

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **10 January 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 redacted version

Decision on the request for disclosure of document DRC-OTP-0085-0003

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

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea
Counsel for Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
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Legal Representatives of Victims

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Legal Representatives of Applicants

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Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Other

**Victims Participation and Reparations
Section**

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”), acting pursuant to articles 54(3)(e), 64(2), 64(3)(c), 64(6)(c) and 67 of the Rome Statute (“the Statute”) and rules 77 and 82 of the Rules of Procedure and Evidence (“the Rules”), decides the following.

I. Background

1. On 5 November 2009, the Prosecutor moved the Chamber for leave to disclose to the Defence a summary of document DRC-OTP-0085-0003, which was obtained [REDACTED] under article 54(3)(e) of the Statute (“the Prosecutor’s Request”).¹ Attached to that request were the entire document (“Report”) and the summary in question (“Summary”).² On 10 November 2009, the Chamber authorised the provisional disclosure of the Summary to enable the Defence to inspect it.

2. On 20 November 2009, the Defence for Germain Katanga filed a submission in which it argued that the information contained in the document may have a direct impact on the charges brought against the Accused (“Germain Katanga’s Response”).³ The Defence requested the Chamber to order the Prosecutor to disclose the Report and the identity of its authors and all persons or information sources who were involved in its drafting.⁴ The Defence for Germain Katanga wishes to be able to contact these persons to assess their credibility and verify the reliability of the information which they provided.⁵

3. Moreover, the Defence for Germain Katanga is of the view that it has been prejudiced by the late and selective disclosure of the information contained in the

¹ Office of the Prosecutor, “Prosecution’s request to disclose a new summary of document DRC-OTP-0085-0003 obtained pursuant to the confidentiality restrictions of Article 54(3)(e)”, 5 November 2009, ICC-01/04-01/07-1602.

² ICC-01/04-01/07-1602-AnxB. The ERN of this summary is DRC-OTP-1050-0861.

³ Defence for Germain Katanga, “Defence Request for Disclosure”, 20 November 2009, ICC-01/04-01/07-1662-Conf-Exp.

⁴ *Ibid.*, paras. 16 and 17 and p. 14.

⁵ *Ibid.*, paras. 18 and 32.

Report, which it considers useful for its defence. It submits that the disclosure of documents in summary form should be authorised only during the pre-trial stage of the proceedings and prohibited during the trial stage, in particular where the documents contain information about the acts for which the Accused are considered criminally responsible.⁶

4. Furthermore, the Defence states that, in the matter at hand, the extracts which feature in the Summary are not useful, since it has been unable to make inquiries of the Report's authors and information sources.⁷ It further considers that access to this information confers on the Prosecutor a clear advantage in that he has an opportunity to enter into further contact with those persons and is therefore in a position to diminish the exonerating nature or augment the incriminating nature of the information which they provided.⁸

5. On 23 November 2009, the Defence for Mathieu Ngudjolo filed an addendum to Germain Katanga's Response,⁹ concurring with the latter's factual and legal arguments¹⁰ and setting forth the elements of the Summary it considers to be of particular interest.¹¹ However, it did not state why it considers those elements to be essential.¹²

6. Lastly, the Prosecutor filed his response on 8 December 2009,¹³ recalling that the Report was provided to him on 28 January 2005 by [REDACTED] under confidentiality agreements provided for in article 54(3)(e) of the Statute. He also

⁶ *Ibid.*, paras. 32 and 33.

⁷ *Ibid.*, para. 34.

⁸ *Ibid.*, paras. 35 and 36.

⁹ Defence for Mathieu Ngudjolo, "*Adjonction de la Défense de Mathieu Ngudjolo à la Requête ICC-01/04-01/07-1662-Conf-Exp introduite par l'Equipe de Défense de Germain Katanga*", 23 November 2009, ICC-01/04-01/07-1668-Conf-Exp.

¹⁰ *Ibid.*, paras. 11 and 12.

¹¹ *Ibid.*, paras. 4 and 7.

¹² *Ibid.*, para. 5.

¹³ Office of the Prosecutor, "Prosecution's Response to Defence Request for Disclosure of Document DRC-0085-0003", 8 December 2009, ICC-01/04-01/07-1716-Conf-Exp.

emphasises that since 2005 he has been attempting to have the confidentiality conditions lifted but has been unsuccessful – the information provider has only consented to the Defence teams receiving a summary of the Report.¹⁴

