



Original: English

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

Date: 7 August 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

URGENT and PUBLIC

**With annexes A, B, C and D – confidential, ex parte, only available to
the Office of the Prosecutor**

Public Redacted Version of ICC-01/04-01/07-1351-Conf-Exp

**Application for Authorization to Disclose Redacted Incriminating Evidence and
Rule 77 Material to the Defence (Witness 267)**

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
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Me Carine Bapita Buyangandu
Me Hervé Diakiese
Me Vincent Lurquin
Me Jean Chrysostome Mulamba Nsokoloni
Me Flora Mbuyu Anjelani
Me Fidel Nsita Luvengika
Me Jean-Louis Gilissen
Me Joseph Keta

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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Prosecution requests that this application be considered on an urgent basis in light of the disclosure deadlines concerning P-267's statement.
2. The Prosecution requests leave to disclose certain redacted materials to the Defence and to include them on the list of incriminating evidence. These items are intrinsically linked to and referenced in a statement of witness P-267, whose un-redacted statement, with the witness's identity, was ordered produced 45 days before the start of trial.
3. These documents are so linked to the protected witness statement that if they had been disclosed without the statement itself they would have been unintelligible and useless to the Defence. They also may reveal, or provide clues that would lead to the discovery of, the identity of the [REDACTED] whose need for protection in part prompted the Chamber's order authorizing deferred disclosure. Because the Chamber authorized late disclosure of the witness's identity and the witness's full statement, it is appropriate to also disclose the documents to which he referred or that are linked to the witness at the same time.
4. For that reason, the Prosecution submits that the requested disclosures are timely, since they are being made in accordance with a disclosure ordered to be made 45 days before the start of trial.
5. Nor is the Defence unfairly prejudiced by disclosure at this time. The Prosecution would remind the Chamber that the Defence has had the bulk of the Prosecution's case for many months and has had ample time to prepare for the upcoming trial. The Chamber's order that the Prosecution create a

detailed Table of Incriminating Evidence ensured that the Defence would have, more than four months before the start of trial, not simply a list of the incriminating evidence but also a detailed roadmap as to the particular relevance that each item of evidence had to the facts underlying the charges and the legal elements of proof and modes of liability that the Prosecution is obligated to prove at trial. This additional material is not extensive and will not require substantial time to examine and use in the preparation of the Defence. Had it been disclosed earlier without the underlying statement, moreover, it would have been marginally useful at best, in the absence of context or explanation. Finally, there is no reason to believe that the disclosure of the materials more than 45 days before the start of trial will overburden the Defence and require that trial be delayed. ¹

Background

6. In its “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 (règle 132 du Règlement de procédure et de preuve) », ² Trial Chamber II (“the Chamber”) set the following deadlines regarding disclosure of evidence to the Defence :

- Ordered the Prosecution to disclose to the Defence by 30 January 2009, the evidence on which it intends to rely for trial;
- Directed the Prosecution to file applications for redactions to evidentiary material not yet disclosed to the Defence by 30 January 2009;

¹ Rule 84 explains that the Trial Chamber has the power to set time limits regarding disclosure of evidence in order “to avoid delay and to ensure that the trial commences on the set date.”

² ICC-01/04-01/07-846.

- Ordered the Prosecution to disclose to the Defence by 27 February 2009, all evidentiary items currently within its possession that fall within the terms of Article 67(2) of the Statute or of Rule 77 of the Rules;
 - Directed the Prosecution to file applications for redactions to exculpatory evidence or material falling under Rule 77 of the Rules, not yet disclosed to the Defence, by 16 February 2009.
7. On 13 March 2009, the Chamber ordered the Prosecution to comply with the following:³
- Submit a Table of Incriminating Evidence no later than 3 April 2009;
 - Submit a detailed list of all incriminating evidence included in the Table of Incriminating Evidence no later than 3 April 2009.
 - The 3 April deadline was subsequently amended, and the Table and detailed list of incriminating evidence were submitted on 27 May 2009.⁴
8. The Prosecution had previously advised the Court and the Defence during the status conference of 3 February 2009 that it could not divulge the identities of certain witnesses, including Witness P-267, until protective measures were put into place. The Prosecution proposed deferring the disclosure of the identities of these witnesses (“rolling disclosure”) until shortly before the start of the trial.⁵

³ ICC-01/04-01/07-956, pp. 18-19.

⁴ ICC-01/04-01/07-1174.

⁵ ICC-01/04-01/07-T-56-ENG-CT-WT, p. 23.

9. During an *ex parte* hearing on 25 February 2009, the Prosecution indicated to the Chamber that it would specifically request a rolling disclosure in the case of information regarding P-267's identity.⁶
10. On 8 April 2009, the Prosecution filed an application formally requesting the Chamber to authorize deferral of disclosure of P-267's identity until 45 days before he testified, because of particular security concerns with regards to this witness.
11. On 23 April 2009, at the behest of the Chamber, the Victims and Witnesses Unit prepared a report concerning *inter alia* the specific protective measures concerning P-267.⁷
12. On 8 May 2009, the Chamber held an *ex parte* hearing on the matter with the Prosecution and the Victims and Witnesses Unit.⁸ Subsequent to the hearing, on 15 May 2009 the Prosecution filed an application requesting that the disclosure of P-267's identity be deferred to 45 days before the commencement of the trial.⁹
13. On 20 May 2009, the Chamber agreed to the request. It directed the Prosecution to disclose an amended summary of P-267's statement to the Defence¹⁰, which the Prosecution provided on 26 May 2009.¹¹ The Chamber also ordered the Prosecution to disclose a non-redacted version of P-267's statement to the Defence, 45 days before the start of the trial.¹²

⁶ ICC-01/04-01/07-T-60-Conf-Exp-FRA-ET, p. 34.

