

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 May 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 CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public version

Decision on the protection of the neutral and impartial status of information providers

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

Counsel for Mathieu Ngudjolo Chui

Legal Representatives of the Victims

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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to articles 54, 64, 67 and 68 of the Rome Statute of the International Criminal Court ("Statute"), rules 73 and 81(4) of the Rules of Procedure and Evidence ("Rules"), and regulation 54 of the Regulations of the Court ("Regulations") issues the following decision:

I. BACKGROUND

A. United Nations

1. On 3 November 2009, the Chamber authorised the Office of the Prosecutor ("Prosecution") to add witness P-317 to the Prosecution Witness List.¹ It also ordered the Prosecution to specify the legal basis as well as the reasons justifying the application of redactions to the statement of P-317, which included, for the purposes of this decision, a redaction of the name of [REDACTED]. Accordingly, the Prosecution submitted that its redactions fell under article 54(3)(e) of the Statute, and the redactions were provisionally authorised pending a ruling from the Chamber.²

2. In an *ex parte* hearing held with the Prosecution on 17 November 2009,³ the Chamber raised the question of whether article 54(3)(e) was the appropriate legal basis, and invited the Prosecution to consider re-filing its application for redactions under rule 81(4) of the Rules.⁴ On 30 November 2009, the Prosecution filed an amended application, again relying on article

¹ "Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537)", 3 November 2009, ICC-01/04-01/07-1590

² ICC-01/04-01/07-1597, par. 2, 4; "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 5 and 9 November 2009", 10 November 2009, ICC-01/04-01/07-1621

³ ICC-01/04-01/07-T-77-CONF-EXP-ENG ET, 17 November 2009

⁴ *Ibid.*, p. 4, lines 22 and 23

54(3)(e) of the Statute, and in the alternative, rule 81(4) of the Rules.⁵ On 30 November 2009, the Defence for Germain Katanga filed its observations to the Prosecution's amended application, strongly disagreeing to the reliance on article 54(3)(e).⁶

3. In its decision of 16 December 2009, the Chamber expressed concern about the Prosecution's reliance on article 54(3)(e) in this application, and rejected the provision as the correct legal basis. Instead, the Chamber analysed the application for redactions as if they had been requested under rule 81(4) of the Rules, and stated that it would apply the criteria laid down previously by the Appeals Chamber on this matter.⁷ Thus, whilst it provisionally granted the redactions pursuant to rule 81(4), it ordered "the Prosecution to provide it with information as to why the disclosure of the name of [REDACTED] would potentially help identify individuals and endanger their safety".⁸

4. The Prosecution filed its response on 21 December 2009,⁹ in which it set forth the information it had received from the Office of Legal Affairs of the

⁵ "Prosecution's amended application seeking redactions to the statement of Witness 317 pursuant to Rule 81(4) and Articles 54(3)(e), 19 November 2009, ICC-01/04-01/07-1654, par. 13 - 18; for a summary of the arguments of the Prosecution see "Decision on the redactions contained in the statement of P-317", 16 December 2009, ICC-01/04-01/07-1721-Conf-Exp, par. 6

⁶ ICC-01/04-01/07-1689, par. 5, 9, 14, 15, 17, 18, 22; ICC-01/04-01/07-T-77-CONF-EXP-ENG ET, 17 November 2009, p. 6, lines 21-23 ; for a summary of the Defence position see ICC-01/04-01/07-1721-Conf-Exp par. 7 - 10

⁷ ICC-01/04-01/07-1721-Conf-Exp par. 15; "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-01/04-01/04-475, par. 71 and 97

⁸ ICC-01/04-01/07-1721-Conf-Exp par. 19

⁹ "Prosecution's Response to order ICC-01/04-01/07-1721-Conf-Exp", 21 December 2009, ICC-01/04-01/07-1735-Conf-Exp

United Nations on 12 November 2009.¹⁰ Therein, the Office of Legal Affairs of the United Nations states [REDACTED].¹¹

B. [REDACTED]

5. On 24 March 2010, the Prosecution filed another request for protective measures, this time for the benefit of [REDACTED].¹² It concerns a letter dated 17 February 2010 originating from that organisation. The letter in question attests that before 29 July 2003, [REDACTED] “did not have in place a system of record keeping [REDACTED], and therefore it cannot certify if Trial Witness [REDACTED] before that date.”¹³

6. [REDACTED] has no objection against disclosure of the letter to the Defence without restrictions. However, according to the Prosecution, “[REDACTED] requests that the content of the Document and the fact that [REDACTED] has been in contact with and provided information to the Court not be discussed in open session nor become public.”¹⁴ The reason given for this request is that “any association of the organization and the author of the Document with the Court could have an adverse effect on [REDACTED] and on the safety of its staff [REDACTED]

