



Original: **French**

No.: ICC-01/04-01/07  
Date: 12 January 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  
including annex A**

**Decision on the Redaction Process**

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

Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for Germain Katanga**

Mr David Hooper

Ms Caroline Buisman

**Counsel for Mathieu Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kagengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

**Legal Representatives of the Victims**

Ms Carine Bapita Buyangandu

Mr Joseph Keta

Mr Jean-Louis Gilissen

Mr Hervé Diakiese

Mr Jean Chrysostome Mulamba

Nsokoloni

**Legal Representatives of the Applicants**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

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”), Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively) decides:

## **I. Background**

1. At the status conference held on 27 and 28 November 2008, the Chamber noted that the redaction of material or information, as provided for in rule 81 of the Rules, must be the exception and subject to strict judicial supervision.<sup>1</sup> Furthermore, it ordered the Prosecutor to stop redacting exonerating evidence himself which he had previously been authorized to do<sup>2</sup> by decision of the Single Judge dated 18 April 2008,<sup>3</sup> at the confirmation of charges stage, an authorization which the Defence, in any event, had requested be lifted.<sup>4</sup> The Prosecutor then offered to review these redactions whilst suggesting that it consult with the Defence with a view to reaching an agreement, and thereby avoid unnecessarily submitting the matter to the Chamber.<sup>5</sup> Accordingly, the latter asked the Prosecutor to inform it of its proposals, with the consent of the Defence, whilst reminding him that the proposals must take account of the statutory and regulatory requirements and the directions of the Appeals Chamber.<sup>6</sup> Furthermore, it stated that it would assess these proposals and

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<sup>1</sup> ICC-01/04-01/07-T-53-ENG ET WT 27-11-2008, p. 52, line 21 to p. 53, line 8.

<sup>2</sup> ICC-01/04-01/07-T-53-ENG ET WT 27-11-2008, p. 53, lines 6 to 8; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 81, lines 3 to 7.

<sup>3</sup> Pre-Trial Chamber I, *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 18 April 2008, ICC-01/04-01/07-411-Conf-Exp, para. 139 et seq.

<sup>4</sup> Mathieu Ngudjolo’s Defence Team, “Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 novembre 2008 (article 64-3-a du Statut)”, 24 November 2008, ICC-01/04-01/07-758, para. 8; Germain Katanga’s Defence Team, *Defence response to the Order dated 13 November 2008*, 24 November 2008, ICC-01/04-01/07-763, p. 4.

<sup>5</sup> ICC-01/04-01/07-T-53-ENG ET WT 27-11-2008, p. 53, line 9 to p. 55, line 3; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 78, line 17 to p. 79, line 5.

<sup>6</sup> 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; Appeals Chamber, *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; Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution*

that, more generally, it would then specify how it would want requests for redactions to be submitted to it.<sup>7</sup>

2. On 5 December 2008, the Prosecutor transmitted its proposals<sup>8</sup> and the Defence transmitted its observations.<sup>9</sup> The proposed process is as follows:

*[TRANSLATION:] In order to avoid any unnecessary delays in the proceedings, the parties met on 2 December 2008 and agreed to the following practice for redacting documents which do not contain incriminating evidence:*

- *The Prosecution undertakes to provide to the Defence of each accused person the relevant documents containing the proposed redactions, indicating, to the extent possible, the underlying reasons therefor.*
- *The Defence shall, within one week, provide its comments on the proposed redactions to the Prosecution, indicating whether it approves or disapproves of each of them.*
- *The Prosecution shall then submit its applications for redactions to Chamber II together with the relevant Defence comments.*

*[...] Such a practice will enable the Chamber to assess those applications for redactions on which the parties do not disagree and those to which, by contrast, the Defence objects.<sup>10</sup>*

3. The Prosecutor stated that this process would be of limited application insofar as it would pertain solely to potentially exculpatory material or material falling under rule 77 of the Rules and would exclude incriminating evidence.

