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No.: ICC-01/04-01/07
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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

**Public Document
with Annex A - Confidential, *ex parte*, only available to the Office of the
Prosecutor**

**Prosecution's amended application seeking redactions to the statement of Witness
317 pursuant to Rule 81(4) and Article 54(3)(e)**

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 the Victims

Mr Jean-Louis Gilissen

Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

In an *ex parte* closed session hearing on 17 November 2009¹, Trial Chamber II (“Chamber”) requested the Prosecution to file an amended application, based on a revised legal foundation, justifying the redactions applied to the statement of Witness 317.²

Confidentiality

1. The Prosecution requests that Annex A to this filing be received by the Chamber as confidential, *ex parte*, only available to the Office of the Prosecutor as it contains the reasons for the redactions to the statement of Witness 317.

Background

2. On 2 June 2009, the Prosecution obtained the consent of the United Nations (“UN”) to interview Witness 317, a UN employee. The UN conditioned its agreement to the interview of Witness 317 on the application of Article 18(3) of the Relationship Agreement between the United Nations and the International Criminal Court (“Relationship Agreement”).³ Article 18(3) states: “The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations”. Article 18(3) of the Relationship Agreement mirrors Article 54(3)(e) of the Rome Statute (“Statute”), and the legal basis under the Statute for the Prosecutor to agree to the application of Article 18(3) of the Relationship Agreement is Article 54(3)(e).

¹ ICC-01/04-01/07-T-77-CONF-EXP. A redacted version of this transcript will be available to the Defence.

² ICC-01/04-01/07-T-74-CONF-ENG ET, p. 4, lines 19-21. The written reasons were filed by the Chamber on 3 November, see ICC-01/04-01/07-1590, para. 28.

³ <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Negotiated+Relationship+Agreement+between+the+International+Criminal+Court+and+the+United+Nations.htm>.

3. The statement taken during that interview remained at all times subject to the conditions of confidentiality as set out in Article 54(3)(e). Following the request of the Prosecution to the UN for the lifting of Article 54(3)(e) restrictions on the statement of Witness 317, the Prosecution received on 5 October 2009 confirmation in writing that the UN agreed to the lifting of the applicable confidentiality restrictions, subject to the retention of certain redactions to the statement.
4. On 7 October 2009, the Prosecution received a copy of the statement of Witness 317 with the redactions retained by the UN.
5. On 16 October 2009, the Prosecution filed the List of Redactions ("List") as received by the UN. The last column of the List describes the reasons of the UN for maintaining a limited number of restrictions (redactions) pursuant to Article 54(3)(e).⁴
6. Pursuant to the Chamber's instruction on 23 October 2009, the redacted statement of P-317⁵ was reclassified as Confidential, *ex parte*, OTP and Defence Teams only.
7. On 2 November 2009, the Chamber authorised the Prosecution to add Witness 317 to its List of Witnesses and requested the Prosecution to renew its application for redactions describing the precise legal foundation as well as the reasons justifying the requested redactions to the statement of Witness 317.⁶
8. On 4 November 2009, the Prosecution filed its "provision of information in relation to the redactions applied to the statement of Witness 317".⁷
9. On 5 and 9 November 2009, the statement of P-317 was disclosed to the Defence teams of Germain Katanga and Mathieu Ngudjolo Chui respectively, with the redactions authorised until further review of the Chamber.⁸

⁴ ICC-01/04-01/07-1537-Conf-Exp-AnxD.

⁵ ICC-01/04-01/07-1537-Conf-Exp-AnxC (DRC-OTP-1050-0037).

⁶ ICC-01/04-01/07-T-74-CONF-ENG ET, p. 4, line 10 and following.

⁷ ICC-01/04-01/07-1597.

⁸ See ICC-01/04-01/07-1621.

Request for redactions pursuant to Rule 81(4) and Article 54(3)(e)

10. During the closed session hearing, the Chamber suggested that Article 54(3)(e) might not be the proper legal basis to justify the redactions as applied in the light of the fact that the Prosecution was aware that the statement would serve as a means toward obtaining the testimony of the witness in court, and was not obtained for lead purposes only.

11. The Prosecution recalls its position that Article 54(3)(e) does not regulate the nature or evidentiary value of the information obtained pursuant to that provision, but only the use to which it may be put. The Appeals Chamber accepts that the Prosecutor, when receiving material on the condition of confidentiality, may not be able to predict with certainty how this material can be used."⁹ Contrary to the suggestion from the Trial Chamber, in the case of the interview of Witness 317, the Prosecution did not have certainty before the interview that it would call the individual to testify at trial, as that assessment must be made on the basis of relevance. Nor did the Prosecution have any certainty that Witness 317 and the United Nations would consent to the witness's testimony. Accordingly, if relevance and consent were not obtained, the process would not have inexorably led to testimony.

12. Notably, at any stage in this process, and as foreseen in Article 54(3)(e), the possibility remained that the United Nations would reserve its right pursuant to that provision to limit the Prosecution's use of the information obtained during the interview to generating new evidence (i.e. lead material). It was only with the consent of the information provider to lift applicable restrictions that the Prosecution was able to disclose the statement. Thus, the situation in fact falls within the process of Article 54(3)(e): the Prosecution "[a]gree[d] not to disclose [...] unless the information provider consents".

⁹ "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/07-1486 OA13, p. 17, para. 42.

13. As such, it remains the Prosecution's position, and that of the UN, that any redactions applied by the UN on this statement remain in place pursuant to Article 54(3)(e).
14. The authority under which the information provider retained redaction to the statement can be distinguished from the separate question of the legal basis for the Chamber to allow disclosure by the parties of redacted documents. In this instance, the Prosecution concurs with the Chamber's view that the authority under which the Chamber may grant the Prosecution permission to disclose the statement in a redacted form may rest under the applicable Rules governing restrictions on disclosure (Rule 81 of the Rules of Procedure and Evidence).
15. Accordingly, in light of the Chamber's comments, the Prosecution alternatively requests the disclosure of a redacted version of the statement of Witness 317 pursuant to Rule 81(4), which refers specifically to Article 54 of the Statute, including its paragraph 3(e). At the same time, the Prosecution requests the Chamber to take the necessary steps to ensure the confidentiality of information requested by the United Nations, in accordance with Article 54, and to protect the safety of witnesses and victims and members of their families in accordance with Article 68, as well as in the light of its authority under Article 64(6)(c) and Rule 81(3).
16. The Prosecution files, in Annex A, a chart that follows the model adopted by the Chamber in its "*Décision relative à la procédure d'expurgation*" of 12 January 2009.¹⁰

¹⁰ ICC-01/04-01/07-819. The Prosecution is only in a position to populate Annex A with the information as received by the UN and as previously submitted in ICC-01/04-01/07-1537-Conf-Exp-AnxD.

Categories of information for which the redactions are sought

17. The Prosecution is seeking redactions to:

- the name of an NGO¹¹;
- the name of an international organisation;
- the profession of individuals;
- the identity of two individuals.

18. The Prosecution respectfully submits that these redactions are limited, that they do not affect the substance of the information, and that the statement of Witness 317 remains fully and completely understandable. The redactions sought therefore do not prejudice the rights of the Defence.



Luis Moreno-Ocampo, Prosecutor

Dated this 19th day of November 2009

At The Hague, The Netherlands

¹¹ The Chamber has previously granted redactions to the name of this NGO, see ICC-01/04-01/07-1551, para. 46.