

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 4 July 2011

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

**Decision on the Defence Request to Redact the Identity of the
Source of Three Items of Documentary Evidence**

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
Ms Fatou Bensouda
Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika
Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

REGISTRY

Registrar

Counsel Support Section

Victims and Witnesses Unit

Others

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64, 67 and 68 of the Rome Statute (“the Statute”), rule 81 of the Rules of Procedure and Evidence (“the Rules”), and regulation 54 of the Regulations of the Court (“the Regulations”) decides as follows:

I. PROCEDURAL HISTORY

1. On 30 June 2011, the Defence for Mr. Katanga (“the Defence”) sought the authorisation of the Chamber to introduce three new documents and use them in the examination-in-chief of witness DRC-D02-P-0258.¹ The Defence also asked the Chamber to authorise the redaction of the source of the three documents. According to the Defence, the documents were provided to it “on the strict condition that [the source’s] identity not be disclosed to the Prosecutor.”² The Defence alleges that if the identity of the source were to be disclosed to the Prosecutor, this would expose the source to the double risk of (a) losing his position and (b) having his personal safety as well as that of his family compromised.³ The Defence observes, in this regard, that the only way for the Prosecution to make effective use of the name of the source is by contacting him or others with a view to obtain further details about the source.⁴ This, it is claimed, would clearly put the source at risk, as it would be difficult to maintain any attempts to contact the source or others who might know him confidential.⁵

2. The Defence further argues that it does not see any alternative measure other than permanent redaction that could reduce the risk sufficiently.⁶ The

¹ “Urgent Defence Request to Use New Documents and Redact Source”, 30 June 2011, ICC-01/04-01/07-3044-Conf (“the Request”)

² ICC-01/04-01/07-3044-Conf, para. 14

³ ICC-01/04-01/07-3044-Conf, para. 18

⁴ ICC-01/04-01/07-3044-Conf, para. 17

⁵ ICC-01/04-01/07-3044-Conf, para. 17

⁶ ICC-01/04-01/07-3044-Conf, para. 20

Defence states that “[i]n the event that the Chamber rules that the Defence is obligated to disclose the identity of the source, the Defence cannot and will not use the documents.”⁷

3. Finally, the Defence submits that the redaction of the source’s identity does not jeopardise the fairness of the proceedings, as the Prosecution can cross-examine witness DRC-D02-P-0258, who received the documents from the source, in order to evaluate the authenticity of the documents and to find out more about the source.⁸

4. On 30 June 2011, the Defence suggested to provide the Chamber with the identity and position of the source on an *ex parte* basis, in a closed envelope which would be handed over directly to the judges, without being filed with the Registry.⁹ After the hearing was adjourned, the Defence handed over a closed envelope addressed to the Chamber to a Legal Officer of Trial Chamber II. To this date, the envelope has not been opened and is in possession of the Presiding Judge.

5. On 1 July 2011, the Prosecution responded to the Request.¹⁰ The Prosecution denies that disclosure of the identity of the source to it would put that person at risk. It asserts that it takes its obligations to protect the confidentiality of victims, witnesses and sources very seriously and that there are procedures in place to protect the confidentiality of material communicated under seal.¹¹ The Prosecution further submits that it needs to know the identity

⁷ ICC-01/04-01/07-3044-Conf, para. 19

⁸ ICC-01/04-01/07-3044-Conf, para. 21

⁹ ICC-01-04-01-07-T-258-CONF-FRA-ET, p. 76

¹⁰ “Prosecution’s response to Defence’s request to redact the name of a document provider”, 1 July 2011, ICC-01/04-01/07-3053-Conf

¹¹ ICC-01/04-01/07-3053-Conf, paras. 3 and 4

of the source in order to be able to satisfy its “continuous duty to *investigate exonerating circumstances*”.¹²

6. On the same day, the Legal Representatives of the Victims also submitted their observations about the Request.¹³ Before addressing the requested redactions, the Legal Representatives first argue that the Chamber ought to reclassify a number of confidential *ex parte* documents in relation to a cooperation request by the Defence of which the Representatives were not previously aware.¹⁴ Concerning the redaction of the identity of the source, the Legal Representatives argue that the Request does not meet the criteria for redaction as enunciated by the Appeals Chamber. The Legal Representatives submit that the Defence did not establish that disclosure of the identity to the Prosecution would create a risk for the source.¹⁵ They remind the Chamber of the existing ‘Protocol on investigations in relation to witnesses benefiting from protective measures’ and further suggest that the Chamber could adopt specific measures to reduce any difficulties that might arise because of investigating the source.¹⁶ In addition, the Legal Representatives argue that the fact that the Defence has agreed with the source not to reveal its identity can have no influence on the Chamber’s decision whether or not to order the disclosure of that identity.¹⁷ Finally, it is submitted that the possibility to cross-examine witness DRC-D02-P-0258 on how he obtained the three documents does not allow the parties and the participants to ascertain their authenticity and that the

