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

Public redacted version of document ICC-01/04-01/07-1231-Conf-Exp

Prosecution's Submissions regarding Interpretation of Regulation 42

Source: Office of the Prosecutor

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

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1. Pursuant to the Trial Chamber II's order of 12 June 2009,¹ the Office of the Prosecutor ("Prosecution") makes the following submissions regarding the interpretation of Regulation 42 of the Regulations of the Court ("Regulation 42").

Request for Receipt of Filing as Confidential *Ex Parte*

2. The Prosecution requests that this filing be received as "Confidential, *ex parte*, only available to the Office of the Prosecutor", as it relates to material that is currently treated as confidential *ex parte*. A public redacted version of this filing will be filed as soon as possible.

Background

3. On 2 April 2009 the Prosecutor applied on a confidential *ex parte* basis for redaction of documents, disclosable under Rule 77 of the Rules of Procedure and Evidence ("Rules"), that relate to Witness 7 and Witness 294.²
4. On 20 May 2009, the Office of Public Counsel for Victims ("OPCV") requested that protective measures in relation to Witness 7 as ordered by Trial Chamber I apply in the proceedings before Trial Chamber II by virtue of Regulation 42.³

¹ Ordonnance relative à la soumission d'écritures sur l'interprétation de la norme 42 du Règlement de la Cour, ICC-01/04-01/07-1205, 12 June 2009.

² Requête aux fins d'expurgations d'informations dans certains éléments de preuve relevant de la Règle 77 (W-007 et W-294) avec Annexes A et B confidentielles, *ex parte*, réservées à l'Accusation, ICC-01/04-01/07-1018-Conf-Exp, 2 April 2009. The public version of the request was made on 8 May 2009. See Version publique expurgée du document ICC-01/04-01/07-1018-Conf-Exp du 2 avril 2009, Requête aux fins d'expurgations d'informations dans certains éléments de preuve relevant de la Règle 77 (W-007 et W-294) avec Annexes confidentielles, *ex parte*, réservées à l'Accusation, ICC-01-04/01/07-1118, 8 May 2009.

³ Demande du BCPV afin d'être autorisé en vertu de la norme 81-4-b du Règlement de la Cour à comparaître devant la Chambre dans le cadre de questions spécifiques liées aux mesures de protection au bénéfice du témoin W-007, ICC-01-04-01/07-1160, 20 May 2009.

5. On 28 May 2009, the Prosecution requested from Trial Chamber II that one of its specific requests for redactions for Witness 294 be withdrawn, on the basis that this redaction had already been authorized on a permanent basis by Trial Chamber I, referring to Regulation 42.⁴
6. On 12 June 2009, Trial Chamber II requested that the parties submit their observations on the interpretation of Regulation 42, commenting that Regulation 42 has implications as regards redactions previously authorized by another Chamber including in relation to obligations of parties to communicate evidence.⁵
7. Trial Chamber II rendered a confidential *ex parte* decision on 17 June 2009, stating that it would decide on specific requests for redactions for Witnesses 7 and 294 as previously ordered by Trial Chamber I, once it had received the parties' submissions regarding Regulation 42.⁶

Interpretation of Regulation 42

I. Protective measures envisaged by Regulation 42

8. The protective measures "in respect of a victim or a witness" envisaged by Regulation 42 must be interpreted in light of the Court's obligation to protect persons pursuant to Articles 54(3)(f), 68(1), 64(2), 64(6)(e) and Rules 87 and 88; and the restrictions on disclosure provided by Rule 81 of the Rules. In order to secure the useful effect of the provision, as well as consistency of practice, Regulation 42 must thus be interpreted as a procedural device encompassing all scenarios of protective measures enshrined in the Statute and the Rules.

⁴ Addendum du Bureau du Procureur à la *Requête aux fins d'expurgations d'informations dans certains éléments de preuve relevant de la Règle 77 (W-007 et W-294)* - ICC-01/04-01/07-1018-Conf-Exp, ICC-01/04-01/07-1177, 28 May 2009, paras. 3-4.

⁵ ICC-01/04-01/07-1205.

⁶ ICC-01/04-01/07-1214-Conf-Exp, p. 18.

9. Regulation 42 includes measures to protect identities of victims and witnesses pursuant to Article 68(1) and Rule 81(4), or any protective or special measure ordered under Rule 87 or 88. These measures are “*in respect of a victim or witness*” pursuant to the language of Regulation 42.
10. Similarly, the “protective measures...ordered... *in respect of a victim or witness*” under Regulation 42 must be interpreted to include measures to protect identities of family members and their place of residence for the following reasons:
- First, issues of protection of family members directly impact upon victims and witnesses. Identification of family members can compromise the protection of a victim or witness, and interference with family members can discourage a witness from cooperating or testifying in Court.
 - Second, Regulation 42 must be interpreted in light of the explicit reference to protection of family members under Rule 81(4) and to protection of “*any person*” under Article 54(3)(f).
11. The protective measures envisaged by Regulation 42 must also be interpreted to include measures designed to protect identities of others who might be at risk on account of the activities of the Court or testimony of victims and witnesses, in light of the obligation to protect “*any person*” pursuant to Article 54(3)(f). The Appeals Chamber held that Rule 81(4), which only refers to “witnesses and victims and members of their families”, includes additional categories of individuals who may be at risk from the activities of the Court,⁷ stating:

⁷ ICC-01/04-01/07-475, paras. 1, 43, 55, 56. At para. 1. This interpretation has also been applied by Trial Chamber II. See ICC-01/04-01/07-1214-Conf-Exp, para. 40.

