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No.: **ICC-01/04-01/07**
Date: **3 November 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public

**Defence Application for Leave to Appeal the *Version publique expurgée de « la
Décision relative à la levée, au maintien et au prononcé de mesures d'expurgation »
du 22 Octobre 2009 (ICC-01/04-01/07-1551-Con£-Exp)***

Source: Defence for Mr Germain Katanga

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Court to:

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Introduction

1. The Defence for Mr. Germain Katanga (“Defence”) requests leave to appeal the Trial Chamber’s *Version publique expurgée de « la Décision relative à la levée, au maintien et au prononcé de mesures d’expurgation » du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp)* (“Impunged Decision”).¹ It files this *Defence Application for Leave to Appeal the Version publique expurgée de « la Décision relative à la levée, au maintien et au prononcé de mesures d’expurgation » du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp)* (“Defence Application”) pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules, and to regulation 65 of the Regulations of the Court.

2. The Defence submits that the Trial Chamber erred in granting permanent redactions with respect to the following nine categories of information:
 - (1) Identities, identifying details and addresses of family members of witnesses;
 - (2) Identities of alleged rape victims;
 - (3) Identifying details of witness 292;
 - (4) Identities of intermediaries, whether from the Section of Victim Participation and Reparation (SVPR); the Office of the Prosecution; an NGO or other;
 - (5) Identities of local employees of the ICC;
 - (6) Information relating to the security of a witness;
 - (7) Names of NGOs and their employees;
 - (8) Means of Communication used by the Office of the Prosecutor; and
 - (9) Identities and addresses of persons at risk as a result of their cooperation with the court.

Threshold Criteria for Leave to Appeal

3. The Chambers have repeatedly stated that leave to appeal pursuant to article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue arising out of the impugned Decision, and that such issue meets the following two cumulative criteria:

¹ ICC-01/04-01/07-1551-Red2, public version filed on 28 October 2009.

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must 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.²

Issue of Appeal

4. The Chamber authorises in the Impugned Decision the permanent redactions of nine categories of information. The Defence has frequently raised objections to the temporary redactions sought and to the granting of information falling into one of these categories. It has generally not sought leave to appeal any of the decisions granting such redactions on a temporary basis because, according to these decisions, the Defence would in general receive the redacted information at the latest 30 days prior to the commencement of the trial. Indeed, it was always the position of the Chamber that, with the exception of information disclosing details on the relocation of relocated witnesses, permanent redactions were excessive in light of the rights of the Defence.³
5. The Impugned Decision is different, however, in that it involves the authorisation of permanent redactions of information falling within the nine categories mentioned above, unless the Defence is in a position to demonstrate in detail the necessity to be provided with the redacted information. The burden is then now on the Defence to demonstrate the need for such disclosure, whilst the defence would submit that the Prosecution should at all times retain the burden of establishing the need to withhold information from the Defence.
6. In fact, it would be the submission of the Defence is entitled to receive all incriminating information on which the Prosecution intends to rely to prove the charges against the accused, as well as any exculpatory information or information falling under rule 77. Only where the Prosecution is in a position to clearly establish a need to redact such

² ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

³ ICC-01/04-01/07-1034, *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), 7 April 2009, para. 46. See also, *inter alia*, ICC-01/04-01/07-1096, *Décision concernant la requête du Procureur aux fins d'expurgations d'informations relevant de l'article 67-2 du Statut ou la règle 77 du Règlement de procédure et de preuve* (ICC-01/04-01/07-971-Conf-Exp), 4 May 2009, para. 27.

information may the Chamber grant a request for redactions on a temporary basis, balancing all interests at stake, and in particular, the interests on the one hand of the Defence, and the interests of the victims and witnesses, on the other.⁴

7. The Defence has often expressed its objection to information disclosed being subject to any permanent redactions. The Defence therefore reiterates that the Rome Statute and Rules of Procedure and Evidence do not envisage the imposition of permanent redactions as protective measure, as so confirmed by the Appeal Chamber's approach with respect to disclosure.⁵
8. Indeed, 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

⁴ See, *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", ICC-01/04-01/07-475, 13 May 2008.

⁵ Cf. ICC-01/04-01/07-1414, Defence Observations on Prosecution's *Requête sollicitant le maintien de versions expurgées d'éléments de preuve*, 21 August 2009, paras 4-6, 7-11 (footnotes omitted):

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", let alone permanent redactions. As the 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."

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 whether the measure proposed is the least intrusive measure available. 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 reevaluation, 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.

the Pre-Trial Chamber. It may be necessary to disclose the withheld information subsequently, should circumstances change.”⁶

9. In particular, the Defence disagrees with any permanent redactions sought authorised of the identities of Prosecution sources, intermediaries, interpreters, employees of the ICC, NGO and other international organisations. They are already protected by virtue of their position. *Prima facie*, the Defence contests that it can be established that such persons would have a subjective and objective fear for their safety if their identities would be known to the Defence. The Defence has never seen any evidence of any threat, intimidation or interference directed against anyone working at the ICC, NGOs or other international organisations, which had any link to any of the trials before the ICC.⁷

10. The Defence submits that the issue of permanent redactions for all categories listed is of such crucial importance and so prejudicial to the Defence that this issue clearly warrants the Appeals Chamber’s consideration. This is so particularly in light of the Appeals Chamber’s own views expressed on permanent redactions. Authorising redactions on a permanent basis unless the Defence can establish clearly and in detail that it needs to receive the information, constitutes a reversal of the burden that pursuant to the ICC Statute, Rules and jurisprudence, is on the Prosecution to demonstrate why it must redact the information. This is undoubtedly a matter affecting the fairness and expeditiousness of the proceedings, possibly also the outcome of the trial. Its immediate resolution may materially advance the proceedings.

