



Original: **French**

No.: ICC-01/04-01/07
Date: 26 February 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public Document

Reasons for the Oral Decision of 3 February 2009 on the Procedure for the Redaction of Documents Obtained by the Prosecutor Under Article 54(3)(e) of the Statute and Order Instructing the Prosecutor to Submit Documents to the Chamber

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

**Victims Participation and Reparations
 Section**

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 54, 67 and 68 of the *Rome Statute* (“the Statute”) and rules 77 and 81 of the *Rules of Procedure and Evidence* (“the Rules”), decides as follows:

1. This decision sets out in writing the reasons for the decision rendered orally by the Chamber on 3 February 2009. On 21 January 2009, the Chamber instructed the Prosecutor¹ to explain the reasons incriminating and exculpatory evidence or evidence falling under rule 77 of the Rules obtained pursuant to article 54(3)(e) of the Statute was deleted without its first having been brought to the attention of the Chamber in breach of the procedure set down by the Appeals Chamber at paragraph 48 of its judgment of 21 October 2008.²

2. In this case and in view of the document which was since produced by the Prosecutor on 12 February 2009,³ the Chamber, absent error, identified the following documents as having been disclosed directly to the Defence in redacted form (Original Doc ID/ERN): DRC-OTP-0003-0030, DRC-OTP-0003-0388, DRC-OTP-0004-0175, DRC-OTP-0006-0201, DRC-OTP-0006-0368, DRC-OTP-0007-0145, DRC-OTP-0007-0185, DRC-OTP-0007-0336, DRC-OTP-0007-0374, DRC-OTP-0008-0496, DRC-OTP-0009-0028, DRC-OTP-0009-0106, DRC-OTP-0009-0117, DRC-OTP-0009-0157, DRC-OTP-0009-0194, DRC-OTP-0009-0200, DRC-OTP-0011-0191, DRC-OTP-0043-0086, DRC-OTP-0065-0436, DRC-OTP-0111-0720, DRC-OTP-0126-0309, DRC-OTP-

¹ “*Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant certaines notes de communication, des rapports d’inspection et le rapport daté du 5 janvier 2009 (norme 28 du Règlement de la Cour)*”, 21 January 2009, ICC-01/04-01/07-838.

² 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 (“the Judgment of 21 October 2008”).

³ Office of the Prosecutor, “*Prosecution’s Submission of Annexes on Disclosure Categories of Documents Obtained Pursuant to Article 54(3)(e) of the Statute*”, 12 February 2009, ICC-01/04-01/07-897.

0152-1356, DRC-OTP-0001-0125, DRC-OTP-0006-0089, DRC-OTP-0006-0227, DRC-OTP-0065-0068 and DRC-OTP-0111-0662.

3. In its response dated 26 January 2009,⁴ the Prosecutor maintains that the Chamber did not correctly interpret the above-mentioned paragraph 48 which must be taken in conjunction with paragraph 44 of the Judgment of 21 October 2008, which makes the Chamber's intervention contingent on the existence of tension between the confidentiality which the Prosecutor has undertaken to respect and the requirements of a fair trial.⁵ In his view, "where no such tension exists and the redactions applied do not impact on the requirements of fair trial, [...] the modalities of disclosure remain an *inter partes* process [...] the matter does not require the review of the Chamber."⁶ He considers that disclosure, in this instance, was effected pursuant to this interpretation at the earliest possible opportunity in order to comply with the provisions of article 67(2) of the Statute⁷ and emphasises that he intended to place all the relevant documents before the Chamber for its review.⁸

4. Paragraph 48 of the Judgment of 21 October 2008 reads as follows:

[...] where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under article 54 (3) (e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider (see article 64 (6) (c) of the Statute and rule 81 (3), first sentence, of the Rules of Procedure and Evidence). Instead, the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54 (3) (e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.⁹

⁴ Office of the Prosecutor, "Prosecution's response to the Trial Chamber's '*Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant certaines notes de communication, des rapports d'inspection et le rapport daté du 5 janvier 2009 (norme 28 du Règlement de la Cour)*' of 21 January 2009", 26 January 2009, ICC-01/04-01/07-852.

⁵ ICC-01/04-01/07-852, paras. 3 and 4.

⁶ ICC-01/04-01/07-852, para. 3.

⁷ ICC-01/04-01/07-852, para. 6.

⁸ ICC-01/04-01/07-852, para. 7.

⁹ Judgment of 21 October 2008, para 48.

