



Original: English

No.: ICC-01/04-01/07
Date: 17 February 2011

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 Redacted

**Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to
Their Testimony**

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. This is a request by the Defence for Mr. Germain Katanga (“The Defence”) to allow it to have additional meetings in The Hague with its proposed witnesses DRC-D02-P-0236, DRC-D02-P-0228, DRC-D02-P-0214, and DRC-D02-P-0350. The Defence is aware of the Protocol in place which effectively prevents the Defence from meeting with its witnesses once they are in The Hague.¹ This request is based on the fact that, despite its very best efforts, the Defence has had insufficient time to meet with these proposed witnesses in adequate circumstances and that it is consequently only fair and just to permit the Defence to meet them once they arrive at The Hague. In short, the Defence requests under these circumstances, merely that it be permitted to continue its investigations with these witnesses once they arrive in The Hague, and prior to their familiarisation process.
2. The Defence relies on the Accused’s right to a fair trial, his right to equality of arms and his right to have adequate time and facilities for its preparation, by virtue of Article 67 (1), (1) (e) and (1) (b) of the Rome Statute.
3. This request is filed confidentially because it contains information which may lead to the identification of Defence witnesses. A public redacted version will be filed shortly.

General Obstacles in Conducting Defence Investigations

4. The Defence does not propose to recite in detail the undoubted difficulties it has met in conducting effective investigations and meeting potential witnesses. The Chamber will be well aware of the likely difficulties to be met due to the size of the DRC and its poor infrastructure. The Defence has had to divide its limited resources to investigate and meet potential witnesses in places separated by considerable distance – Kinshasa, Kisangani, Bunia, Beni and Goma – and reliant on the availability of MONUC flights for travel. MONUC flights are not always available. Possible contacts have often moved to different and distant Provinces. Others are to be found in remote, country villages. Possession of mobile phones, the only available telephone, is limited. Security issues have occasionally prevented investigations, or limited the opportunity to conduct them.

¹ Registry Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, filed on 21 January 2009, ICC-01/04-01/07-842-Conf-Anx.

5. On its current mission the Defence has been unable, for example, to access Aveba and Gety due to the unavailability of military personnel sufficient to conduct the team there. It need not be rehearsed here the otherwise critical importance for the Defence of such access. Contacts or potential witnesses have difficulty travelling to meet Counsel due to their own commitments or lack of resources.
6. Given the difficulties faced on mission it is unsurprising that the mission objectives are often frustrated and unmet. The problem for the Defence is that this takes place against the background of the limited budget provided for investigations and missions. It is incontestable that there is a clear imbalance between the assets available to the Prosecution for its investigations and missions and those available to the Defence. While the Defence accepts that full equality of arms, as would be reflected by parity in financial, personnel and material assets, is never likely to be achieved – and may be unachievable, the fact remains that at a practical level the Defence is disadvantaged. For example, the Prosecutor meets and interviews his witnesses, or potential witnesses, in surroundings conducive to an interview. Some Prosecution witnesses were met on ‘safe’ territory, such as at The Hague, or in Uganda, or elsewhere, where in addition the facilities are better.
7. The Defence does not have the budget to cover the costs of transferring witnesses to safe, third territories. Rather, it has to meet the contact in his or her own environment. Nor is the Defence provided with office space in any of the DRC locations where it can bring witnesses. The Defence is limited to meeting potential witnesses in their own homes – perhaps even a mud hut, or a public place such as a bar, restaurant or hotel lobby. In Ituri such public places are very limited. The Defence has often managed to overcome those difficulties but the fact remains that such interviews take place in circumstances not conducive to effective work.
8. The limit on resources, coupled with the time available for the team’s counsel to meet with potential witnesses (an essential exercise as will be referred to later) is to be contrasted with the situation found with the incriminating witnesses. The Defence notes the amount of investigatory time the Prosecution took in respect of its witnesses, and the extent of the resources available in conducting such interviews, with all manner of ancillary personnel such as trained interpreters, psychiatrists etc. The Defence has no interpreter available to it outside its own team members. All interviews are conducted in at least two, and sometimes three, languages.

