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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 Document

Defence Response to the *Requête aux fins d'expurgations d'informations dans certains éléments de preuve relevant de l'Article 67-2 ou de la Règle 77*

Source: Defence for Mr Germain Katanga

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

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Introduction

1. The Defence for Mr. Katanga (« the Defence ») hereby files its Response to the *Requête aux fins d'expurgations d'informations dans certains éléments de preuve relevant de l'Article 67-2 ou de la Règle 77*, filed on 27 February 2009 (« Prosecution's Request for Redactions »).¹ The Prosecution seeks the Trial Chamber's permission to be relieved of its disclosure obligation pursuant to Article 67(2) and Rule 77 in respect of 6 categories of information. The Prosecution relies on Articles 54(3)(f), 64 and 68, and Rules 81(1), 81(2) and 81(4) as the foundation of their requests.
2. In this response, the Defence relies on the observations made 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"*, issued on 13 May 2008 (« Appeals Chamber's 13 May 2008 Judgment on Prosecutor's Appeal »),² as well as its own observations made in *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"*, filed on 5 March 2009.³
3. In addition, the Defence submits the following general observations as well as observations in respect of each category of proposed redactions.

General Observations

4. The present Trial Chamber has fully endorsed the observations set out in the Appeals Chamber's 13 May 2008 Judgment on Prosecutor's Appeal as well as other Appeals Chamber's Judgments on this subject matter.⁴ For the purpose of this Response, the Defence recalls the Trial Chamber's frequent acknowledgment of the need to examine proposed redactions on a case-to-case basis.⁵ It further emphasises that such redactions

¹ ICC-01/04-01/07-934.

² ICC-01/04-01/07-475.

³ ICC-01/04-01/07-944, in particular, paras. 3-16.

⁴ See in particular: ICC-01/04-01/07-476, (AC) 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.

⁵ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras 5 and 7; Status Conference held by Trial Chamber II, ICC-01/04-01-07-T-52-ENG ET WT 27-11-2008, p. 55 lines 4-10 & p. 60 lines 4-6.

should be authorised on an exceptional basis only,⁶ and only be used “as an absolute last resort”⁷.

5. The Trial Chamber has further adopted the Appeals Chamber’s main requirements in assessing the need to take protective measures pursuant to Rules 81 and 82: “1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations; 2) the existence of a link between the source of the risk and the accused persons; 3) the infeasibility or insufficiency of less restrictive protective measures; 4) the obligation to periodically review the decision authorizing the redactions should circumstances change”.⁸
6. In assessing proposed redactions pursuant to Rule 81, the Trial Chamber should balance the various interests at stake “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”.⁹ In line with this balancing exercise, the Trial Chamber has to carefully consider on a case-by-case basis the prejudice likely to be caused to the Defence by the proposed redactions.¹⁰
7. On such grounds, the Trial Chamber has previously rejected any proposal for permanent redactions as excessive and held that any ruling issued on non-disclosure must be subject to a periodic overview and re-evaluation to consider whether the redactions are still the last resort and, therefore, necessary to protect victims, witnesses, their family members and anyone else who may be entitled to receive protection under the ICC Statute and Rules. Such non-disclosure ruling should be amended if the circumstances, which initially justified the invocation of the exceptional measure of non-disclosure, change.¹¹
8. The Trial Chamber has further pointed out that one of the reasons for oversight by the Chamber before the documents are disclosed to the Defence is the assurance that “in no case the rights of the accused can be affected by redaction which would make incomprehensible or unapprehendable or useless by Defence this document in question”¹².

⁶ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 1 & 12 ; ICC-01/04-01/07-946, (TCII) Décision sur la requête du Procureur aux fins d'autorisation d'interjeter appel de la décision relative aux expurgations rendue le 10 février 2009, 6 March 2009, para. 13; Status Conference held by Trial Chamber II, , ICC-01/04-01-07-T-52-ENG ET WT 27-11-2008, p. 55 lines 4-10 & p. 60 line 4.

⁷ Status Conference held by Trial Chamber II, , ICC-01/04-01-07-T-52-ENG ET WT 27-11-2008, p. 60 line 6 & p. 80 lines 22-25.

