

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 CONGO

IN THE CASE OF

***THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO
CHUI***

Public

Decision on the communication of P-316's statement

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

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Unrepresented Victims

**Unrepresented Applicants for
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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 article 64(3)(c) of the Rome Statute of the International Criminal Court ("Statute"), rules 77, 81(2) and (4) of the Rules of Procedure and Evidence ("Rules") and regulations 23(1)(d) and 35(2) of the Regulations of the Court ("Regulations"), issues the following decision:

I. BACKGROUND

1. On 12 November 2009, the Chamber received the "Prosecution's Application to Redact and Disclose the Interview Transcripts of Witness 316 and one related document pursuant to Rules 77, 81(2), 81(4) and Regulation 35" ("Application").¹ The Application was initially filed confidential *ex parte*, Prosecution only, which did not allow the Defence to make observations. To remedy this, an "Addendum to Prosecution's Application to Redact and Disclose the Interview Transcripts of Witness 316 Pursuant to Rules 77, 81(2), 81(4), and Regulation 35 on 12 November 2009"² was filed on 25 November 2009. The relevant annexes of this filing were subsequently reclassified to make them available to the Defence. The addendum contains one additional request for redaction. The Chamber will deal with both the Application and the addendum together.

2. The Application is the third in a series of applications filed under regulation 35(2) of the Regulations, for the addition of new witness statements in relation to the alleged influence of P-316, an intermediary

¹ ICC-01/04-01/07-1631-Conf-Exp

² ICC-01/04-01/07-1674-Conf-Exp

for the Prosecution, on the testimony of witness P-15.³ After re-interviewing all Prosecution witnesses who had been in contact with P-316, the Prosecution interviewed P-316 himself on 6 and 7 October 2009. The present Application concerns specifically the transcripts of those interviews, as well as a 'Record of destruction of video media',⁴ which the Prosecution wishes to communicate to the Defence under rule 77 of the Rules. The Prosecution also wishes to apply a number of redactions to the transcripts on the basis of both rules 81(2) and 81(4).

3. In addition, the Application serves to transmit a document to the Chamber, containing relatively detailed information about the current security situation of P-183, another intermediary. The Prosecution asks for the provisional redaction of P-183's identity from the interview transcripts, until his security situation has been resolved.

4. On 3 December 2009 the Defence for Mr. Katanga filed its observations in relation to the Application.⁵ The Defence does not object to the communication of the interview transcripts, but opposes most of the requested redactions. In particular, it objects to the redaction of the identity of a MONUC employee, because it maintains that the Defence has an interest in being able to contact anyone who has been in contact

³ The two previous applications were "Prosecution's Application to Redacts, Disclose and to Add to its List of Incriminating Evidence the Interview Transcripts of Witnesses 28 and 250", 20 August 2009, ICC-01/04-01/07-1408-Conf-Exp; "Prosecution's Response to Defence requests contained in filing ICC-01/04-01/07-1533-Conf-Exp", 26 October 2009, ICC-01/04-01/07-1561-Conf-Exp. The Chamber decided on those applications in its decision of 3 November 2009, entitled "Decision on the Prosecution's Applications to Redact, Disclose and to Add the Interview Transcripts of Witnesses P-15, P-28, P-159, P-161, P-166, P-249, P-250 and P-268", 3 November 2009, ICC-01/04-01/07-1591-Conf-Exp

⁴ Annex E, DRC-OTP-0215-0087

⁵ "Defence Response to the Prosecution's Application to Redact and Disclose the Interview Transcripts of Witness 316 Pursuant to Rules 77, 81(2), 1631 and its Addendum, 1674", 3 December 2009, ICC-01/04-01/07-1705-Conf-Exp

with P-316 to learn what has been their experience with P-316.⁶ It is argued, in this respect, that “it would be unfair to expect the Defence simply to rely on the Prosecution’s investigation. The Defence must also be given an opportunity to conduct its own investigation into the allegation.”⁷ For that purpose, the Defence demands that it be given “full access to anyone who may provide it with information about these allegations and should not be hampered by the non-disclosure of their identities.”⁸ On the same basis, the Defence asks to know the identity of intermediary P-183.⁹

