

**UNITED
NATIONS**



International Residual Mechanism for
Criminal Tribunals

Case No. MICT-13-38-PT

Date: 7 December 2020

Original: English

BEFORE THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Graciela Susana Gatti Santana
Judge Elizabeth Ibanda-Nahamya

Registrar: Abubacarr Tambadou

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**PROSECUTION SUBMISSIONS PURSUANT TO “ORDER
FOLLOWING INITIAL APPEARANCE”
AND MOTION FOR RECONSIDERATION OR
CERTIFICATION**

The Office of the Prosecutor

Serge Brammertz

Duty Counsel for Félicien Kabuga

Emmanuel Altit

1. The Prosecution submits the following update on and plan for disclosure of Rule 73 material in accordance with the Pre-Trial Judge's "Order Following Initial Appearance" of 25 November 2020.
2. Mindful of the important role that disclosure plays in ensuring a fair trial, the Prosecution has adopted a proactive and practical approach to disclosure based on best practices and lessons learned from previous cases. However, certain aspects of the Prosecution's disclosure plan were based on the expectation of an enforceable confidentiality order covering disclosed material, which was a regular feature of previous cases.¹ The existing confidentiality orders, including witness protection orders that carry over from earlier proceedings, are insufficient to ensure that all types of disclosure identified as confidential by the Prosecution are used only for the preparation of the case and not released to the public.
3. The Prosecution regrets that its original motion did not fully clarify the importance of a general confidentiality order. In light of the impact on the disclosure plan, the Prosecution therefore seeks reconsideration of or, in the alternative, certification to appeal that aspect of the Decision of 30 November 2020.²

A. The Prosecution's intended Rule 73 disclosure plan

4. The Prosecution has adopted a proactive and practical approach to disclosure—including Rule 73 disclosure—based on best practices and lessons learned from previous cases at the ICTR and ICTY.
5. The Prosecution has taken concrete steps to ensure that the Prosecution team is alert to the continuing obligation to disclose exculpatory materials. A number of documents have already been identified as being potentially exculpatory. The Prosecution is currently reviewing and processing these materials for disclosure through the Electronic Disclosure Suite ("EDS"). Any material that the Prosecution knows to be exculpatory will be identified as falling under Rule 73(A).
6. Consistent with the practice in other cases, the Prosecution is actively searching its evidence collection for potentially exculpatory material. As the team gathers and reviews

¹ See below fn.4.

² Decision on Prosecution Motion for Confidentiality of Disclosed Information and Materials, 30 November 2020 ("Decision of 30 November 2020"), pp.2, 5.

evidence to prepare for trial, it is always looking for potentially exculpatory materials. The Prosecution has also taken preparatory steps to review the ICTR records of disclosure in related cases to determine whether there is overlap in exculpatory materials.

7. The Prosecution is committed to working collaboratively with the Defence on disclosure of exculpatory materials. The Defence is invited to assist the Prosecution in identifying any particular issue that they might consider exculpatory. In addition, the Defence may also request searches for documents “material to the preparation of the defence” pursuant to Rule 71(B).

8. In addition to disclosing exculpatory materials pursuant to Rule 73(A) on the EDS, the Prosecution also intends to make searchable collection(s) of materials relevant to the case available to the Defence pursuant to Rule 73(B). The disclosure of electronic collections of relevant materials pursuant to Rule 73(B) enables the Defence to independently search within these materials using the EDS software. Experience in prior cases has shown that the disclosure of case-specific relevant collections is an important measure to ensure that the Defence is able to prepare their case, in particular in situations where only the Defence is aware of a potentially exculpatory issue.

B. The effect of the denial of a confidentiality order on the disclosure plan

9. In the Decision of 30 November 2020, the Pre-Trial Judge confirmed the confidentiality of material disclosed under Rule 71(A)(i) and clarified and extended previously-ordered witness protection measures for potential Prosecution witnesses. However, the Pre-Trial Judge denied the Prosecution’s request for further restrictions on the disclosure of confidential material to the Defence.³ This aspect of the Decision, denying a general confidentiality order for disclosed information and materials, will have a significant impact on the efficiency and practicality of the Prosecution’s disclosure plan. Regrettably, the Prosecution failed to include this detailed explanation in its original motion.

10. Some materials that will be disclosed are already confidential pursuant to extant orders in this or prior cases. However, other materials that the Prosecution will disclose—including pursuant to Rules 73(A), 73(B) and 71(B)—may not be covered by an enforceable confidentiality order in this case or continuing from a previous case. For example, statements of persons who are not potential Prosecution witnesses in this case and who do not have

witness protection measures from prior cases fall outside of any confidentiality order. Likewise, the confidentiality of documents (other than witness statements) that disclose sensitive or private information—including for example: (i) investigative files provided by national authorities; (ii) materials relating to ongoing Prosecution investigations; and (iii) banking, medical, court and governmental records—are not automatically protected by court order unless they were admitted under seal in prior cases.

11. In cases where a general disclosure confidentiality order is in place,⁴ these otherwise-unprotected documents can be directly disclosed to the defence, because the defence is only permitted to use the material for the purposes of preparing their case and cannot reveal its content publicly. This limits the risk that the information will be shared with the public and offers remedies in case of a breach. In this way, the general confidentiality order offers a base-line level of protection to currently-unprotected witnesses and documents, which the Defence did not oppose⁵. If a person is selected as a witness or a document is selected as an exhibit, then more tailored witness protection and confidentiality measures can be requested at the appropriate time.