⁸ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, para. 8 ; reliance on : ICC-01/04-01/07-475, paras. 71, 73 and 97; ICC-01/04-01/06-568, para. 37; ICC-01/04-01/06-773, para. 33.

⁹ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, para. 7.

¹⁰ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, para. 9, reliance on: ICC-01/04-01/07-476, para. 57.

¹¹ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, para. 12 ; ICC-01/04-01/07-946, (TCII) Décision sur la requête du Procureur aux fins d'autorisation d'interjeter appel de la décision relative aux expurgations rendue le 10 février 2009, 6 March 2009, paras. 13-14.

¹² Status Conference held by Trial Chamber II, T-03-02-2009, ICC-01/04-01/07-T-56-ENG, pp. 18-19.

9. With these guidelines in mind, the Defence makes the following observations on the redactions sought per category.

Categorical redactions – Preliminary Observations

10. The Defence submits that, in accordance with the Appeals Chamber's guidelines incorporated in the Trial Chamber's principles on redactions,¹³ the proposed categorical redactions should be rejected. Indeed, the Chambers have very clearly stated that any determination on redactions is based on an individual case-to-case assessment of all interests at stake, which cannot be done on a categorical basis.
11. Moreover, in line with the Trial Chamber's finding that any proposal for permanent redactions is excessive at this stage, given its obligation to periodically review any ruling on redactions,¹⁴ the Defence objects to any permanent redactions sought save those under Rule 81(1). Even if redactions are considered necessary at this moment, the Defence submits that such redactions should be lifted at a later stage where necessary to allow the Defence to effectively prepare for its cross-examination and its defence as a whole, and where the circumstances, which currently justify the redactions, change.
12. Also in line with the Trial Chamber's findings set out above,¹⁵ any excessive redactions, including the blackening out of whole paragraphs, should be rejected out of hand.

A. Non-disclosure pursuant to Rule 81(1)

13. The Defence has no objection to the non-disclosure proposed under Rule 81(1) provided the redactions sought fall within the scope of Rule 81(1).

B. Location where witnesses have been met pursuant to Rule 81(2)

14. The Defence does not object to the proposed redactions, provided they are strictly limited to the interview locations of protected witnesses whose identities are still undisclosed. Such redactions accord with the Appeals Chamber's 13 May Judgment on the Prosecutor's Appeal provided that each redaction is independently justified on a case-to-case basis pursuant to the criteria set out above (paras. 4-6).¹⁶ If, in fact, the redactions are sought in respect of interview locations of persons who are neither a

¹³ See, inter alia, ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 5, 7, 9; ICC-01/04-01/07-475, para. 59.

¹⁴ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, para. 12 ; ICC-01/04-01/07-946, (TCII) Décision sur la requête du Procureur aux fins d'autorisation d'interjeter appel de la décision relative aux expurgations rendue le 10 février 2009, 6 March 2009, paras. 13-14.

¹⁵ Status Conference held by Trial Chamber II, ICC-01/04-01/07-T-56-ENG 3.02.2009, pp. 18-19.

¹⁶ ICC-01/04-01/07-475, paras. 101-105.

witness nor a victim in the present proceedings, the Defence fails to understand the necessity of the redactions sought.

15. Transparency relating to the circumstances in which witnesses were interviewed may become relevant to the issue of motive to testify. Thus, the proposed redactions may infringe upon the interests of the Defence. The interests of the Defence must be carefully balanced with other interests, such as the protection of victims and witnesses, in relation to each independent redaction sought before any redaction can be authorised.
16. The Defence further submits that the burden to demonstrate the need for non-disclosure remains with the Prosecution. Notwithstanding this burden, in the spirit of cooperation and provided that the Prosecution is in a position to explain to the Chamber the need for the redactions sought, the Defence does not object to temporary non-disclosure of interview locations, even when the interview was not conducted with a witness in the current proceedings.

