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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
Judge Christine Van den Wyngaert, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

PUBLIC REDACTED VERSION

**Prosecution's request for authorisation to disclose in alternative form information
contained in document DRC-OTP-0020-0003**

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

The Office of the Prosecutor (“Prosecution”) requests authorisation to disclose a summary, and to rely on alternative evidence previously disclosed, in lieu of disclosure of document DRC-OTP-0020-0003, pursuant to Articles 54(3)(e), 54(3)(f), 64(2), and 64(6)(e) of the Rome Statute (“Statute”) and Rule 77 and 81(4) of the Rules of Procedure and Evidence (“Rules”) and Regulation 35 of the Regulations of the Court.

Request for receipt of filing as Confidential *Ex Parte*

The Prosecution requests that this filing and Annexes A, B, C and D be received as “Confidential, *ex parte*, only available to the Office of the Prosecutor”, as they relate to material that is currently treated as confidential. The Prosecution has no objection to the reclassification of Annexes C and D as ‘Confidential, *ex parte*, only available to the Prosecution and the Defence’ to permit the Defence to immediately have access to the summary and references to the alternative evidence, if Trial Chamber II (“Chamber”) so approves.

Introduction

1. On 16 September 2004, the Prosecution received document DRC-OTP-0020-0003 (“Document”) from [REDACTED] (“the Provider”), on condition of confidentiality, pursuant to Article 54(3)(e) of the Statute.¹
2. The Provider explained that the reason for providing this Document pursuant to Article 54(3)(e) was due to their concerns for: a. the security of the individuals who wrote or compiled the report [REDACTED] sources [REDACTED].
3. [REDACTED].²

¹ The Prosecution also provides for the benefit of the Chamber the French version. See DRC-OTP-0020-0049.

² DRC-OTP-0020-0003 at 0003; DRC-OTP-0020-0049 at 0049.

4. On 3 November 2006, the Prosecution requested the Provider to lift the confidentiality restrictions pursuant to Article 54(3)(e). This request was repeated on a number of occasions throughout 2006 and 2007.
5. On 11 December 2007, the Provider confirmed that for the time being it was unable to lift the confidentiality restrictions on the Documents pursuant to Article 54(3)(e).
6. On 22 May 2008, a request was made to disclose the Document to the Judges, which was agreed to by the Provider on 2 and 24 June 2008, subject to the following conditions: that a. there would be no disclosure of any names of individuals involved in the drafting of the report and a guarantee that the ICC would not call them before it in any case³; and b. that there would be no authorisation to disclose names [REDACTED] to the Judges, only the identity of the Provider and its representative.
7. The Provider initially agreed to disclosure to the Defence by way of a summary on 31 October 2008.
8. On 5 January 2009, the Prosecution submitted its « Rapport de l'Accusation sur les documents ou renseignements obtenus en vertu d'accords de confidentialité conclus sur la base de l'article 54(3)(e) suite à « l'Ordonnance enjoignant au participants et au Greffe de déposer des documents complémentaires » » ("Report").⁴

³ [REDACTED].

⁴ ICC-01/04-01/07-811. See Confidential, *ex parte* Annex 1A, line 67, for the reference to document DRC-OTP-0085-0003.

9. In this Report, the Prosecution informed the Chamber that the provider of document DRC-OTP-0020-0003 had agreed to the lifting of the confidentiality restrictions by way of the disclosure of a summary ("first summary").⁵ In compliance with the Chamber's order⁶, the Prosecution has been waiting for the Chamber's authorisation before proceeding to the disclosure of this first summary.⁷ Document DRC-OTP-0020-0003 is provided in Annex A and the first summary in Annex B.
10. Since the submission of its Report, the Prosecution has been seeking a more comprehensive summary ("New summary") of document DRC-OTP-0020-0003 from the provider.
11. On 1 December 2009, the Prosecution received from the provider this New summary, which is being submitted as Annex C. The Prosecution has no objection to the immediate reclassification of Annex C as confidential, *ex parte*, only available to the Office of the Prosecutor and the Defence, if the Chamber so approves.
12. On 23 January 2009, the Prosecution was ordered to disclose all of the relevant material in its possession pursuant to Rule 77 of the Rules or Article 67(2) of the Statute to the Defence by 27 February 2009 ("Order").⁸

⁵ *Ibid.*

⁶ See ICC-01/04-01/07-819, para. 7, « À cet égard, la Chambre lui demande instamment de mettre fin à la pratique d'expurgations faites *proprio motu*, telle qu'elle a pu encore le constater dans de récentes communications » and the Chamber specifically referred in footnote 17 to the Report of the Prosecution (ICC-01/04-01/07-811).