7. The Prosecutor states that [REDACTED] which provided him with the document is not the author of the Report,¹⁵ which originated from [REDACTED]. According to [REDACTED], presenting a summary of the Report is essential to protect the safety of its authors, [REDACTED] and the information providers.¹⁶ The Prosecutor emphasises that there is a real risk to these persons and recalls that [REDACTED] had to be relocated after receiving threats as a result of the professional activities [REDACTED].¹⁷ He further states that [REDACTED] have refused to disclose the identity and whereabouts of those same persons.¹⁸ He adds that, even though the Report does not mention their names, the disclosure of a more complete version would enable them to be identified. He recalls that, in any event, it is for the Chamber to ensure that any disclosure of information does not endanger individuals as a result of the Court's activities.¹⁹

8. The Prosecutor states that any information which could mitigate the guilt of the Accused or exonerate them is already contained in the Summary, and that, apart from such information, the Report is of no interest.²⁰ Lastly, the Prosecutor recalls that, in addition to the Summary, the Defence already has access to several documents which contain analogous information, particularly a report which was already disclosed to it under rule 77 of the Rules²¹ (“[REDACTED]”).

¹⁴ *Ibid.*, paras. 3-5.

¹⁵ *Ibid.*, para. 1.

¹⁶ *Ibid.*, paras. 2 and 16; ICC-01/04-01/07-1716-Conf-Exp-AnxC, paras. 2 and 3.

¹⁷ *Ibid.*, para. 16.

¹⁸ ICC-01/04-01/07-1716-Conf-Exp, paras. 13-14.

¹⁹ *Ibid.*, para. 10.

²⁰ *Ibid.*, para. 10.

²¹ This document bears the registration number DRC-OTP-1010-0067. It was disclosed to the Defence on 21 May 2008 in document bundle no. 14. See ICC-01/04-01/07-1716-Conf-Exp, paras. 10-13.

II. Discussion

9. The Chamber is mindful that it cannot compel the Prosecutor to disclose to the Defence documents obtained under article 54(3)(e) of the Statute without the consent of the information provider. Nonetheless, it recalls that where documents are disclosed in summary or redacted form, it must conduct a review prior to disclosure in order to ensure that the rights of the Accused are not compromised and the trial is conducted fairly.²²

10. Firstly, the Chamber would reaffirm that it prefers disclosure of complete documents to the extent possible or, in the alternative, those with minimal redactions, and that disclosure in summary form is a last resort.²³ Furthermore, contrary to what the Defence for Germain Katanga submits, the Chamber wishes to emphasise that it has previously authorised such a form of disclosure during the trial, as has Trial Chamber I in the *Lubanga* case.²⁴ These authorisations were granted exceptionally, subsequent to a case-by-case review conducted by the trial chambers, in accordance with previous Appeals Chamber rulings.²⁵

11. In the case at hand, the Report was obtained from [REDACTED] headquartered [REDACTED], [REDACTED] transmitted it to the Office of the Prosecutor under

²² See, *inter alia*, 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. 48; *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 and ICC-01/04-01/07-862), 25 March 2009, ICC-01/04-01/07-1033-Conf-Exp-tENG, paras. 30 and 31; *Decision on Documents Obtained Pursuant to Article 54(3)(e) and Already Disclosed to the Defence in Redacted Form*, 23 July 2009, ICC-01/04-01/07-1330-Conf-Exp-tENG, paras. 10-16; *Second decision on documents obtained pursuant to article 54(3)(e) and already disclosed to the Defence in redacted form*, 20 November 2009, ICC-01/04-01/07-1661-Conf-Exp-tENG, paras. 12-16.

²³ See *Order Instructing the Prosecutor to Provide the Chamber with Additional Information Relating to the Statement of Witness 56*, 16 July 2009, ICC-01/04-01/07-1307-Conf-Exp-tENG, paras. 5 and 6; *Decision on the request for disclosure of documents DRC-OTP-0021-0034 and DRC-OTP-0159-0408 and their source*, 8 March 2010, ICC-01/04-01/07-1948-Conf-Exp-tENG, para. 15.

²⁴ See ICC-01/04-01/07-1662-Conf-Exp, para. 33; ICC-01/04-01/07-1948-Conf-Exp and Trial Chamber I, *Reasons for Oral Decision lifting the stay of proceedings*, 23 January 2009, ICC-01/04-01/06-1644.

²⁵ ICC-01/04-01/06-1486, paras. 42 and 48.

article 54(3)(e) of the Statute. The Report seems to have various authors who had direct contact [REDACTED]. It was drafted following interviews with several persons who provided useful information. [REDACTED] consented to its disclosure to the Defence on the condition that a summary be prepared; a summary was finally disclosed to the Office of the Prosecutor on 26 October 2009.²⁶

12. The Report is entitled [REDACTED]. According to the Prosecutor, the Report contains five pieces of information which fall under article 67(2) of the Statute and 35 pieces of information falling under rule 77 of the Rules.²⁷

13. The Chamber notes that the names of the information providers, the authors, [REDACTED] are not mentioned in the Report. It appears that the Report was drafted with the intention of preserving their anonymity in mind from the outset, since the information sources provided several pieces of information which incriminate the Accused in the present case as well as other persons. In fact, it seems to the Chamber that, in the circumstances, the information provider could not have considered less restrictive measures.