9. The most significant distinction to be made between the parties in this respect is found in the time spent with a witness, as between the Prosecution and the Defence. Given its circumstances the Defence has to aim to meet with at least two contacts or potential witnesses a day when on mission. In contrast, Prosecution interviews appear to have been conducted on an almost limitless basis as demonstrated by the following examples:

1. 42 hours for Witness 132;²
2. 120 hours for Witness 12;³
3. 50 hours for Witness 219;⁴
4. 34 hours for DRC-OTP-280;⁵
5. Witness 28 was seen by the Prosecution on at least six different occasions in December 2005, in January 2006⁶, in April 2006 over five days,⁷ and in February of 2007, in July 2009,⁸ and in October 2010, over four or five days;⁹ and
6. Witness 250 was met on at least four different occasions, for a total of more than 48 hours of interviews.¹⁰

The Defence again points out that the Prosecutor's meetings have taken place in far more conducive circumstances, over a far longer period of time, and with a greater amount of personnel available to do the job.

10. The Defence has referred to the various difficulties mentioned above in order to underline the point that it starts off materially disadvantaged in contrast to the Prosecution. In conducting its missions over the duration of the case the Defence considers that it has done so diligently and necessarily economically. Despite its best efforts, the Defence is currently in the situation where it wishes to call as witnesses those persons specifically the subject of this Motion but is very concerned that it may be calling such witnesses without having had, despite best efforts, the opportunity to discuss the full extent of their potential areas of evidence. This is plainly prejudicial to the Accused. It may also mean that the Defence will not be best placed to assist the

² DRC-OTP-132, ICC-01/04-01/07-T-143-CONF-ENG ET (19/05/10), p. 13. Private Session.

³ See DRC-OTP-12, ICC-01/04-01/07-T-198-CONF-ENG ET (07/10/10), pp. 60-61.

⁴ See DRC-OTP-219, ICC-01/04-01/07-T-207-CONF-ENG CT (20/10/10), p. 29.

⁵ DRC-OTP-280, ICC-01/04-01/07-T-161-CONF-ENG ET (28/06/10), p. 41-42.

⁶ See DRC-OTP-28, ICC-01/04-01/07-T-220-CONF-ENG ET (22/11/10), p. 19.

⁷ See DRC-OTP-28, ICC-01/04-01/07-T-220-CONF-ENG ET (22/11/10), p. 19.

⁸ See DRC-OTP-28, ICC-01/04-01/07-T-220-CONF-ENG ET (22/11/10), p. 19.

⁹ See DRC-OTP-28, ICC-01/04-01/07-T-220-CONF-ENG ET (22/11/10), p. 19.

¹⁰ DRC-OTP-250, ICC-01/04-01/07-T-102-CONF-ENG ET (15/02/10), p. 41. Private Session.

Chamber by drawing out of the witness all the potentially available areas of interest to the Chamber.

11. The Defence is currently on mission. Lead Counsel is due to leave Ituri on Friday to return to The Hague for the coming session for victim witnesses to be called as of this coming Monday. The Defence has been requested to present its witness list for March 7th 2011. In any event, even if a further mission to meet with the potential witnesses, the subject of this request, was feasible (and it is unlikely, even if further funding was to made available), such a mission would not remove the significant difficulties presented by having to interview these persons in their present prison environment, where conditions are appalling.
12. Plainly, it is important for counsel to meet and interview the potential defence witnesses before the decision to call them as witnesses is made. It would be wrong for counsel to rely, for example, on an investigator (or person of resource in the present case) or an assistant, to interview and form an opinion as to the relevance and suitability of a person as a witness. Nor is it to be expected such a person would have the necessary knowledge of a case of this complexity and range. The importance of this has been underlined by a Chamber in the ICTY:¹¹

The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence. Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

13. Counsel's duty to be present in The Hague during the trial has left little opportunity for meeting with witnesses in an effective manner, nor is it practical to meet with many of them without first having a full appreciation of the Prosecution case, as to do otherwise would merely lead to the need for further meetings.

