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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

Public

Prosecution Response to « 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) »

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Introduction

1. On 28 October 2009, Trial Chamber I issued its “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)” (“Decision”).¹ In the Decision, the Chamber granted or maintained a number of redactions requested by the Prosecution for the duration of the trial. The Chamber further specified that the Defence and the Prosecution may request the lifting of any of the redactions during trial. In particular, the Defence may provide detailed arguments justifying the need for the lifting of certain redactions and the Prosecution has to inform the Chamber if there is no further need for a redaction.
2. The Defence for Germain Katanga seeks leave to appeal the Decision (“the Application”).² The Application raises an issue regarding “the authorization [by the Chamber] of permanent redactions of information falling within nine categories [...] unless the Defence is in a position to demonstrate in detail the necessity to be provided with the redacted information” (“the Issue”).³
3. The Prosecution submits that the Application should be dismissed as it does not meet the criteria set out in Article 82(1)(d). The Issue as framed by the Defence does not arise from the Decision: the Chamber has not granted the redactions on a permanent basis. Rather, and following relevant Appeals Chamber jurisprudence,⁴ it has adopted certain redactions during trial which remain subject to review in light of any change of circumstances.⁵ In the alternative, the Prosecution submits that even if the Chamber considers that the Issue arises from the Decision, it does not meet the criteria for leave to appeal pursuant to Article 82(1)(d).

¹ ICC-01/04-01/07-1551-Red2.

² ICC-01/04-01/07-1589, 3 November 2009.

³ Application, para. 5. See also paras. 4 and 9.

⁴ Decision, paras. 4-7, 68 and 72.

⁵ Decision, para. 72 and pp. 38(5)-39(6).

4. Finally, it is submitted that the Application has been filed prematurely, to the extent that the Decision leaves the Defence with sufficient recourse before the same Chamber if any concrete prejudice arises out of the Decision. The Trial Chamber has assessed each of the Prosecution's requests for redactions (or their maintenance). It has balanced all the interests at stake and considered the relevant factors set out by the Appeals Chamber before deciding on the need for the redactions.⁶ The Chamber has concluded that the rights of the Defence are not prejudiced and do not outweigh the need for the redactions at trial in the context of the current circumstances.⁷ The Chamber's assessment remains open to subsequent review by the same Trial Chamber as clearly stated in the Decision. Hence, if during trial the Defence considers that in light of changed circumstances its rights are prejudiced as a result of some or all of the continued redactions, it may apply for its/their lifting. The Defence can seek leave to appeal any subsequent decision if it disagrees with it.

Arguments

(a) The Issue does not arise from the Decision

5. The issue as framed by the Defence does not arise from the Decision. At no point in time has the Chamber granted permanent redactions. Rather, the Decision authorizes or maintains certain redactions for the upcoming trial which may be lifted if the circumstances change. In particular, the Defence can show during trial that certain information is sufficiently relevant so that its disclosure outbalances the need to protect the persons at risk, and explain to the Chamber why it needs the information.⁸ In turn, the Prosecution has to make sure that the redactions are needed during the trial and inform the

⁶ Decision, paras. 4-5.

⁷ Decision, paras. 26, 32, 35, 45, 48, 52, 63. Only one redaction was granted on provisional basis pending further information to be provided by the Prosecution. Decision, para. 39.

⁸ Decision, para. 72, p. 38 (5). The Defence for Katanga has previously argued in favour of such procedure. See ICC-01/04-01/07-1016, para.4. See also Katanga Observations, para.11.

Chamber if this is not the case.⁹ In either case, the Trial Chamber will revisit its decision regarding any of the redactions in question.

6. In this sense, the Decision does not shift any burden of proof, as argued by the Defence.¹⁰ It merely allows for the possibility that a prior decision be reviewed on the basis of additional information provided by either party. This approach respects the rights of the Defence that has been given a specific remedy before the Trial Chamber, and is consistent with the jurisprudence of the Appeals Chamber which stated that any redaction “should be kept under review”.¹¹ In prior submissions, the Defence has also argued in favour of the need for revision of measures if circumstances change.¹²
7. Even if the Trial Chamber considers that the Issue does arise from the Decision, the Prosecution submits that the Application does not fulfil the requirements for leave to appeal. The relevant issue is whether the redactions pertaining to each of the nine categories addressed in the Decision meet the criteria for leave to appeal under Article 82(1)(d), and not whether permanent redactions can be granted in general. The Application must be assessed against the factual backdrop considered in the Decision.

⁹ Decision, para. 72, p. 39 (6). In fact, the Prosecution has requested or accepted the lifting of numerous redactions in the same Decision. See paras. 10-12, 36-37, 49-50.

