



Original: English

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

Date: 23 March 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , President
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* - only available to the Prosecutor

Prosecution's Application for Protective Measures for Witness 243 , Witness 288, Witness 169, Witness 178 - also known as witness 253- , Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu

Mr Hervé Diakiese

Mr Vincent Lurquin

Mr Jean Chrysostome Mulamba

Nsokoloni

Ms Flora Mbuyu Anjelani

Mr Fidel Nsita Luvengika

Mr Joseph Keta

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

Detention Section

Victims Participation and Reparations Section **Other**

Pursuant to the Trial Chamber II's order of 23 January 2009,¹ the Office of the Prosecutor ("Prosecution") requests authorisation to take appropriate measures to protect 12 witnesses, on the basis of Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Rome Statute ("Statute") and Rule 81(4) of the Rules of Procedure and Evidence ("Rules") ("Court"), by:

- a. applying permanent redactions to the identities of witnesses as detailed in this application, by redacting such identifying information as contained in their relevant statements, transcripts ("Statements"), or screening notes; and
- b. disclosing their Statements or screening notes to Germain Katanga and Mathieu Ngudjolo and their Defence teams ("Defence") in either redacted version or narrative summary form.

Request for Receipt of Filing as Confidential *Ex Parte*

The Prosecution requests that the Annexes to this application be received by the Trial Chamber II as confidential and *ex parte*, only available to the Prosecution, as it relates to material that is currently treated as confidential. The Prosecution submits that the present classification of the filing is necessary to protect the identity of the witnesses for whom permanent redactions to their identities and alternative methods of disclosure are sought.

Introduction

1. On 23 January 2009, Trial Chamber II ordered, *inter alia*, that the Prosecution file any requests for redactions to statements relating to witnesses who provide information falling under Article 67(2) of the Statute or Rule 77.² On 25 February 2009, at an *ex parte* hearing, Trial Chamber II ordered that any

¹ Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état, ICC-01/04-01/07-846, 23 January 2009.

² Ibid.

requests for protection measures including redactions regarding such witnesses be submitted by 23 March 2009.³

Background

2. The Prosecution has identified to date 94 witnesses whose Statements or screening notes are potentially relevant to the Defence pursuant to Article 67(2) or Rule 77 and who are not being relied upon by the Prosecution for incriminatory purposes.⁴ Out of these 94 witnesses, four witnesses have informed the Prosecution that they do not consent to disclosure of their information for security reasons, and 17 witnesses have been identified as not contactable. The Prosecution has assessed these 21 witnesses' individual circumstances and determined that their identities and the fact of their cooperation should not be disclosed to avoid endangering them ("21 witnesses"). The Prosecution is seeking alternative methods of disclosure to Defence of their information.
3. The Prosecution submits that the information of nine of these 21 witnesses for whom alternative methods of disclosure are sought could be disclosed to Defence by way of admissions of facts reflected in their Statements or screening notes. These witnesses are the subject of a separate application.⁵
4. 12 of the 21 witnesses provide information for whom admissions of facts cannot be made by the Prosecution and who would be at risk if their identity and cooperation were disclosed.⁶ These are individuals who have either

³ ICC-01/04-01/07-T-60-Conf-Exp-Eng, pp. 4-5, 10-11, 16.

⁴ This figure does not include witnesses whose statements, transcripts or screening notes have been disclosed to the Defence on the basis of their incriminatory information, but who also provide information relevant under Article 67(2) or Rule 77. The exception to this are witnesses 243 and 271, whose information was previously disclosed to Defence on the basis of their incriminatory value but who have since confirmed their unwillingness to testify.

⁵ This is the subject of a separate application being filed by the Prosecution today 23 March 2009.

⁶ The Prosecution refers to witnesses 243, 102, 288, 169, 174, 178 (also known as witness 253), 179, 337, 271, 292, 175, 270, 280; and witnesses 90 and 47.

refused to consent to disclosure of their identities to the accused (and declined to cooperate further with the Court, or refused offers of protection, or both), or who cannot be located. These witnesses are the subject of the present application.

