

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 February 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

**Prosecution's Submissions on the Modalities of Disclosure Required for the
Protection of Witnesses Providing Exculpatory Evidence or Evidence of a Nature
Material to the Preparation of the Defence**

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. At the Status Conference held on 3 February 2009, Trial Chamber II ("the Chamber") ordered the Prosecution to submit a report setting out suggested modalities for the protection of witnesses on whom the Prosecution will not rely at trial and for whom statements and transcripts exist which are either of exculpatory value or are material to the preparation of the Defence.¹
2. The Prosecution sets out its submissions below which, in part, mirror the suggestions made with respect to the modalities of disclosure proposed for the protection of incriminating witnesses.²

Submission

3. As it has previously stated,³ the Prosecution implements its duty, pursuant to Article 54(1)(a), to investigate both incriminating and exonerating circumstances equally. Such an impartial investigation generates information of an exculpatory nature which the Prosecution will not adduce at trial. The Prosecution is, nevertheless, aware of the Defence's right to receive such material pursuant to Article 67(2) of the Statute of Rome ("the Statute") and Rule 77 of the Rules of Procedure and Evidence ("the Rules").
4. Article 68(1) of the Statute stipulates that the Prosecutor's duty to take measures to protect the safety of victims and witnesses applies particularly at the investigation and prosecution stage. Mindful of this provision, the Prosecution does not relinquish its duty to protect those witnesses formerly

¹ ICC-01/04-01/07-T-56-ENG ET, pp. 40-41 and p. 43, lines 2-14, 3 February 2009.

² ICC-01/04-01/07-882.

³ ICC-01/04-01/07-834, para. 10, 19 January 2009.

interviewed yet not relied on at trial ("PEXO Witnesses" or "R77 Witnesses").

5. The Office of the Prosecutor has endeavoured to make contact with all such PEXO or R77 Witnesses in order to seek their views on the possible disclosure of their identity to the Defence.⁴ Where the PEXO or R77 Witnesses have indicated that they have no objection to their identity being divulged, then disclosure of their evidence has proceeded as normal. The Prosecution has assessed the required security measures for each of these witnesses so that proper protection is ensured in light of the level of risk they face.
6. Where, however, a PEXO or R77 Witness has expressed a fear that disclosure of his identity will endanger his safety or physical and/or psychological well-being, the Prosecution proposes the institution of certain protective measures which were briefly mentioned during the Status Conference of 3 February 2009.
7. In requesting such measures, the Prosecution is aware of the need to strike an equitable balance between the Defence's right, on the one hand, to access disclosable evidence as soon as practicable and, on the other hand, the PEXO or R77 Witnesses' right to protection. The Prosecution stresses that the protective measures suggested hereinafter are calculated to minimise the restrictions to material collected in the course of its investigations and to facilitate the Defence, as far as possible, in the preparation of its case.

⁴ There remains a number of PEXO/R77 Witnesses whom the Office of the Prosecutor has not succeeded in contacting.

8. A form of protective measure, considered by the Prosecution, would be for the provision of discrete contextual admissions of fact to those exculpatory or materially beneficial elements of the PEXO or R77 Witness's evidence *in lieu* of disclosing the identity of the witness. It should be noted that a similar proposal was made by the Prosecution in the case against Thomas Lubanga Dyilo ("the Lubanga case") and while a decision on the issue has yet to be rendered, Trial Chamber I has, *de facto*, not deemed the issue worthy of delaying the commencement of the evidential hearings. The Prosecution draws further support for the adequacy of admissions of fact in this context from the oral decision of Trial Chamber I lifting the stay of proceedings in the Lubanga case thereby affirming the provision of summaries for the purpose of the disclosure of information collected pursuant to Article 54(3)(e) of the Statute.⁵
9. Moreover, in the case of R77 Witnesses, as distinct from PEXO Witnesses, the Prosecution is of the opinion that analogous information may be provided as an alternative to redactions and summaries similarly obviating the need for the eventual disclosure of the witness's identity and statement.
10. Another protective measure that the Prosecution envisages would comprise the redaction of the PEXO or R77 Witness's evidence or the preparation of a summary thereof. Such a course of action, while providing the core of disclosable information in a comprehensive manner, would retain the anonymity of the PEXO/R77 Witness.
11. The choice between the preparation of a summary or the imposition of redactions would be determined on a case by case basis with reference to the

⁵ ICC-01/04-01/06-1644.

content of the evidence and consideration of whether it is so precise and specific as to lead to the immediate identification of the PEXO/R77 Witness.

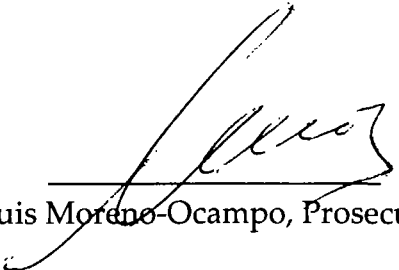
12. The Prosecution stresses that any redactions, summaries, analogous information or admissions contemplated would, at all times, be subject to review by the Chamber.
13. Failing approval by the Chamber, however, of the abovementioned protective measures, the Prosecution proposes that the identity of the PEXO or R77 Witness be withheld from the Defence until an agreed time-period prior to the start of the evidential hearings which would give the Prosecution the necessary time to take any supplementary protective measure in the field if this is required in light of the risk profile of each individual witness.
14. In its filing of 9 February 2009 on the modalities of disclosure required for protective purposes,⁶ the Prosecution suggested that the identity of certain incriminating witnesses be retained until a period of 30 days prior to testimony. This period was calculated by the Prosecution as a compromise in light of the security situation in Ituri and of the jurisprudence of the *ad hoc* international criminal tribunals.⁷
15. In the present instance, the Prosecution is of the opinion that the retention of a PEXO or R77 Witness's identity is equally justifiable, albeit up until a period of 30 days prior to the start of the trial.

⁶ ICC-01/04-01/07-882.

⁷ *Ibid*, para. 7.

Conclusion

16. The Prosecution respectfully presents the submissions stated above as the suggested modalities for the disclosure of exculpatory material and information materially benefiting the Defence emanating from witnesses requiring protective measures.



Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of February 2009

At The Hague, The Netherlands