

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 August 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 DRC-D03-0001-0707**

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

2. On 21 July 2011, the Defence for Mr. Ngudjolo (“the Defence”) requested authorisation to add a number of documents to the Defence Evidence List.¹ One of the documents to which this request pertained was DRC-D03-0001-0707. The identity of the source of this document (“the Source”) had been redacted without prior authorisation and on 26 July 2011, the Chamber asked the Defence to submit a request to that effect by 5 August 2011.²
3. On 2 August 2011, the Defence complied with this instruction and informed the Chamber that it had obtained document DRC-D03-0001-0707 on the condition that it would not disclose the identity of the Source.³ The Defence further claimed that disclosing the identity of the Source would result in grave consequences for the life of the Source and its family.⁴
4. On 9 August 2011, the Prosecution responded and argued that the Defence had not shown that the Source would be at risk if its identity were to

¹ “Requête de la Défense de Mathieu Ngudjolo en vue de solliciter l’autorisation d’ajouter sur sa liste des pièces et de communiquer aux parties et participants des documents en application des règles 78 et 79-4 du Règlement de procédure et de preuve, et de la norme 35-2 du Règlement de la Cour”, 21 July 2011, ICC-01/04-01/07-3082

² Electronic communication from Trial Chamber Legal Officer of 26 July 2011 at 12h26

³ “Précisions concernant la ‘Requête de la Défense de Mathieu Ngudjolo en vue de solliciter l’autorisation d’ajouter sur sa liste des pièces et de communiquer aux parties et participants des documents en application des règles 78 et 79-4 du Règlement de procédure et de preuve, et de la norme 35-2 du Règlement de la Cour’ (ICC-01/04-01/07-3082) et Requête en vue de solliciter l’expurgation de la source du document DRC-D03-0001-0707”, 2 August 2011, ICC-01/04-01/07-3085, para. 12

⁴ ICC-01/04-01/07-3085, para. 13

be disclosed to the Prosecution and that non-disclosure would hamper the latter in fulfilling its duties under article 54 of the Statute.⁵ The Prosecution insisted that “[i]n the absence of concrete information supporting the allegations of imminent danger to the source and lack of any link between such dangers and the potential revelation of the source’s identity to the Prosecution, the Prosecution should be granted access to the redacted name of the provider.”⁶

5. On the same day, the Legal Representatives of the Victims submitted a joint filing in which they equally argued that the Defence had not sufficiently justified its request for redaction of the source’s identity.⁷

6. On 12 August 2011, the Chamber ordered the Defence to file a fully motivated request for the redaction of the identity of the Source.⁸

7. On 16 August 2011, the Defence complied and provided the Chamber with information about the Source.⁹ This information allows the Chamber to evaluate the risk. The position of the Source was that of an insider, with access to confidential information. The Chamber accepts that the Source could be easily identified if more specific information were to be revealed.

⁵ “Prosecution’s response to Defence for Mathieu Ngudjolo’s requests ICC-01/04-01/07-3082 and ICC-01/04-01/07-3085”, 9 August 2011, ICC-01/04-01/07-3094, para. 14

⁶ ICC-01/04-01/07-3094, para. 15

⁷ “Observations sur la requête de la Défense de M. Ngudjolo en vue de solliciter l’autorisation d’ajouter sur sa liste des pièces qu’elle entend utiliser lors de la présentation de sa preuve”, 9 August 2011, ICC-01/04-01/07-3092, para. 40-44

⁸ “Decision on the Defence Request to Vary Time Limit for Addition to Defence Evidence List”, 12 August 2011, ICC-01/04-01/07-3102

⁹ “Exécution par la Défense de Mathieu Ngudjolo de la Décision ICC-01/04-01/07-3102 relativement à l’expurgation de la source du document DRC-D03-0001-0707”, 16 August 2011, ICC-01/04-01/07-3110-Conf-Exp

II. ANALYSIS

8. Before addressing the issue at hand, the Chamber emphasises that the present decision does not address the admissibility of document DRC-D03-0001-0707.

