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No.: ICC-01/04-01/07
Date: 17 February 2010

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
Redacted Version
with Annexes A, B and C - Confidential, *ex parte*, only available to the
Office of the Prosecutor**

**Prosecution's Application to disclose the redacted transcripts of an interview with
Witness 157 pursuant to Rule 77 and Regulation 35**

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

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Detention Section

**Victims Participation and Reparations
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**Other
TC I**

The Office of the Prosecutor (“Prosecution”) seeks authorisation from Trial Chamber II (“Chamber”) to disclose to the Defence, pursuant to Rule 77 of the Rules of Procedure and Evidence (“the Rules”) and Regulation 35(2) of the Regulations of the Court (“RoC”), three redacted transcripts of a recent interview with Witness 157¹ conducted in the context of the case of *the Prosecutor v. Thomas Lubanga Dyilo*.

Request for receipt of Annexes as Confidential, *ex parte*

1. The Prosecution requests that the annexes to this filing be received by the Chamber as Confidential, *ex parte*, only available to the Office of the Prosecutor, since they relate to undisclosed material and a request for redactions. The Prosecution submits in Annex A an unredacted version of the transcripts and in Annex B a chart providing the reasons for the proposed redactions. Annex C contains a copy of the transcripts with the redactions as sought to permit the Defence to immediately have access to the transcripts, pending the Chamber’s decision on the request for redactions, if the Chamber so decides. A public redacted version will be submitted simultaneously with this Request.

Background

2. On 23 January 2009, the Chamber ordered, *inter alia*, that all Rule 77 material be disclosed to the Defence no later than 27 February 2009.²
3. On 2 October 2009, the Prosecution in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”), before Trial Chamber I, filed an application seeking leave of the Chamber to “contact trial witnesses called by the Prosecution, when necessary to conduct further inquiries regarding the

¹ DRC-OTP-0222-0446, DRC-OTP-0222-0478 and DRC-OTP-0222-0513.

² « Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d’une conférence de mise en état », 23 January 2009, ICC-01/04-01/07-846.

Defence case, specifically to assess the veracity of facts and allegations that may be raised by Defence witnesses and obtain contact information for persons who may be potential leads for the Prosecution investigation into the Defence case”.³

4. On 19 November 2009, Trial Chamber I authorised the Prosecution to contact its own witnesses with the purpose of re-interviewing them.⁴
5. On 11 January 2010, investigators of the Office of the Prosecutor met Witness 157 for the purpose of inquiring into the veracity of information provided by the Defence in the *Lubanga* case.
6. It must be recalled that Witness 157 will also be called as a witness by the Prosecution in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“*Katanga* case”).

Request for redactions

7. The Prosecution requests the Chamber’s authorisation to disclose the transcripts of the interview of Witness 157 with redactions, pursuant to Rule 81(4) of the Rules. The Prosecution seeks redactions to the current location of Witness 157 who is in the Court’s protection programme, and to the names and whereabouts of family members of Prosecution witnesses. The Prosecution submits that the information which it seeks to redact is not material to the preparation of the Defence and does not prejudice the accused. The detailed reasons for the proposed redactions are set out in a table submitted as Annex B to this application.

³ ICC-01/04-01/06-2144-Red, p. 4, at (iii). See also para. 34.

⁴ ICC-01/04-01/06-2192-Red, para. 66: the “Chamber is persuaded that it is appropriate for the prosecution to meet again with witnesses [...] for the purposes identified in the application. These meetings should be recorded by audio or video equipment, and the prosecution must apply its disclosure obligations following any re-interview. If it becomes necessary to use this procedure with other witnesses, the same approach is to be followed (once the Court and the defence have been given adequate notice).”

Witness 169

8. The Prosecution draws the Chamber's attention to the fact that in the re-interview transcript bearing the ERN [REDACTED]. A request for redactions regarding the screening note of a person named [REDACTED], also known under the pseudonym of Witness 169 is still pending before this Chamber.⁵ This request was necessary in order to comply with Regulation 42 of the Regulations of the Court, insofar as Trial Chamber I has previously ordered the redaction of Witness 169's identity in the same screening note.⁶

9. The Prosecution is unable to confirm or refute whether the [REDACTED]. Nevertheless, the Prosecution in the *Lubanga* case, will seek authorisation to lift the redactions to the identity of Witness 169 in his screening notes. Upon lifting of the redactions by Trial Chamber I, the Prosecution in the *Katanga* case will be withdrawing its requests for similar redactions before Trial Chamber II.

Request

10. The Prosecution seeks the Chamber's permission to disclose the transcripts of the interview of Witness 157 with the redactions as requested, pursuant to Rule 77 of the Rules.

⁵ ICC-01/04-01/07-1259-Conf-Exp-AnxB1. See DRC-OTP-0150-0150.

⁶ This request followed an order by Trial Chamber I dated 9 April 2009, see ICC-01/04-01/06-1814-Conf, para. 55.

Regulation 35(2) of the Court

11. This request falls within the ambit of Regulation 35(2) of the RoC. The Prosecution was unable to file an application for an extension of time prior to 29 February 2009 because of exceptional circumstances that were out of its control. Essentially, it was unknown prior to this date that the preparation for the cross-examination of Defence witnesses in the *Lubanga* case would prompt a request by the Prosecution to re-interview its witness. On 19 November 2009, The Prosecution in the *Lubanga* case was granted leave to investigate into issues that have recently arisen in Court in the context of that case,⁷ and Witness 157 was interviewed on 11 January 2010.

Disclosure pursuant to Rule 77

12. The Prosecution submits that the nature of the information provided by Witness 157 during his re-interview is potentially material to the preparation of the Defence, as the witness provides additional information on certain facts contained in the previous statements disclosed in the *Katanga* case. Consequently, the transcripts of the interview of Witness 157 should be disclosed to the Defence.



Luis Moreno-Ocampo, Prosecutor

Dated this 17th day of February 2010

At The Hague, The Netherlands

⁷ ICC-01/04-01/06-2144-Red, para. 36.