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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 document

**Decision on the Prosecutor's Application to Redact Information and to Maintain
and Reinstate Redacted Passages in Certain Documents under Rule 77 of the *Rules
of Procedure and Evidence* (Witnesses 26, 36, 158 and 180)
(ICC-01/04-01/07-981-Conf)**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for the Defence of Germain

Katanga
Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence of Mathieu

Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
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Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Ms Paolina Massida

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 54, 67 and 68 of the *Rome Statute* (“the Statute”) and rules 77 and 81 of the *Rules of Procedure and Evidence* (“the Rules”) decides as follows:

I. Procedural history

1. This decision arises from the Prosecutor’s application (“the Application”) to redact documents and also to maintain redactions and reinstate redacted passages in documents covered by rule 77 of the Rules.¹ The Application was submitted in accordance with the Chamber’s *Decision on the Redaction Process*.²

2. The Application was submitted on 23 March 2009 after the expiry of the prescribed time limit. In fact, the Chamber had ordered the Prosecutor to file all applications to redact documents under article 67(2) of the Statute and rule 77 of the Rules before 4 p.m. on 16 February 2009.³ Given the [TRANSLATION] “physical incapacity [of the Prosecutor] to file [...] all the requests for redactions [by that date]”, which was invoked in a previous application dated 16 February 2009,⁴ at an *ex parte* hearing held on 25 February 2009, the Chamber granted him a further period of three weeks, i.e. until 23 March 2009.⁵

3. The Prosecutor is seeking authorisation to redact certain information contained in these documents under rules 81(2) and 81(4) of the Rules. The Defence

¹ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurgations d’informations et aux fins de maintien et de levée d’expurgations dans certains éléments de preuve relevant de la Règle 77 (W-26, W-36, W-158, W-180)*”, 23 March 2009, ICC-01/04-01/07-981-Conf, with Confidential *ex parte* Annexes only available to the Prosecutor.

² *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG.

³ *Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference*, 23 January 2009, ICC-01/04-01/07-846-tENG.

⁴ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurgations d’informations relevant de l’article 67-2 ou la règle 77 conformément à l’Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès*”, 16 February 2009, ICC-01/04-01/07-902, para. 3.

⁵ ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009 1-28 SZ T, p. 18, line 6 to 13 and p. 23, lines 11 to 20.

for Germain Katanga submitted observations on 31 March 2009,⁶ reiterating its observations of 5 March,⁷ 9 March⁸ and 23 March 2009.⁹ The Defence for Mathieu Ngudjolo did not submit any observations.

II. The Chamber's Analysis

4. The Chamber emphasises once again¹⁰ the requirements laid down by the Appeals Chamber: 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;¹¹ 2) the existence of a link between the source of the risk and the accused;¹² 3) the infeasibility or insufficiency of less restrictive protective measures;¹³ 4) an assessment of whether the redactions sought are prejudicial to or inconsistent with the rights of the accused

⁶ Germain Katanga's Defence Team, "Defence Observations in response to Prosecution's « *Requête aux fins d'expurgation d'informations et aux fins de maintien et de levée d'expurgations dans certains éléments de preuve relevant de la Règle 77 (W-26, W-36, W-158, W-180)* », 31 March 2009, ICC-01/04-01/07-1012-Conf.

⁷ Germain Katanga's Defence Team, "Defence Observations in respect of the « *Motifs de la décision orale du 3 février 2009 relative à la procédure d'expurgation de documents obtenus par le Procureur en vertu de l'article 54-3-e du Statut et ordonnance enjoignant au Procureur de soumettre des documents à la Chambre* », 5 March 2009, ICC-01/04-01/07-944.

⁸ Germain Katanga's Defence Team, "Defence Response to the *Requête aux fins d'expurgations d'informations dans certains éléments de preuve relevant de l'Article 67-2 ou de la Règle 77* ", 9 March 2009, ICC-01/04-01/07-948

⁹ Germain Katanga's Defence Team, "Defence Observations in response to Prosecution's « *Requête aux fins d'expurgation d'informations dans certains éléments de preuve relevant de l'Article 67-2 ou de la Règle 77* », 23 March 2009, ICC-01/04-01/07-979-Conf.