9. Based on the information that is available to it, the Chamber is of the view that the Source of document DRC-D03-0001-0707 can be considered as a “person at risk on account of the activities of the Court” in the sense of the Appeals Chamber’s judgment of 13 May 2008.¹⁰ As the Chamber held in its decision of 4 July 2011, 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.¹¹

10. Accordingly, the Chamber will apply the standard three-stage test as outlined by the Appeals Chamber.¹²

A. Would disclosure of the Source’s identity generate an objectively justified security risk?

11. On the basis of the information provided by the Defence, the Chamber is persuaded that there is little doubt that, if the identity of the Source were to become publicly known, this would almost certainly put this person at risk. It is clear that the Source did not have the authority to release this document to the Defence. It is reasonable to expect that, having done so without authorisation, the Source will be considered as a ‘traitor’. Moreover, the mere

¹⁰ 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

¹¹ “Decision on the Defence Request to Redact the Identity of the Source of Three Items of Documentary Evidence”, 4 July 2011, ICC-01/04-01/07-3057, para. 9

¹² ICC-01/04-01/07-475

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. The fact that the document appears to implicate the national authorities of the DRC in the organisation and planning of the attack on Bogoro and other localities in Ituri can only increase the potential risk to the Source.

12. Accordingly, the Chamber is satisfied that if the identity of the Source were to be disclosed to the public there would be an objectively justified security risk. However, this does not answer the question whether disclosure to the parties only, potentially under strict conditions, would have a similar effect.

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

13. As the Chamber previously held, 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 leaking it.¹³

14. However, for the reasons given in its decision of 4 July 2011,¹⁴ 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. Considering the particular position of the Source, the

¹³ ICC-01/04-01/07-3057, para. 13

¹⁴ ICC-01/04-01/07-3057, para. 14

Chamber is of the view that the risk of this happening would be too great. It should also be stressed that the Source is not benefiting from any form of operational protective measures and that it is doubtful that any such measures could usefully be put in place on short notice. The Chamber therefore considers that complete non-disclosure is the only reasonably available measure that can provide the Source with sufficiently strong protection.

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

1. Prejudice to the Prosecution

15. The Chamber must balance the obligation to protect the source against the Prosecution's need to have this information in order to carry out its investigations. The fact that the Source is not the author of the document considerably lessens the importance for the Prosecution to know its identity. In this regard, the Chamber is not persuaded that the Prosecution will be prevented from meaningfully investigating the content and authenticity of the document.¹⁵ The document contains several possible indicators of authenticity, such as name of alleged author, his signature, seals, etc.

16. Nevertheless, as indicated in its decision of 4 July 2011, if the authenticity of DRC-D03-0001-0707 were to hinge upon the Source's identity, the Defence will have to accept the consequences of non-disclosure of the identity to the parties and participants.

2. Prejudice to the Defence of Mr. Katanga

17. The Defence for Mr. Katanga did not allege any prejudice.

¹⁵ 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

3. 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. Compared to the Prosecution, the role of the Legal Representatives is limited regarding evidence pertaining exclusively to the alleged criminal responsibility of the accused. The Chamber notes, in this regard, that the Legal Representatives have not expressed a desire to intervene in relation to the authenticity of DRC-D03-0001-0707 and, in any event, such intervention would be subject to the Chamber's prior authorisation.


19. Accordingly, the Chamber finds that the non-disclosure of the Source's identity does not unduly prejudice the parties or participants.

FOR THESE REASONS,

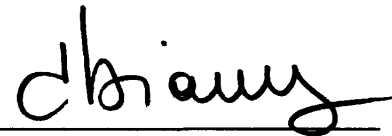
THE CHAMBER,

AUTHORISES the permanent redaction of the identity of the Source of document DRC-D03-0001-0707.

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 22 August 2011

At The Hague, The Netherlands