II. ANALYSIS AND CONCLUSION

7. The Chamber considers that these requests are very similar in nature. They both concern the protection of the image of neutrality of the organisations in question, which, it is alleged, would be jeopardised if it became known that they had provided the Court with information. In

¹⁰ ICC-01/04-01/07-1735-Conf-Exp, par.1

¹¹ Ibid., par.1

¹² “Prosecution’s request to disclose document DRC-OTP-1053-0175 with protective measures”, 24 March 2010, ICC-01/04-01/07-1997-Conf

¹³ Idem., par. 2

¹⁴ Idem., par. 4

addressing these requests, the Chamber will first deal with the request for redactions originating from the UN.

A. Request for redaction

8. In its decision of 13 May 2008, the Appeals Chamber held that although rule 81(4) of the Rules does not authorise the Chamber to take measures to protect *any* person, there are other provisions in the Statute and the Rules which are aimed at ensuring that persons are not put at risk through the activities of the court, and which are not limited to the protection of only witnesses, victims, and members of their families.¹⁵ The Appeals Chamber thus concluded that there is an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court,¹⁶ and that it would defeat the object and purpose of these other provisions if the Chamber were not able to authorise redactions pursuant to rule 81(4) for the protection of persons other than witnesses, victims, and members of their families.¹⁷ It thus held that rule 81(4) should be read to include the words "persons at risk on account of the activities of the Court".¹⁸

9. It is not immediately apparent whether the current factual configuration falls within this definition. Clearly, the terms of rule 81(4), even within the broad interpretation of the Appeals Chamber, only applies to individuals¹⁹ and not to legal entities or other types of organisations. That

¹⁵ 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, par. 43-54, in particular the Appeals Chamber made reference to articles 54(3)(f), 43(6), 68(4) of the Statute, and rules 16-18, 17(2)(a), 59(2), and 87(1) of the Rules.

¹⁶ ICC-01/04-01/04-475, par. 54

¹⁷ *Ibid.*, par. 55

¹⁸ *Ibid.*, par. 56

¹⁹ *Ibid.*, par. 71 "non-disclosure pursuant to rule 81(4) may only be authorised if, first of all, disclosure of the information concerned would pose a danger to *the particular person.*" [emphasis added]

said, if it can be established that by implicating an organisation in the activities of the Court all or some of its members are thereby personally put at risk, the Chamber may have to accord redactions in order to protect these individuals. This may be so even if these members are not identified.

10. The Chamber sees no reason why different criteria should be applied for evaluating this type of risk than for when identified individuals are concerned. However, the criteria must be applied with the same rigour, thereby taking into consideration the specific factual circumstances of the request and the fact that the trial is now fully underway.²⁰

11. As the Chamber has previously stated,²¹ applications for redactions are subject to strict judicial supervision and will be considered on a case-by-case basis in light of the criteria previously laid down by the Appeals Chamber,²² which are outlined below:

- 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;²³
- 2) the risk must arise from disclosing particular information *to the Defence*, as opposed to disclosing the information to the public at large;²⁴
- 3) the infeasibility or insufficiency of less restrictive protective measures;²⁵

²⁰ Ibid., par. 68 "it must be emphasised that this judgment concerns the stage of the proceedings relating to the confirmation of the charges against a suspect and must be seen in that light. [...] As such, it may be permissible to withhold disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial."

²¹ ICC-01/04-01/07-888-Conf-Exp-tENG; ICC-01/04-01/07-889-Conf-tENG, par. 3; ICC-01/04-01/07-987-Conf-Exp, par. 5

²² ICC-01/04-01/04-475, par. 71 In particular, the Appeals Chamber obliges the Chamber to consider "whether the danger could be overcome by ruling that the information should be kept confidential between the parties."

²³ Ibid., par. 71 and 97

²⁴ Ibid., par. 71 and 97

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;²⁶ and

5) the obligation periodically to review the decision authorizing the redactions should circumstances change.²⁷

12. In regard to the current application for the redaction of the name [REDACTED], the Chamber considers that the Prosecution has not provided sufficient explanation of why there is an objectively justifiable risk to the safety of members of [REDACTED], which can be linked to the Accused. Moreover, the Chamber is not convinced that no less restrictive - but sufficient - measures are available.

13. In particular, the Chamber is not persuaded by the argument that disclosure of the fact that unidentified members of [REDACTED] provided information to [REDACTED], who relied on this information for the preparation of [REDACTED] that was subsequently communicated to the Prosecution several years later, places the current members of [REDACTED] in danger from supporters and sympathizers of the Accused. There is simply insufficient evidence to support this claim.