¹⁰ *Grounds for the Oral Decision on the Prosecutor's Application to Redact the Statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323 and the Investigator's Note concerning Witness 176 (rule 81 of the Rules of Procedure and Evidence)*, 10 February 2009, ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf-tENG, para. 4; *Decision on Three Prosecutor's Applications for the Maintenance of Redactions or Reinstatement of Redacted Passages* (ICC-01/04-01/07-859, ICC-01/04-01/07-860 and ICC-01/04-01/07-882), 25 March 2009, ICC-01/04-01/07-987-Conf-Exp-tENG, para. 4

¹¹ Appeals Chamber, *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, paras. 71 and 97.

¹² ICC-01/04-01/07-475, para. 71.

¹³ Appeals Chamber, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence*, 13 October 2006, ICC-01/04-01/06-568, para. 37; Appeals Chamber, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81*, 14 December 2006, ICC-01/04-01/06-773, para. 33.

and a fair and impartial trial;¹⁴ and 5) the obligation to periodically review the decision authorising the redactions should circumstances change.¹⁵

5. As the Chamber has had occasion to point out more than once,¹⁶ any application for redactions is subject to strict judicial scrutiny on a case-by-case basis. Any decision by which the Chamber authorises non-disclosure of part of a document to the Defence must be sufficiently reasoned in light of, *inter alia*, the arguments submitted by the Prosecutor in support of his application. The Chamber has a duty to balance the various interests at stake, as stipulated in rule 81 of the Rules, whilst ensuring that the proceedings include safeguards that would protect the interests of the accused so as to comply, to the fullest extent possible, with the requirements of adversarial proceedings and the principle of equality of arms. The Chamber has undertaken a detailed review of each redaction sought on the basis of the criteria set out in the previous paragraph.

6. The Chamber notes that the Prosecutor's arguments pertaining to the existence of an objectively justifiable risk are identical, both for the redactions sought under rule 81(2) of the Rules and for those sought under rule 81(4). It therefore seems appropriate to furnish a joint response on this issue.

7. The Prosecutor draws the attention of the Chamber to the threats allegedly made against [REDACTED].¹⁷

8. The Chamber has already acknowledged that there is an objectively justifiable risk resulting from the state of insecurity prevailing in Ituri and, more generally, in

¹⁴ ICC-01/04-01/06-773, para. 34.

¹⁵ ICC-01/04-01/07-475, para. 73.

¹⁶ *Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses*, 18 December 2008, ICC-01/04-01/07-800, para. 9; ICC-01/04-01/07-819-tENG, para. 1 and 7; ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf-tENG, para. 3; ICC-01/04-01/07-987-Conf-Exp, para. 5.

¹⁷ ICC-01/04-01/07-981-Conf-Exp-Anxs A, B, C, D.

the DRC, both for the Prosecutor's ongoing and further investigations and for the safety of witnesses, victims and members of their families.¹⁸

9. The general observation does not, however, prejudice the existence of an objectively identifiable risk of which the Chamber must satisfy itself when reviewing each of the redactions sought on a case-by-case basis.

a) **Safety of witnesses and of members of their families (rule 81(2) and 81(4))**

i) **Information about members of their families and places of residence**

10. The Prosecutor requests, under rule 81(4) of the Rules, leave from the Chamber to permanently redact the names of the family members of Witness 26¹⁹ and also all references to the places of residence of Witnesses 26²⁰ and 180²¹ and members of their families.

11. According to the Prosecutor, mere fact that these witnesses have provided a written statement identifies them as cooperating with the Court. He also notes that, while the witnesses personally assume risks in cooperating with the Court, they do not, however, intend that their action should have repercussions on their families.²²

12. The Prosecutor maintains that information pertaining to relatives is of limited interest and is not material to the preparation of the Defence, given that they are not prosecution witnesses.²³ Thus, the Prosecutor is of the view that disclosing the identity of relatives would undermine the position of witnesses and their families, a

¹⁸ ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf-tENG, para. 9; ICC-01/04-01/07-987-Conf-Exp, para. 10.

¹⁹ ICC-01/04-01/07-981-Conf-Exp-Anx A.

²⁰ *Idem*.

²¹ ICC-01/04-01/07-981-Conf-Exp-Anx D.

²² ICC-01/04-01/07-981-Conf, para. 18.

