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No.: **ICC-01/04-01/07**

Date: **8 July 2009**

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

**Public Redacted Version of the *Decision on the Disclosure of a Redacted Version of
the Screening Notes concerning Witness 315 of 2 July 2009*
(ICC-01/04-01/07-1264-Conf-Exp)**

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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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 54(3)(e), 54(3)(f), 64(2), 64(3)(c), 64(6)(f), 67 and 68(1) of the Rome Statute (“the Statute”) and rules 77 and 82 of the Rules of Procedure and Evidence (“the Rules”) decides as follows:

I. Procedural History

1. On 23 January 2009, the Chamber directed the Prosecutor, in the event that, in his view, one or more items of exculpatory evidence, or of material falling within the terms of rule 77 of the Rules, could only be disclosed to the Defence after first being redacted, to file all requests for redactions by 4 p.m. on 16 February 2009.¹

2. On 25 February 2009, at an *ex parte* hearing, the Chamber granted the Prosecutor an extension of three weeks for the filing of his requests, namely until 23 March 2009.²

3. On 20 March 2009, pursuant to regulation 35 of the Regulations of the Court, the Prosecutor applied to the Chamber for a further 15-day extension of the time limit for the filing of requests for redactions in respect of seven witnesses, or for the filing of requests for alternative forms of disclosure.³ The Chamber granted leave for the Prosecutor to file his requests by 6 April 2009.⁴

4. On 6 April 2009, the Prosecutor filed an application requesting authorization from the Chamber to disclose the redacted version of the screening notes concerning

¹ *Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence)*, ICC-01/04-01/07-846-tENG, 23 January 2009.

² ICC-01/04-01/07-T-60-CONF-EXP-ENG ET, p. 16, lines 9-15.

³ Office of the Prosecutor, “*Requête, en application de la Norme 35 du Règlement de la Cour, aux fins de prorogation de délai pour le dépôt de demandes d’expurgations d’informations dans certains éléments de preuve relevant de l’Article 67-2 ou de la Règle 77 ou pour le dépôt de demandes de communications alternatives concernant ces éléments de preuve*”, 23 March 2009, ICC-01/04-01/07-972-Conf-Exp, only available to the Office of the Prosecutor and the Registry.

⁴ *Order on the Prosecutor’s Application for an Extension of Time (Regulation 35 of the Regulations of the Court)*, 23 March 2009, ICC-01/04-01/07-977-Conf-Exp-tENG, only available to the Office of the Prosecutor.

Witness 315, obtained pursuant to article 54(3)(e).⁵ This application was filed with the indication “confidential, *ex parte*, only available to the Prosecution”.

II. The Chamber’s Analysis

5. The Prosecutor met with Witness 315 on 7 May 2008 and prepared screening notes, whose content is to be regarded, at the request of the witness and of the witness’ organization, [REDACTED] (“[REDACTED]”), as covered by article 54(3)(e) of the Statute.⁶ The Chamber recalls that reliance on article 54(3)(e) must not lead the Prosecutor to act in breach of his obligations towards suspects or accused persons, in particular their right to disclosure of evidence in his possession which shows, or tends to show, their innocence or to mitigate their guilt, or which is necessary to enable them to prepare their defence.⁷

6. In its Judgment of 21 October 2008, the Appeals Chamber recalled that, where the Prosecutor relies on article 54(3)(e) of the Statute, he must apply it in a manner that will allow the Court to resolve the potential tension between, on the one hand, the confidentiality to which he has agreed and, on the other, the requirements of a fair trial.⁸ Furthermore, it is ultimately the Trial Chamber’s responsibility to determine whether or not the evidence in the Prosecutor’s possession, or under his control, should be disclosed pursuant to article 67(2) of the Statute and in accordance

⁵ Office of the Prosecutor, “Prosecution’s Application to Disclose a Redacted Version of Screening Notes of Witness 315”, 6 April 2009, ICC-01/04-01/07-1030-Conf-Exp, only available to the Office of the Prosecutor.

⁶ ICC-01/04-01/07-1030-Conf-Exp, para. 4.

⁷ Appeals Chamber, *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, para. 42. See also, *Decision on the Thirteen Documents Obtained under Article 54(3)(e) of the Statute and Not Yet Disclosed to the Defence*, 19 June 2009, ICC-01/04-01/07-1227-Conf-Exp-tENG, only available to the Office of the Prosecutor, para. 6.