“Rule 81 (4) of the Rules of Procedure and Evidence should be read to include the words ‘persons at risk on account of the activities of the Court’ so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.”

12. For instance, the permanent redaction of the image of a third party from a photograph or video footage ordered in one case should continue to apply in other cases, to reflect the intention underlying the Statute to protect such third parties.

13. Regulation 42 must also be interpreted to cover measures to protect identities of locally-based interpreters, intermediaries and sources, further examples of ‘others’ at risk from the activities of the Court. Trial Chamber II has recognised the risks posed to these categories of individuals.⁸ Accordingly, redactions related to intermediaries and interpreters are required not only to preserve further or ongoing investigations pursuant to Rule 81(2), but also to ensure the protection pursuant to Articles 54(3)(f) and Rule 81(4) of “*persons at risk on account of the activities of the Court*”. Moreover disclosure of their identities might jeopardise the security of victims and witnesses if they could be identified or located through these third parties.⁹ On that basis, protection for these groups of individuals may also be considered to be protective measures “*in respect of a victim or witness*” pursuant to Regulation 42.

⁸ ICC-01/04-01/07-1214-Conf-Exp, paras. 18-21, 26-27.

⁹ ICC-01-04-01/07-987-Conf-Exp, para. 29: “La Chambre considère que la divulgation de l'identité de ces intermédiaires ne pourrait qu'accroître les menaces qui pèsent sur eux. Aussi estime-t-elle nécessaire de procéder à la suppression du nom des personnes et des organismes qui agissent en cette qualité entre la Cour et des témoins potentiels afin d'assurer leur protection. Elle est aussi consciente de l'importance du rôle joué par ces sources dans le bon déroulement des enquêtes ainsi que du risque, en cas de communication de leurs noms, de les voir refuser de continuer leur collaboration avec le Bureau du Procureur et, plus généralement, avec la Cour. La suppression de leurs noms s'avère donc nécessaire pour la protection des enquêtes et il ne semble pas possible de recourir à des mesures moins restrictives ».

14. Redaction of interview locations, pursuant to Article 68(1) and Rules 81(2) and 81(4), will avoid compromising the Prosecution's investigations and ensure that the security of victims and witnesses is not endangered when meeting with Court staff in these locations.¹⁰ Accordingly, those measures are "in respect of" victims and witnesses and covered by Regulation 42.

15. Redactions that avoid disclosure of the Prosecution's internal work product, pursuant to Rule 81(1) are not explicitly envisaged in Regulation 42. Nevertheless, documents that need to be disclosed containing information relevant under Rule 81(1) are subject to decisions on redaction of sensitive information. For the sake of consistency and efficiency these redactions should also be applied automatically in subsequent legal proceedings.

II. *Protective measures ordered in one case must apply to subsequent legal proceedings in other cases*

16. Regulation 42(1) is unambiguous in its requirement that any protective measure once ordered in respect of a victim or a witness "*shall continue to have full force and effect in relation to any other proceedings before the Court*". Accordingly, any protective measures (including redactions) ordered by one Chamber of the Court must be maintained in other proceedings, including those before a different Chamber of the Court, unless a variation to that protective measure is required and authorised by the Chamber that issued the original order.¹¹

17. Thus, Trial Chamber II recognized, in relation to protective measures ordered by Trial Chamber I as regards [REDACTED], that: [REDACTED].¹²

¹⁰ ICC-01/04-01/07-987-Conf-Exp, para. 20.

¹¹ Regulation 42(3).

¹² ICC-01/04-01/07-T-62-CONF-EXP-ENG ET, 16-03-2009, p. 20, lines 12-17.

18. The requirement and presumption -- that protective measures previously ordered by a Chamber of the Court must be maintained in subsequent proceedings -- is based in particular on the following reasons.¹³

19. First, the Court is obliged to apply the prior ordered protective measure on the basis of its **obligations to protect victims and witnesses and other persons** at risk on account of the activities of the Court. To ignore the binding character of protective measures ordered by a Pre-Trial or Trial Chamber in a given case, or to refuse to extend them to other parallel or subsequent cases, would undermine the effectiveness of those protective measures and with it, of the promise of protection and confidentiality made by a Chamber of the Court.