## II. The Chamber's analysis

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*Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-774; 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; Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Autorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-476; 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 Autorisation to redact Statements of Witnesses 4 and 9", 27 May 2008, ICC-01/04-01/07-521.*

<sup>7</sup> ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 81, lines 24, 25 and p. 82, line 1.

<sup>8</sup> Office of the Prosecutor, "Propositions de l'Accusation au sujet des demandes d'expurgations de documents contenant des éléments à décharge ou relevant de la règle 77 du Règlement de procédure et de preuve, suite à la conférence de mise en état des 27 et 28 novembre 2008", 5 December 2008, ICC-01/04-01/07-783.

<sup>9</sup> Germain Katanga's Defence Team, *Defence submissions in respect of redactions*, 5 December 2008, ICC-01/04-01/07-781; Mathieu Ngudjolo's Defence Team, "Réponse de la Défense de Monsieur Ngudjolo aux « Propositions de l'Accusation au sujet des demandes d'expurgations de documents contenant des éléments à décharge ou relevant de la règle 77 du Règlement de procédure et de preuve, suite à la conférence de mise en état des 27 et 28 novembre 2008 »", 5 December 2008, ICC-01/04-01/07-784.

<sup>10</sup> ICC-01/04-01/07-783, paras. 4 and 5.

4. Through his proposals, the Prosecutor is essentially seeking to expedite the redaction process<sup>11</sup> by distinguishing between applications on which the parties do not disagree and those to which, by contrast, the Defence objects.<sup>12</sup> Accordingly, the Chamber is aware that, to the Prosecutor's mind, the parties' agreement on proposed redactions should enable him to focus solely on problematic requests which accordingly require particularly careful scrutiny on his part.

5. Nevertheless, the Chamber considers that the strict supervision which it must undertake cannot be confined to those requests upon which the parties were unable to agree: all requests for redactions must be carefully scrutinised on a case-by-case basis, even if the Defence has raised no objection thereto. The desired objective of expeditiousness therefore seems somewhat illusory, all the more so since Defence representatives have each expressly reserved the right to return to the Chamber at any time to request the reinstatement of those passages for which redaction was authorized.<sup>13</sup>

6. Admittedly, the Chamber observes with interest that the proposed practice allows the Defence to provide its observations, including from the very start of the redaction process. However, the lack of access to unredacted documents, which makes it impossible for Counsel for the accused persons to express an informed opinion on the merits of the proposed redactions, considerably diminishes the value of such a process. Moreover, the fact that, contrary to the express wishes of Germain Katanga's Defence,<sup>14</sup> the Prosecutor only intends to provide the reasons for his proposed redactions "[TRANSLATION:] to the extent possible",<sup>15</sup> does not allow the Defence to meaningfully assess the proposed redactions and to give its informed "consent".

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<sup>11</sup> ICC-01/04-01/07-783, para. 6.

<sup>12</sup> *Ibid.*, para. 5.

<sup>13</sup> ICC-01/04-01/07-781, paras. 6 and 7.

<sup>14</sup> ICC-01/04-01/07-781, para. 3.

<sup>15</sup> ICC-01/04-01/07-783, para. 4.

7. The Chamber has already recalled the importance it gives to the judicial scrutiny which every application for redactions must undergo. It considers that the effective and continuous performance of this scrutiny on a case-by-case basis<sup>16</sup> constitutes the best safeguard for the Defence. In order to be able to fully perform this task, the Chamber must receive all the necessary information from the Prosecutor. In fact, it is under the obligation to balance the various interests at stake, as stipulated in rule 81 of the Rules, whilst ensuring that the process includes safeguards that would protect the accused persons' interests so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms. It is precisely in that spirit that it desired that the Prosecutor's *proprio motu* redactions be stopped, even if the request for the redaction of documents obtained by his office under article 54(3)(e) of the Statute comes from the information provider. In this respect, the Chamber requests that he immediately end the practice of *proprio motu* redactions which the Chamber has continued to discern in recent communications.<sup>17</sup> It was in that same spirit too that the Chamber, by order of 18 December 2008, asked the Registrar to provide it with any useful information on the influence which the accused persons may have retained in the Democratic Republic of the Congo and on the pressure that they might currently exert on victims and witnesses.<sup>18</sup> Lastly, for that same reason, the Chamber ordered the Prosecutor to provide further details on his request of 10 December 2008 to redact witness 280's second statement.<sup>19</sup>

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<sup>16</sup> See in particular ICC-01/04-01/07-475, para. 69.

