



Original: **French**

No.: **ICC-01/04-01/07**
Date: **23 September 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 Redacted Version

Supplementary Decision on the Situation of Witness 267

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Éric Macdonald, Senior Trial Lawyer

**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
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Legal Representatives of the Victims

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Legal Representatives of the Applicants

**The Office of Public Counsel for
 Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

**Victims Participation and Reparations
 Section**

Ms Fiona McKay

Others

Trial Chamber I

TRIAL CHAMBER II of the International Criminal Court (“the Chamber”), acting pursuant to article 64(2) and (3)(c) of the Statute (“the Statute”), rules 77 and 81 of the Rules of Procedure and Evidence (“the Rules”) and regulation 42 of the Regulations of the Court, decides as follows.

1. On 20 May 2009, the Chamber requested the Prosecutor to disclose to the Defence for Germain Katanga and Mathieu Ngudjolo, 45 days before the start of the trial, an unredacted version of the statement of Prosecution Witness 267, that is to say, not later than 10 August 2009.¹

2. On 4 August 2009, the Prosecutor submitted to the Chamber an application (“the Application”) for leave to disclose a redacted version of this witness’s statement (“the Request for Redaction of the Statement”), as well as of various new items of evidence relating to that witness, one of which was the subject of a request for redaction (“the Request regarding Additional Evidence”). He also sought leave to disclose to the Defence certain rule 77 material, also containing redactions (“the Request for Disclosure”).²

3. On 10 August, the date of expiry of the deadline set by the Chamber, the Prosecutor submitted a separate application under regulation 35 of the Regulations of the Court, contending that it was not possible to disclose Witness 267’s statement until the Chamber had ruled on the Application.³

¹ *Decision on the Protection of Prosecution Witnesses 267 and 353*, 20 May 2009, ICC-01/04-01/07-1156-Conf-Exp. See the public redacted version of 28 May 2009, ICC-01/04-01/07-1179.

² Office of the Prosecutor, “Application for Authorization to Disclose Redacted Incriminating Evidence and Rule 77 Material to the Defence (Witness 267)”, 4 August 2009, ICC-01/04-01/07-1351-Conf-Exp.

³ Office of the Prosecutor, “Application for extension of time pursuant to Regulation 35 of the Court”, 10 August 2009, ICC-01/04-01/07-1358.

4. The public redacted version of the Application was filed on 7 August 2009.⁴ The Defence teams responded on, respectively, 14⁵ and 18⁶ August 2009. They asked that it be dismissed because of its late filing in relation to the deadlines set by the Chamber, and were both strongly opposed to the disclosure of new evidence regarding Witness 267, although the Chamber would point out that, when the Defence formulated their observations, they had no knowledge of the content of the documents in question.

5. In order to be able to rule in a fully informed manner on the respective merits of the claims before it, the Chamber invited the Prosecutor to submit a reply explaining to it the reasons why he had only submitted the Application on 4 August 2009, two and a half months after the Chamber had fixed the time limit for disclosure of the statement to the Defence.⁷ That reply was filed on 28 August 2009.⁸ [REDACTED].⁹

6. On 10 September 2009, the Chamber rendered a decision granting in part the Requests on additional evidence and disclosure. It further deemed it necessary, before ruling on the Requests for redactions, for the Prosecutor to explain to it whether investigations were currently in progress in Ituri, or whether others were contemplated, and, if so, whether the individuals concerned by the Application could contribute further to those investigations. It also asked the Prosecutor to explain to it what the current policy was in regard to requests for the redaction of names of family members of witnesses, as well as specific justification for the redaction of the name of the mother of Witness 267. The Chamber further invited the

⁴ Office of the Prosecutor, "Application for Authorization to Disclose Redacted Incriminating Evidence and Rule 77 Material to the Defence (Witness 267)", 4 August 2009, ICC-01/04-01/07-1351-Conf-Exp. See the public redacted version filed on 7 August 2009 (ICC-01/04-01/07-1356).

⁵ Defence for Mathieu Ngudjolo, "*Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux requêtes du Procureur référencées sous les numéros ICC-01/04-01/07-1356 et ICC-01/04-01/07-1358*", 14 August 2009, ICC-01/04-01/07-1376.

⁶ Defence for Germain Katanga, "Defence Observations on the Prosecution's Applications relative to Witness 267", 18 August 2009, ICC-01/04-01/07-1402.