5. Finally, the Defence insists that there is no reason to redact the identity of a deceased person, and argues that it has an interest in knowing the identity of this person “in order to be able to investigate the accuracy of P-316’s assertion.”¹⁰ [REDACTED]

6. Mr. Ngudjolo’s Defence also advocates for the immediate communication of the interview transcripts, but without any redactions.¹¹ As the Defence is not privy to the reasons for which the Prosecution has requested the redactions, it does not comment on their justification.¹² However, based on general considerations of transparency and procedural fairness, the Defence wishes to obtain the interview transcripts in unredacted form, and relies on the Chamber to apply the

⁶ ICC-01/04-01/07-1705-Conf-Exp, par. 8

⁷ Ibid, par. 10

⁸ Id.

⁹ Ibid., par. 11-13

¹⁰ Ibid., par. 14

¹¹ “Réponse de la Défense de Mathieu Ngudjolo aux requêtes de l’Accusation déposées en vertu des règles 77, 81(2), 81(4) et de la norme 35, et référencées ICC-01/04-01/07-1631-Conf-Exp et ICC-01/04-01/07-1674-Conf-Exp”, 4 December 2009, ICC-01/04-01/07-1706-Conf-Exp

¹² Ibid., par. 9

criteria it has previously used in deciding upon redactions of this nature.¹³

II. ANALYSIS

A. Late submission

7. In analysing the previous applications under regulation 35 of the Regulations in relation to the situation involving intermediary P-316, the Chamber found that the Prosecution could invoke 'exceptional circumstances' to justify the late submission of the interview transcripts of P-28 and P-250, but determined that it could not find 'good cause' for the late submission of interview transcripts of the other witnesses.¹⁴ The Chamber found that the unexplained delay between 16 June 2009, when P-15 first made the allegations against P-316, and 30 September 2009, when the Prosecution interviewed the 5 other witnesses who had been in contact with P-316, casts doubt on the justification for the late submission.¹⁵

8. In the current Application, the Prosecution argues that it had to obtain as much information as possible from witnesses before interviewing P-316. It is further argued that there were logistical reasons as to why the interview with P-316 could not be conducted before the month of October 2009.¹⁶ However, the Prosecution does not furnish any further information about these 'logistical reasons'. The Chamber is therefore not in a position to evaluate whether they constitute 'good

¹³ Ibid., par. 11

¹⁴ "Decision on the Prosecution's Applications to Redact, Disclose and to Add the Interview Transcripts of Witnesses P-15, P-28, P-159, P-161, P-166, P-249, P-250 and P-268", 3 November 2009, ICC-01/04-01/07-1591-Conf-Exp

¹⁵ ICC-01/04-01/07-1591-Conf-Exp, par. 21

¹⁶ ICC-01/04-01/07-1631-Conf-Exp, par. 13

cause' for the long delay between the moment when the problem involving P-316 first came to light and when the Application was filed.

9. As the Chamber has held on a previous occasion,¹⁷ it is incumbent upon the party making an application to provide the Chamber with all significant legal and factual elements that will allow it to decide on the request. In the context of regulation 35(2), this includes explaining the reasons for any unusual delays.

10. Nevertheless, as the Prosecution rightly points out, the Chamber has consistently held that the fact that the Prosecution does not fulfil the statutory requirements of regulation 35(2), cannot stand in the way of the communication of information that is material to the preparation of the Defence. Given the potentially important implications of any possible manipulation by P-316, the transcripts of the interviews with him clearly fall into this category. Moreover, both Defence teams have requested that the interview transcripts be communicated to them.

11. The Chamber will therefore allow the late communication of the transcripts and the related record of destruction of video media.