C. Prosecution sources pursuant to Rule 81(2)

17. The Prosecution seeks to withhold from the Defence, on a permanent basis, the identities of intermediaries and other persons who cooperate with the Prosecution. The Prosecution alleges that its investigations may be prejudiced if it is forced to disclose their identities to the Defence, given the general security situation in Ituri, which is dangerous without adequate protection.
18. The Defence opposes the redactions sought. The ICC Appeals Chamber has held that a general finding concerning the security in Ituri constitutes insufficient justification for the imposition of redactions.¹⁷ In the absence of any more substantial grounds justifying the proposed redactions, the redactions sought under category C should be rejected.
19. The Prosecution has failed to establish any exceptional basis. As aforementioned, redactions can only be ordered “as an absolute last resort”¹⁸. This can only be the case where the Prosecution has demonstrated: “1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations; 2) the existence of a link between the source of the risk and the accused persons; 3) the infeasibility or insufficiency of less restrictive protective measures; 4) the obligation to periodically review the decision authorizing the redactions should

¹⁷ Prosecutor v. Lubanga, ICC-01/04-01/06-773, 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, at para 21.

¹⁸ Status Conference held by Trial Chamber II, T-27.11.2008, p. 60 line 6 & p. 80 lines 22-25.

circumstances change”.¹⁹ The Defence cannot see any evidence of any of those four steps.

20. Moreover, where redactions sought are in reports they would generally not even reveal that the persons whose identities are being redacted are intermediaries or other persons cooperating with the Court. This surely rebuts any need for redaction.
21. Even if, as a result of disclosure of their identity, the Defence is in a position to know that they are intermediaries or provide assistance to the Prosecution in another way, that knowledge itself will not put the intermediaries in danger. The accused have no interest in threatening intermediaries who are not offering any incriminating evidence against them. The accused have limited opportunity to interfere with individuals, let alone organisations, from the prison in The Hague. The telephone communications the accused may have with people from Ituri are monitored and strictly regulated. The accused are therefore not capable of threatening the intermediaries or other collaborators of the Prosecution residing in Ituri. Doubtless there would be a vigorous response if they did.
22. The Appeals Chamber, rejecting a categorical approach, insists that all applications be considered on their individual merit. Accordingly, whilst the status of a person as intermediary or collaborator of the Prosecution may, in certain circumstances, put such a person at risk, it is for the Prosecution to demonstrate that this is indeed the situation in an individual case.
23. Finally, the Defence opposes any permanent character of such redactions given that many of them may have useful information for the Defence and, accordingly, the Defence may wish to contact them.

D. Information about the security of a witness pursuant to Rule 81(4)

24. The Defence submits that information about a witness's security is not covered by Rule 81(4) which authorises redactions of the identities and identifying information about witnesses, victims and members of their families. If the information about the security of the witness concerned may reveal his or her identity, then such information falls within the ambit of Rule 81(4) provided that the witness concerned is a witness in the present proceedings and the Chamber finds that there are legitimate grounds for withholding his or her identifying details from the Defence for the time being. Provided that is the case, the Defence does not, at this stage, object to the proposed redaction under D.

¹⁹ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, para. 8 ; reliance on : ICC-01/04-01/07-475, paras. 71, 73 and 97; ICC-01/04-01/06-568, para. 37; ICC-01/04-01/06-773, para. 33.

E. Names and identifying details of family members of witnesses

25. The title of this category is misleading, given that, under section E, the Prosecution is seeking the redactions of the identities of family members of persons who will not be called as witnesses in the present proceedings. The danger these family members of non-witnesses are facing is, therefore, unclear to the Defence given their remoteness to the proceedings at hand. Moreover, their names may be mentioned in general reports and would not therefore identify them as having any connection to the case. Accordingly, the Defence submits that the redactions sought under E should be dismissed.

F. Location and Information which would disclose where the family members of the witnesses are residing

26. The Defence reiterates the above submissions and requests dismissal of the proposed redactions under F.

Conclusion

27. It is submitted that most of the security concerns can be addressed by non-disclosure to the public. As aforementioned, 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.

28. Accordingly, the Defence prays the Trial Chamber to only permit limited redactions in line with the established principles.

Respectfully submitted,



David HOOPER

Dated this 9 March 2009

At London