⁷ DRC-OTP-0204-0391.

⁸ "Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès", ICC-01/04-01/07-846.

Request to disclose in alternative form the information in the Documents

13. The Prosecution seeks to disclose the New summary, and rely on alternative information, in lieu of the Document, which contain information relevant pursuant to Rule 77, in particular in relation to: the role of Uganda, Rwanda and the Kinshasa government in the conflict in Ituri and support to the various armed groups; the FNI-FRPI structure; and regarding the respective roles of the accused, including during attacks.

Obligations pursuant to Article 54(3)(e)

14. The Provider has not consented to lift the confidentiality restrictions to allow disclosure of the whole Document to the Defence, notwithstanding the Prosecution's requests to do so as described at paragraphs 4 to 7. In those circumstances, as confirmed by the Appeals Chamber:⁹ *"where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under Article 54 (3) (e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider [...]."*¹⁰

15. The Appeals Chamber has recognised that there may be circumstances in which a Trial Chamber is unable to order full disclosure even of potentially exculpatory materials, such as where an information provider refuses to grant its consent to disclosure of a document, and that the Chamber is then authorised to determine *"whether and, if so, which counter-balancing measures can be taken to ensure the rights of the accused are protected and that the trial is fair, in spite of non-disclosure of the information."*¹¹

⁹ ICC-01/04-01/06-1486, para. 48.

¹⁰ See ICC-01/04-01/07-1661-Conf-Exp, para. 11. The Chamber has adopted this approach.

¹¹ ICC-01/04-01/06-1486, para. 48.

16. The Prosecution submits that in this particular situation, all the relevant material was provided to the Defence. The underlying information contained in the Documents, including all relevant material, has been provided by way of the Summary. The remaining information in the Documents is not material to the Defence.

17. Trial Chamber I remarked: “[i]t is not realistically arguable that a piece of evidence, which includes exculpatory elements must be disclosed in its entirety, regardless of its content, in order to meet the requirements of a fair trial.”¹²

18. Additionally, the relevant material in the Documents is cumulative to a considerable volume of analogous alternative information already disclosed to the Defence, as detailed in confidential Annex D to this filing.¹³ The alternative sources include witnesses who will be testifying at trial and/or whose identities have been disclosed to the Defence. Certain key sections of the Documents are also very similar to parts of a report previously disclosed to the Defence pursuant to Rule 77 (“Rule 77 Report”).¹⁴ The Prosecution has no objection to the immediate reclassification of Annex D as confidential, *ex parte*, only available to the Office of the Prosecutor and the Defence, if the Chamber so approves.

Obligation to protect persons at risk due to activities of the Court

19. The Document does not name the [REDACTED], authors of the Documents or sources of information mentioned in the Document. However, the

¹² ICC-01/04-01/06-1557, para. 34.

¹³ See ICC-01/04-01/06-1557, para. 41. See also ICC-01/04-01/06-1644, paras 46-47. Trial Chamber I has determined that alternative evidence can be an appropriate counter-balancing measure as regards potentially exculpatory evidence.

¹⁴ See ICC-01/04-01/07-1716-Conf-Exp-AnxB. DRC-OTP-1010-0067. Disclosed on 21 May 2008 in Pre-confirmation Rule 77 Package 14.

Prosecution submits that providing a more detailed form of the Document could enable the accused to identify the individuals who wrote the Document or sources who provided information contained in the Document.

20. As explained at paragraphs 2 and 6, the Provider did not consent to provide this information citing security concerns.

21. The Prosecution submits that even if information concerning the identities of these individuals was available, this information should not be disclosed to the Defence, in accordance with the Court's obligations pursuant to Article 64(2), 64(6)(e) and 54(3)(f) and Rule 81(4). In particular, when deciding what is the most appropriate form of disclosure of material relevant to the Defence, the Chamber must be mindful of the Appeals Chamber's decision that disclosure should not endanger persons at risk due to the activities of the Court.¹⁵

22. There is a real risk to the sources who provided information for the Document, [REDACTED] and the authors.

a. The Provider's concerns with security of the sources, [REDACTED] and the authors are described at paragraphs 2 to 3 and 6. The Provider still maintains these concerns with full disclosure of the Document to the Defence because of risk to these individuals. [REDACTED].¹⁶

b. There is a risk of reprisals against these individuals as they may be considered to be 'traitors' within the accused's communities. The Document primarily contains information of an incriminatory nature

¹⁵ ICC-01/04-01/07-475, para. 54. The Appeals Chamber stated:
the specific provisions of the Statute and the Rules for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.