Impact on the Fairness of the Proceedings

11. The Impugned Decision imposes a heavy and unfair burden on the Defence. It is a time-consuming exercise to set out in detail and in a convincing manner for each specific redaction authorised why the Defence needs the information. The Defence will also have to show why its need to receive disclosure of the withheld information outweighs the need for redactions to protect victims, witnesses, their families or the Prosecution’s further or ongoing investigations pursuant to rule 81.

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 See also Public Defence Motion for Leave to Appeal the Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233, paras. 5-15.

12. In the course of the trial, the Defence will be occupied with daily issues arising from the trial and will have limited time to make detailed and specific applications for each of the redactions sought. In essence, it will lack the extensive time needed to properly make these important submissions.
13. Not only is this a time-consuming and laborious exercise; also it also requires the Defence to have information that is otherwise unavailable to it. The Defence is habitually left in the dark as to the reasons why protection of witnesses, victims, their families or the Prosecution's further or ongoing investigations is needed and can only be guaranteed by withholding information from it. In view of this lack of knowledge, it is a difficult and unfair task to establish convincingly why the Defence's needs are greater than those for whom protection is sought. Furthermore, it is difficult to demonstrate why the Defence needs information that it simply does not have.
14. Moreover, the Defence is clearly prejudiced as a result of permanent redactions. By withholding the identities of family members of a witness, the Defence is deprived of an opportunity to verify whether the personal details given by a witness are in fact correct. Similarly, by withholding the identities of intermediaries and interpreters, the Defence is deprived of an opportunity to verify whether the intermediaries or interpreters had any influence on the witness and to contact them with specific questions about the witness. In short, the Defence is deprived of an opportunity to understand the full extent of the case and investigations conducted if it is not in possession of the names of NGOs and their members, as well as the names of the ICC employees who have played a role in these proceedings.
15. Many people with potentially viable information are thus not accessible to the Defence. In order to understand if and why certain misinformation was shared with the Prosecution, the Defence is also keen to know who cooperated with the Prosecution. Whilst the Defence may be able to find some of the redacted information in the course of its investigations, this requires a much longer time than if certain names were communicated to it. Accordingly, the fairness of the proceedings is clearly and significantly affected by allowing the Prosecution to permanently withhold crucial information from the Defence. It infringes on the right of the accused to a fair trial in accordance with Article 67 of the ICC Statute.

Impact on the Expeditionness of the Proceedings

16. The Defence submits that the expeditionness of the proceedings will be affected by authorising the permanent redactions. The Defence will have to file applications for each redaction authorised; the Prosecution and victim participants will be given an opportunity to respond, after which the Chamber must then render a decision on each and every application. In case of disagreement of the decision rendered, one of the parties may seek leave to appeal it. This is a time-consuming exercise that will delay the proceedings.
17. In addition, given that the Defence is deprived of fundamental information about the Prosecution's investigation and the sources that it has used, it will require more time for investigations in order to piece the pieces together. As mentioned above, had the Defence been able to contact certain intermediaries, members of NGO's or family members of the witnesses, for example, it would have been able to conduct more expeditious investigations. Accordingly, the issue of permanent redactions will have a significant impact on the expeditionness of the proceedings.

Impact on the Outcome of the Trial

18. The Defence submits that the issue of permanent redactions is so significant that it may impact the outcome of the trial. Indeed, if the Defence is missing certain crucial information, it may not be able to prepare an adequate defence to rebut the charges against Mr. Katanga. It may also be deprived of an opportunity that certain allegations against him were concocted or based on general rumour rather than on concrete evidence. That is to say, such redactions may depending on the type of information that is permanently redacted, have an impact on the outcome of the trial.

An Immediate Resolution may materially advance the Proceedings

19. It is evident that an immediate resolution of the Appeals Chamber would materially advance the proceedings. If the Appeals Chamber is not given the opportunity to review this matter until an eventual appeal may be lodged against the Chamber's final judgment in this case, the damage will have been done. It is now that the Defence needs the information in order to adequately prepare for trial and to cross-examination the

Prosecution witnesses. At the very least, the Defence submits that an immediate resolution of the Appeals Chamber may materially advance the proceedings.

Conclusion

20. On the basis of the foregoing, the Defence requests the Trial Chamber to grant leave to appeal the Trial Chamber's *Version publique expurgée de « la Décision relative à la levée, au maintien et au prononcé de mesures d'expurgation » du 22 Octobre 2009 (ICC-01/04-01/07-1551-Con£-Exp)* pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules of Procedure and Evidence, and to regulation 65 of the Regulations of the Court.

Respectfully submitted,



David HOOPER
Lead Counsel for Germain Katanga

Dated this 3rd November 2009

At The Hague