



Original: English

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

Date: 26 January 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR***

v. Germain KATANGA and Mathieu NGUDJOLO CHUI

Public

**With Annexes - Confidential – ex parte – Prosecution Only and Confidential
Redacted Annexes available to the Defence.**

**Prosecution's response to the Trial Chamber's
"Ordonnance enjoignant au Procureur de fournir des détails supplémentaires
concernant certaines notes de communication, des rapports d'inspection et le
rapport daté du 5 janvier 2009 (norme 28 du Règlement de la Cour)" of
21 January 2009**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Background

1. In its order of 21 January 2009, (the “Order”)¹ Trial Chamber II (“the Chamber”), ordered the Prosecution to file a report, by 26 January 2009, providing further details on matters relating to the disclosure and redaction of items obtained by the Prosecution pursuant to Article 54(3)(e) of the Rome Statute (“Statute”).

Submission

Point (1) of the Operative Part of the Order

2. The Prosecution reiterates as stated prior to² and during the Status Conference held on 27 November 2008³ that it abides and will continue to abide by the terms of the Appeals Chamber judgment in *The Prosecutor v. Thomas Lubanga Dyilo*⁴ (“the Appeals Chamber Judgment”) when dealing with information collected pursuant to Article 54(3)(e) of the Statute and for which the lifting of security restrictions has been refused. The Chamber approved of the Prosecution’s proposal in this respect in the following manner:

“... you have specified, quite rightly, that on the basis of the experience gained in the Lubanga case, you intend to adopt an analogous approach as regards evidence which is provided by confidential -- or providers of confidential information. The

¹ ICC-01/04-01/07-838-Conf-Exp.

² ICC-01/04-01/07-764 at p.9.

³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008 at p.50, lines 7-14.

⁴ ICC-01/04-01/06.

Chamber is delighted to hear this but would remind you that judicial review remains at all times possible.”⁵

3. In response to the Chamber’s specific question as to whether the practice followed by the Prosecution in this instance departs from the procedure set out in the Appeals Chamber Judgment, the Prosecution makes particular reference to paragraph 44 of the Appeals Chamber judgment where it is stipulated that the Chamber’s supervisory role will be triggered by the need “to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial”.⁶ Consequently, where no such tension exists and the redactions applied do not impact on the requirements of fair trial, in the Prosecution’s view, the modalities of disclosure remain an *inter partes* process;⁷ the matter does not require the review of the Chamber .

4. From the above, it follows that the Prosecution did not interpret paragraph 48 of the Appeals Chamber’s judgment as preventing it from disclosing directly to the Defence items collected under Article 54(3)(e) in redacted form as soon as possible after their receipt from the relevant information provider. It should be stressed that the redactions were not applied by the Prosecution *proprio motu*. The redactions were proposed by the information providers as a condition for their consent to the disclosure of information previously provided pursuant to article 54(3)(e). The said documents were communicated by the Prosecution to the Defence in the anticipation that the Chamber would, in any event, convene an *ex parte* hearing and allow it to explain, document by document, the reasons underpinning those redactions

⁵ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008 at p.63, lines 1-6.

⁶ ICC-01/04-01/06-1486 at para. 44.

⁷ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008 at p.57, lines 2-12.

imposed by the information providers; this would include an analysis of whether they affect the values obliging disclosure.⁸

5. At no stage was such *inter partes* disclosure to the Defence intended by the Prosecution to circumvent the power of the Chamber to review the redactions proposed by the information providers or to create the impression that the Prosecution viewed itself as having discharged its disclosure obligations in full.
6. Disclosure, in the present instance, was effected pursuant to the aforementioned understanding of the Appeals Chamber Judgment, and at the earliest possible opportunity in order to give effect to the provisions of Article 67(2) of the Statute which stipulates that disclosure should be effected "*as soon as practicable*", and with maximum regard to the Prosecution's obligation of due diligence in increasing the time available to the Defence for the preparation of its case.
7. The Prosecution stresses that it will place all the documents referred to in paragraphs 6 to 8 of the Order before the Chamber for its review in fully unredacted form should the Chamber deem this appropriate. This undertaking relates to all items of evidence collected pursuant to Article 54(3)(e) whether they impact on values obliging disclosure or not and whether they have been redacted or summarised. The Prosecution, moreover, will seek the information providers' consent for any modality of disclosure which may be approved by the Chamber.

