



Original: English

No.: ICC-01/04-01/07
Date: 29 November 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

**Defence Request for Guidelines on the scope of the Prosecution Disclosure
Obligations in respect of Defence Witnesses**

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

Ms Fatou Bensouda

Mr Eric MacDonald

Counsel for the Defence of Mr Katanga

Mr David Hooper, Q.C.

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis 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

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Defence Request

1. Given that we are near completion of the Prosecution case and the Defence case is to start soon, the Defence for Mr. Katanga ("Defence") would like to have clarity on the scope of the Prosecution disclosure obligations in respect of material relevant to defence witnesses.
2. The Defence bases this request on Article 64(3)(c) and Article 67(2) of the Rome Statute (the "Statute"), and Rule 77 of the Rules of Procedure and Evidence ("Rules"). These provisions should be interpreted in light of Article 54(1) of the Statute, which states that the Prosecution has a duty to investigate incriminating and exonerating circumstances equally.
3. In the view of the Defence, the Prosecution's obligation to disclose to it any material that is relevant to the preparation of a defence pursuant to Rule 77 of the Rules must be interpreted broadly. The Defence submits that this obligation includes an obligation on the Prosecution:
 - (1) to indicate clearly the evidence it intends to use for the purpose of cross-examining defence witnesses;
 - (2) to disclose any information in its possession which is relevant to the assessment of the credibility of defence witnesses; and
 - (3) that this disclosure takes place as soon as the Prosecution is able, that is, once it is informed of the identities of the defence witnesses and the information is in its possession.
4. Under Rule 77, not only should the Prosecution disclose any documents and statements in its possession that relate to defence witnesses, but also any other information relevant in respect of the witnesses it intends to call.
5. The Defence maintains that the disclosure of the information sought is necessary for the preparation of the defence. Such disclosure would allow the Defence to advance informed objections to the use of this material or questions based on it and it would enable the Chamber to deal with any challenge without delaying the trial. Most importantly, the Defence can only make an informed decision as to whether it should call a particular witness if it has sight of all relevant information pertaining to the witness's credibility. Disclosure of any information that can assist the Defence in this regard therefore appears necessary to ensure a fair and efficient trial.

6. The Defence refers for that purpose to the Decision of the ICC Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, according to which the term "*material to the preparation of the defence [...] should be understood as referring to all objects that are relevant for the preparation of the defence.*"¹:

"The Appeals Chamber finds that the Trial Chamber interpreted rule 77 of the Rules of Procedure and Evidence too narrowly because it excluded objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence. The wording of rule 77 of the Rules of Procedure and Evidence does not suggest that the term "material to the preparation of the defence" should be construed as narrowly as the Trial Chamber did. Rather, the term should be understood as referring to all objects that are relevant for the preparation of the defence."²

7. In its "*Decision on the scope of the prosecution's disclosure obligations as regards Defence*" dated November 12th, 2010, Trial Chamber I held that it follows from this Decision of the Appeals Chamber that:

"the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, inter alia, any item that is relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation. This means that the prosecution is to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case."³

8. Trial Chamber I further considered:

"In all the circumstances, the information, in the sense described above, that is relevant and concerns Defence witnesses who are to be called, is to be disclosed to the Defence for preparation, not least because it will enable the accused to decide whether or not to call them. Therefore, information that undermines or supports the evidence, or the credibility, of proposed Defence witnesses falls within the scope of Rule 11 of the Rules. This is likely to assist trial efficiency, because it will increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible and reliable. The prosecution is not obliged to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the Defence witnesses."⁴

9. The Defence requests that a similar policy be adopted by Trial Chamber II and that such information be disclosed to the Defence on a regular basis and in a timely manner.

10. The Defence points out that the Prosecution has an investigative budget which far outweighs the Defence investigative budget. The Defence also points out that the

¹ ICC-01/04-01/06-1433 OA11, paragraph 77

² *Ibid*, paragraph 77

³ ICC-01/04-01/06-2624 paragraph 16

⁴ ICC-01/04-01/06-2624 paragraph 18

Prosecution and Defence have very different rights and obligations in the proceedings.⁵ Whilst the Prosecution has the burden of proving the case against the accused beyond reasonable doubt, the Defence has no obligation to prove his innocence or present a defence. Given that the accused faces a significant sentence if found guilty, he should not be taken by surprise by material known to or in the possession of the Prosecution. Rather, he is entitled to know what material can potentially be used by the Prosecution to undermine the credibility of the defence witnesses. The trial is not a game of winning or losing but should be a fair determination of the charges.

11. Accordingly, it would be unfair to allow the Prosecution to withhold information from the Defence which pertains to the credibility of its witnesses and to use this information during the cross-examination of Defence witnesses without having given the Defence notice, and significantly in advance to the calling of those witnesses.⁶

Conclusion

On these grounds, the Defence respectfully requests the Chamber to order the Prosecution to disclose to the Defence all the information that is relevant to the witnesses the Defence intends to call as soon as the Prosecution has knowledge of who the defence witnesses are and is in possession of such information.

Respectfully submitted,



David HOOPER, Q.C.
Lead Counsel for Germain Katanga

Dated this 29th November 2010

At The Hague, Netherlands

⁵ See ICC-01/04-01/07-2388, Decision on the “Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4)”, 14 September 2010, para. 36 (“The Chamber notes that the Statute's framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and the Defence differ significantly, because of the particular roles that these two parties have at trial. While the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(l)(a) of the Statute, the role of the Defence is largely reactive to the Prosecution's presentation of evidence. The Statute and the Rules impose on the Prosecution specific obligations of disclosure of incriminating and exculpatory material to the Defence, in time to allow the accused to adequately prepare its defence.”)

⁶ See *Idem*, para. 37 (“The Chamber considers, in particular, that an effective and meaningful application of the principle of *audi alteram partem* requires that the responding party has sufficient time to prepare its response.”).