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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

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

Public

**Defence Response to the Prosecution's "Requête aux fins d'expurgation de
certaines métadonnées apparaissant dans la nouvelle version du protocole E-
Court»**

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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Defence Response to the Prosecution's Request for Redactions in *E-Court* metadata

1. The Defence for Mr. Katanga ("the Defence") hereby files its Response to the Prosecution's « *Requête aux fins d'expurgation d'informations de certaines métadonnées apparaissant dans la nouvelle version du protocole E-Court* » filed on 27 April 2009 ("the Prosecution's Request").¹
2. The Prosecution seeks to replace permanently the names, identifying information and locations of Prosecution sources and intermediaries mentioned in the *E-Court* metadata with one of the following indications of the type of organisation where they work: "ONU-MONUC" (United Nations Mission in the Democratic Republic of the Congo); "ONU-OLA" (United Nations Office of Legal Affairs); "ONU DPKO" (United Nations Department of Peacekeeping Operations) or "NGO" (Non-Governmental Organisation). The Prosecution further seeks to redact provisionally the names of W-175, W-179, W-270 and W-271, appearing in the *E-Court* protocol, while waiting for the Prosecution's pending requests for permanent redactions of their identities to be ruled upon by the Chamber. The Prosecution also requests the permanent redaction of the name of a family member of W-287 in the metadata.
3. The Defence disagrees with the Prosecution's assertion that the names of the sources of evidentiary material have no use or probative value for the Defence, given that they are ordinarily not the author of the material.² On the contrary, the names of the persons who provided the documents are highly relevant, not only because the Defence may have an interest in contacting these sources, but also because they pertain to the chain of custody - which itself goes to the reliability and authenticity of the document. The identity of the sources thus falls under article 67(2). This is in line with rulings of ICTY and ICTR Chambers on admissibility. In *Blaskic*, for instance, the Trial Chamber held that:

"in respect of Rule 68 regarding exculpatory material, it is reasonable to hold that in transmitting material of this kind the Prosecution must also include any information going to the authenticity of the document so as to enable the Defence to make full use of it. Indeed, if there is other material which tends to establish the authenticity of the document, such other material itself becomes part of the exculpatory evidence as being beneficial to the accused. Moreover, if the Prosecution possesses evidence which tends to suggest that some specific

¹ ICC-01/04-01/07-1076, VERSION PUBLIC EXPURGÉE Avec Annexes confidentielles, ex parte, réservées à l'Accusation, Urgent.

² Prosecution's Request, para. 15.

material being ruled on by it may not be authentic, the Prosecutor would, of course, be obliged to transmit such evidence as exculpatory evidence”.³

4. As acknowledged by the Prosecution, the same logic applies to cases before the ICC. Indeed, in *Lubanga*, the Prosecution conceded that information concerning chain of custody goes to the reliability of a document and thus its admissibility.⁴ Hence, the information which is sought to be redacted is relevant to the Defence.
5. Pursuant to this Chamber’s *Décision concernant trois requêtes du Procureur aux fins de maintien des suppressions ou de rétablissement de passages supprimés* (ICC-01/04-01/07-859, ICC-01/04-01/07-860 et ICC-01/04-01/07-862),⁵ the identities of Prosecution sources, intermediaries and family members of Prosecution witnesses may be redacted, albeit temporarily. The Chamber rejected Prosecution’s requests for permanent redactions of such identities as being excessive in light of the rights of the Defence.⁶ Accordingly, the Defence objects to the permanent redactions sought and requests that the Chamber order the Prosecution to disclose the said identities at the latest thirty days prior to the commencement of the trial. The Defence has no objection to the provisional redactions sought while waiting for a ruling of the Chamber on the Prosecution’s request to permanently redact the identities of the witnesses in question.

Respectfully submitted,



David HOOPER

Dated this 5th May 2009

At The Hague, Netherlands

³ *Prosecutor v. Blaskic*, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude From Evidence Authentic and Exculpatory Documentary Evidence, 30 January 1998, para. 15.

At: <http://www.un.org/icty/blaskic/trialc1/decisions-e/80130EV113316.htm>. See further: *Prosecutor v. Bagosora et al*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8; *Prosecutor v. Delalic*, Decision on Application of Defendant Zejnir Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18; *Prosecutor v. Kordic and Cerkez*, Decision on Prosecutor’s Submissions Concerning ‘Zagreb Exhibits’ and Presidential Transcripts, 1 December 2000, paras. 43-44; *Prosecutor v. Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 20.

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, para. 11.

⁵ ICC-01/04-01/07-1034, version publique expurgée.

⁶ ICC-01/04-01/07-1034, paras. 31, 32, 46.