¹² ICC-01/04-01/07-3053-Conf, para. 6

¹³ “Observations sur la requête de la Défense de G. Katanga en vue de pouvoir ne pas communiquer le nom de la personne qui lui a fourni les documents DRC-D02-0001-0932, DRC-D02-0001-0937 et DRC-D02-0001-0941 (ICC-01/04-01/07-3044-Conf)”, 1 July 2011, ICC-01/04-01/07-3052-Conf

¹⁴ ICC-01/04-01/07-3052-Conf, para. 12-21

¹⁵ ICC-01/04-01/07-3052-Conf, para. 27

¹⁶ ICC-01/04-01/07-3052-Conf, paras. 28-31

¹⁷ ICC-01/04-01/07-3052-Conf, para. 32

identity of the source of a document is an important element in the question of its admissibility.¹⁸

II. ANALYSIS

7. Before addressing the issue at hand, the Chamber wants to make clear that the present decision does not in any way prejudge the question as to whether the Defence has met the criteria under regulation 35 of the Regulations regarding the lateness of the disclosure of the three documents or indeed whether they are admissible as evidence.

8. In relation to the Legal Representatives' request for reclassification of a number of documents relating to the Defence's request for cooperation, the Chamber sees no obstacle to their reclassification as public documents at this stage of the proceedings. However, as the documents are concerned with Defence investigations, the Chamber invites the Defence to assess whether all information contained in these documents can be disclosed. If this is not the case, the Defence may request the redaction of this information from the documents before their reclassification.

9. In regard to the question of whether the non-disclosure of the identity of the source of the three documents can be authorised, the Chamber is of the view that providers of documentary evidence can be considered as "persons at risk on account of the activities of the Court" in the sense of the Appeals Chamber's judgment of 13 May 2008.¹⁹ The fact that the person in question provided documentary evidence to the Defence instead of to the Prosecution does not mean that the potential risk is not related to the activities of the Court, even though the Defence is not, strictly speaking, an organ of the Court.

¹⁸ ICC-01/04-01/07-3052-Conf, paras. 33-4

¹⁹ 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

10. Accordingly, the Chamber will apply the standard three-stage test as outlined by the Appeals Chamber.²⁰

A. Would disclosure of the source's identity generate an objectively justified security risk?

11. The Chamber is of the view that there is little doubt that if the identity of the source were to become publicly known, this would potentially put this person at risk. As stated by the Defence, the source provided the documents in violation of strict confidentiality obligations. There may thus be important legal and professional repercussions for the source if this breach of confidentiality becomes known. Moreover, the mere fact of having provided documentary evidence to a defendant before the Court may put the source in a precarious position. As has been argued repeatedly by the Prosecution in the past, in some circumstances the fact of being associated with the activities of the Court may put a person at risk. If it is true that the source abused its official position to reveal documents which allegedly "demonstrate the involvement of EMOI, FAC, MM, CEMIA, QC and the Ministry of Defence in the war in Ituri in the period following the fall of Lopondo",²¹ this would clearly exacerbate the potential risk of retaliation. The Chamber considers, therefore, that there would be an objectively justified risk if the identity of the source were to be disclosed to the public.

12. However, this does not answer the question whether disclosure to the parties only, potentially under strict conditions, would have a similar effect.

²⁰ ICC-01/04-01/07-475

²¹ ICC-01/04-01/07-3044-Conf, para. 12

B. Are there any less restrictive protective measures reasonably available?

13. The Chamber agrees with the Prosecution that the simple fact of disclosing the identity of the source to a limited number of officials of the Office of the Prosecutor would not automatically put the person at risk. The Prosecution must be presumed capable of keeping confidential information, without unintentionally disclosing or indeed leaking it.