5. The Prosecution requests authorisation that the information they provide, of relevance under Article 67(2) of the Statute or Rule 77 of the Rules, be disclosed to Defence with permanent redactions applied to their identities, by way of redacted version of their Statements or screening notes, or as a narrative summary.
6. These 12 witnesses include 11 persons who provide information that is relevant under Article 67(2) and/or Rule 77 (Witness 243, Witness 288, Witness 169, Witness 178 - also known as witness 253-, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, and Witness 280) ("PEXO Witnesses"); and one who provides information that is relevant only under Rule 77 (Witness 90) ("Rule 77 Witness").
7. The Prosecution attaches as confidential annexes to this application:
 - a. all the Statements or screening notes of the PEXO Witnesses and Rule 77 Witnesses in unredacted form to enable the Chamber to review the evidentiary value of the information they provide (confidential *ex parte* Annex A);
 - b. the individual analysis of their evidence and specific security circumstances (confidential *ex parte* Annex B);
 - c. a chart providing an analysis of their potentially relevant information under Article 67(2) or Rule 77 and any analogous information already disclosed to Defence (confidential *ex parte* Annex C); and
 - d. all the sources identified in Annex C (confidential *ex parte* Annex D).

A. Witnesses whose information is potentially relevant under Article 67(2) of the Statute (“PEXO Witnesses”)

I. Disclosure to the accused should not endanger witnesses

8. The Prosecution submits that when deciding what is the most appropriate form of disclosure to Defence of potentially exculpatory evidence pursuant to Article 67(2), the Chamber must be mindful that any disclosure to the accused cannot endanger witnesses in accordance with the Court’s obligations to protect witnesses under Articles 68(1), 64(2), 64(6)(e) and 54(3)(f).
9. Dealing with the issue of disclosure of identities and evidence of witnesses with potentially exculpatory evidence, Trial Chamber I stated that, pursuant to Article 68(1), *“the right of endangered witnesses to protection and of the defendant to a fair trial are immutable and neither can be diminished because of the need to cater for other interests.”*⁷
10. Trial Chamber I reiterated that *“the right of a witness to protection cannot be diminished because of the importance of other considerations”*⁸ and concluded that as regards the form of disclosure of a witness’s exculpatory evidence: *“[t]he Chamber must select a solution from the range of possibilities ...that satisfies both obligations.”*⁹ Trial Chamber I also held that the Chamber has a statutory responsibility for the protection of witnesses throughout the entirety of the period it is seized of the case.¹⁰

⁷ ICC-01/04-01/06-1311-Anx2, para. 94.

⁸ ICC-01/04-01/06-1311-Anx2, para. 94.

⁹ ICC-01/04-01/06-1311-Anx2, para. 98.

¹⁰ ICC-01/04-01/06-1644, para. 41.

II. The Defence does not have an automatic right to identifying information of PEXO witnesses

11. The Prosecution respectfully submits that there is no automatic right of the accused to information identifying witnesses who provide potentially exculpatory evidence.
12. Instead, as stated by Trial Chamber I, when deciding what is the most appropriate form of disclosure of potentially exculpatory information for witnesses who may be at risk if their identity and involvement with the court is revealed, “[i]ndividual, fact-sensitive decisions” must be taken; i.e. a case-by-case approach.¹¹
13. Trial Chamber I stated that in any review of a witness’s material, it needed to investigate *“the nature of the suggested risk to the witnesses and whether the material, in a real sense, assists the accused.”*¹² Accordingly, Trial Chamber I assessed both the weight of the information of potentially exculpatory nature and the risk to the witnesses.
14. Even as regards of potentially exculpatory evidence, which Trial Chamber I assessed had a *“real, as opposed to minimal, impact on the trial in favour of the accused”*, Trial Chamber I determined that the Defence had a right to receive such information *“albeit in an appropriate form.”*¹³ [Emphasis added].
15. Trial Chamber I stated when assessing whether there should be non-disclosure of the identity of a witness who provides potentially exculpatory evidence: *“the Chamber must make detailed, fact-specific decisions on whether the identity of someone who has provided information to the court or who is referred to in that information, comes within the scope of Article 67(2) or Rule 77 material, and if it*

¹¹ ICC-01/04-01/06-1311-Anx2, para. 98.