12. Without a general confidentiality order in place, the disclosure process will be more time consuming and burdensome to both parties and the court. In carrying out its disclosure obligations, the Prosecution must at the same time adhere to obligations to ensure the protection of confidential information in its possession. The Prosecution will therefore have to delay disclosure of many documents to the Defence until a full assessment is made on whether any (or augmented) witness protection measures or confidentiality restrictions are required. In many instances this will require locating and re-contacting individuals who gave

³ Decision of 30 November 2020, pp.2, 5.

⁴ See e.g. *Prosecutor v. Turinabo et al.*, Case No.MICT-18-116-PT, Decision on Prosecution Motion for Order of Non-Disclosure to Third Parties, 7 December 2018; *Prosecutor v. Stanišić and Simatović*, Case No.MICT-15-96-PT, Decision on Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 18 February 2016; *Prosecutor v. Hadžić*, Case No.IT-04-75-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 23 August 2011; *Prosecutor v. Mladić*, Case No.IT-09-92-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 24 June 2011 (“*Mladić Decision*”); *Prosecutor v. Karadžić*, Case No.IT-95-5/18-PT, Decision on Prosecution Motion for Non-Disclosure, 2 September 2008; *Prosecutor v. Župljanin*, Case No.IT-99-36/2-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 30 July 2008 (partly confidential and *ex parte*); *Prosecutor v. Čermak and Markač*, Case No.IT-03-73-PT, Decision and Order on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 1 April 2004; *Prosecutor v. S. Milošević*, Case No.IT-02-54-T, Order on Prosecution Motion for Variance of Prior Orders of Non-Disclosure, 23 January 2003; *Prosecutor v. Mrda*, Case No.IT-02-59-PT, Order on Prosecution’s Motion for Protective Measures, 8 July 2002.

⁵ Decision of 30 November 2020, p.1.

witness statements to the Prosecution. For Rule 76 documents it may require seeking additional permission from the provider. Depending on the outcome of these inquiries, the Prosecution may have to litigate these issues on a document-by-document basis prior to disclosure, notwithstanding that the Prosecution does not intend to call the witness or tender the document in court.

C. Reconsideration of the Decision of 30 November 2020

13. Unfortunately, the Prosecution did not explain in detail in its original motion how important a general confidentiality order is to the efficiency of its disclosure practice. The Prosecution provides further explanation belatedly, seeking reconsideration of this aspect of the Decision of 30 November 2020. Reconsideration should be granted, since there is both an error of reasoning and particular circumstances justifying reconsideration in order to avoid injustice.⁶

14. In the Decision of 30 November 2020, the Pre-Trial Judge erred in reasoning that the Prosecution had to show “exceptional circumstances” to justify a general order under Rule 53 that all disclosure should be treated as confidential. While the exceptional circumstances standard is set out in Rule 53(A), it is not required for orders under Rule 53(C). Rule 53(C) permits the Judge to make a confidentiality order in relation to a document or information where this “is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.” The Prosecution argued in the motion that it had met these criteria.⁷ Even if the Pre-Trial Judge was not satisfied that the Prosecution had shown exceptional circumstances, he should have considered whether the request should have been granted under Rule 53(C).⁸

15. In addition, there are circumstances that justify reconsideration in order to avoid injustice. As explained above, the denial of the general confidentiality order will have a serious impact on the efficiency of the Prosecution’s disclosure in this case. In practical terms, it will cause delays and consume Prosecution, Defence and Chambers resources that could be more effectively used in preparing the case for trial.

⁶ *Prosecutor v. Mladić*, Case No.MICT-13-56-A, Public Redacted Version of the “Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release” filed on 22 May 2018, 8 June 2018, p.3; *Prosecutor v. Mladić*, Case No.MICT-13-56-A, Decision on Ratko Mladić’s Motions for Reconsideration, 16 March 2018, p.3; *Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Decision on a Motion to Reclassify Filings, 3 October 2017, p.5.

⁷ Prosecution Motion for Confidentiality of Disclosed Information and Materials, 17 November 2020, paras.3-5.

⁸ *E.g. Mladić* Decision, para.6.

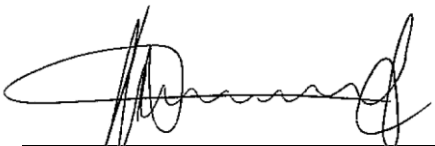
D. In the alternative, certification to appeal should be granted

16. In the alternative, if reconsideration is denied, the Prosecution seeks certification to appeal this decision pursuant to Rule 80(B).⁹

17. Whether an order for confidentiality exists is an issue that will affect the fair and expeditious conduct of the proceedings. As explained above, without a confidentiality order, the efficiency of disclosure practice will be significantly impaired. Without an order, there are no enforceable protections in place for certain sensitive disclosure materials, which could expose witnesses to risks and impact ongoing and future investigations. Moreover, the lack of an order protecting disclosure materials will delay the Prosecution's disclosure to the Defence and thereby delay the proceedings.

18. At this early stage of the case, an immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings. Resolving this issue in the earliest pre-trial phase is important to ensure that disclosure is both effective and efficient.

Word Count: 1876



Serge Brammertz
Prosecutor

Dated this 7th day of December 2020
The Hague, The Netherlands

⁹ See e.g. *Prosecutor v. Turinabo et al.*, Case No.MICT-18-116-T, Decision on Anselme Nzabonimpa's Request for Certification to Appeal the Order on the Procedure for the Conduct of Trial, 30 October 2020, p.2; *Prosecutor v. Stanišić and Simatović*, Case No.MICT-15-96-PT, Decision on Requests for Certification to Appeal Decision on Stanišić's Request for Stay of Proceedings, 1 March 2017, para.6. Also *Prosecutor v. Karemera et al.*, Case No.ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras.13, 17.



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