Point (2) of the Operative Part of the Order

⁸ See *supra* footnote 3.

8. The Prosecution submits as confidential Annex I to this filing, a table providing, as requested, supplementary information on the items of evidence identified by the Chamber at paragraphs 11 to 17 of the Order.

Point (3) of the Operative Part of the Order

9. The evidentiary item referred to in paragraph 18 of the Order was not summarised by the Prosecution *proprio motu*. The document concerned had initially been identified for disclosure in the Lubanga case. Accordingly, the Prosecution had requested the lifting of restrictions from the information provider, which responded that certain elements of the document would require the retention of confidentiality restrictions. As such, given that the document was not amenable to easy redaction, the information provider specifically requested that the Prosecution prepare a summarised version which, while providing maximum information to the Defence, would also respect the information provider's confidentiality requirements. This summarised version of the document, which includes a verbatim extract from the original document that captures the relevant potentially exculpatory portion, was subsequently approved for disclosure in the Lubanga case by Trial Chamber I in its oral decision on the lifting of the stay of proceedings⁹. Given the availability for disclosure of the summary version in its evidence collection, the Prosecution considered it apposite to disclose the same summary in the present case in the interests of expeditiousness.
10. The Prosecution stresses, once again, that its primary concern, as with all the items mentioned in paragraphs 6-8 of the Order, was to communicate the item of evidence to the Defence as quickly as possible in the full

⁹ ICC-01/04-01/06-1644.

understanding that the Chamber, in an *ex parte* hearing, would be the final arbiter of the suitability of the summary.

Point (4) of the Operative Part of the Order

11. The Prosecution submits as confidential Annexes IIA and IIB to this filing, updated charts providing supplementary information concerning the disclosure history of the evidentiary items set out in Annexes IA and IB of its report of 5 January 2009¹⁰ and, as requested, details concerning which of these items have been disclosed as incriminating evidence.

12. The Prosecution respectfully submits the following clarification of the discrepancy identified at paragraph 9 of the Order. In addition to the 4 documents identified by the Chamber and listed in footnote 23 of its Order, the Prosecution identified another four documents that were mentioned in previous disclosure reports as being redacted pursuant to Rule 77 and that presently appear on the list submitted as Annex IB to the filing of 5 January 2009.¹¹ The Prosecution, furthermore, identified an additional fourteen documents listed in Annex IB as having been disclosed in redacted form which were not identified as such in the previous disclosure reports. A further four documents were inadvertently omitted from Annex IB of which two were properly identified in the disclosure reports as redacted documents¹² and the remaining two were not identified in the disclosure reports as being redacted documents¹³.

¹⁰ ICC-01/04-01/07-811-Conf-Exp-AnxIA & ICC-01/04-01/07-Conf-Exp-Anx-IB.

¹¹ These four documents are the following: DRC-OTP-0202-0647, DRC-OTP-0202-0822, DRC-OTP-0202-0655, and DRC-OTP-0204-0181.

¹² The two documents are both identically redacted versions of the same original document (listed in Annex 1B as DRC-OTP-0003-0339), DRC-OTP-0204-0122 having a better quality image than DRC-OTP-0202-0661.

¹³ DRC-OTP-0202-0044 and DRC-OTP-0204-0285.

13. A detailed list containing the above identified documents is attached to the present filing as Annex IV. An updated version of Annex IB is also re-submitted as Annex IIB as indicated above in paragraph 11.
14. The Prosecution submits as confidential Annex III to this filing, an updated chart providing, as requested, supplementary information concerning the exact modalities of disclosure of four items of evidence set out in Annex IB of its report of 5 January 2009 and referred to in the last paragraph of point 4) of the operative part of the Order.

Conclusion

15. The Prosecution reiterates its submissions hereinabove and supplies the supplementary information requested by the Chamber in the Order.



Luis Moreno-Ocampo, Prosecutor

Dated this 26th day of January 2009

At The Hague, The Netherlands