Appeals Chamber agrees with the Trial Chamber that to avoid such inquiries the “*inquiring party must scrupulously avoid, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other. If the third party demands explanations which should require revealing that information, then the investigation must cease (...)*” »

(Quoted in the Response of the Representative of Victims, ICC-01/04-01/07-1719, paras 10-11.)