Paragraph 44 of that same Judgment states:

Therefore, whenever the Prosecutor relies on article 54 (3) (e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial. There might be circumstances in which this tension can be resolved by reverting to some or all of the measures referred to by the Prosecutor in his Document in Support of the Appeal and summarised at paragraph 28 above, in particular if only small numbers of documents are concerned. In the present case, however, material has been collected on a large scale, in particular on the basis of the ICC-UN Relationship Agreement and the MONUC Memorandum of Understanding. It appears from the record that when agreeing to receive the material on the condition of confidentiality the Prosecutor was aware that the material could contain exculpatory information (see ICC-01/04-01/06-1387-Conf-Exp-Anx1, page 4, and ICC-01/04-01/06-13 87-Conf-Exp-Anx2, page 3). He relied on the expectation that the information providers would, at a later stage, agree to the lifting of the confidentiality, should this become necessary.

Moreover, paragraph 28, to which the above-mentioned paragraph 44 refers, reads as follows:

The Prosecutor states that in the event that potentially exculpatory information is covered by article 54 (3) (e) of the Statute, he is under an obligation to request the information provider to consent to the lifting of the confidentiality; if such consent is not given, the Prosecutor will explore all other options, including the identification of new, similar exculpatory material, providing the material in summarised form, stipulating the relevant facts, or amending or withdrawing the charges (Document in Support of the Appeal, paragraph 17).

5. In its oral decision, the Chamber stated that the Prosecutor's interpretation of the Judgment of 21 October 2008 could not be accepted since, in its view, paragraph 48 is unequivocal. The Chamber considers that the judges of the Appeals Chamber required that scrutiny by the Chamber would precede disclosure of the documents to the Defence in order to enable the Chamber to ensure that, under no circumstances, would the rights of the accused be affected by a redaction carried out by the provider in such a way as to render the relevant document incomprehensible, impossible to read or even worthless to the Defence.

6. The Chamber appreciates that the Judgment of 21 October 2008 relates to the disclosure of exculpatory material covered by article 54(3)(e) agreements since this is the matter brought before the judges of the Appeals Chamber. Nevertheless, the

Chamber does not see how the procedure thus established by the Appeals Chamber could not be applied in the event of disclosure of incriminating material.

7. The Chamber recalls that any redaction must be subject to judicial review before the document is transmitted to the Defence. In the opinion of the Chamber, this requirement, which has been consistently reiterated by the Appeals Chamber,¹⁰ pertains to both the redactions made at the Prosecutor's initiative and those required by the information provider where the document was obtained under article 54(3)(e) of the Statute.

8. Admittedly, when the document is obtained by the Prosecutor under article 54(3)(e) agreements, the Chamber's leeway is not entirely the same as is the case when a redaction is requested by the Prosecutor at his own initiative. In the latter case, the Chamber may not accept the proposed redactions requested by the Prosecutor and require that the document be disclosed. However, in the specific context of article 54(3)(e) of the Statute, it cannot require such disclosure. If, after ensuring that the material should have been disclosed to the Defence if it has not been obtained under the above-mentioned article 54(3)(e), it considers that the redactions requested by the provider prejudice the rights of the Defence, it can only ask the Prosecutor to seek, in consultation with the information provider, other solutions to cancel or amend the requested redactions or, failing that, determine whether and how counter-balancing measures can be taken to ensure that the rights of the accused are respected and the trial is fair.

¹⁰ 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. 39; 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, para. 59; *Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476, para. 56; Appeals Chamber, *Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecution Request for Authorisation to redact Statements of Witnesses 4 and 9"*, 27 May 2008, ICC-01/04-01/07-521, para. 35.

9. The Chamber considers that the concern to reconcile the confidentiality required of the Prosecutor with that of a fair trial, as recalled at paragraph 44 of the Judgment of 21 October 2008, far from challenging the procedure established in paragraph 48, merely reiterates the Prosecutor's responsibilities to implement article 54(3)(e) of the Statute and his disclosure obligations. In this respect, the Appeals Chamber actually relied on the jurisprudence of the European Court of Human Rights¹¹ to emphasise that it is necessary for the judges to review decisions restricting the disclosure of evidence. Therefore, in no way do the Appeals Chamber's considerations at paragraph 44 of its judgment make the Chamber's intervention contingent on the existence of tension between the confidentiality which the Prosecutor has undertaken to respect and the requirements of a fair trial.

FOR THESE REASONS, THE CHAMBER

ORDERS the Prosecutor to submit by no later than 4 p.m. on 5 March 2009 all the documents obtained under article 54(3)(e) of the Statute and already disclosed to the Defence in redacted form, accompanied by their original version; and

INVITES the Defence to submit its observations, if any, on the redactions to the above-mentioned documents before 4 p.m. on 5 March 2009.

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

[signed]

Judge Bruno Cotte

¹¹ *Rowe and Davis v. United Kingdom*, No. 28901/95, Reports 2000-II, 16 February 2000, para. 60 to 62.

Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 26 February 2009

At The Hague, the Netherlands