B. Redactions

12. The Chamber reiterates¹⁸ the requirements laid down by the Appeals Chamber: 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing

¹⁷ "Decision on the 'Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, ICC-01/04-01/07-1336, par. 32

¹⁸ Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence), 10 February 2009, ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf, par. 4; ICC-01/04-01/07-987-Conf-Exp, par. 4

investigations;¹⁹ 2) the existence of a link between the source of the risk and the accused persons;²⁰ 3) the infeasibility or insufficiency of less restrictive protective measures;²¹ 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;²² and 5) the obligation periodically to review the decision authorizing the redactions should circumstances change.²³

13. As the Chamber has had occasion to stress on several occasions,²⁴ any application for redactions is subject to strict judicial supervision carried out on a case-by-case basis. Any decision whereby it authorises non-disclosure to the Defence of part of a document must be sufficiently justified in light of, *inter alia*, the arguments submitted by the Prosecutor in support of his application. The Chamber is under an obligation to weigh the various interests at stake, as set out in rule 81 of the Rules, whilst ensuring that the proceedings include safeguards which will protect the interests of the accused, so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms. The Chamber has reviewed in detail each request for redactions in light of the criteria set forth in the previous paragraph.

¹⁹ "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, paras. 71 and 97

²⁰ *Ibid.*, par. 71

²¹ "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

²² ICC-01/04-01/06-773, par. 34

²³ ICC-01/04-01/07-475, par. 73

²⁴ 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.

1. Identity of P-183 and a MONUC employee

14. The Prosecution asks for the provisional redaction of two names from P-316's interview transcripts. The first relates to P-183, another intermediary whose security situation is currently being re-evaluated. The Chamber has already authorised the provisional redaction of P-183's identity from other documents.²⁵ Given the particularity of P-183's situation and the need to guarantee the person's personal security, the Chamber sees no reason to depart from its previous practice, and allows the provisional redaction of his name. However, the Chamber urges the Prosecution and the Victims and Witnesses Unit to find an appropriate solution regarding P-183's security situation without further delay.

15. The other redaction relates to the identity of a MONUC employee.²⁶ The Prosecution informs the Chamber that a request for additional information about this person is currently pending before the United Nations and that it may revoke the requested redactions, once the additional information concerning this person is available. The Chamber understands that the requested redactions are a precautionary measure. It further considers that the redaction of his name does not make the document incomprehensible, nor will the absence of his name unduly prejudice the Defence. It therefore allows the provisional redaction of the name of the MONUC employee, which will automatically be lifted if no further justification has been received by 20 January 2010.

²⁵ "Decision relative à la levée, au maintien et au prononcé de mesures d'expurgation", 3 November 2009, ICC-01/04-01/07-1551-Conf-Exp, par. 39. See also ICC-01/04-01/07-1591-Conf-Exp, par. 24, in which the Chamber instructed the Prosecution to indicate the intermediary's identification number (P-183) wherever his identity is redacted.

²⁶ ICC-01/04-01/07-1631-Conf-Exp, par. 18

2. *Location of the Interview*

16. The Prosecution also asks for the redaction of the location where the interview with P-316 took place. This request is based on rule 81(2) and is aimed at protecting the Prosecution's ongoing third investigation in the Democratic Republic of Congo.²⁷

17. The Chamber notes that it previously granted requests for temporary redactions of interview locations on the basis of the continuing insecurity in the region and the fact that these redactions were limited in scope and time.²⁸ However, these redactions were allowed only temporarily and most of them were indeed lifted before the start of the trial proceedings.²⁹

18. The present request does not indicate any temporal limitation. However, seeing that the Defence admits that the information is not of great relevance to their preparations and that the Prosecution has demonstrated the need for the protection of its ongoing investigation, the Chamber will allow the location of the interview to be redacted.