⁷ *Décision enjoignant au Procureur de déposer une réplique (norme 24 du Règlement de la Cour)*, 25 August 2009, ICC-01/04-01/07-1424.

⁸ Office of the Prosecutor, "Reply Pursuant to Order 100-01/04-01/07-1424", 28 August 2009, ICC-01/04-01/07-1439.

⁹ [REDACTED].

Prosecutor to list all of the reasons for his seeking, in this case, the adoption of a protective measure for one of the individuals mentioned in documents DRC-OTP-0167-0908 and DRC-OTP-1000-0065.¹⁰ The Prosecutor submitted his response to the Chamber's instructions on 15 September 2009 ("the Additional Information").¹¹

7. The Chamber again stresses the requirements laid down by the Appeals Chamber in regard to redactions: (1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;¹² (2) the existence of a link between the source of the risk and the accused persons;¹³ (3) the infeasibility or insufficiency of less restrictive protective measures;¹⁴ (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;¹⁵ and (5) the obligation to periodically review the decision authorizing the redactions should circumstances change.¹⁶

8. As the Chamber has had occasion to point out a number of times, any application for redactions is subject to detailed judicial scrutiny on a case-by-case basis. Any decision by which the Chamber authorises non-disclosure to the Defence of part of a document must be sufficiently reasoned in light, in particular, of the arguments submitted by the Prosecutor in support of his application. The Chamber has a duty to balance the various interests at stake as set out in rule 81 of the Rules, whilst

¹⁰ *Décision relative à la situation du témoin 267*, 10 September 2009, ICC-01/04-01/07-1465-Conf-Exp. See also the public redacted version of 14 September 2009 (ICC-01/04-01/07-1469).

¹¹ Office of the Prosecutor, "Prosecution's Reply Pursuant to the *Décision relative à la situation du témoin 267* [ICC-01/04-01/07-1465-Conf-Exp]", 15 September 2009, ICC-01/04-01/07-1474-Conf-Exp.

¹² Appeals Chamber, *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.

¹³ ICC-01/04-01/07-475, para. 71.

¹⁴ Appeals Chamber, *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, para. 37; Appeals Chamber, *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, para. 33.

¹⁵ ICC-01/04-01/06-773, para. 34.

¹⁶ ICC-01/04-01/07-475, para. 73.

ensuring that the proceedings include safeguards to protect the interests of the accused, so as to comply, to the fullest extent possible, with the requirements of adversarial proceedings and the principle of equality of arms.¹⁷

9. In order better to assess the redactions sought on a case-by-case basis, the Chamber has drawn a distinction between those whose purpose is to avoid prejudicing further or ongoing investigations (rule 81(2) of the Rules) and those which aim to ensure the safety of witnesses and members of their families (rule 81(4) of the Rules). In considering each of these requests, the Chamber will recall the arguments put forward by the Prosecutor in his most recent filing.

I. Redactions requested under rule 81(2) of the Rules

10. In his Additional Information, the Prosecutor points out that his Office is still active in Ituri, in relation both to the present case and to that against Mr Thomas Lubanga, and that the reference to rule 81(2) of the Rules accordingly remains justified.¹⁸ [REDACTED].¹⁹

11. The Prosecutor again emphasises that protection must be provided to all persons [REDACTED], acting as intermediaries, since they are collaborating with the Court and/or disclosure of their identity could affect their security or the conduct of ongoing investigations in Ituri.

(a) [REDACTED]

12. Both in the statement of Witness 267 and in the five rule 77 documents that the Prosecutor seeks to disclose to the Defence,²⁰ the Chamber recalls that the Prosecutor

¹⁷ *Grounds for the Oral Decision*, ICC-01/04-01/07-888-Conf-Exp-tENG, and ICC-01/04-01/07-889-tENG-Conf, para. 3.

¹⁸ ICC-01/04-01/07-1474-Conf-Exp, para. 3.

¹⁹ [REDACTED].

²⁰ DRC-OTP-0164-0908, DRC-OTP-1000-0065, DRC-OTP-1000-0072, DRC-OTP-1000-0083 and DRC-OTP-1000-0087.

wishes to have deleted all information which would permit the identification of [REDACTED], as well as that relating to [REDACTED].²¹ In the statement, the following such persons are mentioned: [REDACTED]. As regards the rule 77 material, the individuals in question are listed in the relevant documents as referred to above.