20. Regulation 42 thus must be interpreted in light of the Court's obligations to ensure protection of victims and witnesses under Article 68(1), 64(2), and 64(6)(e), and Rule 81(4), and of other persons under Article 54(3)(f). It must also be viewed in light of the specific restrictions on disclosure envisaged by Rule 81. As Trial Chamber I stated in the context of disclosure of identities and evidence of witnesses with potentially exculpatory evidence, the rights of victims and witnesses to protection under Article 68(1) are *"immutable, and neither can be diminished because of the need to cater for other interests."*¹⁴

21. Second, failure to maintain in subsequent proceedings the protective measures (for instance redaction of a witness's identity) deemed necessary by one Chamber would undermine the **efficacy** of the measures. It would be

¹³ The International Criminal Tribunal for former Yugoslavia and International Criminal Tribunal for Rwanda have similar provisions for automatic application of previously ordered protection measures in subsequent legal proceedings. See Rule 75(F) to (K) of the ICTY Rules of Procedure and Evidence. Rule 75(F) provides that: "Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the 'first proceedings'), such protective measures: (i) shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal ('second proceedings') or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings." Rule 75(G) requires parties to apply to the Chamber which ordered the protective measure if it remains seized of proceedings.

¹⁴ ICC-01/04-01/06-1311-Anx2, para. 94.

impossible to maintain the protection in the first trial once the information became available to other parties in other legal proceedings. This is particularly so where accused from different legal proceedings are held in common detention facilities and it is not possible to monitor all information that might be shared amongst them. [REDACTED]¹⁵

22. Third, maintaining previously ordered protection measures in subsequent proceedings **ensures that proceedings are efficient:**

- by avoiding unnecessary duplication where a Chamber has already determined that there is a protection interest warranting protection; and
- as a result, most importantly, by avoiding unnecessary delays in disclosure in subsequent cases.

23. Fourth, maintaining previously ordered protection measures in subsequent proceedings **ensures judicial consistency (“sécurité juridique”)** by avoiding a series of variations that will create uncertainty as to which protective measure(s) apply in the event the same witnesses, and any documents in relation to the witnesses, appear in several legal proceedings (for instance, the same witness and their statements might be used in proceedings in *Prosecutor v. Lubanga*; *Prosecutor v. Katanga and Ngudjolo*; and any subsequent case related to the Democratic Republic of Congo).

24. Fifth, protective measures ordered by a Chamber attach to a specific **protection interest requiring protection and do not necessarily attach to any specific case.** For instance, once a Chamber decides that permanent redactions to information is required to protect identities of witnesses and their families (under Article 68(1) and Rule 81(4)), or to protect identities of locally-based interpreters, intermediaries or sources (under Article 54(3)(f), Article 68(1),

¹⁵ [REDACTED].

Rule 81(2) and Rule 81(4)), this need continues for as long as the persons remain at risk. Thus, the order must provide for continuing confidentiality of their identities. Moreover, interview locations (and indeed locally-based interpreters and intermediaries and sources) may be relevant for investigations in a situation country for more than one case.

25. The presumption that the protective measure shall continue to apply, in the form as ordered, in subsequent proceedings is also reflected by Regulation 42(4), which requires the Chamber from whom an application to vary (or rescind or augment) a protective measure is sought, to obtain whenever possible the consent of the person who is the subject of that protective measure.¹⁶

III. Applications for variation

26. Regulation 42(3) states that any application to vary (rescind or augment) a protective measure “*shall first be made to the Chamber which issued the order*”, unless they are no longer seized of the proceedings in which case the application is made to the Chamber before which a variation of the protective measure is requested.¹⁷ Thus, if any variation is required to a protective measure in subsequent proceedings, an application can be made by the Prosecution or Defence to the Chamber that issued the order, or – if that Chamber is no longer seized of the proceedings – to the Chamber seized with the proceedings at that point in time.

27. [REDACTED].¹⁸ The Prosecution would also immediately notify Trial Chamber II where a variation to a protective measure ordered previously by Trial Chamber I was necessary in the proceedings before Trial Chamber II.

¹⁶ See also Rule 75(J) of the ICTY Rules of Procedure and Evidence.

¹⁷ ICC-01/04-01/06-T-147-CONF-EXP-ENG ET 13-03-2009, at p. 11, lines 13-16: [REDACTED].

¹⁸ See ICC-01/04-01/07-T-62-CONF-EXP-ENG ET 16-03-2009, p. 20, lines 12-17: [REDACTED].

28. The Prosecution submits for the foregoing reasons that the presumption must be that the protective measure should continue to be maintained in the form as ordered, unless good reasons are shown to justify the contrary and, whenever possible, the consent has been obtained of the victim or witness who is the subject of the protective measure.

29. Moreover, the Prosecution submits that any variation to that protective measure cannot diminish the protection afforded to an individual where the need for protection still exists in those other proceedings, and a measure should only be rescinded where there is no longer any need for that protection measure (for instance, the end of a rolling disclosure period previously ordered so that the identity of a witness can be disclosed).

Conclusion

30. For the foregoing reasons, the Prosecution submits that Regulation 42 must be interpreted to cover all protective measures envisaged by the Statute and Rules including: in relation to victims or witnesses, including regarding interview locations, family members, others at risk on account of the activities of the Court including interpreters, intermediaries and sources; as well as redactions under Rule 81(1). These measures must be applied in subsequent legal proceedings. Any variations must be justified, with the consent of the victim or witness subject to those measures where possible, and not diminishing protection where still required.



Luis Moreno-Ocampo, Prosecutor

Dated this 24th day of June 2009

At The Hague, The Netherlands