¹¹ See ICTY, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 36, at <http://www.icty.org/x/cases/brdanin/tdec/en/00703PM213035.htm> ICTY, citing: *Prosecutor v. Aleksovski*, Case IT-95-14/1-AR73, (AC) Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 18. <http://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm>

Problems specifically relating to DRC-D02-P-0236 DRC-D02-P-0228, DRC-D02-P-0214, and DRC-D02-P-0350

14. In respect of the specific witnesses, the subject of this request, they are all [REDACTED]. The Defence has been significantly hampered in its efforts to meet and to discuss matters with them. On the first occasion, in January 2009, Counsel met with some of them. The Defence mission plan was for two weeks [REDACTED]. The Defence points out that missions [REDACTED] are particularly expensive due to the cost of accommodation there. On that first occasion it is the Defence view that it was deliberately obstructed [REDACTED].¹² [REDACTED]. Consequently, time was very limited.
15. On the second occasion that Counsel sought to meet [REDACTED] a similar problem arose. [REDACTED] the Defence had to leave for Kisangani for several days for investigations previously scheduled elsewhere. Such meetings consequently held [REDACTED] were compressed in the then limited time available. Further investigations in Ituri – some 2500 kilometres from Kinshasa – and with limited time and budget have meant that counsel has not been able to make up for the loss of time.
16. Moreover, the quality of the much shorter Defence interviews was poor, to say the least. [REDACTED] Accordingly, the interviews [REDACTED] were generally conducted in haste and in difficult circumstances.
17. There were also problems particular to the particular potential witnesses. For example, DRC-D02-P-0228 [REDACTED] has not always been available when members of the Defence team visited [REDACTED]. The Defence saw him for only a relatively limited time, some seven hours in total, which, [REDACTED] is far from adequate. Also, time was spent discussing non evidential matters, including concerns as to security [REDACTED].
18. DRC-D02-P-0214, has, until recently, indicated that he was unwilling to testify at The Hague. Only recently did he change his mind. As a result, the Defence has spent little time with him.

¹² [REDACTED].

19. The Defence has spent even less time with DRC-D02-P-0350, some two hours at most. The Defence has been looking for him for a long time. [REDACTED] It was only on its recent mission that the Defence had an opportunity to see him.
20. The testimony of these [REDACTED] persons is important for the presentation of the Defence case. [REDACTED] they all have significant information to provide to the Court. They deserve appropriate preparation and it is to that end that the present request is made.
21. [REDACTED].

Legal Principles

22. In light of the difficulties met and the disproportion between the means and time at the disposal of the Defence and that of the Prosecution to lead investigations, the Defence submits that it is only just that it should be authorised to meet the said witnesses in The Hague prior to their testimony. The principle of equality of arms should be applied to ensure that, at the very least, a basic proportionality will govern the relationship between the time and number of witnesses allocated to the parties.¹³ As held by the Appeals Chamber of the ICTY,

The question of time limits and witness allocation is somewhat less straightforward. The Appeals Chamber has long recognized that “the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee.”¹⁷ At a minimum, “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case,” certainly in terms of procedural equity.¹⁸ [...].¹⁴

Were the Defence denied its request to have further time to meet the above witnesses in The Hague prior to their testimony, the principle of equality of arms risks not being ensured.

23. In *Defence Observations Regarding Registry Reports 821 and 842*,¹⁵ the Defence made general observations on the issue of witness familiarisation. It submitted that whilst it was against “the practice of substantive preparation of a witness for their in

¹³ IT-04-74-AR73.4, Prosecutor v. *Prlić et al.*, Decision on Prosecution Appeal following Trial Chamber’s decision on remand and further certification, 11 May 2007, para. 38.

<http://www.icty.org/x/cases/prlic/acdec/en/070511.pdf>

¹⁴ IT-03-68-AR73.2, Prosecutor v. Oric, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7. <http://www.icty.org/x/cases/oric/acdec/en/050720.htm>

¹⁵ ICC-01/04-01/07-857-Conf, dated 28 January 2009.

court testimony,” or “a preparation session directly before giving testimony”, as prohibited in *Lubanga*, it was nevertheless concerned that it might lead to unfairness. The Defence relied on arguments of, *inter alia*, disproportion between its means and the financial and logistical support available to the Prosecution, as well as the principal of judicial economy. It submitted that it was concerned that “the manner in which the matter has been resolved in the Lubanga case may create unfairness, particularly for the Defence.”¹⁶ The present situation concerning the specific witnesses is an example of such unfairness.