⁸ ICC-01/04-01/06-1486, para. 44.

with internationally recognised human rights. For this reason, the material in question must be submitted to the Chamber in order that it may rule thereon.⁹

7. The Chamber has also ruled that documents obtained under article 54(3)(e) must be similarly reviewed by it before being disclosed to the Defence. This review is in fact necessary in order to enable the Chamber to ensure that the rights of the accused are not affected by any redaction carried out by the information provider that would render the document in question incomprehensible, unreadable, or unusable by the Defence.¹⁰

8. The Chamber has already stated that it cannot force the Prosecutor to disclose documents to the Defence obtained by him pursuant to agreements under article 54(3)(e) of the Statute without the prior consent of the information provider. Where the Chamber considers that the material would have had to be disclosed had it not been obtained by virtue of that provision, and that the redactions required by the provider infringe the rights of the Defence, it must ask the Prosecutor to undertake discussions with the provider with a view to finding other solutions that might enable the redactions to be reconsidered or modified. If the providers do not consent to disclosure, the Chamber must then determine whether counter-balancing measures can be taken in order to ensure that the rights of the accused are protected and that the trial is fair.¹¹

9. In his application, the Prosecutor points out to the Chamber that [REDACTED] agreed to his disclosure of the screening notes on the condition that certain information¹² be redacted to prevent the possibility of the person who provided the information, and the organization to which he or she belongs, from being

⁹ ICC-01/04-01/07-1227-Conf-Exp-tENG, para. 7. See also ICC-01/04-01/06-1486, para. 46.

¹⁰ ICC-01/04-01/07-931-tENG, paras. 5 and 7.

¹¹ ICC-01/04-01/07-1227-Conf-Exp-tENG, para. 10. See also ICC-01/04-01/06-1486, para. 48; and ICC-01/04-01/07-931-tENG, para. 8.

¹² ICC-01/04-01/07-1030-Conf-Exp, para. 8.

identified.¹³ [REDACTED].¹⁴ The Prosecutor emphasizes, lastly, that according to [REDACTED], the screening notes contain several errors and factual inaccuracies that [REDACTED] did not have the time to correct.¹⁵

10. The Chamber notes that the reasons cited for the redactions sought by the information provider are based on the need to protect persons or organizations who or which, if measures were not taken, would be placed at risk. The Chamber recalls, however, that it has to check that no less restrictive measures are available and, where non-disclosure of names proves to be essential, it has to ensure, as the Appeals Chamber has made clear, that the trial is conducted fairly and with full respect for the rights of the accused.¹⁶

11. In the Prosecutor's view, disclosure of the screening notes with the redactions sought is not prejudicial to the Defence, because he will not be calling the witness whose name is redacted to give evidence at trial and because it is apparent that the relevant information in question can also be found within other "alternative" sources and has been disclosed to the Defence.¹⁷ The Prosecutor further observes that the redactions are limited, and that the rule 77 material is disclosed in its entirety.¹⁸

12. The information provider requests the redaction of the name, initials and all other information that would allow Witness 315 to be identified in the screening notes relating to the witness. The Chamber considers that non-disclosure to the

¹³ Ibid., para. 9.

¹⁴ ICC-01/04-01/07-1030-Conf-Exp, paras. 24 and 26.

¹⁵ ICC-01/04-01/07-1030-Conf-Exp, para. 7 and AnxB.

¹⁶ ICC-01/04-01/07-1227-Conf-Exp-tENG, para. 11.

¹⁷ The alternative sources of information noted by the Prosecutor are: the transcripts of the statement given by Witness 285 (DRC-OTP-1017-0541 to DRC-OTP-1017-0571; DRC-OTP-1017-0572 to DRC-OTP-1017-0603; DRC-OTP-1017-0638 to DRC-OTP-1017-0671; DRC-OTP-1017-0742 to DRC-OTP-1017-0779; DRC-OTP-1017-0780 to DRC-OTP-1017-0815), the transcripts of the statement given by Witness 163 (DRC-OTP-1016-0018 to DRC-OTP-1016-0046), the Human Rights Watch report, "Ituri: Covered in blood" (DRC-OTP-0074-0797 to DRC-OTP-0074-0878), and several other documents (DRC-OTP-0165-0541 to DRC-OTP-0165-0546; DRC-OTP-0202-0195 to DRC-OTP-0202-0210; DRC-OTP-1008-0089 to DRC-OTP-1008-0100; DRC-OTP-0102-0071 to DRC-OTP-0102-0085; DRC-OTP-0204-0151 to DRC-OTP-0204-0154; DRC-OTP-0163-0357 to DRC-OTP-0163-0539; DRC-OTP-1030-0202 to DRC-OTP-1030-0289).

¹⁸ ICC-01/04-01/07-1030-Conf-Exp, para. 27.