<sup>17</sup> Office of the Prosecutor, "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 19 December 2008", 19 December 2008, ICC-01/04-01/07-805; Office of the Prosecutor, "Prosecution's Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 19 December 2008", 19 December 2008, ICC-01/04-01/07-807; 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.

<sup>18</sup> Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses, 18 December 2008, ICC-01/04-01/07-800-Conf-tENG.

<sup>19</sup> Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant sa requête aux fins d'expurger la seconde déclaration du témoin 280 (norme 28 du Règlement de la Cour), 19 December 2008, ICC-01/04-01/07-804.

8. The Chamber considers that the information which it currently receives from the Prosecutor, in the form of a table which he devised and prepared, needs to be supplemented so as to meet the Appeals Chamber's requirements for justifying requests for redactions. For this reason, it has attached to this decision a new more detailed template table, together with an explanation in annex A which includes headings which reflect the Appeals Chamber's main requirements: 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;<sup>20</sup> 2) the existence of a link between the source of the risk and the accused persons;<sup>21</sup> 3) the infeasibility or insufficiency of less restrictive protective measures;<sup>22</sup> 4) the obligation to periodically review the decision authorizing the redactions should circumstances change.<sup>23</sup> This table replaces the one used by the Prosecutor to date and from now on shall be the reference document for any request for redactions.

9. In addition, the Chamber intends to show particular vigilance towards any request from the Prosecutor for the redaction of passages in a potentially exculpatory document within the meaning of article 67(2) of the Statute or a document under rule 77 of the Rules. As the Appeals Chamber has recalled, the Chambers must undertake a thorough assessment on a case-by-case basis of the potential relevance to the Defence of information to be redacted. If it turns out to be relevant or potentially exculpatory, the Chamber must perform the balancing exercise between the interests at stake with particular care.<sup>24</sup> This is why, in future, it will also be necessary for the Prosecutor to indicate in the new justification table, for each of the passages for which redaction is requested, if he considers the material to be incriminating information, information falling within the scope of article 67(2) of the Statute, information under rule 77 of the Rules or "other" information which

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<sup>20</sup> ICC-01/04-01/07-475, paras. 71 and 97.

<sup>21</sup> ICC-01/04-01/07-475, para. 71.

<sup>22</sup> ICC-01/04-01/06-568, para. 37; ICC-01/04-01/06-773, para. 33.

<sup>23</sup> ICC-01/04-01/07-475, para. 73.

<sup>24</sup> ICC-01/04-01/07-476, para. 57.

does not fall within any of these three categories.<sup>25</sup> Highlighting such information will therefore enable the Chamber to better balance the interests at stake and to assess on a case-by-case basis the prejudice which the proposed redactions are likely to cause to the Defence.

10. Furthermore, requests for redactions now made by the Prosecutor include one extremely small number filed as “public” and another filed as “Confidential – *Ex Parte* – Prosecution only”, which sets out the requested redactions in greater detail. Not only does this not reflect the practice followed by other Chambers, particularly by Trial Chamber I, it does not enable the Defence to respond, if only succinctly, to the Prosecutor’s explanations. The Appeals Chamber has in fact directed that prior to ruling on an application for redactions, the Chamber should, as far as possible, give the Defence the opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected<sup>26</sup> or inviting it to give any form of consent. The Chamber therefore directs the Prosecutor, henceforth, to follow the practice in effect before Trial Chamber I and, barring special circumstances which he will have to justify,<sup>27</sup> to file on the same day two requests for redactions: one “Confidential – *Ex Parte* – Office of the Prosecutor only” for the Chamber, and another “public redacted version”<sup>28</sup> for the Defence. The Defence shall have 7 (seven) days in which to present its observations, if any.

