

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 16 December 2009

TRIAL CHAMBER II

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

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

Confidential *ex parte* Prosecution and Defence only

Decision on the redactions contained in the statement of P-317

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

The Office of the Prosecutor

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Mr David Hooper

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Mr Jean-Pierre Kilenda Kakengi Basila

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to articles 54(3)(e), 64(3)(c) and 68(1) of the Rome Statute of the International Criminal Court ("Statute"), and rules 76 and 81 of the Rules of Procedure and Evidence ("Rules"), issues the following decision:

I. BACKGROUND

1. On 3 November 2009, the Chamber authorised the Office of the Prosecutor ("Prosecution") to add witness P-317 to the Prosecution Witness List.¹ However, given that the Prosecution had not specified the legal basis for applying a limited number of redactions to the statement of P-317, the Chamber ordered the Prosecution to specify the legal basis as well as the reasons justifying the requested redactions.²

2. On 4 November 2009, the Prosecution filed a response³ in which it submitted the following:

2. The United Nations ("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"). [...] 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).

3. The content of the 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

¹ "Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537)", 3 November 2009, ICC-01/04-01/07-1590

² *Idem*.

³ "Prosecution's provision of information in relation to the redactions applied in the statement of Witness 317", 4 November 2009

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, which remained subject to Article 18(3) of the Relationship Agreement and Article 54(3)(e). Thus, while the UN agreed to lift Article 54(3)(e) restrictions on part of the document, namely the majority thereof, it retained Article 54(3)(e) restrictions with respect to other portions of the document, namely those set out in the redactions.⁴

3. The Prosecution further specifies that the redacted version of P-317's statement was prepared by the UN and that an explanatory table was provided which sets out the UN's reasons for maintaining the said redactions.⁵ An additional table containing the same information as that contained in the UN's explanatory table is attached to the Response. This latter table is filed in the format laid down by the Chamber in its decision of 12 January 2009.⁶

4. P-317's statements were disclosed to the Defence on 5 and 9 November 2009 respectively.⁷ The Chamber authorised the Prosecution to provisionally apply the requested redactions until it ruled on the matter.

5. In an *ex parte* hearing held with the Prosecution on 17 November 2009,⁸ the Chamber addressed the issue of the legal basis relied on by the Prosecution in respect of the aforementioned redactions. The Chamber raised the question as to whether article 54(3)(e) of the Statute was indeed the appropriate legal basis, given that P-317 was not merely a source for generating new evidence.

⁴ ICC-01/04-01/07-1597, par. 2

⁵ Ibid., par. 4

⁶ "Décision relative à la procédure d'expurgation", 12 January 2009, ICC-01/04-01/07-819

⁷ "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 5 and 9 November 2009", 10 November 2009, ICC-01/04-01/07-1621

⁸ ICC-01/04-01/07-T-77-CONF-EXP-ENG ET, 17 November 2009

It hence invited the Prosecution to reconsider filing its application for redactions under rule 81(4) of the Rules.⁹

6. On 30 November 2009, the Prosecution filed an amended application ("Amended Application") seeking redactions to the statements of P-317.¹⁰ The Prosecution submits that it remains the Prosecution's position that the issue falls within the ambit of article 54(3)(e).¹¹ It argues that the "authority under which the information provider retained redactions 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."¹² However, and in the light of the Chamber's comments regarding the issue, the Prosecution "alternatively requests the disclosure of a redacted version of the statement of witness P-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".¹³ It further submits that the redactions are limited and do not affect the substance of the information, leaving the statement of P-317 completely understandable.¹⁴

7. On 30 November 2009, the Defence for Germain Katanga filed its observations on the Amended Application.¹⁵ The Defence submits that "the Prosecution's proposed reliance on article 54(3)(e) is wholly inappropriate in the present circumstances where witness 317 was being interviewed with a

⁹ ICC-01/04-01/07-T-77-CONF-EXP-ENG ET, 17 November 2009, p. 4, lines 22 and 23

¹⁰ "Prosecution's amended application seeking redactions to the statement of Witness 317 pursuant to Rule 81(4) and Article 54(3)(e), 19 November 2009, ICC-01/04-01/07-1654

¹¹ *Ibid.*, par. 13

¹² *Ibid.*, par. 14

¹³ *Ibid.*, par. 15

¹⁴ *Ibid.*, par. 18

¹⁵ "Defence Response to the Prosecution's amended Application seeking Redactions to the Statement of Witness 317 pursuant to Rule 81(4) and Article 54(3)(e), 30 November 2009, ICC-01/04-01/07-1689

view to use this interview as evidence in the proceedings".¹⁶ According to the Defence, information obtained from a potential witness who was interviewed on matters directly relevant to the case, cannot be said to have been obtained solely for the purpose of generating new evidence. In its submissions, the key word contained within article 54(3)(e) is the word *solely*. Thus, it submits, if information to potentially incriminate or exonerate an accused is obtained, such information may not be withheld from the Defence on the basis of article 54(3)(e) of the Statute.¹⁷