13. The Prosecutor argues that such action is necessary, in particular in order to safeguard his ongoing or further investigations. He also stresses that disclosure of the identity [REDACTED] who [REDACTED], could put them at risk, since they currently reside in the Democratic Republic of the Congo (DRC). He further points out that [REDACTED] are currently under threat, and that the Chamber has already held that the real threats faced by intermediaries could justify the deletion of their names.²² Furthermore, he proposes substituting for the deleted names the words [REDACTED].²³

14. It should be noted that, in his Application²⁴ and in his Additional Information,²⁵ the Prosecutor relies on paragraphs 2 and 4 of rule 81 of the Rules in order to justify his requests for redactions. However, the Chamber notes that the Justification Table annexed to his Application refers only to paragraph 2 of that rule.²⁶ For that reason the Chamber will address these requests on the latter basis, while at the same time remaining mindful of the fact that consideration must also be given to protection of the physical safety of the persons concerned. In light of all of the material currently available to it, the Chamber considers that there are in fact real threats to the individuals whose names appear in the statement of Witness 267, as well as in the five rule 77 documents, since they are shown in the various documents as collaborating, even if indirectly, with the Court. It is thus necessary to protect them

²¹ [REDACTED].

²² *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, para. 21.

²³ [REDACTED].

²⁴ ICC-01/04-01/07-1351-Conf-Exp, para. 24.

²⁵ ICC-01/04-01/07-1474-Conf-Exp, para. 5.

²⁶ ICC-01/04-01/07-1351-Conf-Exp-AnxA.

and to delete their names from the documents in question, as well as the names of certain of the organisations to which they belong, since no less restrictive measure can satisfy this requirement for protection. The Chamber further notes that the proposed deletions, which are confined to just a few names, are of very limited scope, that they do not affect the Defence's understanding of the statement, or of the five above-mentioned documents, and that the suggested substitutions enable their content to be perfectly well understood.

(b) The witness's source

15. The Prosecutor also requests redaction of the identity of [REDACTED], author of a document passed to his Office by the witness, as well as of any other matter enabling this source to be identified.²⁷

16. Following the same approach as that described above in paragraph 14,²⁸ the Prosecutor argues that such a measure is necessary [REDACTED] ongoing or further investigations, as well as the [REDACTED] confidential sources [REDACTED], but also to protect the individual in question. He cites the existence of risks similar to those faced by [REDACTED], as recalled above. Finally he proposes that the name of the individual in question be replaced by the words "name of the source of the document".²⁹

17. For the Chamber, the witness's confidential source, although not in this case in direct contact with the Court, must be regarded as its occasional indirect collaborator. As such, he must, for the reasons set out above in paragraph 14, be protected in the same way as the Office of the Prosecutor's direct sources. The Chamber further notes that the proposed redaction, confined to just one name, is of extremely limited scope and in no way affects the Defence's proper understanding of the document.

²⁷ ICC-01/04-01/07-1351-Conf-Exp-AnxA.

²⁸ ICC-01/04-01/07-1351-Conf-Exp, para. 25.

²⁹ ICC-01/04-01/07-1351-Conf-Exp-AnxA.

(c) The intermediary of the Office of the Prosecutor mentioned in an investigator's note

18. The documents that the Prosecutor wishes to communicate to the Defence, and to have added to the list of incriminating evidence,³⁰ include an investigator's note (DRC-OTP-0149-0011), for which he requests a redaction.

19. The Chamber notes that the request concerns an intermediary of the Office of the Prosecutor [REDACTED], in respect of whom it has already ordered protective measures.³¹ It further notes that Trial Chamber I recently held that protective measures adopted in relation to this individual should be maintained [REDACTED].³² In his Additional Information, the Prosecutor emphasises that he still has recourse to the services of [REDACTED], both for purposes of the *Lubanga* trial and in the *Katanga/Ngudjolo* case, [REDACTED].³³

20. The Chamber recalls that the first Chamber to rule on protective measures for [REDACTED] was Trial Chamber I and that, since its decision, those measures have not been varied by either of the two Chambers. The Chamber notes that regulation 42 of the Regulations of the Court provides that protective measures, once ordered in any proceedings before the Court in respect of a victim or witness, shall continue to apply, *mutatis mutandis*, in any other proceedings. Hence, subject to implementation

³⁰ ICC-01/04-01/07-1465-Conf-Exp, paras. 18-28.