11. The new process so defined shall be implemented for all future applications for redactions as well as for the three applications filed respectively on 10<sup>29</sup> and 24

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<sup>25</sup> See heading B2 in the said table and the explanations in its footnotes contained in annex A.

<sup>26</sup> ICC-01/04-01/07-475, para. 73.

<sup>27</sup> ICC-01/04-01/06-568, para. 67.

<sup>28</sup> Office of the Prosecutor, “Prosecution’s Request for Non-Disclosure of Information in the Statements of Fifteen Individuals providing *Tu Quoque* Information”, 24 December 2008, ICC-01/04-01/06-1574-Anx1.

<sup>29</sup> Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurger la seconde déclaration du témoin W-280*”, 10 December 2008, ICC-01/04-01/07-789.

December 2008<sup>30</sup> and on 8 January 2009.<sup>31</sup> With respect to the passages redacted by the Prosecutor since the Single Judge's decision of 18 April 2008<sup>32</sup> and which the Defence is requesting that they be reinstated, it will be for the Prosecutor to justify the redactions made in the 47 documents in question by following this new process. In the event that he intends to dispense with certain redactions falling within rule 81(4) of the Rules, he shall have to request the reinstatement of the relevant passages from the Chamber by providing it with all the necessary justifications. On the other hand, he himself will reinstate the passages which were redacted under rule 81(2) of the Rules by identifying, for the Defence, the passages which have been reinstated. He shall, however, immediately inform the Chamber thereof by submitting an exact list of the documents concerned.

12. With respect finally to the redactions authorized by Pre-Trial Chamber I in the eight decisions issued on 7 December 2007,<sup>33</sup> 23 January 2008,<sup>34</sup> 5 March 2008,<sup>35</sup> 3 April 2008,<sup>36</sup> 21 April 2008,<sup>37</sup> 28 May 2008<sup>38</sup> and 9 June 2008<sup>39</sup> respectively, the Chamber recalls that even if a ruling on non-disclosure has been issued, it must be regularly reviewed and, if necessary, amended should circumstances changes. To

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<sup>30</sup> Office of the Prosecutor, *"Requête de l'Accusation aux fins d'expurger les déclarations et notes d'enquêteur des témoins W-001, W-155, W-172, W-176, W-281 et W-284"*, 24 December 2008, ICC-01/04-01/07-809.

<sup>31</sup> Office of the Prosecutor, *"Requête de l'Accusation aux fins d'expurger les déclarations du témoin à charge W-323 et du témoin à décharge W-312"*, 8 January 2009, ICC-01/04-01/07-812.

<sup>32</sup> ICC-01/04-01/07-411-Conf-Exp.

<sup>33</sup> Pre-Trial Chamber I, *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements*, 7 December 2007, ICC-01/04-01/07-90.

<sup>34</sup> Pre-Trial Chamber I, *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, 23 January 2008, ICC-01/04-01/07-160.

<sup>35</sup> Pre-Trial Chamber I, *Corrigendum to the Third decision on the Prosecution request for Authorisation to redact materials related to the statements of Witnesses 7, 8, 9, 12 and 14*, 5 March 2008, ICC-01/04-01/07-249.

<sup>36</sup> Pre-Trial Chamber I, *Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233*, 3 April 2008, ICC-01/04-01/07-361.

<sup>37</sup> Pre-Trial Chamber I, *Fifth Decision on the Prosecution request for Authorisation to Redact Statements, Investigator's Notes, Written Consents and documents relating to Witnesses 157, 161, 268, 279, 280 and 311 and Other Documents*, 21 April 2008, ICC-01/04-01/07-427; Pre-Trial Chamber I, *Sixth Decision on the Prosecution Request for Authorisation to Redact Interviews Transcripts of Witness 238*, 21 April 2008, ICC-01/04-01/07-425.