⁷ ICC-01/04-01/07-1070-Conf-Exp.

⁸ ICC-01/04-01/07-1106.

⁹ ICC-01/04-01/07-1141-Conf-Exp.

¹⁰ ICC-01/04-01/07-1156-Conf-Exp.

¹¹ It is important to note that on 18 April 2008 the Prosecution first disclosed to the Defence a summary of P-267's statement, [REDACTED].

¹² ICC-01/04-01/07-1179.

Request for confidentiality

14. The Prosecution requests that this Application's annexes be classified as "confidential, *ex parte*, only available to the Office of the Prosecutor" in light of the nature of the information that they contain.

Submissions

15. The Prosecution hereby requests the Chamber's authorization for the following:

- i. Disclosure of incriminating evidence to the Defence, with narrow redactions to protect the identities of other persons. The incriminating evidence is composed of (1) P-267's statement, which has previously been disclosed with redactions [REDACTED] (2) three maps annexed to this statement [REDACTED] (3) two investigator's notes, totalling four pages, concerning [REDACTED]; and (4) five additional documents that P-267 provided [REDACTED].
- ii. Disclosure of possible Rule 77 material to the Defence, also with some with narrow redactions to protect the identities of other persons. The Rule 77 material is composed of 14 documents that P-267 provided the Prosecution; and
- iii. Addition of the above-mentioned incriminating evidence to the list of incriminating evidence.

16. All the documents mentioned in this Application are annexed herewith.

A. Request for disclosure of P-267's statement and additional documents, as inculpatory evidence, some with redactions to protect third parties

17. The Prosecution requests limited redactions in the statement of witness P-267 [REDACTED] and one of the investigator's interview notes [REDACTED] to protect the identity of other [REDACTED] members of the witness's family, a [REDACTED] and [REDACTED]. Non-disclosure of their identities is essential to protect their safety.

18. P-267's statement and its three annexes are included in annex A with a chart indicating the redactions that are requested and the justifications. The investigator's notes are included in annex B along with a chart detailing the redactions and their justifications.

19. The Prosecution also requests the disclosure of five additional items, referenced in paragraph 15(i)(4) above, and their inclusion on the list of incriminating evidence, without redactions. P-267 provided these documents to the OTP. They are:

- [REDACTED], a six page document [REDACTED];
- [REDACTED], totalling 41 pages, [REDACTED];
- [REDACTED], a four page document [REDACTED];
- [REDACTED], a two page list [REDACTED];
- [REDACTED], a two page document [REDACTED].

20. The five un-redacted documents are included in annex C.

B. Request for disclosure of Rule 77 information, five with minimal redactions

21. The Prosecution requests the Chamber's authorization to disclose the following 14 documents, some with narrow redactions.

- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED] ;
- [REDACTED].

22. These documents are included in annex D along with a chart providing details concerning the redactions and the justifications for these.

C. Justifications for the requested redactions

23. The redactions sought by the Prosecution, for the duration of the proceedings, fall under the following categories:

24. **Rule 81(2) and (4):** [REDACTED]. The Chamber has already authorized redactions to the [REDACTED].¹³ For the same reasons, in this case, the Prosecution requests that the names of [REDACTED]. Furthermore, the disclosure of their names and the fact that they [REDACTED] compromise their safety.¹⁴

25. **Rule 81(2) and (4): Identification of the** [REDACTED]. Consequently, disclosure of this person's identity may not only prejudice P-267's ongoing or future investigations, but could equally compromise the person's safety.¹⁵

26. **Rule 81(4): Identification of family members of the witness.** On the basis of Rule 81(4), the Prosecution requests redactions to the names of family members of the witness as well as information that could lead to their identification. This category of redaction has already been authorized by the Court in previous decisions.¹⁶ It is justified by security concerns not only for family members, but for the witnesses as well, especially when the former still find themselves in Ituri.¹⁷

27. **Rule 81(2): Identification of an** [REDACTED]. On the basis of Rule 81(2) the Prosecution requests a redaction to the name of an [REDACTED] mentioned by the witness, along with any other information that may lead to this person's identification. This category of redaction has already been authorized by the Chamber in prior decisions.¹⁸ It is justified not only by the need to protect ongoing or future investigations but also to protect the safety of the [REDACTED].

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ [REDACTED].

¹⁶ ICC-01/04-01/07-859; ICC-01/04-01/07-860, ICC-01/01-01/07-862 and ICC-01/04-01/07-1036-Conf-Exp, p. 16.

¹⁷ It is important to note that the Prosecution made similar arguments in its applications regarding P-132: See ICC-01/04-01/07-859-Conf-Exp-AnxA-1 and ICC- 01/04-01/07-862-Conf-Exp-AnxC.

¹⁸ [REDACTED].

Conclusion

28. The Prosecution respectfully requests the Chamber's authorization for the disclosure to the Defence of the aforementioned incriminating evidence and Rule 77 material, along with the proposed redactions for the duration of the proceedings. The Prosecution also seeks the authorization of the Chamber to add the former to the list of incriminating evidence.



Luis Moreno-Ocampo, Prosecutor

Dated this 7 August 2009

At The Hague, The Netherlands