14. Moreover, in the event that the identity of the Prosecutor's source is disclosed to the Defence, there is nothing to indicate that the Defence would be able to obtain the identity of the authors or of their own sources, as this information has not been disclosed to the Office of the Prosecutor and does not even feature in the Report.²⁸ The Defence's argument that the Prosecutor could have access to the document's

²⁶ ICC-01/04-01/07-1602-Conf-Exp, para. 5. A summary (DRC-OTP-0204-0391) was disclosed to the Defence for Thomas Lubanga: see *Decision issuing Annex accompanying Decision lifting the stay of proceedings of 23 January 2009*, 23 March 2009, ICC-01/04-01/06-1803-Conf-Exp-Anx2, Anx42. The Prosecutor stated that it would be provided "[TRANSLATION] shortly", Office of the Prosecutor, "*Rapport de l'Accusation sur les documents ou renseignements obtenus en vertu d'accords de confidentialité conclus sur la base de l'article 54(3)(e) suite à «l'Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires»*", 5 January 2009, ICC-01/04-01/07-811-Anx1A, p. 7. The Chamber itself obtained a copy at the same time as the Summary, on 5 November 2009. See ICC-01/04-01/07-1602-AnxB.

²⁷ ICC-01/04-01/07-1602-AnxC.

²⁸ ICC-01/04-01/07-1662-Conf-Exp, para. 34.

sources, which would put him at an advantage, cannot therefore succeed in the matter at hand.²⁹

15. Furthermore, the Chamber recalls that “[i]dentities can be material to the accused’s defence where the individuals concerned have information which could assist in its preparation”³⁰ and that “[w]here the source requires his or her name, or that of certain of his or her sources, to be redacted in order to avoid reprisals, even where those individuals provide information which might be useful and relevant for the Defence, the disclosure of other sources of information providing similar material to that contained in the documents in question can constitute an adequate counterbalancing measure and enable the rights of the Defence to be respected”.³¹

16. The Summary first discusses the Report generally, then presents the five items of potentially exculpatory information within the meaning of article 67(2) of the Statute, and lastly mentions the 35 items of information it deems material to the Defence within the meaning of rule 77 of the Rules. The Prosecutor has presented alternative sources for each item of information of interest to the Defence for Germain Katanga, and the Chamber has endeavoured to assess the information on a case-by-case basis, directing the Prosecutor to provide any additional information it considered necessary.³²

²⁹ *Ibid.*, paras. 35 and 36.

³⁰ *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, para. 12; ICC-01/04-01/07-1661-Conf-Exp, para. 13; ICC-01/04-01/06-1644, paras. 48 and 49.

³¹ ICC-01/04-01/07-1661-Conf-Exp, para. 16.

³² E-mail dated 8 March 2010 from a legal assistant of the Chamber to the Office of the Prosecutor.

Information under article 67(2) of the Statute

- Pexo 1

17. The Defence states that it is interested in the information that [REDACTED]. The Chamber considered the alternative sources insufficient on this point and hence invited the Office of the Prosecutor to inquire of its source whether it would consent to the disclosure to the Defence of the relevant passages of the Report. The source consented, under the proviso that the footnotes be redacted.³³

- Pexo 2

18. Secondly, the Defence wishes to obtain additional information³⁴ on an extract from the Summary indicating that:

[REDACTED].³⁵

19. The Chamber notes that this is a verbatim extract from interview notes annexed to the Report and that the Summary includes the entire third and last paragraph of the section of the notes entitled [REDACTED]. The interview was with a source of information on the events which took place in [REDACTED] village. In the Chamber's view, the remaining two paragraphs of the relevant section do not provide any additional information on the two Accused's positions in the organisations or on other individuals who may have led the armed groups. Furthermore, contrary to the Defence's view, they do not contain any other information which may affect the common plan.³⁶

³³ E-mail dated 21 April 2010 from the Office of the Prosecutor to the Legal Adviser to the Trial Division.

³⁴ ICC-01/04-01/07-1662-Conf-Exp, paras. 21 and 22; ICC-01/04-01/07-1668-Conf-Exp, paras. 8 and 9.

³⁵ ICC-01/04-01/07-1602-Conf-Exp-AnxC, at p. DRC-OTP-1050-0863.

³⁶ *Ibid.*, para. 22; ICC-01/04-01/07-1668-Conf-Exp, para. 5.

20. The Prosecutor has provided alternative documentary sources indicating (i) [REDACTED]; [REDACTED];³⁷ (ii) [REDACTED];³⁸ (iii) [REDACTED]; [REDACTED];³⁹ (iv) that [REDACTED].⁴⁰

Pexo 3, 4 and 5

21. The Defence wishes to obtain additional details on the following information, corresponding to pexo (3), (4) and (5), which, in the Prosecutor's view, fall under article 67(2) of the Statute:

(3) [REDACTED].