8. The Defence further contends that the legal basis chosen in support of a request for redactions has direct implications on the rights of the Defence. It avers that in case redactions are being sought on the basis of rule 81(4) of the Rules, the Defence has the right to ask for the disclosure of the information in relation to which redactions are being sought. If, on the contrary, redactions are being sought under article 54(3)(e) of the Statute, the Chamber cannot order redactions without the consent of the information provider.¹⁸

9. The Defence further concurs with the view previously expressed by the Chamber¹⁹ that article 54(3)(e) should not be given an interpretation which could be used as a reference in an inadequate or even irregular manner.²⁰

10. If the Chamber were to accept the Prosecution's request for redactions on the alternative legal basis of rule 81(4) of the Rules, the Defence objects to any permanent redactions.²¹ It argues that it is crucial for the Defence to be given all information by Prosecution witnesses in order to be able to prepare

¹⁶ ICC-01/04-01/07-1689, par. 5

¹⁷ *Ibid.*, par. 9

¹⁸ *Ibid.*, par. 14

¹⁹ ICC-01/04-01/07-T-77-CONF-EXP-ENG ET, 17 November 2009, p. 6, lines 21 to 23; a redacted version of the transcript of this *ex parte* hearing was disclosed to the Defence pursuant to an oral ruling made during the said hearing.

²⁰ ICC-01/04-01/07-1689, par. 15,

²¹ *Ibid.*, par. 17

properly.²² In the Defence's submissions the redaction of the name of a Non Governmental Organisation (NGO) and an international organisation seem unnecessary and excessive in the absence of any evidence of a threat, interference or intimidation directed against their staff.²³

II. ANALYSIS AND CONCLUSION

A. Legal Basis for the Requested Redactions

11. The Chamber expresses its concern about the Prosecution's reliance on article 54(3)(e) in order to justify the requested redactions. As the Appeals Chamber held in its decision of 21 October 2008, article 54(3)(e) is a provision that may be relied on for one specific purpose only, namely to generate new evidence.²⁴

12. According to the Chamber, the interviewing of a witness for the specific purpose of obtaining her statement, and possibly calling her as a witness at trial, does not fall into this category. The Chamber is of the view that the sole fact that the Prosecution was not completely certain as to whether it would indeed wish to call P-317 to testify at trial when it obtained her statement does not justify the reliance on article 54(3)(e) of the Statute. The Prosecution's argument that it was unable to predict with certainty how it would use the statement taken from P-317,²⁵ therefore fails to persuade the Chamber. The Chamber is, in this respect, inclined to agree with the Defence for Germain Katanga, when it states that a party can never be sure whether it will call a

²² Ibid., par. 18

²³ Ibid., par. 22

²⁴ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "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'", 21 October 2008, ICC-01/04-01/06-1486, par. 41

²⁵ ICC-01/04-01/07-1654, par. 11

witness, until it has had an opportunity to interview that potential witness and has obtained his or her consent to testify.

13. Accordingly, the Chamber finds that the fact that the Prosecution was not able to know with certainty that it would call P-317 at the time when it took her statement cannot be a ground for arguing that the purpose of taking the statement was *solely* that of generating new evidence. This conclusion is reinforced by the fact that the interview was conducted in August 2009, more than six months after the time limit for disclosing incriminating evidence had expired, and less than two months away from the start date of the hearings on the merits, as it was then scheduled.

14. The Chamber stresses in this regard, that the Prosecution's argument, that the UN preconditioned its agreement to interview P-317 on the confidentiality of her statement under article 18(3) of the Relationship Agreement, is beside the point. The issue is not whether the UN was entitled to make the interview of P-317 conditional upon confidentiality, but whether the Prosecution was allowed to agree to these conditions on the basis of article 54(3)(e) when it knew that there was a high probability that it was going to call P-317 to testify. According to the Chamber, the Prosecution has gone beyond what is permitted by article 54(3)(e) in agreeing to take P-317's statement on the condition of confidentiality, even though it knew that there was a real possibility that it would wish to call her as a witness.

