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Date: 18 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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

Defence Observations on the Prosecution's Applications relative to Witness 267

Source: Defence for Mr Germain Katanga

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

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**Unrepresented Applicants for
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Procedural Background

1. By its '*Décision relative à la protection des témoins à charge 267 et 353*' of 20 May 2009 ("Order of 20 May 2009"),¹ notified to the Defence on 29 May 2009,² the Trial Chamber ordered the Prosecution to disclose to the Defence, 45 days before the start of the trial, which is the 10th of August 2009, the identity and the unredacted statement of witness P-267.
2. A public redacted version of the Prosecution's 'Application for Authorization to Disclose Redacted Incriminating Evidence and Rule 77 Material to the Defence (Witness 267)' was notified to the Defence on 10 August 2009 ("First Application")³. By this application, the Prosecution requested leave to disclose as incriminating evidence, with narrow redactions to protect the identities of other persons, and to add to the list of incriminating evidence, the statement of witness P-267, three annexed to his statements, two investigator's notes, five documents provided by witness P-267; it also requested leave to disclose as Rule 77 material fourteen documents provided by witness P-267. The Application is so redacted that the Defence does not know neither the content of the documents given by witness P-267 nor the type of redactions requested.
3. On the same day, the Prosecution filed an 'Application for extension of time pursuant to Regulation 35 of the Court', by which it requested that TC grant, pursuant to Regulation 35, an extension of time to disclose witness P-267's statement and related material described in the First Application ("Second Application")⁴.
4. On 14 August 2009, the Defence for M. Ngudjolo filed its '*Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux requêtes du Procureur référencées sous les numéros ICC-01/04-01/07-1356 et ICC-01/04-01/07-1358*', by which it requested the Chamber to deny the Prosecution's Applications.⁵

Defence Submissions

5. The Defence submits that the Prosecution's Application is too late, because it does not allow the Chamber to authorize the disclosure of the material relative to witness P-267

¹ ICC-01/04-01/07- 1156-Conf-Exp.

² ICC-01/04-01/07- 1178-Conf-Exp. See also the public redacted version ICC-01/04-01/07-1179, 29 May 2009.

³ ICC-01/04-01/07-1356, public redacted version of the filing [ICC-01/04-01/07-1351-Conf-Exp.](#)

⁴ ICC-01/04-01/07-1358.

⁵ ICC-01/04-01/07-1376.

on the 10 August 2009, deadline at which the Defence should have obtained the disclosure of the identity and the material relative to witness P-267.

6. The Prosecution does not provide any explanation to the Court for its failure to comply with the Court Order of 20 May 2009. It is therefore submitted that the requirements of Regulation 35(2) cannot be fulfilled.
7. Accordingly, the Defence objects to the addition of this material to the list of incriminating evidence. The Defence does not oppose the disclosure of exculpatory material pursuant to Article 67(2) and Rule 77.
8. Regulation 35 (2) of the Regulations of the Courts states that “[t]he Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”
9. The Trial Chamber recognised that it has a duty to ensure that the Defence has sufficient time to prepare itself for the trial and that when it considers a request of disclosure based upon Regulation 35 of the Regulations of the Court, it should assess the volume of the material whose disclosure is requested:

“La Chambre, comme le prévoit l'article 64-3-c du Statut, a l'obligation d'assurer la divulgation des documents ou des renseignements suffisamment tôt avant l'ouverture du procès pour permettre une préparation suffisante de celui-ci. L'article 67-1-b, en ce qui le concerne, consacre le droit de l'accusé à disposer du temps nécessaire à la préparation de sa défense, droit dont la Chambre assure le respect en vertu de l'article 64-2 du Statut. Il lui appartient donc de veiller à ce que la Défense ne subisse en l'espèce aucun préjudice, ce qui la conduit à examiner le volume de l'élément de preuve en cause et à apprécier s'il soulève une question nouvelle et si la Défense dispose du temps suffisant pour l'exploiter et se préparer au procès ».⁶

10. The Defence submits that the late disclosure of the material relative to witness P-267 would be prejudicial to the Defence.

⁶ ICC-01/04601/07-1280-Conf-Exp, Version confidentielle expurgée de la « Décision relative à la requête du Procureur aux fins de mesures de protection et d'expurgation d'informations dans des éléments de preuve relevant de la règle 77 (témoins 132, 249 et 287) (ICC-01/04-01/07-1194) " du 2 juillet 2009 (ICC-01/04-01/07-1265-Conf-Exp), 8 July 2009; a public redacted version was filed the same day, ICC-01/04-01/07-1281.

11. The summaries of the statement of witness P-267 disclosed to the Defence on 21 April 2008 and 26 May 2009⁷ are general and do not give any identifying information on the witness, therefore preventing the Defence from inquiring into the credibility of the witness, a task that the Defence will still have to undertake once his identity is disclosed, now less than 45 days before the start of the trial.
12. Moreover, the Prosecution requests leave to disclose to the Defence not only the statement of W-267 but also material referred to in this statement, investigators' notes and other documents given by the witness. The Order of 20 May 2009 authorized the late disclosure only of the statement of witness W-267, and not of any other related material. There is no reason to believe that the Prosecution was not able to disclose earlier at least some of the documents given by the witness (5 qualified by the Prosecution as incriminating, 14 as Rule 77 material) – unless they all contained the identity of the witness.
13. Given that the summary of the statement of witness P-267⁸ is already included in the Table of incriminating evidence, the Defence requests that his identity be disclosed immediately in accordance with the Order of 20 May 2009.
14. Nevertheless, the Defence submits that the Chamber should deny the Prosecution First and Second Applications and refuse the inclusion in the list of incriminating evidence of any other material relative to witness P-267, given the late character of the Prosecution's applications.
15. In the alternative, if the Chamber were to grant the Prosecution's applications, the Defence respectfully prays the Chamber to order the immediate disclosure of un-redacted statement of witness P-267 and relative material. The Prosecution's request for permanent redactions of the material relative to witness P-267, contained in the First Application,⁹ is so redacted that the Defence cannot formulate any precise observations and the Defence therefore relies on the Chamber to protect the rights of the Accused. The Defence nonetheless wishes to underline that the Prosecution does not appear to justify the permanent character of the redactions; such redactions should remain highly exceptional.

⁷ DRC-OTP-1016-0106, disclosed as incriminating evidence on 21 April 2008 (package 8) and DRC-OTP-1041-0365, disclosed as incriminating evidence on 26 May 2009 (package 36).

⁸ DRC-OTP-1041-0365.

⁹ First Application, paras 23-27

Respectfully submitted,



David HOOPER

Dated this 18 August 2009

At The Hague