Defence of the name of a person who has provided information could cause prejudice to the accused. As the Chamber has already stated, names can in fact prove material to the accused's defence where the individuals concerned have information which could assist in its preparation. Thus the Defence might wish to call them as witnesses, or to contact them beforehand in order to obtain further particulars of the facts or to dispute their veracity.¹⁹

13. It is therefore for the Chamber to assess whether the redactions sought relate to passages containing material information. In this case, the Prosecutor states that the screening notes contain incriminatory information and rule 77 material.²⁰ He further states that he has already disclosed alternative information which refers to the relevant rule 77 material.²¹

14. The Chamber considers that, although, according to the Prosecutor, the screening notes contain incriminatory evidence, for purposes of the present application they should be considered as falling within rule 77 because they are not on the list of evidence that the Prosecutor intends to use at trial. He will therefore be able to rely on these at trial as incriminatory evidence only with prior permission from the Chamber under regulation 35(2) of the Regulations of the Court.

15. The Chamber considers that it cannot insist upon the disclosure of the name of the information provider, but it must ensure that the proposed counter-balancing measures are sufficient and enable any prejudice to the accused to be avoided. The Chamber has examined the relevant rule 77 passages in the screening notes, and has compared them with the alternative information submitted to it. It has thus been able to satisfy itself that all the relevant information has already been disclosed to the Defence in other documents. It has also verified that, where the Prosecutor did not

¹⁹ ICC-01/04-01/07-1227-Conf-Exp-tENG, para. 12. See also, Trial Chamber I, *Reasons for Oral Decision lifting the stay of proceedings*, 23 January 2009, ICC-01/04-01/06-1644, paras. 48 and 49.

²⁰ ICC-01/04-01/07-1030-Conf-Exp, paras. 17 and 25.

²¹ ICC-01/04-01/07-1030-Conf-Exp, para. 18, in which the Prosecutor states that Annex D contains a table and documents with the alternative sources of information.

provide any alternative information relating to certain passages, these did not contain any rule 77 material.²²

16. In addition to the redaction of the name of Witness 315, the information provider also requests the deletion of five paragraphs containing information relating to its own sources and to an investigation by the Prosecutor in another case.²³ Where the redactions sought by the information provider relate to passages containing no rule 77 material, the Chamber considers that the Prosecutor's duty of disclosure is less strict. If the redactions do not affect the readability and understanding of the document and it remains usable by the Defence, then, in the Chamber's view, the rights of the accused are respected.²⁴

17. The five paragraphs in question have indeed been deleted in their entirety, but at the express request of the information provider, which greatly reduces the Chamber's room for manoeuvre. In order to assess the prejudice that could be suffered by the accused as a result, the Chamber has satisfied itself that, with the exception of a specific item of information that might fall under the terms of rule 77, and which has, moreover, already been disclosed in an alternative form adjudged by the Chamber to be adequate,²⁵ the redacted passages do not contain any evidence falling within article 67(2) of the Statute or rule 77 of the Rules.²⁶ Finally, the Chamber considers that, despite the amount of material sought to be deleted, the document remains readable, intelligible and useable by the Defence, thereby satisfying the requirements of a fair trial.

²² E-mail exchange between the Prosecutor and the Legal Adviser to the Trial Division, 25 June 2009.

²³ ICC-01/04-01/07-1030-Conf-Exp, paras. 27 and 28, and e-mails exchanged between the Prosecutor and the Legal Adviser to the Trial Division on 19 and 22 June 2009.

²⁴ ICC-01/04-01/07-1227-Conf-Exp-tENG, para. 14. See also, similarly, ICC-01/04-01/06-1644, paras. 52 and 53.

²⁵ The redacted paragraph 4 in DRC-OTP-0193-0101 contains the following information: [REDACTED]. This latter information has already been disclosed in [the transcript of the statement of Witness 285, DRC-OTP-1017-0572 to DRC-OTP-1017-0603]. See ICC-01/04-01/07-1030-Conf-Exp-AnxD, page 18, and exchange of e-mails between the Prosecutor and the Legal Adviser to the Trial Division, 25 June 2009.

²⁶ E-mails exchanged between the Prosecutor and the Legal Adviser to the Trial Division on 19, 22 and 25 June 2009.

FOR THESE REASONS, THE CHAMBER

18. **GRANTS** the Prosecutor's Application relating to the redactions sought by the information provider of the documents obtained under article 54(3)(e);

19. **AUTHORIZES** the disclosure of the screening notes concerning Witness 315 with the redactions sought by the information provider;

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

_____[signed]____

Judge Bruno Cotte
Presiding Judge

_____[signed]____

Judge Fatoumata Dembele Diarra

_____[signed] 8/7/09____

Judge Hans-Peter Kaul

Dated this 8 July 2009,

At The Hague, The Netherlands