¹² ICC-01/04-01/06-1311-Anx2, para. 27.

¹³ ICC-01/04-01/06-1311-Anx2, para. 94.

*does, whether or not alternative measures can be found which will protect the accused, and particularly by ensuring there is a fair hearing, where the individual will be at risk following disclosure of his or her identity".*¹⁴

16. Trial Chamber I further confirmed that even where there cannot be full disclosure of the underlying exculpatory elements themselves, that this does not necessarily violate the accused's right to a fair trial. Refusing Defence's application for leave to appeal its decision allowing for alternative measures to full disclosure of exculpatory materials, Trial Chamber I remarked: "*[i]t is not realistically arguable that a piece of evidence, which includes exculpatory elements must be disclosed in its entirety, regardless of its content, in order to meet the requirements of a fair trial.*"¹⁵

17. Similarly, the Appeals Chamber confirmed that there may be circumstances in which a Trial Chamber is unable to order full disclosure of potentially exculpatory materials, and that the Chamber is authorised to determine "*whether and, if so, which counter-balancing measures can be taken to ensure the rights of the accused are protected and that the trial is fair, in spite of non-disclosure of the information.*"¹⁶

III. The Defence will not suffer serious prejudice from non-disclosure of identities of PEXO Witnesses

18. The Prosecution submits that, in this instance, there is no serious prejudice to the Defence by the non-disclosure of the identities of these PEXO Witnesses, for the following reasons.

¹⁴ See ICC-01/04-01/06-1644, paras. 48-49.

¹⁵ ICC-01/04-01/06-1557, para 34.

¹⁶ ICC-01/04-01/06-1486, para. 48. Trial Chamber I has stated that "*[t]here is no logical reason for suggesting that this approach is confined to issues arising out of Article 54(3)(e) [of the Statute].*" [Emphasis added] .See ICC-01/04-01/06-1557, para. 35.

- a. First, the PEXO Witnesses would be unavailable to give evidence in any event, because they have either refused their consent to disclosure of their identities to the accused or cannot be located. Trial Chamber I determined that where a witness with potentially exculpatory evidence is not available to testify, the Chamber should assess whether “*the evidential value of his or her statement and the need to disclose his or her identity are significantly reduced, and as regards the latter, effectively eliminated.*”¹⁷
- b. Second, the Defence would receive the underlying elements of the potentially exculpatory information for the PEXO Witnesses, either as a redacted version of their relevant Statements or screening notes (or as a narrative summary), with limited redactions only for information identifying the witnesses (and other usual categories of redaction where necessary).¹⁸
- c. Third, their evidence is analogous to materials already disclosed by the Prosecution, which provide similar potentially exculpatory information, and some of that information comes from witnesses relied upon by the Prosecution who will be available to testify. The Prosecution refers to confidential *ex parte* Annexes C and D, which set out the similar or analogous evidence disclosed to the Defence. Trial Chamber I determined that alternative evidence can be an appropriate counter-balancing measure as regards potentially exculpatory evidence.¹⁹

¹⁷ ICC-01/04-01/06-1311-Anx2, para 99.

¹⁸ The Prosecution would seek the redaction of the usual categories of information if necessary, namely information identifying: family members ; local interpreters and intermediaries; and relevant interview locations.

¹⁹ ICC-01/04-01/06-1557, para. 41. See also ICC-01/04-01/06-1644, para. 46-47. As regards potentially exculpatory evidence Trial Chamber I determined that alternative evidence can be an appropriate “counter-balancing measure” to ensure that the trial remains fair, by providing satisfactory alternative measures.

