



Original: English

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

Date: 8 July 2010

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

URGENT

**Defence Request for the Disclosure of the Audio Records of Interview of
Incriminating Witness 219 Dated December 2009**

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 Q.C.
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

Registrar

Ms Silvana Arbia

Introduction

1. On 5th April 2010, the Defence for Germain Katanga ('Defence') requested, by email, the Prosecution to disclose the transcripts of their interview with Incriminating Witness 219 dated December 2009. This interview was held on 10 (1.02 pm to 7.40 pm) and 12 December 2009 (8.37 am to 12.42 am), in order to obtain a signed statement from Witness 219, based upon his previous extensive transcripts of interviews of February 2007 and November 2008, following the Trial Chamber's Order of 23 October 2009.¹
2. The Prosecution responded three months later, on 6 July 2010, by email, arguing that it did not have to disclose such transcripts; they affirmed that pursuant to Rule 111 of the Rules and the Chamber's Order of 23 October 2009, only the statement of December 2009 of Witness 219 could be disclosed, not the relative transcripts of interview of December 2009.
3. The Defence then requested on 7 July 2010 the disclosure of the audio records of interview of Witness 219 of December 2009. The Prosecution replied the same day that if the Chamber would order the disclosure of these audio records, they would disclose them.
4. On 8 July 2010, in Court, Mr. Hooper raised this issue and the Prosecution reiterated orally that they do not consider that they had the duty to disclose such audio records of Witness 219 to the Defence.²

Submissions

5. The Defence maintains that this duty of disclosure is incumbent upon the Prosecutor pursuant to Rule 77 of the Rules of Procedure and Evidence, according to which 'The

¹ ICC-01/04-01/07-1553, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, ordering the Prosecution to produce a signed witness statement of P-219.

² ICC-01/04-01/07-167.

Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person' (emphasis added).

6. The Defence submits that the audio records whose disclosure is sought are necessary to prepare its cross-examination of Witness 219. The Defence has noted some discrepancies between the transcripts of interview of February 2007 and November 2008 on one side, and Witness 219's statement on the other side. The audio records may then assist the Defence to understand the reasons for such discrepancies, to assess the methodology of questioning of the Prosecution, and in particular, to ensure that the witness was not subject to leading questions. It is further justified by the fact that the credibility of this witness is in issue. The Defence requests only the disclosure of the audio records, and not of their transcripts, and any available transcripts that do not necessitate any additional work on the part of the Prosecution. There is no apparent reason for the Prosecution not to disclose these audio records.
7. Whilst the rules at the *ad hoc* tribunals do not define what constitutes a witness statement³, it has been held that any such statement or declaration made by a witness in relation to an event he witnesses, and recorded in any form by an official in the course of investigation, falls within the meaning of a "witness statement" under Special Court for Sierra Leone Rule 66 (Disclosure by the Prosecutor).⁴
8. Also, disclosure of materials by the prosecutor requires disclosure of all witness statements in its possession, regardless of their form or source, save for matters not

³ See *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15 ("The Rules do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.").

⁴ See *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para. 16; *Prosecutor v. Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, 16 July 2004, para. 10.

subject to disclosure.⁵ The Prosecution is therefore required to make available to the Defence the witness statement in the form in which it has been recorded.

9. For its part, ICC Rule 111(1) provides that “a record shall be made of formal statements made by any person who is questioned.” The term “record” is sufficiently broad, and can include audio files/recordings taken in conjunction with the transcription of the statement. In other words, electronic recordings can be considered as a record of the witness’s evidence,⁶ and therefore subject to inspection by the Defence.⁷

Conclusion

10. For the reasons set forth above, the Defence respectfully requests the Prosecution to disclose immediately the audio records of interview of Witness 219 in December

⁵ *Prosecutor v. Brima et al*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para. 16.

⁶ See *Prosecutor v. Bemba*, Public Redacted version of “Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure”, ICC-01/05-01/08-750-Conf), ICC-01/05-01/08-750-Red, 9 April 2010, para. 32 (“As referred to by the prosecution (see paragraph 19 above), Trial Chamber I has observed that screening notes or investigator’s notes ‘are not the same as a signed witness statement or an electronic recording of an interview, both of which provide a certain record of the witness’s evidence approved by or coming from the witness. Screening notes and investigator’s notes will be a personal record - not the witness’s - of what the latter said.’ Although this comment was made in a different context, namely witness familiarization, it is of assistance when considering these issues”). See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-104-ENG ET, dated 1 January 2009, page 24 (“The decision of the Chamber is as follows: [...] Point 2. We are unable to accept the VWU’s submission as regards the documents that should be made available to the witnesses for the memory refreshing exercise. The evidence from the witness may have been recorded in a signed statement, but it may also have been recorded in a taped interview (audio or video or both). All of these methods provide a reliable record of the witness’s evidence, and depending on the record that was made, they should each be available to each and every witness.”).

⁷ See *Prosecution v. Norman*, Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii), 14 June 2006, paras 15 et seq (“We hold, therefore, that although sub-Rule 66(A)(iii) deals essentially with items of a “tangible” nature, such as books, documents, photographs and tangible objects, which are in custody or control of the Prosecution, and which may be tendered as exhibits, the language of that sub-Rule, with the use of the words “documents” and “tangible objects”, given the definition of “documents” as previously stated, is sufficiently broad to include witness statements recorded in the form of written statements, interview notes, audio and video tape recordings and/or transcripts of the recordings. Hence, in our opinion, pursuant to sub-Rule 66(A)(iii) the Defence may be permitted to inspect documents in custody or control of the Prosecution, which may consist of witness statements and/or interview notes given by witnesses for the Defence”).

2009. The Defence would appreciate as soon as possible an order to review these audio records before the recess.

Respectfully submitted,



David HOOPER Q.C.

Dated this 8 day of July 2010
At The Hague