14. Moreover, even assuming that the alleged danger had been established, the Chamber must also consider whether there are less restrictive measures available that will sufficiently protect the interested persons. It is to this question that the Chamber will turn its attention now.

²⁵ "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, par. 37; "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, par. 33

²⁶ ICC-01/04-01/06-773, par. 34

²⁷ ICC-01/04-01/07-475, par. 73

B. Other protective measures

15. The second argument in support of the Prosecution's application in relation to the UN's request is that [REDACTED] and elsewhere may be impeded in the future if it is known that it provided information which is being used in a prosecution before this Court. In essence, the argument is if it becomes public knowledge that [REDACTED].

16. The same argument is invoked for the protective measures asked in favour of [REDACTED]. However, the Chamber notes that [REDACTED] does not object to the disclosure to the Defence of the fact that it directly provided the Court with information. Instead, [REDACTED] asks only that the fact that [REDACTED] has been in contact with and provided information to the Court not be discussed in open session nor become public.²⁸

17. The Chamber notes that the Prosecution relies on article 68 of the Statute as the unique legal basis of its request regarding [REDACTED]. It is particularly telling that the Prosecution could not invoke a more specific provision as a legal basis for this request. Indeed, the only provision in the Rules which relates to a similar type of situation is rule 73(4)-(6) of the Rules, which deals exclusively with privileged communications between the Court and the International Committee of the Red Cross ("ICRC"). There is, in other words, no specific legal basis in the Statute or the Rules which mandates the Chamber to protect the neutral image of information providers.

18. Nevertheless, the Chamber recognises that the two organisations involved have a legitimate interest which must be protected. In order for them to carry out their [REDACTED] mandates, it is important that they are

²⁸ ICC-01/04-01/07-1997-Conf, par. 4

seen to be neutral and impartial. This is as much a matter of perception as it is one of fact.

19. In the specific situations at hand, [REDACTED] only provided very general information to the Court, which has no bearing whatsoever on the acts and conduct of the accused, their allies or the organisations to which they may have belonged or have links with. Indeed, the letter only provides information about the internal working methods of [REDACTED].

20. With regard to [REDACTED], the Chamber reiterates that [REDACTED] is only mentioned in relation to information that it purportedly provided to a [REDACTED]. There is no allegation that [REDACTED] provided information directly to the ICC.

21. Neither organisation has therefore done anything that could objectively call into question its neutrality or impartiality.

22. However, what matters is not just whether the organisations in question have done anything to forfeit their impartial status, but whether they may be perceived as such. There is a real risk that an innocent act of technical cooperation with the Court or the fact of having provided information to a third party, who subsequently transmitted it to the Court, may, rightly or wrongly, be perceived by some as an act of active collaboration with the Prosecution.

23. The Chamber will therefore exceptionally use its discretion under article 64(6)(c) and(f) of the Statute and regulation 54(l) of the Regulations to issue any order in the interests of justice, in order to prevent that the image of impartiality of [REDACTED] and [REDACTED] suffers unduly. The parties and participants will therefore be forbidden from mentioning the fact that [REDACTED] and [REDACTED] have provided information to the Court,

either directly or indirectly, in open session. They will furthermore be forbidden from discussing the fact that [REDACTED] and [REDACTED] have provided information to the Court with any third parties. The Chamber stresses that this is an exceptional measure, which is based on the highly specific circumstances of the two cases involved.

24. The Chamber considers that measures ordered are not in any way prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Indeed, the Defence can claim no strong interest in having it be publicly known that [REDACTED] or [REDACTED] have provided information to the Court. A crucial element in reaching this decision is the fact that the information provided by [REDACTED] and (indirectly) by [REDACTED] is not of central significance for the Defence.

FOR THESE REASONS,

THE CHAMBER,

REJECTS the request to redact the name of [REDACTED];

ORDERS that the names of [REDACTED] and [REDACTED], or the fact that they have provided – directly or indirectly – information to the Court, shall only be mentioned in private session;

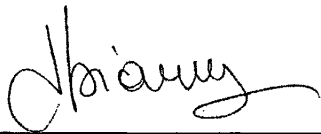
ORDERS that the content of Document DRC-OTP-1053-0175 shall only be discussed in private session; and

ORDERS that the accused or their respective Defence teams, as well as the Victims' Legal Representatives, may not discuss the fact that [REDACTED] and [REDACTED] have provided the Court with information with any third party or person.

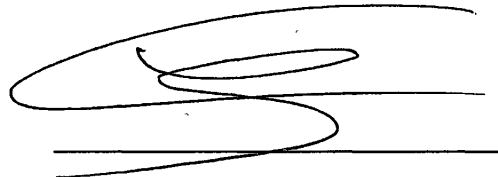
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 5 May 2010

At The Hague, the Netherlands