



Original: **English**

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

Date: **5 March 2009**

TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

Defence Observations in respect of the « *Motifs de la décision orale du 3 février 2009 relative à la procédure d'expurgation de documents obtenus par le Procureur en vertu de l'article 54-3-e du Statut et ordonnance enjoignant au Procureur de soumettre des documents à la Chambre* »

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper
Mr Andreas O'Shea

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence for Mr. Katanga (“the Defence”) hereby submits its observations in respect of the “*Motifs de la décision orale du 3 février 2009 relative à la procédure d'expurgation de documents obtenus par le Procureur en vertu de l'article 54-3-e du Statut et ordonnance enjoignant au Procureur de soumettre des documents à la Chambre*” (“the Decision”).¹
2. The Defence submits the following general observations and observations specifically related to redacted documents.

General Observations

3. As stated by the Appeals Chamber: “The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule.”²
4. The Appeals Chamber also fully endorsed the Defence’s earlier submissions that “[t]he Statute and the Rules of Procedure and Evidence place much importance on disclosure to the defence” and that the non-disclosure of portions of witness statements is an exception to the general rule of full disclosure.³
5. Accordingly, the Prosecution may delay the disclosure or disclose a redacted version of the disclosure material in the most exceptional circumstances only.
6. In determining whether redactions in exonerating evidence or evidence that is material to the preparation of the defence case are permissible pursuant to Rules 81(2) and (4), the Chamber is guided by the ICC Statute and Rules, as well as the existing jurisprudence on this issue. In particular, the Defence brings to the attention of the Chamber the criteria set out by the Appeals Chamber in its 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” dated 13 May 2008 (“Appeals Chamber’s 13 May Judgment on Prosecutor’s Appeal”).⁴

¹ ICC-01/04-01/07-931, 26 February 2009.

² 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”, ICC-01/04-01/07-475, 13 May 2008, para. 70.

³ Response to the Document in Support of the Appeal, paragraph 17. See 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”, ICC-01/04-01/06-568, OA3, 13 October 2006, paras 36 and 37; cited in Public Document 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”, ICC-01/04-01/07-475, 13 May 2008, para. 61.

⁴ ICC/01/04-01/07-475. Although this Judgment primarily addresses redactions sought under Rule 81(4), at paras. 97-98, the Appeals Chamber held that the same criteria apply *mutatis mutandis* to redactions proposed under Rule 81(2).

7. The Appeals Chamber stated clearly that any request for redactions under Rules 81(2) or (4) must be considered on the basis of the individual circumstances of each application, and has rejected a category approach. Indeed, it held that “a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber.”⁵
8. The Appeals Chamber concluded that, “while the non-disclosure of information for the protection of persons at risk is permissible in principle pursuant to rule 81(4) of the Rules, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake.”⁶
9. The criteria that need to be considered in assessing whether a request for redactions should be authorised are “a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”⁷
10. First, the Chamber must consider whether disclosure of the information in question would pose a danger to the particular person the Prosecution seeks to protect. The risk of danger to such a person is to be assessed on the basis of the following factors:
 - “a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned;
 - b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.”⁸
11. If the Chamber finds that, based on these criteria, there is a risk of danger to the person whose protection is sought, it has to consider whether non-disclosure of the information sought would overcome or reduce the risk. If not, the redactions should not be granted. If non-disclosure would have such effect, the following factors must be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary:

⁵ Ibid, para. 59. Also see para. 62, citing the Defence Response to the Document in Support of the Appeal, paras 12 and 14, referring to the case of Prosecutor v Bagosora et al, Decision On Disclosure Of Identity Of Prosecution Informant, May 24, 2006, para 8.

⁶ Ibid, para. 66; also para. 69.

⁷ Ibid, para. 67.

⁸ Ibid, para. 71.

“a) the Pre-Trial Chamber should consider whether an alternative measure short of redaction is available and feasible in the circumstances. If a less restrictive protective measure is sufficient and feasible, that measure should be chosen;
 b) the Pre-Trial Chamber should bear in mind that the non-disclosure is sought at the stage of the proceedings in relation to the hearing to confirm the charges. The Appeals Chamber refers, in this context, to paragraph 68 above;
 c) the Pre-Trial Chamber should carefully assess the relevance of the information in question to the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake;
 d) if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.”⁹

12. The Appeals Chamber has set out the following additional factors that must be taken into account:

“a) in balancing the various interests at stake, the Pre-Trial Chamber must make sure that adequate safeguards are in place to protect the interests of the suspect so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms;
 b) prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected;
 c) even if it is determined that certain information should not be disclosed, such determination should be kept under review by the Pre-Trial Chamber. It may be necessary to disclose the withheld information subsequently, should circumstances change. The Prosecutor should assist the Pre-Trial Chamber in this regard by bringing to its attention factors that may cause it to reconsider its ruling on nondisclosure.”¹⁰

13. Accordingly, in line with the Appeals Chamber’s guidance, which apply to redactions sought under both Rules 81(4) and Rule 81(2) redactions,¹¹ the Chamber must take a number of steps before it may conclude that the redactions are necessary and justified. Only where the redactions are considered necessary and helpful to the purpose sought should the Chamber consider the implications for the fair trial of the accused and the relevance of the material to the Defence. Accordingly, the alleged lack of relevance to the Defence cannot be used as a justification for the redactions sought unless it has been demonstrated that the redactions are necessary and justified.