¹⁰ Application, paras. 5-6.

¹¹ 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”, 13 May 2008, ICC-01/04-01/07-475 (OA), para. 73: “[...] It may be necessary to disclose the withheld information subsequently, should circumstances change. The Prosecutor should assist the Pre-Trial Chamber in this regard by bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure.” The Decision refers to this Judgment and concrete paragraph on several instances. See Decision, paras. 4 (fn. 31), 7 (fn.35).

¹² See Katanga Response to a Prosecution’s Application for protective measures for several witnesses (ICC-01/04-01/07-1016, paras. 4-5). In particular, para. 4 reads: “[...] 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. This balance may turn in favour of victim and witness protection at this point in time, but, due to changed circumstances, may turn in favour of fair trial protection in the future. It is respectfully submitted that there should always remain room to give effect to changed circumstances and adjust the protective measures accordingly” (Emphasis added). See also Defence Observations on Prosecution’s *Requête sollicitant le maintien de versions expurgées d’éléments de preuve*, 21 August 2009, ICC-01/04-01/07-1414 (Katanga Observations), para. 11.

The issue is not a question of the generic impact of the redactions throughout trial in the abstract.

(b) The Issue does not affect the fair conduct of the proceedings

8. The Defence fails to demonstrate that the Issue affects the fair conduct of the proceedings. The Defence argues that it is unduly prejudiced as it will have to prove the need for each specific redaction while lacking the required information.¹³ It further states that for certain groups of redactions, lifting is necessary to conduct its case and wrongly asserts that the redactions allow the Prosecution to withhold “crucial information”.¹⁴
9. The Trial Chamber decided on the redactions in light of its duty under Article 68(1) to take appropriate measures to protect the safety of persons at risk on account of the activities of the Court. In so doing, the Trial Chamber applied the test and considered the factors set out by the Appeals Chamber.¹⁵ The Chamber conducted a balancing exercise between the need of protection and the fairness of the proceedings,¹⁶ taking into account on a case-by-case basis all the interests at stake, as well as the relevance of the information for which redactions were sought and possible alternative and less restrictive measures.¹⁷ The Trial Chamber conducted this exercise with full knowledge of the information that the Prosecution sought to redact and the reasons underlying its requests, as well as with detailed knowledge of the Prosecution’s case and evidence.¹⁸

¹³ Application, paras. 11-13.

¹⁴ Application, paras. 14-15.

¹⁵ Decision, paras. 4-6.

¹⁶ It is also important to note that for the purposes of conducting the balancing exercise for granting permanent or temporary redactions, there is no need for the Prosecution to provide actual proof of a concrete threat, as suggested by the Defence (Application, para. 9). The Court must make a prospective assessment of a reasonable likelihood of harm based on direct or circumstantial evidence and it must take measures to eliminate or manage all foreseeable risks i.e. those risks which, based upon factual ground, have a reasonable likelihood of occurrence.

¹⁷ Decision, paras. 5, 26, 35, 48.

¹⁸ See for instance, *Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste de témoins de l’Accusation et de la liste de pièces à charge* (with its 17 Annexes), ICC-01/04-01/07-1174, 27 May 2009.

10. The Chamber found that the information redacted was limited in its scope (or of minimal importance) and that the redactions did not impair the comprehension and use of the relevant documents by the Defence.¹⁹ Thus, there was no entitlement of the Defence to this information. The Defence has received all relevant information that is entitled to under Rules 76, 77 and Article 67(2). Any assertion that as a result of the Decision the Prosecution is withholding information falling within these provisions lacks merit.²⁰
11. The Chamber further took note of the extent of materials available to the Defence and concluded that maintaining or granting redactions does not prejudice the rights of the accused.²¹
12. In addition, as stated above,²² any redactions may be lifted upon request by either party if there is a change in circumstances. Contrary to the Defence assertion, the Defence does not need to prove “why it need to receive [...] the withheld information outweighs the need for redactions to protect victims [...]”.²³ The Trial Chamber only requires the Defence to explain with detail the reasons why the information in question must be brought to their knowledge.²⁴ This is consistent with the Appeals Chamber jurisprudence and the practice of other international criminal tribunals where “a party may obtain confidential material [...] to assist in the preparation of its case if (a) the material sought has been ‘identified or described by its general nature’; and (b) a ‘legitimate forensic purpose’ exists for such access”.²⁵
13. Thus, neither the redactions nor the process followed by the Trial Chamber to grant or maintain these redactions affect the fairness of the proceedings.