¹⁶ See ICC-01/04-01/07-1631-Conf-Exp-AnxA: [REDACTED]. See also ICC-01/04-01/07-1674-Conf-Exp.

against the accused regarding the alliance between the FNI-FRPI, the accused's positions of authority and control over their respective groups, allegations that the accused were amongst those who should be deemed criminally responsible for the events occurring in Bunia in March and May 2003; and the alleged responsibility of FNI-FRPI forces based in Zumbe and Bogoro for the attacks at Tchomia and Kasenyi. Information from Prosecution witnesses indicates that the accused and their supporters have sought to identify those cooperating with the Court.¹⁷ It is logical that individuals who provided primarily incriminatory information against the accused would be similarly at risk of reprisal.

c. [REDACTED]¹⁸, [REDACTED]¹⁹

23. The Chamber has recognised that there may be circumstances where it is appropriate to maintain non-disclosure of sources of information provided pursuant to Article 54(3)(e), where : *“la source exige la suppression de son nom ou de certaines de ses sources afin d’éviter des représailles, et ce, même lorsque ces personnes fournissent des informations qui seraient utiles et pertinentes pour la Défense, la communication d’autres sources d’information fournissant des éléments similaires à ceux contenus dans les documents en question peut constituer une mesure compensatoire suffisante et permettre de respecter les droits de la Défense.”* As described at paragraph 14, such alternative information has been made available to the Defence. Trial Chamber I has taken a similar approach.²⁰

¹⁷ See ICC-01/04-01/07-985-Conf-Exp-AnxB.

¹⁸ ICC-01/04-01/07-964-Conf-Exp, para. 8.

¹⁹ ICC-01/04-01/07-964-Conf-Exp, para. 9. See also ICC-01/04-01/07-84-Conf-Exp, paras 13-22. [REDACTED].

²⁰ See ICC-01/04-01/06-1644, paras 48-49. Similarly, as Trial Chamber I stated when assessing whether there should be disclosure of the identity of individuals who provide potentially exculpatory evidence: *“the Chamber must make detailed, fact-specific decisions on whether the identity of someone who has provided information to the court or who is referred to in that information, comes within the scope of Article 67(2) or Rule 77 material, and if it does, whether or not alternative measures can be found which will protect the accused and particularly by ensuring there is a fair hearing, where the individual will be at risk following disclosure of his or her identity.”*

Disclosure of summary

24. Summaries including of Article 54(3)(e) documents have already been allowed at trial stage by both the Chamber²¹ and Trial Chamber I.²²

25. [REDACTED].²³

26. The Prosecution submits that it has not been possible before now to seek disclosure of the underlying information contained in the Document because the New summary was only made available on 1 December 2009. Moreover, the Prosecution was still awaiting authorisation from the Chamber to disclose the first summary. The Prosecution submits that this constitutes good cause for a variation of the time limit for disclosure of this Rule 77 information, pursuant to Regulation 35.

²¹ See ICC-01/04-01/07-1661-Conf-Exp, paras 88-91.

²² See ICC-01/04-01/06-1803-Anx3, p. 39 (annex 39), pp. 43-44 (annex 40); p. 45-49 (annex 41); pp. 49-51 (annex 42); pp. 54-56 (annex 44); p. 65 (annex 48); p. 66 (annex 49); p. 67 (annex 51); p. 68 (annex 52); p. 70 (annex 54); pp. 71-72 (annex 55); pp. 72-73 (annex 56); pp. 73-74 (annex 57); pp. 74-75 (annex 58); p. 76 (annex 59); p. 79 (annex 63); pp. 81-82 (annex 67); p. 84 (annex 70); p. 85 (annex 71). *See also* ICC-01/04-01/06-1644, paras 40 to 49. Similarly, Trial Chamber I rejected a Defence argument in the case of the *Prosecutor v. Thomas Lubanga* that the protective measure of redactions to Article 54(3)(e) documents could only apply prior to trial. *See* ICC-01/04-01/06-1644, paras 36-46.

²³ [REDACTED].

Request for Relief

27. For the foregoing reasons, the Prosecution requests that the Chamber authorise the disclosure to the Defence of a summary, and reliance on analogous information previously disclosed, in lieu of disclosure of the Document DRC-OTP-0020-0003.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo, Prosecutor

Dated this 16th day of December 2009

At The Hague, The Netherlands