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

Date: **1 April 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 Response to Prosecution's Application for Protective Measures for
Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -,
Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270,
Witness 282 and Witness 90 pursuant to Article 53(3)(f), Article 64(2) and 64(6)(e),
and Article 68(1) of the Statute and Rules 81(4) of the Rules***

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. On 25 March 2009, the Prosecution filed an Application for Protective Measures (“Prosecution Application”),¹ requesting the permanent redactions of the identities and the facts relating to the cooperation of 21 witnesses, 4 of whom have not consented to disclosure of their identities to the Defence and 17 of whom are not contactable. The Prosecution has submitted another application requesting admissions of fact reflected in the statements or screening notes of nine of these 21 witnesses.² As for the remaining 12 witnesses, the Prosecution alleges that they would be at risk if their identity and cooperation were disclosed to the Defence and, therefore, proposes the following alternative measures:
 - (i) Disclosure of redacted versions of the Statements or screening notes from eight witnesses, permanently redacting the identities of these witnesses;
 - (ii) Disclosure of narrative summaries of four witnesses who are highly identifiable, omitting all identifying details concerning these witnesses.
2. The Prosecution justifies its request on the grounds that: (1) disclosure to the accused should not endanger witnesses; (2) the Defence does not have an automatic right to identifying information of PEXO witnesses; (3) the Defence will not suffer serious prejudice from non-disclosure of identities of PEXO witnesses; (4) no less intrusive protection measures are available; (5) vulnerable witnesses who provide exculpatory evidence require special protection; (6) the witnesses primarily provide information of an incriminatory nature, which increases the risk of potential retaliation, particularly in light of the insecurity in the DRC, and Ituri in particular; (7) one of the witnesses is potentially relevant under Rule 77 of the Rules only and not under Article 67(2) (unlike the remaining eleven witnesses) and, therefore, the redaction of his or her identity is directly justified under the Statute and Rules, which explicitly subject the obligation to disclose Rule 77 material to the obligation for the Court to provide for protection.
3. The Defence for Germain Katanga (“the Defence”) objects to the measures sought by the Prosecution and submits that none of the arguments set out in the Prosecution Application are persuasive on the grounds set forthwith, as well as those set out in previous filings on redactions.³

General Observations

4. As frequently repeated, the Defence objects to the permanent status of any redaction proposed.⁴ Whether or not protective measures should be imposed is a balancing exercise. A protective measure may only be imposed if, on balance, the necessity to

¹ ICC-01/04-01/07-985-Corr, Public With Annexes – Confidential, ex parte, only available to the Office of the Prosecutor and the Victims and Witnesses Unit, Corrigendum to Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 282 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules, 25 March 2009.

² ICC-01/04-01/07-991.

³ ICC-01/04-01/07-944 ; ICC-01/04-01/07-948 ; ICC-01/04-01/07-979-Conf ; ICC-01/04-01/07-1012-Conf

⁴ ICC-01/04-01/07-948, para. 11 ; ICC-01/04-01/07-979-Conf, para. 2; ICC-01/04-01/07-1012-Conf, para. 2.

protect a victim or witness or any of their family members or the further or ongoing investigations of the Prosecution overrides the prejudice to the Defence that such a protection measure may cause.⁵ This balance may turn in favour of victim and witness protection at this point in time, but, due to changed circumstances, may turn in favour of fair trial protection in the future. It is respectfully submitted that there should always remain room to give effect to changed circumstances and adjust the protective measures accordingly.

5. The Appeals Chamber has held that “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.”⁶
6. The Trial Chamber has also found that any proposal for permanent redactions is excessive at this stage. The Trial Chamber held that any ruling issued on non-disclosure must be subject to a periodic overview and re-evaluation, in order to consider whether the redactions are still absolutely necessary and justified.⁷
7. The Defence further submits that the proposition to permanently redact the identities of witnesses who provide potentially exonerating information and, or Rule 77 is one of the most intrusive protective measure that may be imposed, particularly where the statement is summarised rather than redacted. It severely hampers the Defence in conducting its investigations as it is prevented from contacting witnesses with potentially viable information. Before such measure can be imposed, it has to be made sure that it is the least intrusive measure available in the circumstances.⁸
8. The Defence is not in a position to make an assessment of the necessity of the measures sought and whether there are no alternative, less intrusive measures available to protect the witnesses in question. All the relevant information necessary to make such an assessment has been filed on an *ex parte* basis and is, therefore, not available to the Defence. The Defence is, however, confident that the Trial Chamber will carefully evaluate whether the circumstances of these witnesses justify the measures sought. The Trial Chamber has already confirmed that, in doing so, it will consider, first, whether there is an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations. It will then consider whether there is a link between the source of the risk and the accused. If such link can be established, the Trial Chamber will assess whether the measure

⁵ 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. 73.

⁶ *Ibid*, para. 73.

⁷ ICC-01/04-01/07-819-tENG (TCII), para. 12; ICC-01/04-01/07-946 (TCII), paras. 13-14.

