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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 Document

**Defence Observations on Prosecution's *Requête sollicitant le maintien de
versions expurgées d'éléments de preuve***

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 Germain Katanga (“the Defence”) hereby responds to the Prosecution’s “*Requête sollicitant le maintien de versions expurgées d’éléments de preuve*”,¹ filed on 13 August 2009 (“Prosecution’s Request”), in which the Prosecution seeks a number of permanent redactions. It is difficult for the Defence to measure the exact prejudice that would be caused by such permanent redactions given that it is not provided with the documents in which the redactions are sought. Moreover, the Prosecution’s Request cites ample *ex parte* Decisions, the contents of which are unknown to the Defence. It is, therefore, not an easy task for the Defence to make sense of the Prosecution’s request for permanent redactions when only a general description is provided of the redactions in question.
2. Accordingly, the Defence is not in a position to give a fully reasoned response to the Prosecution’s request for permanent redactions. This itself gives rise to unfairness given that the Defence is left in the dark as to the exact scope and potential prejudicial effect of the permanent redactions sought. In an earlier decision on a similar general Prosecution’s request for redactions the Chamber noted that the Defence was not in a position to fully appreciate the relevance of the information, as it was described in a general manner. The Chamber, therefore, offered both parties an opportunity to address the Chamber on issues relating to redactions granted on a temporary basis once the Defence was equally in a position to analyse and fully appreciate the relevance of the redacted information.² Unfortunately, the Defence is still not in a position to fully appreciate the relevance of the information the Prosecution now seeks to permanently redact. It can and will, therefore, only respond in a general manner.

Legal Provisions

3. As previously indicated,³ the Defence strongly objects to any permanent redactions from the Defence. To withhold permanently information from the Defence is the most intrusive measure and seriously infringes the right of the accused to know the case

¹Version publique expurgée du document ICC-01/04-01/07-1359-Conf-Exp , ICC-01/04-01/07-1363.

² ICC-01/04-01/07-1033-Conf-Exp; ICC-01/04-01/07-1034, para. 31.

³ See, *inter alia*, 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.

against him, which is a component of the rights of the accused set out in Articles 67(1)(a) and (b) of the Rome Statute.

4. The Defence submits that the Rome Statute and Rules of Procedure and Evidence do not envisage the imposition of permanent redactions as protective measure. In accordance with Article 54(3)(f), the Prosecution may “take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence”. Article 68(1) mandates the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. However, these measures “**shall not be prejudicial to or inconsistent with the rights of the accused** and a fair and impartial trial”.
5. Rules 81(1) and (4) of the Rules of Procedure and Evidence, cited by the Prosecution as the legal basis underlying their requests, do also not allow for permanent redactions. Pursuant to Rule 81(2), information can be withheld from the Defence to protect the Prosecution’s further or ongoing investigations. However, “the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial **without adequate prior disclosure to the accused**” (emphasis added). Rule 81(4) allows the Chamber to take the necessary steps to ensure the confidentiality of information to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity **prior to the commencement of the trial**” (emphasis added).
6. Hence, the drafters of these provisions clearly had in mind that the Prosecution would have to provide full and unredacted disclosure prior to the commencement of the trial. This conclusion is consistent with the Appeals Chamber’s and this Trial Chamber’s approaches towards disclosure.

ICC Jurisprudence on Disclosure

7. Consistent with the jurisprudence on disclosure, if in any situation permanent redactions are justified, this must be highly exceptional. Redactions in general can only be ordered “as an absolute last resort”⁴, let alone permanent redactions. As the

⁴ Status Conference held by Trial Chamber II, T-27.11.2008, p. 60 line 6 & p. 80 lines 22-25.

Appeals Chamber put it, any assessment of whether a request for redactions should be authorized involve “a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”⁵

8. In line with this Appeals Chamber’s directive, 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 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.⁶ In respect of permanent redactions, such balancing exercise would turn in favour of the Defence unless the information sought to be permanently redacted has barely any relevance for the Defence and would put a victim, witness or any of their family members or the further or ongoing investigations of the Prosecution at serious risk if disclosed to the Defence.
9. In evaluating whether the circumstances of the victims, witnesses or their family members or the Prosecution’s further or ongoing investigations justify permanent redactions, the Chamber must 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.⁷ If such link can be established, the Trial Chamber will assess

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. 67.

⁶ 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.