²³ ICC-01/04-01/07-981-Conf, para. 14.

situation that is not “[TRANSLATION] offset by a manifest interest on the part of the accused”.²⁴

13. The Prosecutor proposes, in certain cases, other forms of redaction where it is not clear from the text that the information pertains to the families of witnesses. Thus, for Witness 26 he proposes to refer to “places of residence of family members” and to “names and places of residence of family members”.²⁵

14. The Defence objects to these requests for redactions, especially those involving the names of the family members of witnesses or of persons who assisted the Office of the Prosecutor and who are not called to testify in the present case.²⁶ It maintains that their safety is no more jeopardised than that of anybody else living in Ituri or in any other region affected by an armed conflict in the Democratic Republic of the Congo (“the DRC”).²⁷

15. The Chamber recalls that it considers that disclosing the identity of the family members of witnesses as well as information enabling them to be identified or located might jeopardise their safety, especially where they are located in Ituri. It also considers that, even if the family members of witnesses are not involved in this case, persons wishing to exert influence on the witnesses could use the family members to exert pressure on them.

16. Moreover, the Chamber is of the opinion that some of the redactions sought constitute an appropriate measure to lessen that risk, and that no other less restrictive measure would achieve the same result, since the family members of the witnesses in question are not covered by the Court’s witness protection programme.²⁸

²⁴ ICC-01/04-01/07-981-Conf, para. 16.

²⁵ ICC-01/04-01/07-981-Conf-Exp-Anx A.

²⁶ ICC-01/04-01/07-981-Conf, para. 7.

²⁷ ICC-01/04-01/07-1012-Conf, para. 8.

²⁸ ICC-01/04-01/07-981-Conf-Exp-Anxs A and D.

17. The Chamber considers that the redactions sought in the format suggested by the Prosecutor do not prejudice the rights of the accused, since the documents can be read, understood and used by the Defence. The Chamber is therefore in favour of authorising the redactions sought, but is of the view that it can only redact the passages in question on a temporary basis and not through to the end of the trial, since, in its opinion, such a measure seems excessive with regard to the exercise of the rights of the defence.

18. In this case, the Defence has not, until now, had the opportunity to fully assess the value of this information because the applications only provide a general description thereof. It will have the opportunity to analyse and assess the usefulness and relevance of the redacted documents once it has received them, and it may then, if necessary, submit an application for reconsideration to the Chamber prior to the commencement of the trial. In that case, the Chamber will assess the actual impact of the redactions sought, in light of the arguments advanced by the Defence. For his part, the Prosecutor may, no later than 45 days prior to the commencement of the trial, request that these redactions be maintained.

ii) Information on the assessment of safety of the witness

19. The Prosecutor requests the redaction of information regarding the assessment of the safety of Witness 36 in a transcript of his statement. He maintains that if this information were to be disclosed, it could reveal the methods used to implement ICC protection measures. He adds that this information should not have been included in the transcript because normal practice is to keep the facts and information about witness safety separate.²⁹ In addition, the Prosecutor requests that the Chamber authorise the redaction of the telephone number and e-mail address of Witness 180.³⁰

²⁹ ICC-01/04-01/07-981-Conf-Exp-Anx B.

³⁰ ICC-01/04-01/07-981-Conf-Exp-Anx D.

20. The Defence for Germain Katanga objects to the Prosecutor's proposals regarding the permanent redaction of information about the identity of Witness 180. Nevertheless, it concedes that such information can be redacted, albeit only temporarily and provided that it is disclosed to the Defence 30 days prior to the commencement of the trial, once it has been reviewed once again by the Chamber.³¹

21. The Chamber considers that the telephone number and e-mail address of Witness 180 are personal information and, as such, are protected under international human rights treaties.³² Furthermore, the Chamber considers that the Defence teams may not contact this witness directly, and that, as a result, they must obtain the witness's consent through the Office of the Prosecutor if they consider such contact necessary for their preparation.³³ The Chamber therefore authorises this redaction on a permanent basis.

22. Having noted the redactions sought for Witness 36,³⁴ the Chamber notes that they encompass a very significant portion of the document and appear to extend way beyond the objective sought. It will therefore ask the Prosecutor, after consulting with the Victims and Witnesses Unit, to review the redactions sought by restricting them to those passages that are strictly necessary.

b) Requests to maintain redactions and reinstate redacted passages

23. The Chamber recalls that in its decision of 12 January 2009 on the redaction process, it ordered the Prosecutor either to justify maintaining the redactions or to

³¹ ICC-01/04-01/07-1012-Conf, para. 6.

³² See Article 17 of the *International Covenant on Civil and Political Rights* (1966), Article 11 of the *American Convention on Human Rights* (1969), Article 8 of the *European Convention on Human Rights* (1950), Article 5 of the *African Charter on Human and Peoples' Rights* (1982) and Articles 1 and 7 of the *Charter of Fundamental Rights of the European Union* (2000).