¹⁹ Decision, paras. 26, 32, 35, 45, 48, 52, 61, 63.

²⁰ Application, para. 15.

²¹ Decision, paras. 26, 32, 35, 45, 48, 52, 63. Only one redaction was granted on provisional basis pending further information to be provided by the Prosecution. Decision, para. 39.

²² See paras. 1 and 5 above.

²³ Application, para. 11.

²⁴ Decision, para. 72

²⁵ (ICTY) *Prosecutor v. Radovan Karadzic*, Decision on Motion for Access to Confidential Materials in Completed Cases, IT-95-5/18-PT, 5 June 2009, para. 8. See also the jurisprudence cited in footnote 21. As in the instant case, the ICTY chambers seek to “find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses.” *Idem*.

In fact, the Defence has endorsed this process in prior submissions.²⁶ The process developed by the Chamber for any subsequent review of the redactions that have been granted or maintained provides a safeguard to the Defence, and does not impose any taxing obligations on it. The Defence consequently fails to show any unfairness arising out of the Decision.

(c) The Issue does not affect the expeditious conduct of the proceedings

14. The Application fails to demonstrate that the Issue significantly affects the expeditious conduct of the proceedings within the meaning of Article 82(1)(d). The Defence argues that the expeditiousness will be affected if the Defence has to file an application for each authorised redaction or conduct further investigations due to the withholding of “fundamental information”.²⁷
15. The Court as a whole must protect persons at risk on account of its activities.²⁸ This is a pillar of the functioning of the Court. For those purposes, it has a duty to put in place specific mechanisms. The implementation of such mechanisms will entail certain actions to be taken by parties and participants, as well as by the Trial Chamber. Such activities cannot be considered to affect the expeditiousness of the proceedings within the meaning of Article 82(1)(d). Rather, these procedures, that implement the principles set out by the Appeals Chamber and are in full respect with the rights of the accused,²⁹ are an essential element of the Statute and the proceedings before the Court. In any event, the procedural mechanisms at stake do not impose any unduly and cumbersome measure to the parties.

²⁶ Katanga Observations, para.8: “[...] 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 of 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.”

²⁷ Application, paras. 16-17.

²⁸ ICC-01/04-01/07-475, para. 56.

²⁹ See Decision para. 4 and the Appeals Chamber cited in its footnotes..

(c) The Issue does not affect the Outcome of the trial

16. The Defence also fails to establish that the Issue affects the outcome of the trial. The Defence reiterates that it cannot properly prepare its case as it is missing “crucial information”.³⁰
17. As stated above, the Trial Chamber has found the redactions to be limited in its scope and of minimal importance.³¹ The Trial Chamber has balanced all the interests involved and concluded that the authorised redactions do not impair the Defence from conducting its case.³² Moreover, if during trial the Defence considers that the maintenance of a redaction causes a prejudice and that information would be necessary for the proper conduction of its case, the Defence may apply for its lifting by filing a motivated request.³³
18. Finally, the Defence allegations are speculative. They are formulated in the abstract and do not provide any concrete example of how the maintenance of any of the nine categories of redactions may affect the outcome of the trial.

(d) An immediate resolution of the Issue will not materially advance the proceedings

19. The Defence repeats that it needs the information that has been redacted in order to prepare for trial.³⁴ However, it fails to show that the immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings.
20. As stated above, the Chamber has considered the redacted information to be of insufficient relevance to warrant disclosure. It has found that the redactions will not have an impact on the Defence’s ability to prepare for

³⁰ Application, para. 18.

³¹ See para. 10 above.

³² Decision, paras. 26, 32, 35, 45, 48, 52, 61, 63.

³³ Decision, para. 72, p. 38 (5).

³⁴ Application, para. 19.

trial and to cross-examine witnesses.³⁵ More importantly, the matter is not a closed one: the Decision, as already advanced, expressly contemplates the possibility of the Trial Chamber reviewing its determination in light of new circumstances, in order to ensure that no prejudice is (or will be) caused to the Defence as a result of the Decision. Thus, there is sufficient recourse for the Defence before the same Trial Chamber if and when the Defence considers, on an informed basis, that maintaining specific redactions would adversely affect its rights. If faced with a negative decision, the Defence can seek leave to appeal the individual ruling denying lifting of the relevant redactions.

21. In light of the foregoing, the Prosecution submits that the Defence's request for leave to appeal is premature and that there is no need for the Appeals Chamber to rule on the underlying matters at this stage.

Relief sought

22. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 9th day of November 2009

At The Hague, The Netherlands

³⁵ Decision, paras. 26, 32, 35, 45, 48, 52, 61, 63.