24. The Defence further submitted:

13. What is unclear in the Lubanga decision is when the prohibition on a party meeting with its witness takes effect. It is stated in the decision of Trial Chamber 1 to be from the time ‘the process of witness familiarisation has been commenced’, but it is unclear when that process starts in practice. What is of concern to the Defence is if a defence witness were to travel, for example, to the Hague, fell immediately into the welcoming hands of the VWU, and the Defence were thereafter unable to communicate with their witness, nor, if need be, to take a further and more extensive statement from the witness. This is a particular concern for the Defence as circumstances often do not permit sufficient time and contact with potential witnesses to enable a full and satisfactory review of their potential contribution to the case. The Defence lack the financial and logistical support available to the Prosecution. It is to be noted that the Prosecution’s interviews with their witnesses often run into several days, with a team of professional investigators supervising and conducting the interviews, all of which are recorded. The Defence do not have that capacity. From experience, many defence witness interviews take place in imperfect, and sometimes difficult, circumstances. The opportunity to meet with and conduct further fact finding interviews with witnesses is an important factor for the Defence in its preparation of a complex case and the witnesses presence at the Hague is a further and economical opportunity to do that. Such an exercise is to be distinguished from the prohibited exercise of ‘rehearsing’ or ‘witness proofing’ as characterized by the Prosecution in the Lubanga case and the object of judicial disapproval.

14. The matters listed in paragraph 53 of the Lubanga Trial Chamber decision, dealing with the non contentious familiarisation of the witness with the court and its processes, would take no more than a day or two for VWU to discharge. Such a relatively short period before a witness commences his testimony raises no difficulty for the Defence as it is likely that, if the witness were to arrive at the Hague a little before that process commenced, it would still permit a sufficient period of time for the Defence to have the opportunity for, in the Defence submission, proper and appropriate contact.

25. The Trial Chamber did not explicitly rule on these submissions. On 14 May 2009, the Trial Chamber “(took) note of the decisions of Trial Chamber I on the issue of witness familiarisation and the "Protocol on the practices used to prepare and familiarise

¹⁶ *Ibid*, para. 12.

witnesses for giving testimony at trial", dated 16 January 2009", indicating only that "A priori, the Chamber has no comments on the matter [...]."¹⁷

26. The Chamber confirmed more recently, and more explicitly, that it intended to apply this Protocol in the current case, in its *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*.¹⁸ However, the applicability of this Protocol to defence witnesses has never been fully addressed and is therefore still open to discussion. The above arguments were made in anticipation of the investigations to come, but are presently reiterated in light of the real difficulties the Defence has faced in conducting its investigations, as described above. The Defence submits that, in light of those difficulties, it would not be fair for this Protocol to apply to the Defence without exception. Particular circumstances may arise, as in the present application, where it would be unfair to apply the Protocol too rigidly.

27. The Defence notes that Trial Chamber I, in *Lubanga*, has recognised that in certain circumstances, albeit markedly different to the present case, the Defence may be allowed to meet its own witnesses in The Hague prior to their testimony, in the absence of the Prosecution.¹⁹ There is clearly a margin of tolerance which is presently untested as to its application.

28. The circumstances described above justify that further time be allocated to the Katanga Defence to meet four of its witnesses in The Hague prior to their testimony. It is to be noted that the Katanga Defence case is the first of the accused's cases to start, the co-accused having the advantage of waiting until the close of the Katanga Defence case before commencing.

29. Whilst such meetings between the calling party and its witnesses are not explicitly envisaged by the Rome Statute or in the Rules, neither are they prohibited. Indeed, the Trial Chamber has the discretionary power to adopt procedures necessary to facilitate

¹⁷ ICC-01/04-01/07-1134, Decision on a number of procedural issues raised by the Registry, 14 May 2009, para. 18.

¹⁸ ICC-01/04-01/07-1788, dated 22 October 2010 :

80. S'inscrivant dans la même démarche, la Chambre considère que les objectifs poursuivis par la procédure de familiarisation et la possibilité, donnée aux représentants légaux, d'interroger éventuellement des témoins, justifient leur participation à un tel processus. Elle rappelle que la participation des parties et des participants à cette procédure est régie par le Protocole pratique de préparation et de familiarisation des témoins avant qu'ils ne déposent au procès, élaboré par l'Unité d'aide aux victimes et aux témoins,¹¹⁴ protocole que la Chambre entend appliquer dans la présente affaire.

¹⁹ ICC-01/04-01/06-T-284-Red-ENG WT 11-05-2010, pp. 21-24; ICC-01/04-01/06-T-239-Red-ENG CT2 WT 02-02-2010 1-55 EA T, pp. 6-7. See pp. 1-7 for the complete debate.

the fair and expeditious conduct of the proceedings (Article 64 (2) and (3) (a) of the Statute), to allow such meetings.