Nevertheless, given the Chamber's obligation to periodically review any

²⁷ ICC-01/04-01/07-1674-Conf-Exp, par. 2

²⁸ "Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's note concerning witness 176 (rule 81 of the Rules of Procedure and Evidence)", 10 February 2009, ICC-01/04-01/07-888-Conf-Exp-tENG, par. 15-16; "Decision on Three Prosecutor's Applications to Maintain Redactions or Reinstate Redacted Passages", 25 March 2009, ICC-01/04-01/07-987-Conf-Exp-tENG; "Decision on the Prosecutor's Application to Redact Information under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence (ICC-01/04-01/07-934)", 8 April 2009; ICC-01/04-01/07-1038-Conf-Exp-tENG, par. 18; "Décision concernant la requête du Procureur aux fins d'expurgations d'informations dans certains éléments de preuve relevant de l'article 67-2 du Statut ou de la règle 77 du Règlement de procédure et de preuve (ICC-01/04-01/07-916)", 8 April 2009, ICC-01/04-01/07-1040-Conf-Exp, par. 14 ; "Decision on the Prosecutor's Application to Redact Information under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence (ICC-01/04-01/07-971)", 8 April 2009, ICC-01/04-01/07-1042-Conf-Exp-tENG, par. 18 ; "Décision concernant la requête du Procureur aux fins de suppression d'informations dans la seconde déposition du témoin à charge 249 (ICC-01/04-01/07-1078)", 18 May 2009, ICC-01/04-01/07-1149-Conf-Exp, par. 19

²⁹ "Notice of Lifting of Redactions", 24 August 2009, ICC-01/04-01/07-1422

decision authorising redactions, in case circumstances should change,³⁰ it orders the Prosecution to automatically lift the redactions as soon as they are no longer required. Given that these redactions are granted on the basis of rule 81(2) of the Rules, the Prosecution does not need to obtain prior authorisation from the Chamber before lifting them, but must merely inform the latter of the lifting.

C. Signed statement under rule 111 of the Rules

19. The Chamber reiterates its previous observations regarding the obligation of the Prosecution to produce a signed witness statement for each person heard in the context of the proceedings. In its decision of 23 October 2009³¹, the Chamber held that the fact that a person is being interviewed as a suspect and that, as a consequence, a recording of the interview is made in accordance with rule 112 of the Rules, does not diminish the Prosecution's obligation to produce a signed witness statement in accordance with rule 111 of the Rules.³² As the Chamber explained in the aforementioned decision, the recording of the interview with a suspect is primarily a measure designed to protect the person being interviewed.³³ For the purposes of disclosure and communication, the proper form for recording the content of an interview with a potential witness is a signed statement in accordance with the requirements set out in rule 111 of the Rules.

20. Nevertheless, considering the advanced stage in the proceedings and the time that would be required by the Prosecution to obtain a

³⁰ ICC-01/04-01/07-475, par. 73

³¹ "Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence", 23 October 2009, ICC-01/04-01/07-1553

³² ICC-01/04-01/07-1553, par. 35

³³ *Id.*

signed statement from P-316, the Chamber is of the view that there is little advantage in now ordering the Prosecution to produce a signed statement by P-316. It reaches this conclusion on the basis of the fact that the Defence have already received the full interview transcripts on 26 November 2009 and have not requested a signed statement. Furthermore, P-316 is an intermediary for the Prosecution rather than a Prosecution witness in the present case. The Prosecution has not requested permission to call P-316 to testify and the interview transcripts have been disclosed on the sole basis of rule 77 of the Rules.

21. Given these particular circumstances, the Chamber concludes that there is no prejudice to the Defence if it exceptionally allows the interview with P-316 to be disclosed without ordering the Prosecution to produce a signed statement pursuant to rule 111 of the Rules. However, the Chamber stresses that this is a one-off exception, which is granted with regard to the unique circumstances of this particular situation.

FOR THESE REASONS,

THE CHAMBER,

ORDERS the Prosecution to communicate the interview transcripts with P-316 as well as the record of destruction of video media (DRC-OTP-0215-0087);

AUTHORISES the provisional redaction of the identity of P-183 and **URGES** the Prosecution and the VWU to find an appropriate solution for P-183's security situation as soon as possible;

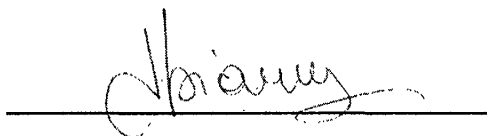
AUTHORISES the provisional redaction of the name of a MONUC employee until 20 January 2010. If no further justification has been received by that date, the redaction must be lifted.

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

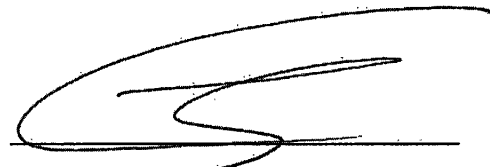


Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 17 December 2009

At The Hague, the Netherlands