³¹ *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, paras. 17 and 19-23 ; *Decision on Three Prosecutor's Applications to Maintain Redactions or Reinstate Redacted Passages* (ICC-01/04-01/07-859, ICC-01/04-01/07-860 et ICC-01/04-01/07-862), 25 March 2009, ICC-01/04-01/07-987-Conf-Exp-tENG, paras. 23 and 24-32 ; *Decision 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, paras. 16 and 18-21; *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, paras. 19 and 20-29; *Decision on the Prosecutor's Application to Redact Information Falling under rule 77 of the Rules of Procedure and Evidence (Witnesses 007 and 294)* (ICC-01/04-01/07-1018-Conf-Exp), 17 June 2009, ICC-01/04-01/07-1214-Conf-Exp-tENG, paras. 14 and 15-21.

³² ICC-01/04-01/06-T-146-CONF-EXP-FRA ET 13-03-2009.

³³ [REDACTED].

of the procedure provided for in that regulation, the protective measure initially ordered remains in force.

21. The Chamber cannot ignore the need to preclude any risk which might prejudice further or ongoing investigations, the Prosecutor's primary justification for today requesting redaction of this intermediary's name. The fact remains that in this case the Chamber is bound to consider the consequences of maintaining such a measure for the defence rights of the two accused. It observes that the existence of an objectively justifiable risk to the safety of this individual is not in fact relied on in support of the Prosecutor's request, and neither does he make any reference to rule 81(4) of the Rules. Moreover, the Appeals Chamber stresses the need for balance between protection, as in this case, of further or ongoing investigations and the need to avoid any redaction prejudicial or contrary to the rights of the Defence and the requirements of a fair and impartial trial. In this regard, the Chamber notes that the Defence for Germain Katanga has in the present case pressed for disclosure of the names of the Office of the Prosecutor's intermediaries,³⁴ so that it may properly conduct its investigations, a concern shared by the Defence for Mathieu Ngudjolo.³⁵ The Chamber further notes that [REDACTED] has acted as intermediary for several Prosecution witnesses in the *Katanga/Ngudjolo* case. In light of this dual finding and of the important role played by this intermediary, which the Prosecutor himself is concerned to stress,³⁶ the Chamber appreciates the potential importance to the Defence of disclosure of the name of this individual, particularly at this advanced stage of the proceedings, with the opening of the trial just a few weeks away, and it is bound to ask itself whether the Defence's continuing ignorance might not prejudice its investigations. Finally, to enable Defence Counsel to be informed at this point of the identity of an intermediary of the Office of the Prosecutor of this

³⁴ Defence for Germain Katanga, "Defence Observations on Prosecution's « *Requête sollicitant le maintien de versions expurgées d'éléments de preuve* »", 21 August 2009, ICC-01/04-01/07-1414, para. 16.

³⁵ Defence for Mathieu Ngudjolo, "Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux requêtes ICC-01/04-01/07-1363 et ICC-01/04-01/07-1379 de l'Accusation tendant à obtenir diverses expurgations d'éléments de preuve", 20 August 2009, ICC-01/04-01/07-1409, para. 11.

³⁶ ICC-01/04-01/07-1474-Conf-Exp, para. 8.

importance might seem fair, since the latter is already aware of the identities of the resource persons of the two Defence teams.

22. The Chamber must therefore leave it to Counsel for the accused to decide whether they should submit an application to Trial Chamber I under regulation 42(3) of the Regulations of the Court for the lifting of the current order for redaction of the name of [REDACTED].

(d) Duration of the redactions

23. The Prosecutor considers that these various redactions should be maintained for the entire duration of the trial.³⁷ For their part, the two Defence teams stress that full disclosure should remain the rule, oppose the proposed redactions,³⁸ and insist that there can be no question of making the redactions permanent as requested.³⁹

24. The Chamber considers that the protective measures authorised herein must be maintained throughout the remaining phase of the proceedings, although it will be open to the accused to request, in the course of the trial, the lifting of a particular redaction, on the ground that it is prejudicing their defence. In current circumstances, and subject to the considerations set out above in regard to the particular situation of the intermediary [REDACTED], the Chamber considers that redaction of the above-mentioned matters does not hinder the Defence's preparation for trial.