30. This also accords with the partly dissenting opinion of Judge Kuniko Ozaki in the *Bemba* case,²⁰ according to which in relevant part, the parties in that case should have been allowed to meet with their respective witnesses before trial, to prepare their in-court testimony.²¹ In recognising that the Rome Statute was silent on the issue of witness proofing, Judge Ozaki based his argument on Article 64(2) and (3)(a), to be read in accordance with Article 21(1)(a).²²

10. The purpose of Article 64 of the Statute is to give judges flexibility in the approaches they can adopt for the good management of a trial. Its formulation makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness proofing, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. On the contrary, the drafters of the Statute have intended to give judges a broad discretion in admitting or prohibiting certain procedures, in order to facilitate fair and expeditious trials, with full respect for the rights of the accused and due regards for the protection of victims and witnesses.

31. Judge Ozaki opined too, that such a practice was further justified in light of the scale, complexity, geographical and temporal scope of the case, and of the cultural and linguistic remoteness from the Court:

In tackling a case of such magnitude and complexity, I do not believe it is practical and reasonable to prohibit any pre-trial meeting between the parties and their witnesses. Indeed, under these circumstances, witness proofing could be considered as a "genuine attempt to clarify a witness' evidence", and to ensure the smooth conduct of the proceedings by enabling a more accurate, complete, methodical and efficient presentation of the evidence.²³

32. It is in the interest of judicial economy to grant the Defence request. An alternative, not at present requested by the Defence, is to permit an adjournment to permit further time for counsel to meet with the witnesses. However that will only result in further time-consuming and onerous trips to the DRC and, in the view of the Defence, will not really overcome the considerable difficulties caused by the interviews [REDACTED].

²⁰ ICC-01/05-01/08-1039, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010.

²¹ ICC-01/05-01/08-1039, para. 7.

²² ICC-01/05-01/08-1039, paras 9, 12.

²³ ICC-01/05-01/08-1039, paras 22, 25.

33. The present request is a modest one. Whilst the Defence would have preferred to have more time with all of its witnesses, given the difficulties it faces, its request is limited to an exception to the Protocol being allowed for the four specific, potential witnesses.
34. In order to be clear, the Defence informs the Chamber that it may seek a similar facility in respect of one, or possibly two, further potential witnesses whom counsel has been unable to meet. One of these is a significant insider witness, currently in the [REDACTED], who has proved difficult to meet. Arrangements were made to meet him last week in [REDACTED] but at the last minute he had moved to [REDACTED]. The Defence then intended to see him this week in [REDACTED] with his consent but the Defence was unable to travel to [REDACTED] to do so due to an error of dates in the amended request for a MONUC flight (requests have to be routed first through The Hague and then back to Kinshasa, all of which takes time and lends to confusion), which was discovered only a day before the traveling was to take place, when it was too late to amend it.
35. Another potential witness with significant information, whose current whereabouts was only discovered this week, is in proximity of [REDACTED]. Efforts are continuing this week to gauge their value to the Defence. In the event that the Defence adds them to the Defence witness list it will be necessary for the Defence to meet them and the practicalities of the situation make them, in the Defence submission, eligible for similar application to be made. The Defence stresses that, if that is the case, it will seek similar relief from the Chamber. They form no part of the present application.
36. With regard to the time sought for a meeting between the Defence and the potential witnesses in The Hague only a day for each witness is requested. These meetings could be held in a consultation room [REDACTED] in The Hague. Due to the confidential nature of such a meeting it would take place solely between each witness and the Defence. Such meetings can take place before the familiarisation process. It is anticipated that if such permission is granted it will not interfere with the witness familiarisation process and that such meetings can be conducted before the Defence opens its case. The latter may be a significant consideration for the Chamber as the interviews will take place before any evidence is given by any defence witness.

Relief Sought

For the reasons above, the Defence respectfully requests the Chamber to allow the Defence to meet witnesses DRC-D02-P-0236, DRC-D02-P-0228, DRC-D02-P-0214, and DRC-D02-P-0350 in The Hague prior to their testimony.

Respectfully submitted,



David HOOPER Q.C.

on behalf of
Germain Katanga

Dated this 17th February 2011 at Bunia, DRC