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

Date: **6 March 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

**Decision on the Prosecutor's Application for Leave to Appeal the Decision on
Redactions Rendered on 10 February 2009**

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

The Office of the Prosecutor

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Legal Representatives of the Applicants

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Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64 and 82(1)(d) of the Rome Statute (“the Statute”), rule 155 of the *Rules of Procedure and Evidence* (“the Rules”) and regulation 65 of the *Regulations of the Court*, decides as follows:

I. Procedural history

1. During the status conference of 3 February 2009, the Chamber issued an oral decision authorizing the Prosecutor’s applications to redact the statements of witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the investigator’s note on witness 176.¹ On 10 February 2009, the Chamber set out in writing the reasoning underpinning this oral decision (“the Decision”).²

2. All of the requested redactions, including those pertaining to the identities and location of members of the witnesses’ families as well as the identities of two of the Prosecutor’s sources or intermediaries, were authorized until the thirtieth day prior to the date of the commencement of trial, unless “the Prosecutor requests, not less than 45 days prior to that date, that they be maintained”.³

¹ ICC-01/04-01/07-T-56-ENG ET WT, p. 14, lines 22 to 25, p. 15 lines 1 to 9. See also, 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; Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurger les déclarations et note 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; 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. These three applications were resubmitted in a single document on 16 January 2009. See Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurger certaines informations dans des éléments de preuve conformément à la « Décision relative à la procédure d’expurgation »*”, 16 January 2009, ICC-01/04-01/07-832.

² “Grounds for the Oral Decision on the Prosecutor’s Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator’s Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence)”, 10 February 2009, ICC-01/04-01/07-888-Conf-Exp-tENG; see also, ICC-01/04-01/07-889-Conf (“the Decision”).

³ Decision, p. 16.

3. On 16 February 2009, the Prosecutor filed an application for leave to appeal the Decision (“the Application”)⁴ and no observations were filed by the Defence teams.

II. The Prosecutor’s submissions

4. The Chamber has considered the submissions set out in the Application and recalls the main ones.

5. The Prosecutor objects in particular to that part of the Decision which refused to authorize, for the duration of the trial, redactions of information enabling members of witnesses’ families to be identified and located and two of his sources or intermediaries to be identified. He emphasizes that the Chamber refused the redactions for the requested period, despite the fact that the Defence had not objected thereto, and states that, as a result, he is forced to reveal this information 30 days prior to the commencement of trial.⁵

6. According to the Prosecutor, the Chamber did not correctly apply the test laid down by the Appeals Chamber, which requires the various interests at stake to be balanced. Thus the Appeals Chamber considers, *inter alia*, that the relevance of the information at issue to the preparation of the Defence must be assessed, and that the rights of the latter must be balanced against the interests of the protected persons.⁶ The Prosecutor further submits that the Chamber did not fully consider the impact of its Decision on the rights of persons who are at risk as a result of their interaction with the Court and that it assumed that the non-disclosure of the information at

⁴ Office of the Prosecutor, *Prosecution Application for Leave to Appeal the Decision on Prosecution’s Request for Redactions*, 16 February 2009, ICC-01/04-01/07-901-Conf.

⁵ Application, para. 1.

⁶ Application, paras. 2, 8, 16. In particular, the Prosecutor considers that the Chamber erred in omitting the critical and mandatory steps of applying the test developed by the Appeals Chamber, and did not expressly assess the relevance of the redacted information to the Defence or determine whether the rights and interests of the persons at risk (witnesses’ family members and sources) outweigh those of the Defence. *Ibid.*, para. 11.

issue could prejudice the rights of the Defence, which is not the case.⁷ He maintains that the application of the above test constitutes a real “issue” arising from the Decision.⁸

7. The Prosecutor further asserts that the issue raised has an impact on the expeditious conduct of the proceedings,⁹ in that it jeopardizes the fairness of proceedings not only with respect to those individuals concerned by the redactions, by severely affecting their safety and well-being,¹⁰ but also with respect to the Prosecutor, by undermining his ability to discharge his obligations under the Statute and to present his case.¹¹

8. In the view of the Prosecutor, this issue also affects the expeditious conduct of the proceedings,¹² since the Court and the Prosecutor will be required to devote substantial additional time and resources to assessing and managing the security implications of the disclosure of the identities of those concerned, so as to ensure their protection through other means in the period immediately before trial.¹³ The Decision could, moreover, have repercussions on how the Prosecutor goes about selecting his witnesses, because he might be forced to find alternatives to those who would no longer be willing to testify on account of the risk to their families or as a result of the disclosure of the identity of the intermediary in question.¹⁴ He notes that the issues thus raised will impact on all current and future investigations and cases.¹⁵

9. The Prosecutor considers that the immediate resolution of the issue will materially advance the proceedings, by avoiding a repetition of this error, by

⁷ Application, paras. 2, 15 and 16.

⁸ Application, para. 9 and paras. 10 to 17.

⁹ Application, paras. 18 to 26.

¹⁰ Application, paras. 2, 19 to 20 and para. 26.