IV. No less intrusive protection measures are available

19. The Prosecution submits that there is no less intrusive protection measure available than permanent redactions of these PEXO Witnesses' identities, because the witnesses refuse to consent to disclosure of their identities, currently refuse any protection by way of relocation or other alternative measures afforded by the Victims and Witnesses Unit,²⁰ or cannot be located;²¹ and disclosure of their identities and cooperation with the Court would put them at risk of harm or endanger their lives. Trial Chamber I has authorised the non-disclosure of identities and other identifying information where no lesser measure was possible.²²

20. The Prosecution has reviewed the individual circumstances of the 12 PEXO Witnesses who provide information of a potentially exculpatory nature and submits, for the reasons outlined in the individual analysis in confidential Annex B to this application, that the only available effective protection measure is permanent redaction of their identities.

V. Vulnerable witnesses who provide exculpatory evidence require special protection

21. Nine of the PEXO Witnesses can be categorised as vulnerable witnesses, as five are former child soldiers (Witnesses 169, 178, 179, 175, and 282), and four are female victims of sexual violence (Witnesses 243, 288, 337 and 271).

22. The Prosecution submits that these vulnerable witnesses require special protection, in particular in light of Article 68(1), which requires that the Court take appropriate measures to protect the safety, physical and psychological well-being of victims and witnesses having regard to relevant factors including their *"age, gender...and the nature of the crime, in particular, but not*

²⁰ Witnesses 243, 271, and 292. Witness 179 refused disclosure of her identity to the accused.

²¹ Witnesses 102, 288, 169, 270, 175, 282, 337, and Witness 178 (also known as Witness 253).

²² ICC-01/04-01/06-1644, para. 46.

limited to, where the crime involves sexual or gender violence or violence against children.”²³

VI. Application for permanent redactions to identities and for the disclosure by alternative form

23. Pursuant to Article 54(3)(f), 64(2), 64(6)(e) and 68(1) and Rule 81(4), the Prosecution seeks authorisation for the permanent redaction to the identity of the 12 PEXO Witnesses.

24. It is submitted that the individual circumstances of the 12 PEXO Witnesses, as detailed in the confidential Annex B to this application, necessitate that these witnesses' information of a potentially exculpatory nature be disclosed with permanent redactions to their identities:

- a. In particular, the Prosecution seeks authorisation that the potentially exculpatory information from nine witnesses (Witnesses 102, 288, 169, 179, 292, 175, 270, 282, and 178 (also known as Witness 253) be disclosed to the Defence through redactions to their full Statements or screening notes as regards their identities, since disclosure of their identities could create security risks .

²³ See David Donat-Cattin, 'Article 68 : Protection of victims and witnesses and their participation in the proceedings », in O. Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Second Edition, C.H.Beck.Hart.Nomos, 2008, at 1284: Referring to the concept of non-disclosure of identity and anonymity of witnesses testifying against the defence, Donat-Cattin observes: **“[I]f anonymity is assessed as the only available measure of protection to comply with the obligation of result posed by article 68, para. 1, the relevant Chamber should order to maintain it and, at the same time, ensure that the testimony rendered by the anonymous victim or witness shall be weighted against this factor and never be the sole proof that would suffice to convict an individual for any specific charge.”** As regards these PEXO Witnesses, none are being called by the Prosecution to give evidence for incriminatory purposes against the accused; which would further militate in favour of maintaining their anonymity vis-à-vis the accused. See also *Baegen v Netherlands*, October 27, 1995, Series A, No. 327-B, in which the European Commission of Human Rights found no violation where an accused could confront an alleged victim of sexual abuse through written questions or application to the court but no opportunity to question her. The Commission had regard to special features of rape and sexual offences trials and accepted that in criminal proceedings concerning sexual abuse, measures may be taken to protect the victim, which are reconcilable with the rights of defence.

- b. Three witnesses (Witnesses 243, 271 and 337) ²⁴ are so highly identifiable, for the reasons set out in the annexes detailing their circumstances that the Prosecution submits that providing their statement in redacted form would be an insufficient protection measure. The Prosecution seeks authorisation to disclose their potentially exculpatory information to the accused as narrative summaries that contain all underlying potentially exculpatory elements provided while redacting all identifying information.
25. The Prosecution observes that 11 of these witnesses (Witnesses 243, 288, 169, 178/253, 179, 337, 271, 292, 175, 270, and 282) were interviewed for the case of the *Prosecutor v Katanga & Ngudjolo*, and primarily provide information of an incriminatory nature. It is submitted that this places them at increased risk of potential retaliation if their identities are disclosed.
26. The Prosecution makes submissions on the security situation of the individual persons in the confidential *ex parte* Annex B, within the background of insecurity within the Democratic Republic of Congo, and Ituri in particular, which has been recognized by Trial Chamber II recently, ²⁵ and which creates risks to witnesses in the context of disclosure.
27. The Prosecution is available pursuant to Rule 83 to discuss these proposals on an *ex parte* basis with Trial Chamber II.