14. However, the Chamber is of the view that if the information were to leave the premises of the Court, in order to be used, directly or indirectly, in contacts with third parties as part of investigations, the Office of the Prosecution would no longer be in a position to offer absolute guarantees that the source's identity would not be revealed. Even if the Prosecution conducts its investigation as cautiously and professionally as can be expected from it, the possibility cannot be excluded that third persons will become aware of the identity of the source. The Chamber notes, in this regard, that the Prosecution left little doubt about its intention to use the name of the source to conduct investigations.²² Under those circumstances, the Prosecution's suggestion to restrict disclosure to a very limited number of individuals familiar with the case is of limited value, as it suffices that one person uses the source's identity in contacts with third parties to generate a potential risk. This is especially true in this case, given that the source allegedly occupies a very specific position, with access to secret documents. It should also be stressed, that the source is not benefiting from any form of operational protective measures and that it is unlikely that any such measures could usefully be put in place. The Chamber therefore considers that complete non-disclosure is the only reasonably available measure that can provide the source with sufficiently strong protection.

²² ICC-01/-04-01/07-3053-Conf, para. 6

C. Does non-disclosure gravely prejudice the Prosecution or the Legal Representatives?

1. Prejudice to the Prosecution

15. The Prosecution did not express a need to have the source's identity for the purpose of cross-examining witness DRC-D02-P-0258. Instead, the Prosecution motivated its objection to the non-disclosure of the source's identity exclusively on the basis of its obligation to "investigate exonerating circumstances".²³ As the Chamber found earlier, it is precisely the use of the source's identity for conducting investigations that gives rise to the potential risk. The Chamber must therefore balance the obligation to protect the source against the Prosecution's need to have this information in order to carry out its investigations.

16. The Chamber is not persuaded that the Prosecution will be prevented from conducting meaningful investigations if it does not have the identity of the source of the three documents. First and foremost, for an investigation into the documents' content, it is irrelevant who provided them to the Defence, as it is not alleged that the source is the author.²⁴

17. The Chamber is also of the view that the Prosecution can still meaningfully investigate the authenticity of the three documents even without knowing the source of the Defence. The documents contain several possible indicators of authenticity, such as names of alleged authors, signatures, alleged official stamps, etc., which can be investigated regardless of the source. The Chamber further observes that if the authenticity of one or more of the three documents were to depend entirely on the source's identity, the Defence will

²³ ICC-01/-04-01/07-3053-Conf, para. 6

²⁴ See Trial Chamber I, *Prosecutor v. Thomas Lubanga*, "Decision on the 'Prosecution's Application for Non-Disclosure of Sources contained in the meta-data in compliance with the Consolidated E-Court Protocol' of 16 April 2009", 28 October 2009, ICC-01/04-01/06-2179-Conf-Exp

have to accept the consequences of non-disclosure of the identity to the parties and participants. This is without prejudice to what the Chamber may decide about taking cognisance of the identity of the source *ex parte*.

2. *Prejudice to the Legal Representatives*

18. As far as the Legal Representatives are concerned, the Chamber considers that non-disclosure of the identity of the source will not cause any identifiable prejudice to them. The role of the Legal Representatives is relatively limited compared to that of the Prosecution, which has a right to cross-examine the witnesses of the Defence. Insofar as the Legal Representatives may be authorised to ask certain questions to witness DRC-D02-P-0258, the identity of the source is not required in order to do so. In respect of the authenticity of the three documents, the same observations made in relation to the Prosecution apply.

FOR THESE REASONS,

THE CHAMBER,

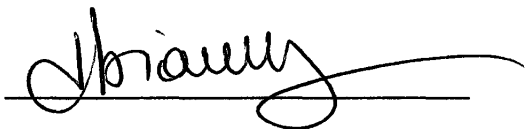
AUTHORISES the permanent redaction of the identity of the source of documents DRC-D02-0001-0932, DRC-D02-0001-0937 and DRC-D02-0001-0941.

INVITES the Defence to seek authorisation to redact documents ICC-01/04-01/07-1900-Conf-Exp; ICC-01/04-01/07-1931-Conf-Exp; ICC-01/04-01/07-2418-Conf-Exp; ICC-01/04-01/07-2619-Conf-Exp, ICC-01/04-01/07-T-133-CONF-EXP; and ICC-01/04-01/07-T-134-CONF-EXP before Monday 15 August 2011 at 16h00.

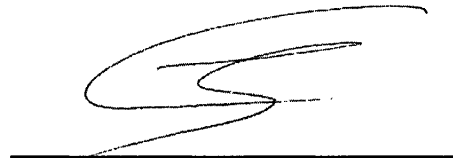
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 4 July 2011

At The Hague, The Netherlands