⁷ It is important that the Prosecutor establishes that the threat stems from the accused, not from general security issues. It has been held that a general finding concerning the security in Ituri constitutes insufficient justification for the imposition of redactions. See Status Conference held by Trial Chamber II, T-03-02-2009, ICC-01/04-01/07-T-56-ENG, pp. 18-19. This is also the approach of the ICTY, where it was held that delayed disclosure may be justified only where the Prosecution demonstrates that “there is a likelihood that the particular witness will be interfered with or intimidated once their identity is made known to the accused and his defence team, notwithstanding the obligations on the accused and his defence team in relation to disclosure to third parties. It is not sufficient to show that the witness is put at risk of interference resulting from disclosure of his identity to the public or the media”. See *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision Protective Measures for Witnesses, October 30, 2008, para. 32; also see para. 19(a) (footnotes omitted, emphasis copied from the Decision). Also see 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, in particular, paras. 70-73, 97; ICC-01/04-01/07-476, para. 57; ICC-01/04-01/07-819-tENG, (TCII)

whether the measure proposed is the least intrusive measure available.⁸ 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.⁹

10. If at the end of this assessment, the balance turns out in favour of authorising redactions, their permanent character may still not be justified. In most cases, the information will have, at the very least, some relevance to the Defence while alternative, less intrusive measures are available to protect the interests of the victim or witness, the most obvious being to withhold the information from the public at large, but not from the Defence. It is submitted that permanent redactions are the most intrusive protective measures a Chamber may authorise and should do so only in the most exceptional circumstances.

11. This is consistent with this Chamber's approach thus far vis-à-vis permanent redactions sought. Save for redactions necessary to protect the locations of relocated witnesses, the Chamber has denied all requests for permanent redactions as being excessive in light of the rights of the Defence.¹⁰ The Chamber has further 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.¹¹ The Defence fails to see a reason for the Chamber to depart from that position now.

Response to New Specific Requests

Décision relative à la procédure d'expurgation, 12 January 2009, paras. 1, 7, 8, 9, 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, p. 60, p. 80; ICC-01/04-01/06-568, para. 37; ICC-01/04-01/06-773, para. 33

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; 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.

⁹ 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; also see 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, paras. 71-73.

¹⁰ ICC-01/04-01/07-1033-Conf-Exp; ICC-01/04-01/07-1034, paras. 31, 32, 46.

¹¹ ICC-01/04-01/07-819-tENG (TCII), para. 12; ICC-01/04-01/07-946 (TCII), paras. 13-14. Also see: 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.

12. The Prosecution's new requests for permanent redactions concern (1) information related to the security of witness 250 and his family members; (2) a Prosecution source; (3) location of interview with witness 157; (4) and an intermediary. The Defence has previously commented generally on Prosecution's requests for non-disclosure of information falling in any of those categories on which the Defence relies in its present Response. It submits the following additional comments.
13. The Defence notes that witness 250 is a core Prosecution witness whose credibility can only be adequately tested if the Defence is given an opportunity to fully investigate his background and whereabouts in order to assess whether his anticipated testimony is accurate. The family is often a necessary and relevant element.
14. As for the Prosecution source, it may well be important for the Defence to question the source of information on how and under which circumstances he or she obtained the information. This is one of the most effective manners in which to assess the reliability of the information, as well as to find out more about the context from which the information was generated. Even though Prosecution sources are not witnesses, the Prosecution heavily relies on them in their investigations. It is therefore important that their credibility be tested because their credibility or lack thereof may colour the information produced. Given that the source is not a witness against the accused, there is no incentive for him to threaten such Prosecution source. Accordingly, no harm is done in providing the Defence with his or her identity. It sometimes occurs - and has done so in other cases in the experience of several members of the Defence - that the sources can adversely effect the testimony of the witness and can be discovered to have featured in other cases or with other witnesses.
15. As for the interview location with witness 157, such information is important to assess whether, for instance, the transport claims of the witness to travel to and from the location from where he or she is based are reasonable. On the surface, the Defence does not see a reason why such information cannot be disclosed to the Defence and how it would put the witness at risk.
16. As for the intermediary, the Defence submits that it is important to know the identity of the intermediary. Intermediaries play important roles in collecting evidence. Their interactions with the witnesses must be examined in order to assess whether the

witnesses were free from any influence from their intermediaries. Well-intended guidance from intermediaries may have an impact on the witness's testimony. It would further be helpful to speak to the intermediary, if he or she is so willing, about the witness and his background given the close proximity between the witness and the intermediary. The Defence fails to see any danger for the intermediary if his or her identity is disclosed to the Defence. There is no incentive for the accused to harm the intermediary who is not a witness against him.

Conclusion

17. On these grounds, the Defence objects to all permanent redactions sought. The Defence requests the Trial Chamber to order the Prosecution to disclose, as soon as possible but at least 30 days prior to the commencement of trial, which is next week, all unredacted versions of the documents in question.

Respectfully submitted,



David HOOPER

Dated this 21 August 2009

At The Hague