²⁴ Witnesses 243, 271 and 337.

²⁵ See ICC-01/04-01/07-964, para. 8. Trial Chamber II stated that: “[...] *la situation en RDC et, plus particulièrement en Ituri demeure toujours instable et, dans un tel contexte, une remise en liberté de l'accusé ne pourrait que compromettre la sécurité des victimes et des témoins dont l'identité a été divulguée et serait ainsi de nature à faire obstacle au bon déroulement de la procédure.* »

B. Witnesses whose information is potentially relevant under Rule 77 of the Rules (“Rule 77 Witness”)

28. The Prosecution is not able to make admissions of fact as regards some of the information provided by Witness 90, whose evidence is potentially relevant to the accused pursuant to Rule 77 (“Rule 77 Witness”). He is a witness who provides information relevant to the role of Uganda and Rwanda in the conflict in Ituri.
29. Pursuant to Articles 54(3)(f), 64(2) and 64(6)(e), and 68(1) and Rule 81(4), the Prosecution seeks authorisation to apply permanent redactions to his identity and to furnish his redacted Statement to the Defence. The limited redactions will concern only his identifying information (and the usual categories of redactions sought where necessary).
30. The Prosecution observes that Rule 77 is explicitly subject to the restrictions on disclosure as provided for in the Statute and in Rules 81 and 82. Accordingly, the Prosecution submits that the obligations to disclose information pursuant to Rule 77 is subject to the obligations of the Court to provide for protection of these witnesses pursuant to Articles 68(1), 54(3)(f), 64(2), and 64(6)(e) and Rule 81(4).
31. For the reasons outlined in the individual assessments for the Rule 77 Witness in the confidential Annex B attached to this application, the Prosecution submits that disclosure of the information of this witness would place him at unnecessary risk of harm, as compared to the relative value of his information to the Defence.
32. The Prosecution submits that the non-disclosure of the identity of the Rule 77 Witness would not be prejudicial to or inconsistent with the rights of the accused, in particular as:

- a. the accused will receive his Statement with only limited redactions;
- b. the Prosecution is proposing to make broad and detailed admissions of fact relating to the role of Uganda and Rwanda in the conflict in Ituri, which will cover most of the information provided by these Rule 77 Witnesses;²⁶ and
- c. most of his evidence is cumulative to a considerable volume of materials already disclosed by the Prosecution; those materials thus provide the same information, and some of that information comes from witnesses relied upon by the Prosecution who will be available to testify.²⁷ The Prosecution refers to confidential *ex parte* Annexes C and D, which set out the similar or analogous evidence provided by the Rule 77 Witness and disclosed to the Defence.

²⁶ See concurrent filing of today proposed admissions by the Prosecution.

²⁷ ICC-01/04-01/06-1557, para. 41. See also ICC-01/04-01/06-1644, para. 46-47. As regards potentially exculpatory evidence Trial Chamber I determined that alternative evidence can be an appropriate “counter-balancing measure” to ensure that the trial remains fair, by providing satisfactory alternative measures.

Request

For the foregoing reasons, the Prosecution respectfully requests that Trial Chamber II authorize permanent redactions to the identities of the PEXO Witnesses and Rule 77 Witness named in this application, with disclosure by way of redacted version for Witnesses 169, 178/253, 179, 292, 175, 270, 282, and 90; and by way of narrative summary for Witnesses 243, 288, 271 and 337.



Luis Moreno-Ocampo, Prosecutor

Dated this 23rd day of March 2009

At The Hague, The Netherlands