25. However, and without losing sight of the need, as noted by the Appeals Chamber, to keep redactions under constant review, the Chamber is aware that, at the current stage of the proceedings, a specific item of information could be of particular importance to the Defence. In such a case it will thus be up to the latter to submit an application setting out, with the maximum of precision, the reasons why the item in question should be disclosed.

³⁷ ICC-01/04-01/07-1351-Conf-Exp-AnxA.

³⁸ ICC-01/04-01/07-1376 paras. 19-21 ; ICC-01/04-01/07-1402, para. 15.

³⁹ ICC-01/04-01/07-1376 para. 26 ; ICC-01/04-01/07-1402, para. 15.

II. Redaction requested under rule 81(4) of the Rules

26. The Prosecutor requests that, in the statement of Witness 267, the name of the witness's mother be deleted, as well as all other information which could enable her to be identified. He states that [REDACTED] and that there is no protective measure in force for the family. He proposes that her name be replaced by the words "the witness's mother".⁴⁰

27. In his "Additional Information", the Prosecutor emphasises that redaction of the identities of family members of witnesses, and indeed of their locations, is a general rule for him in the present case, and is thus systematically requested, both for incriminating and exculpatory evidence as well as for rule 77 material, since such persons must not be put in any way at risk, and information of this kind is not directly related to the case being tried.⁴¹

28. The Chamber cannot endorse the "systematic" use of redactions of this kind, since it appears to run counter to the position adopted by the Appeals Chamber, which insists on the need for requests for redactions to be assessed on a case-by-case basis. Moreover, the Appeals Chamber also asks the Chambers to assess whether there exists an objectively justifiable risk to the safety of the persons concerned. In the Chamber's view, that risk can only be assessed following a specific evaluation. In light of this finding, the Prosecutor should accordingly reconsider, at the earliest opportunity, his policy on redactions, particular since there seem to be differences of approach and practice as between the *Lubanga* case and this one.⁴²

29. Turning now to the specific request before the Chamber, the latter notes that, pursuant to its decision of 20 May 2009,⁴³ the identity of Witness 267 will be disclosed to the Defence 45 days before the opening of the trial, namely on 9 October

⁴⁰ ICC-01/04-01/07-1351-Conf-Exp-AnxA.

⁴¹ ICC-01/04-01/07-1474-Conf-Exp, para. 9.

⁴² ICC-01/04-01/07-1474-Conf-Exp, para. 12, third bullet point.

⁴³ ICC-01/04-01/07-1179.

2009.⁴⁴ The Chamber therefore does not see the point in retaining throughout the trial, as the Prosecutor requests, the deletion from the statement of this witness of the name of his mother, since, from 9 October 2009, the Defence will be able to identify the witness, and hence the name of his mother. The Chamber will therefore allow this redaction only until 9 October 2009, when it must be lifted.

30. As regards the reasons adduced in support of the redactions of the names of family members of a number of witnesses to whom the Prosecutor refers in his Additional Information, the Chamber will as soon as possible hold an *ex parte* hearing confined to the Office of the Prosecutor.

FOR THESE REASONS, the Chamber

AUTHORISES, throughout the trial phase, all of the redactions requested, with the exception of that of the name of the witness's mother, which must be lifted 45 days before the opening of the trial, when the identity of Witness 267 will be disclosed to the Defence;

INSTRUCTS the Prosecutor to disclose to the Defence in the meantime and as soon as possible, in redacted form, all of the documents which are the subject of the present Decision;

INVITES the Defence teams for Germain Katanga and Mathieu Ngudjolo, if they wish to apply to Trial Chamber I under regulation 42 of the Regulations of the Court regarding the situation of [REDACTED], to do so as soon as possible, given the current stage of the proceedings; and

⁴⁴ *Décision reportant la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve)*, 31 August 2009, ICC-01/04-01/07-1442.

INSTRUCTS the Prosecutor to re-disclose, 45 days before the opening of the trial, a copy of the statement of Witness 267 containing only the redactions concerning [REDACTED] and the witness's source.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed] 23/9/09

Judge Hans-Peter Kaul

Dated this 23 September 2009

At The Hague, The Netherlands