(4) [REDACTED].

(5) [REDACTED].

22. The Chamber notes that these three extracts are included in their entirety in [REDACTED],⁴¹ which also includes the notes of interviews with the sources of this information. The Defence therefore has an alternative source which is almost identical to the Report. Accordingly, the Chamber has not considered it necessary to assess the additional alternative sources submitted by the Prosecutor.

Information under rule 77 of the Rules according to the Report

23. The Defence wishes to obtain details on the 35 items of information considered by the Prosecutor as material to the preparation of the defence of the two Accused. All refer to the interview notes annexed to the Report. The Defence for Germain Katanga states that it is particularly interested in the statements made in paragraphs 1 to 6, 11 to 14 and 27 to 35. In its view, they appear to be relevant in that

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ Pexo (3): see [REDACTED], pp. DRC-OTP-1010-0069 to DRC-OTP-1010-0070; pexo (4): see [REDACTED], p. DRC-OTP-1010-0107; and pexo (5): p. DRC-OTP-1010-0104.

they deal with (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; (iv) [REDACTED]; and lastly (v) [REDACTED]. The Defence for Mathieu Ngudjolo indicates that the information in paragraphs 1, 2, 5, 14, 16, 18, 20, 21, 27 to 30 and 35 illustrate the potential materiality of the document to its preparation.

24. Firstly, the Chamber notes that, in respect of the abovementioned items, the Summary reproduces verbatim the substance of the information from the Report. Furthermore, the Chamber considers the documents listed below as valid alternative sources of information.

25. The first is a letter [REDACTED].⁴²

26. The second document is an [REDACTED] report [REDACTED].⁴³

27. The third documentary source is also a report [REDACTED].⁴⁴

28. Finally, the fourth documentary source, [REDACTED], is a report [REDACTED].⁴⁵

29. Furthermore, the Chamber is of the view that the written statement of [REDACTED],⁴⁶ [REDACTED]⁴⁷ could constitute complementary alternative sources of information.

30. In the Chamber's view, these alternative sources cover the information sought by the Defence in relation to points 1 to 6 of the Summary. As for point 11, the Summary fully reproduces half of the interview note, precisely the passage which might be relevant to the Defence. Point 12 presents the entirety of the interview notes. In respect of point 13, the Summary again reproduces in its entirety the extract

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

of the interview notes which feature in the Report, the only element missing being information concerning the source's whereabouts. Finally, the Chamber notes that point 14 alleging that a source "[REDACTED]" and that "[REDACTED]" was absent from the proposed compensatory measures. However, the Prosecutor's source has since consented to the disclosure to the Defence of the relevant extract, under the proviso that any information which might identify the interviewee be redacted.⁴⁸

31. Finally, the Chamber notes that points 27 to 35, which are contained in the Summary and about which the Defence teams wish to obtain further information, correspond to the interview notes featured in the annex to [REDACTED] which are already in their possession.

32. Hence, in light of the arguments submitted by the Defence teams, having assessed the alternative sources of information proposed by the Prosecutor, the Chamber considers that the information under article 67(2) of the Statute and rule 11 of the Rules is sufficiently and adequately covered by those documents. Furthermore, it notes that the Summary includes several verbatim extracts from the Report which, moreover, does not always provide the information sought by Counsel for the Accused. Lastly, it notes that the Defence has in its possession [REDACTED], which is precisely the part of the Report [REDACTED]. Accordingly, the Chamber is of the view that the aforementioned compensatory measures safeguard the rights of the Accused and the fair conduct of the trial.

⁴⁸ E-mail of 21 April 2010 from the Office of the Prosecutor to the Legal Adviser to the Trial Division notifying the source's consent to the disclosure to the Defence of the first two paragraphs of the notes of the interview with [REDACTED], featured on pages DRC-OTP-0085-0047 and DRC-OTP-0085-0048, subject to the redaction of the information [REDACTED].

FOR THESE REASONS, THE CHAMBER

GRANTS the Prosecutor's Request;

INSTRUCTS the Prosecutor to disclose to the Defence pages DRC-OTP-0085-0026 to DRC-OTP-0085-0028 of the Report in accordance with the arrangements set out at paragraph 17 of this decision, and the relevant extract from Annex 1 of the Report under the conditions described at footnote 48 of this decision.

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

_____[signed]____

Judge Bruno Cotte
Presiding Judge

_____[signed]____

Judge Fatoumata Dembele Diarra

_____[signed]____

Judge Christine Van den Wyngaert

Dated this 10 January 2011,

At The Hague, The Netherlands