¹¹ Application, paras. 2, 18, and 21 to 26.

¹² Application, paras. 27 to 33.

¹³ Application, paras. 28 to 30.

¹⁴ Application, paras. 31 to 32.

¹⁵ Application, para. 33.

guaranteeing that the same principles and the same levels of protection apply to all persons similarly situated, in view of the solution adopted by Trial Chamber I, and by contributing to the advancement of other cases.¹⁶

II. Analysis and conclusions

10. For leave to appeal to be granted under article 82(1)(d) of the Statute, the issue raised in the decision must meet the two following cumulative criteria:

- a. be likely to significantly affect i) the fair and expeditious conduct of the proceedings; or ii) the outcome of the trial; and
- b. be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁷

11. The Chamber recalls the position adopted by several Chambers of the Court, according to which the mere fact that an issue is of general interest, or that it could be raised in future pre-trial or trial proceedings, is not sufficient to warrant the

¹⁶ Application, paras. 34 to 39.

¹⁷ According to the Appeals Chamber, only an “issue” may form the subject-matter of an appealable decision. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination and not every issue may constitute the subject of an appeal. It must be one apt to “significantly affect”, i.e. in a material way, either a) “the fair and expeditious conduct of the proceedings” or b) “the outcome of the trial” and identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal. The issue must be one “for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. See Appeals Chamber, *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber 1’s 31 March 2006 Decision Denying Leave to Appeal*, 13 July 2006, ICC-01/04-168, paras. 9 to 14.

granting of leave to appeal.¹⁸ Leave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances.¹⁹

12. The Chamber takes note of the issue raised by the Prosecutor. It also acknowledges that the disclosure of information pertaining to the identities and location of witnesses' family members and the identities of two of its Office's sources must be scrutinised with the utmost care. As stated in the Decision, the Chamber is mindful of the risks faced by individuals and institutions acting as intermediaries between the Court and witnesses as well as the security risks to their family members. It is fully aware of the repercussions that the disclosure of such information could have on the Prosecutor's duties and powers with respect to investigations.

13. Nevertheless, in the instant case, the issue raised by the Prosecutor does not significantly affect, namely in a material way, the fair and expeditious conduct of the proceedings. The Chamber arrived at the impugned conclusion after having balanced the various interests at stake, and relied on all of the tests set by the Appeals Chamber, which it specifically sought to reiterate in the Decision.²⁰ It emphasizes that the disclosure of all of the materials to the Defence is a principle which should only be departed from in exceptional circumstances. In the present

¹⁸ See for example, Trial Chamber I, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008*, 26 February 2008, ICC-01/04-01/06-1191, para. 11.

¹⁹ See for example, Pre-Trial Chamber II, *Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58*, 19 August 2005, ICC-02/04-01/05-20-US-Exp, para. 19 (this decision was made public pursuant to a decision issued on 13 October 2005, ICC-02/04-01/05-52).

²⁰ Decision, paras. 3-4, referring to the relevant Appeals Chamber jurisprudence, *inter alia*: *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, paras. 71, 73 and 97; *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, para. 37; *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, paras. 33-34.

case, at this stage in the proceedings and although the date of the trial has not yet been scheduled, it authorised the requested redactions, but for a period of time different from that requested by the Prosecutor. It did not consider that it could authorize these redactions until the end of trial, “such a measure appearing, in the circumstances and in the absence of any indication to the contrary, excessive in relation to the exercise of the rights of the Defence”.²¹ That is why it authorised the redactions until the thirtieth day prior to the date of the commencement of trial, unless “the Prosecutor requests, not less than 45 days prior to that date, that they be maintained”.²²

14. By proceeding in this way, the Chamber has, albeit for a limited period of time, ensured the protection of those interests referred to by the Prosecutor, who at this stage has been granted leave not to disclose this information to the Defence. However, by giving the Prosecutor the option of submitting, 45 days prior to the date of the commencement of trial, a further application for the maintenance of the measures granted, the Chamber has thus provided for a review of the situation in compliance with the Appeals Chamber’s requirement that decisions on redactions must be periodically reassessed. The Chamber will therefore have to issue a further ruling on the merits of the measures at issue and their precise duration, if the Prosecutor considers it necessary and refers the matter to the Chamber again. It will be for the Prosecutor to provide any relevant justifications and for the Defence to submit observations, if any. The Chamber will issue its new ruling on the basis of all of the information at its disposal shortly before the commencement of trial. The Chamber does not consider that any prejudice has been caused to either of the parties.

15. Accordingly, the Chamber considers that the issue addressed in the Decision would not significantly affect the fair and expeditious conduct of the proceedings.

²¹ Decision, paras. 23 and 34.

²² Decision, p. 16.

Furthermore, it does not consider that the Prosecutor has established that the said issue would significantly affect the outcome of the trial.

16. Since the first criterion set out in article 82(1)(d) of the Statute has not been met, the Chamber does not consider it necessary to consider the second criterion.

FOR THESE REASONS, THE CHAMBER

1) **REJECTS** the Application.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 6 March 2009

At The Hague, The Netherlands