<sup>38</sup> Pre-Trial Chamber I, *Public Redacted version of the 'Seventh Decision on Redactions' issued on 26 May 2008*, 28 May 2008, ICC-01/04-01/07-526.

<sup>39</sup> Pre-Trial Chamber I, *Public Redacted Version of the 'Eighth Decision on Redactions'*, 9 June 2008, ICC-01/04-01/07-568.

this end, the Prosecutor shall bring to the Chamber's attention any factors that may cause it to reconsider its ruling on non-disclosure.<sup>40</sup> Non-disclosure can only be the exception and all material must be disclosed; in any event, a review of all of the redactions, apart from those which would prove to still be necessary, must take place prior to the commencement of the trial, on a date to be set later by the Chamber. For the moment, the Chamber directs the Prosecutor to determine whether maintaining the redactions ordered in those various decisions can still be justified and, if necessary, to submit new requests to the Chamber in accordance with the new process. In the event that the Prosecutor intends to dispense with certain redactions under rule 81(4) of the Rules, he shall have to request reinstatement from the Chamber by providing it with any necessary justifications. On the other hand, he himself will reinstate those passages which were redacted under rule 81(2) of the Rules by identifying for the Defence the passages which have been reinstated. He shall, however, immediately inform the Chamber thereof by giving it an exact list of the documents concerned.

#### **FOR THESE REASONS, THE CHAMBER**

- 1) **REJECTS** the Prosecutor's proposals;
- 2) **DIRECTS** the Prosecutor:
  - henceforth to submit his requests for redactions using the table in annex A and in the manner described at paragraph 10 of this decision;
  - with respect to the requests filed on 10 and 24 December 2008 and on 8 January 2009, to supplement the information which he had provided in his own table, before 16.00 on 16 January 2009, using the table contained in annex A;

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<sup>40</sup> ICC-01/04-01/07-475, para. 73 ; ICC-01/04-01/07-476, para. 64.

- the Defence shall have 7 (seven) days in which to submit its observations, if any, on all the new requests submitted, including the three above-mentioned requests;
- 3) **ORDERS** the Prosecutor to completely stop redacting documents *proprio motu*, including those obtained under article 54(3)(e) of the Statute;
- 4) **ORDERS** the Prosecutor:
- to either justify maintaining the redactions which he himself made to the 47 documents in question, by no later than 16.00 on 30 January 2009 and in accordance with the new process;
  - or, in the event that he considers that it is possible to reinstate the redacted passages, to request from the Chamber, by no later than 16.00 on 30 January 2009, the reinstatement of the passages redacted under rule 81(4) of the Rules, by providing it with all the necessary justifications, and/or to reinstate the passages himself which were redacted under rule 81(2) of the Rules, by providing the Chamber with an exact list of the documents concerned;
- 5) **DIRECTS** the Prosecutor:
- to either justify maintaining the redactions ordered by the Pre-Trial Chamber in the eight above-mentioned decisions, by no later than 16.00 on 30 January 2009 and in accordance with the new process;
  - or, in the event that he considers that it is possible to reinstate the redacted passages, to request from the Chamber, by no later than 16.00 on 30 January 2009, the reinstatement of the passages redacted under rule 81(4) of the Rules, by providing it with all the necessary justifications, and/or to reinstate those passages himself which were redacted under rule 81(2) of the Rules, by providing the Chamber with an exact list of the documents concerned;

6) **REQUESTS** the Defence, notwithstanding the time limit stipulated in point 2 above, to file its observations, if any, on the requests referred to in points 4 and 5 by no later than 16.00 on 16 February 2009.

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

[signed]

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**Judge Bruno Cotte**  
**Presiding Judge**

[signed]

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**Judge Fatoumata Dembele Diarra**

[signed]

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**Judge Fumiko Saiga**

Dated this 12 January 2009

At The Hague, The Netherlands