⁸ 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. 67.

proposed is the least intrusive measure available.⁹ If all of this is confirmed, the Trial Chamber will carefully balance the need for the protective measure on the one hand, and the need to protect the rights of the accused on the other hand.¹⁰

9. The Defence submits that, unless the Chamber is satisfied that the danger a witness is fearing stems directly or indirectly from the accused, there is a very evident alternative measure available, that is, non-disclosure of the witness's identity to the public at large while disclosure to the Defence. Hence, it is particularly important for the Chamber to consider whether the potential risk to a witness's safety is linked to the accused, who is detained in a secured and monitored prison remote from the DRC, and not to persons in DRC who have no connection with the accused.
10. The Defence further submits that the non-consent of witnesses to disclose their identities to the Defence cannot be a decisive factor in determining whether a request for redactions should be granted. The Prosecution has not received this information on the basis of Article 54(3)(e) but relies on Articles 54(3)(f), Article 64(2), 64(6)(e), and Article 68(1) of the ICC Statute and Rule 81(4) of the Rules in support of its application. None of these provisions authorise a witness to prevent his or her identity from being disclosed to the Defence. It is not for the witness to dictate to the Prosecution the conditions under which he or she is willing to cooperate. Only where the witness's non-consent to disclosure of his or her identity is based on a genuine fear for his or her safety, which has an objective foundation, may his or her non-consent have any significance at all. This is, however, determined by the Chamber, not by the witness or the party representing his or her interests.

(1) disclosure to the accused should not endanger witnesses

11. The Defence agrees that an objectively justified fear of witnesses may result in non-disclosure on a temporary basis of their identities to the Defence. However, such a fear does not automatically result in non-disclosure on a temporary basis of their identities to the Defence. Whether such measure should be taken depends on the outcome of the balancing exercise that the Chamber must conduct in determining any request for protective measures (see above, para. 4).

(2) no automatic right to receive identities of PEXO witnesses

12. The Defence respectfully submits that the Prosecution's assertion that "there is no automatic right of the accused to information identifying witnesses who provide potentially exculpatory evidence",¹¹ is misleading. The Defence concedes that there is no absolute right of the accused to such information as it may exceptionally be restricted. Nonetheless, as a rule, such information must be disclosed to the accused. This has been confirmed by the Appeals Chamber: "The overriding principle is that

⁹ 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.

¹⁰ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 7, 9, reliance on: ICC-01/04-01/07-476, para. 57.

¹¹ Prosecution Application, para. 11.

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.”¹² This general rule can be limited only on an exceptional basis¹³ and “as an absolute last resort”.¹⁴

13. The Defence concedes that the Chamber must consider whether the information assists the accused in a real sense. However, such determination must only be made where it has been established that the witnesses are at risk in a real sense.
14. In any event, the information concerned in this particular application would assist the accused in a real sense. The witnesses concerned have given incriminatory statements against the accused, but will not be called to testify. The Defence would certainly be interested in contacting such witnesses to verify their testimony with them and to get a sense as to why they are not called as witnesses.

(3) no serious prejudice caused by non-disclosure of identities of PEXO witnesses

15. The Prosecution submits that the Defence would not be seriously prejudiced by non-disclosure of the identities of PEXO witnesses on the grounds that (a) the PEXO Witnesses are unavailable to testify; (b) the redactions sought are limited to identifying information only; (c) the evidence sought to be redacted is analogous to evidence that will be presented by Prosecution witnesses.
16. The Defence respectfully disagrees that these factors indicate that the Defence would not be seriously prejudiced by the proposed non-disclosure of the identities of PEXO witnesses. In response to the first ground, the Defence submits that the fact that the witnesses are unavailable to testify for the Prosecution does not suggest that these witnesses are not available to speak to the Defence or even testify on behalf of the accused. If they cannot be located, not even with the assistance of the accused, these witnesses cannot be said to fear any danger coming from the accused.
17. As for the second and third grounds, the Defence submits that the redactions sought are limited to the information most essential to the Defence. The main interest the Defence has in receiving PEXO evidence is to speak to the makers of the statements and hear their testimony first-hand. The need to contact them is increased as a result of their non-availability for questioning in court. The fact that analogous information will be presented in Court further increases the need to contact these PEXO witnesses. By speaking to these PEXO witnesses first-hand, the Defence would be in a much better position to evaluate whether the testimony of the PEXO witnesses contradicts or confirms the testimony of witnesses who will be called to testify. To confront a witness with a contradictory statement of another witness is an efficient tool in cross-

¹² 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.

¹³ 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, T-27.11.2008, p. 55 lines 4-10 & p. 60 line 4.

¹⁴ Status Conference held by Trial Chamber II, T-27.11.2008, p. 60 line 6 & p. 80 lines 22-25.

examination which would also assist the Chamber in its important and difficult task of ascertaining the truth.