14. Finally, these criteria should be even more rigorously applied at this stage of the proceedings, with the trial approaching. The criteria were adopted with the specific

⁹ Ibid, para. 72.

¹⁰ Ibid, para. 73.

¹¹ With the difference that, under Rule 81(2), the Prosecution must indicate how disclosure to the Defence may prejudice further or ongoing investigations. Ibid, paras. 97-98.

purpose of guiding the Pre-Trial Chamber in its assessment of requests for redactions until the confirmation hearing. The Appeals Chamber made a clear distinction between the confirmation hearing and the trial: "A hearing to confirm the charges is not a trial to establish guilt or innocence. It is a phase of the proceedings designed to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged" prior to confirming any charges and committing the person to a Trial Chamber to be tried on the charges as confirmed (Article 61(7)). As such, it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial."¹²

15. On this ground, the Defence objects to any permanent redactions sought, if any. Even if redactions are considered necessary at this moment, it is submitted that the Defence should not be deprived of an opportunity to apply to the Chamber to lift those redactions at a later stage if necessary to effectively prepare for cross-examination or their defence.
16. With these guidelines in mind, the Defence makes the following observations on the specific redactions sought as far as the Defence can make out on the basis of the redacted versions disclosed to the Defence.

Observations relative to the redacted documents listed in paragraph 2 of the Decision

17. It is noteworthy that the redacted documents all appear to be reports which were prepared in complete independence of this case. All the redactions seem to be of the names of individuals or organisations with no indications that they are witnesses in the case against Mr. Katanga and Mr. Ngudjolo.
18. The Defence fails to see how a person can be put at risk of danger as a result of disclosure to the Defence of a report in which his or her name is simply mentioned, but without any indication that the person is a witness or victim in the present case or that the person is providing incriminating evidence against Mr. Katanga or Mr Ngudjolo.
19. Accordingly, not only is there effectively no danger to those persons because it is impossible to identify them as having any bearing on the case, but also is there no interest in threatening such persons, given the absence of any real bearing on the case.
20. Some of those individuals whose protection is being sought may be important to the Defence. Individuals who told MONUC that they witnessed the commission of crimes may in fact provide the Defence with exculpatory leads. For example, the persons mentioned in the document DRC-OTP-1029-0338¹³ provide information which

¹² Ibid, para. 68.

¹³ Original ERN: DRC-OTP-0006-0227.

supports Mr. Katanga's version. Accordingly, it may be in the interests of the Defence to contact such persons.

21. The Defence is particularly interested in receiving the identity of a person mentioned in the document DRC-OTP-1029-0413¹⁴, who reported shipment of arms. This person seems to have information which is of interest to the Defence and which it may wish to explore further with the provider of the information. If there is no particular ground on which to justify the redaction of his or her identity, the Defence submits that the fairness of the proceedings requires disclosure. There may be others who the Defence would wish to contact.
22. The Defence further points out that redactions in the documents DRC-OTP-0185-0854¹⁵ and DRC-OTP-0172-0296¹⁶ are excessive, so much so that lapses of information are blackened out and, accordingly, parts of the documents are completely unreadable. The Defence submits that there can be no justification for redactions of such degree and highlights the importance of justifying each separate redaction on the basis of the Statute, Rules and the Appeals Chamber's guidelines.

Conclusion

23. It is submitted that most of the security concerns can be addressed by non-disclosure to the public. The accused are not in a position to threaten anyone in Ituri, given their remoteness from the location and their lack of knowledge of any potential bearing these persons have on the present proceedings, nor do they have any interest in doing so.
24. The Defence has already raised many similar objections to redactions in earlier filings and reiterates all of the arguments set out in the Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements,¹⁷ and the Defence Response to Confidential Prosecution's Document in support of Appeal against the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements.¹⁸ These arguments were not dismissed but the Appeals Chamber held that they should be considered in light of each individual application. The Appeals Chamber held that "the factors that Counsel for Mr Katanga raises in this context, such as alleging that there would be "no real danger" to the safety of 'innocent third parties' if their identities were disclosed to the Defence, that the defendant would not have any interest in intimidating such people, and that "[s]weeping statements not supported by any evidence about potential intimidations or reprisals of 'innocent third parties' by this particular defendant do not demonstrate that disclosure of their identities to the Defence would cause a genuine

¹⁴ Original ERN DRC-OTP-0007-0185.

¹⁵ Original ERN DRC-OTP-0009-0028.

¹⁶ Original ERN DRC-OTP-0126-0309.

¹⁷ ICC-01/04-01/07-132.

¹⁸ ICC-01/04-01/07-140.

risk to their safety", are all factors that would need to be assessed on the facts by the Pre-Trial Chamber. They are not, however, arguments that would negate the need for the authorisation of redactions were such factors to be established. Whether the actual redaction sought would thereafter be granted would depend upon balancing the various interests involved."¹⁹

25. Accordingly, the Defence prays the Trial Chamber to carefully consider the redactions sought on an individual basis, in accordance with the Appeals Chamber's guidelines, thereby following the Appeals Chamber's suggestions and taking the Defence's submissions in this Response into account.

Respectfully submitted,



David HOOPER

Dated this 5 March 2009

At London

¹⁹ Ibid, para. 63, citing Response to the Document in Support of the Appeal, paras. 19-20.