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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***

Public Document

Reply Pursuant to Order ICC-01/04-01/07-1424

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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

Background

1. On 20 May 2009, Trial Chamber II (“the Chamber”) 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.¹
2. On 4 August 2009, the Prosecution filed a confidential *ex parte* application regarding the disclosure of redacted incriminating evidence, Rule 77 material as well as the addition of the former to the list of incriminating evidence (“Application for redactions”).² A public redacted version of this Application was notified to the Defence on 10 August 2009.³
3. On 10 August the Prosecution filed an application requesting an extension of time, by virtue of Regulation 35 of the Regulations of the Court, for the disclosure of P-267’s statement and its related documents (“Application for an extension of time”).⁴
4. The Defence for Mathieu Ngudjolo filed a response to these Applications on 14 August 2009,⁵ while the Defence for Germain Katanga filed its response on 19 August 2009.⁶
5. On 25 August 2009, the Chamber directed the Prosecution to file a reply to these responses by 28 August 2009.⁷

¹ ICC-01/04-01/07-1156-Conf.

² ICC-01/04-01/07-1352-Conf-Exp.

³ ICC-01/04-01/07-1356.

⁴ ICC-01/04-01/07-1358.

⁵ ICC-01/04-01/07-1376.

⁶ ICC-01/04-01/07-1402.

⁷ ICC-01/04-01/07-1424.

Submissions

Redactions: P-267's statement and related material

6. The Prosecution acknowledges having filed the Application for redactions only six days before the deadline set by the Court for the disclosure of the statement of P-267. However, this was not done with the intention of circumventing the Chamber's order on the matter. In effect, the Prosecution submits that because of an internal oversight, it was only during the week of 20 July 2009 that it realized that some narrow redactions were required in order to safely disclose P-267's statement and related documents without causing prejudice to family members, innocent third parties and Prosecution intermediaries.
7. Before 20 July 2009, the Prosecution had concentrated its efforts solely on issues regarding the protection of the witness's identity. However, conscious of its obligation pursuant to Article 68 of the Statute, the Prosecution reviewed P-267's statement and its related documents and this led to the conclusion that some narrow redactions were necessary.⁸
8. The Prosecution thereafter submitted its Application for redactions to protect family members, innocent third parties and Prosecution intermediaries. This task was performed during the judicial recess and the Prosecution needed more time than expected. In light of the impending deadline for disclosure, the Prosecution filed its Application on an urgent basis.

⁸ Pursuant to Rule 81(2) and 81(4) of the Rules of Procedure and Evidence.

Regulation 35 (2): Variation of time limit

9. On the 10 August 2009, having not yet received a decision from the Chamber, and conscious of the short period of time between the date of filing the Application for redactions and the deadline for the disclosure of the Statement of Witness 267, the Prosecution filed its Application for an extension of time. This was necessary since the Prosecution's Application was still pending before the Chamber; it could not, without putting at risk the individuals for whom redactions were sought, disclose an un-redacted version of the said material to the Defence. The Prosecution still maintains that this was a "good cause" pursuant to Regulation 35 of the Court.
10. The Prosecution recognises that it should have filed the Application for an extension of time with its Application for redactions or immediately thereafter.

Prejudice to the Defence

11. With regards to the prejudice alleged by the Defence because of the late disclosure of P-267's statement and related documents, the Prosecution finds it important to make the following submissions:

- 1) The relevant information of P-267's statement has already been disclosed to the Defence in the form of a summary, on 18 April 2008.⁹ An amended summary was recently provided to the Defence on 26 May 2009.¹⁰ These 2 summaries will facilitate the review of P-267's statement and its related documents and minimise any prejudice that might be caused by a late disclosure.

⁹ DRC-OTP-1016-0106.

¹⁰ In compliance with the order set out in ICC-01/04-01/07-1156-Conf-Exp.

2) P-267 is currently scheduled to testify as the 23rd witness of the Prosecution. Consequently the Defence will have ample time to review the evidence related to P-267 before the scheduled testimony.

12. The Prosecution acknowledges that the late submission of its Application for redactions has delayed the disclosure of P-267's statement and related documents. However, the only goal was to respect, pursuant to Article 68 of the Rome Statute, the obligation to ensure the safety of witnesses, victims, members of their families and persons who are at risk on account of the activities of the Court.¹¹ It is with this principle in mind that the Prosecution sought the redactions regarding P-267's statement and its related documents.

Conclusion

13. In light of the foregoing the Prosecution respectfully requests that the Application for redactions be considered by the Court notwithstanding the fact that it was filed late.



Luis Moreno-Ocampo, Prosecutor

At The Hague, The Netherlands

Dated this 28th day of August 2009

¹¹ ICC-01/04-01/06-1814-Conf.