15. Consequently, the Chamber cannot accept article 54(3)(e) of the Statute as the legal basis for the proposed redactions to P-317's statement. Therefore, the Chamber must analyse the proposed redactions as if they were ordinary

requests under rule 81(4) of the Rules, and ascertain whether they are justified on the basis of the criteria as laid down by the Appeals Chamber.²⁶

B. Requested Redactions

16. The Chamber recalls the requirements for the authorisation of redactions laid down by the Appeals Chamber²⁷, namely,

- 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;²⁸
- 2) the existence of a link between the source of the risk and the accused persons;²⁹
- 3) the infeasibility or insufficiency of less restrictive protective measures;³⁰
- 4) an assessment of whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;³¹ and
- 5) the obligation periodically to review the decision authorizing the redactions should circumstances change.³²

17. As the Chamber has stressed on several previous occasions,³³ any application for redactions is subject to strict judicial supervision carried out

²⁶ "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475, par. 71 and 97

²⁷ *Idem.*

²⁸ *Idem.*

²⁹ *Ibid.*, par. 71

³⁰ "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, par. 37; "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773, par. 33

³¹ ICC-01/04-01/06-773, par. 34

³² ICC-01/04-01/07-475, par. 73

on a case-by-case basis. The redaction of certain information must be fully and sufficiently justified, adhering to the requirements set out in rule 81 of the Rules. The Chamber has reviewed each request for redactions in light of the criteria set forth in the previous paragraph.

18. A number of the redactions presently requested pertain to information which the Chamber has already deemed necessary to protect on the basis of rule 81(4) of the Rules in the context of other documents.³⁴ In particular, both this Chamber, as well as Trial Chamber I have previously approved the redaction of the name of the NGO, [REDACTED],³⁵ the redaction of which the Prosecution is currently requesting. The Chamber reiterates the position it adopted in its recent "*Décision relative à la levée, au maintien et au prononcé des mesures d'expurgation*",³⁶ in which it held that it would not revisit the decisions taken by Trial Chamber I in this regard.

19. The second redaction requested by the Prosecution concerns the name of an international organisation. The Chamber provisionally grants the sought redaction, but requests that the Prosecution provide it with additional and more specific information as to why the redaction of the name of this organisation is necessary. [REDACTED]

20. In relation to the requested redactions of the names of individuals, the Chamber considers that there exists an objectively justifiable risk to their

³³ ICC-01/04-01/07-888-Conf-Exp-tENG; ICC-01/04-01/07-889-Conf-tENG, par. 3; ICC-01/04-01/07-987-Conf-Exp, par. 5.

³⁴ "*Décision relative à la levée, au maintien et au prononcé des mesures d'expurgation*", 22 October 2009, ICC-01/04-01/07-1551-Red2

³⁵ "*Décision concernant trois requêtes du Procureur aux fins de maintien des suppressions ou de rétablissement de passages supprimés* (ICC-01/04-01/07-859, ICC-01/04-01/07-860 et ICC-01/04-01/07-862), ICC-01/04-01/07-987-Conf-Exp, the public redacted version of which is ICC-01/04-01/07-1034; See also the oral decisions of Trial Chamber I, dated 13 December 2007, ICC-01/04-01/06-T-66-CONF-EXP ENG ET, p. 1, lines 15-24 and p. 5 lines 16 to 24; and 18 January 2008, ICC-01/04-01/06-T-72-CONF-EXP ENG ET, p. 4 to 5; ICC-01/04-01/07-1551-Red2, par. 46

³⁶ ICC-01/04-01/07-1551-Red2

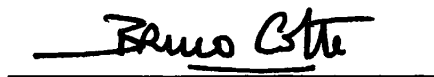
safety. It is further persuaded of the infeasibility or insufficiency of less restrictive protective measures. In its assessment, the application of the said redactions does not unduly prejudice the Defence. The redactions applied are minimal and leave the document perfectly legible. The Chamber, therefore grants the redactions requested in relation to the names of individuals mentioned within the statement of P-317.

FOR THESE REASONS,

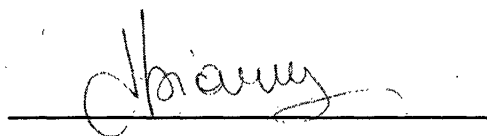
THE CHAMBER,

AUTHORISES the proposed redactions to P-317's statement pursuant to rule 81(4) of the Rules, and **ORDERS** the Prosecution to submit additional information in relation to the name of an international organisation, in accordance with paragraph 18 of this decision.

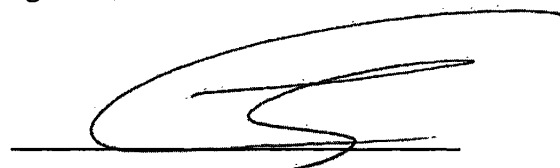
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 16 December 2009
At The Hague, the Netherlands