18. Defence investigations are currently underway and it is a marked disadvantage to the Defence, given the circumstances in which such investigations are conducted, to receive information piecemeal. This leads to a waste of time and resources and loss of potential evidence.
19. Disclosure of statements in summary form would cause even more prejudice to the Defence because such summary would not only withhold the identity of the maker of the statement but also the exact nature of the statement made. The Defence cannot be certain whether a summary accurately reflects that which the witness has stated or an interpretation thereof by the Prosecution.
20. Accordingly, the Defence would be very seriously prejudiced in a real sense by granting the protective measures sought.

(4) no less intrusive protection measures are available

21. The Defence requests that the Trial Chamber seriously consider whether non-disclosure to the public at large without extension of this measure to the Defence is not sufficient to meet the safety concerns. The Defence would thereby invite the Chamber to take account of the current circumstances of the accused and his practical difficulties to threaten anyone in Ituri. Not only is Mr. Katanga constantly watched and his moves and contact with the outside world monitored, it would also be counter-productive to his case to pose any threat to PEXO witnesses. Given that these witnesses are no longer testifying against him, they may be useful for the Defence. Hostility towards them would, accordingly, not assist the preparation of his defence. In any event, these witnesses are no longer creating difficulties for Mr. Katanga because they will not be called to testify against him.
22. The Defence further raises doubts as to whether witnesses who can no longer be traced are in danger in a real sense.
23. The proposition to disclose summaries of the statements by four witnesses because their statements, even if redacted, may identify the witnesses is even more restricted as a protection measure. The Defence objects to disclosure of PEXO statements in summary format, particularly where the evidence is incriminating. The Defence is interested in reading the statement as it was taken from the witness, not in reading a summarised version thereof, which may not accurately reflect what the witness has stated.

(5) vulnerable witnesses who provide exculpatory evidence require special protection

24. The Defence recognises that the Chamber may be particularly concerned with vulnerable witnesses. However, the Defence submits that the extra care the Chamber may wish to give must be carefully balanced with the potential prejudice to the

Defence. Prejudice may particularly arise where the statements made directly incriminate the accused.

(6) incriminatory nature of information and volatile situation in Ituri

25. It is respectfully submitted that the fact that the PEXO statements are incriminatory is a factor that should weigh in favour of disclosure more than in favour of non-disclosure. Due to the incriminating nature of the statements, the Defence has a genuine interest in knowing the identities of the makers of the statement. The Defence does not share the Prosecution's concern that the risk for retaliation against these PEXO witnesses is higher as a result of the incriminating nature of their statements. These PEXO witnesses are not scheduled to testify against Katanga and, or Ngudjolo. This may be because they changed their mind or were never meant to testify or can no longer be traced. Either way, there is no incentive for the accused to threaten witnesses whose testimony is not relied upon to prove the charges against them. The identities of witnesses who will actually testify are disclosed to the Defence despite that they may be in greater danger of retaliation than incriminating witnesses who will not testify.

26. The Prosecution has not presented any solid evidence that may suggest that the accused is or has been involved, directly or indirectly, in interfering with witnesses. General allegations or assumptions are not sufficient to establish an objectively justifiable fear of witnesses that can be linked to the accused. The Appeals Chamber has further confirmed that a general statement about the volatile situation in Ituri is not sufficient to establish a need for protective measures.¹⁵

(7) Rule 77 witness

27. The Defence submits that the same balancing exercise needs to be conducted in respect of witnesses who provide Rule 77 material only and do not qualify as Article 67(2) witnesses. Non-disclosure under Articles 68(1), 54(3)(f), 64(2), and 64(6)(e) and Rule 81(4) is the exception to the general principle that such material must be disclosed in non-redacted format. Accordingly, the same criteria as described above must be applied.

28. The Defence further fails to see how a witness who provides information relevant to the role of Uganda and Rwanda in the conflict in Ituri would be at risk of harm caused, directly or indirectly, by the accused. Such information does not incriminate the accused but, if anything, may exculpate him. This information may therefore be helpful to the Defence and does not put the provider at risk caused by the accused. If the provider of the information fears retaliation coming from Uganda or Rwanda, the Defence suggests that his or her identity be withheld from the public at large. On the information available to the Defence, it seems, however, completely unnecessary to extend this measure to the Accused.

¹⁵ Procureur c. Lubanga, Arrêt relatif à l'appel interjeté par Thomas Lubanga Dyilo contre la décision de la Chambre préliminaire I intitulée « Première décision relative aux requêtes et aux requêtes modifiées aux fins d'expurgations introduites par l'Accusation en vertu de la règle 81 du Règlement de procédure et de preuve », 14 December 2006, ICC-01/04-01/06-773, para. 21.

Conclusion

29. On the grounds stated in this Response to the Prosecution Application, the Defence prays the Chamber to reject the Prosecution's request for permanent redactions in PEXO statements or to produce a summary of such statements.

Respectfully submitted,



David HOOPER

Dated this 1st April 2009

At London