³³ See also in this regard, Trial Chamber I, *Decision on the Prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witness*, 3 June 2008, ICC-01/04-01/06-1372, para. 11.

³⁴ ICC-01/04-01/07-981-Conf-Exp-Anx B, pp. 6-17.

request the reinstatement of the redacted passages in eight decisions rendered by the Pre-Trial Chamber by 30 January 2009 at the latest.³⁵

24. The Prosecutor maintains that he “[TRANSLATION] inadvertently omitted to include a document concerning Witness 158”³⁶ in his application of 30 January 2009, filed in accordance with the aforementioned request from the Chamber.³⁷ However, pursuant to rule 81(2) of the Rules, he seeks permission to maintain the redaction of the surname, first name, initials and signature of the interpreter “[REDACTED]”, which appear in the statement of Witness 158.³⁸ Furthermore, he requests the reinstatement of the redacted passages concerning the identity of Witness 158 and any identifying information. He also states that he will reinstate the passage regarding the interview location *proprio motu*. He points out in this regard that he has just learnt that the witness has died.³⁹

25. The Prosecutor also submits that disclosing the names of the local interpreter might prejudice ongoing investigations, since the interpreters who are involved in the interviews and in the taking of statements reside in the DRC with their families. He also invokes the limited number of Congolese interpreters currently available to take part in the investigations, as well as the level of qualification of such staff, which makes them difficult to replace. He therefore considers that the redactions sought are preventive measures which are necessary to protect those interpreters.⁴⁰

³⁵ ICC-01/04-01/07-819, p. 12

³⁶ ICC-01/04-01/07-981-Conf., para. 21

³⁷ Office of the Prosecutor, “*Requête de l’Accusation aux fins de maintien ou de suppression des expurgations de certaines informations dans des éléments de preuve conformément à la ‘Décision relative à la procédure d’expurgation’*”, 30 January 2009, ICC-01/04-01/07-862, with confidential *ex parte* Annexes only available to the Prosecutor.

³⁸ ICC-01/04-01/07-981-Conf-Exp-Anx C.

³⁹ ICC-01/04-01/07-981-Conf, paras. 24 and 25; ICC-01/04-01/07-981-Conf-Exp-Anx C.

⁴⁰ *Idem*.

26. The Prosecutor states that the information pertaining to the name of the interpreter may be disclosed 30 days prior to the commencement of the trial and that there are no other less restrictive protective measures.⁴¹

27. The Defence team for Germain Katanga is of the view that the disclosure of the identity of this interpreter would not jeopardise his safety.⁴² However, it makes clear that in a spirit of cooperation it will not object to the redaction requested, provided that this information is disclosed 30 days prior to the commencement of the trial.⁴³

28. The Chamber takes note of the difficulties in finding suitably qualified persons to provide quality interpretation services *in situ*. It also considers that it is necessary to protect the interpreters who are involved in the interviews and in the taking of statements from witnesses, given their small number and the ease with which they may be identified. It notes that relocating them with their families is not a feasible option, and considers that disclosing their names, and the risk of pressure to which they may be exposed, would compromise the conduct of the Prosecutor's investigations.⁴⁴

29. The Chamber considers that the requested redactions do not interfere with the intelligibility of the document. They are restricted to names, initials and signatures, and do not seem disproportionate in the Chamber's view. It therefore considers that these redactions do not prejudice the right to a fair and impartial trial.⁴⁵ The Defence will indeed be able to find out the identity of the interpreter 30 days prior to the trial, which safeguards the rights of the accused.

⁴¹ *Idem*.

⁴² ICC-01/04-01/07-1012-Conf, para. 11.

⁴³ *Ibid.*, para. 12.

⁴⁴ ICC-01/04-01/07-888-Conf-Exp-tENG, ICC-01/04-01/07-889-Conf-tENG, para. 27; ICC-01/04-01/07-987-Conf-Exp, para. 36

⁴⁵ See also Grounds for the Oral Decision, ICC-01/04-01/07-888-Conf-Exp-tENG, ICC-01/04-01/07-889-Conf-tENG, para. 28; ICC-01/04-01/07-987-Conf-Exp, para. 37

30. The Chamber is thus in favour of the proposal to maintain the redactions and reinstate the redacted passages. However, it wishes to point out that the Prosecutor must be more diligent when dealing with requests for redaction, especially when they involve exculpatory evidence or evidence which is covered by rule 77 of the Rules. The Prosecutor is reminded that he must pay more heed to the time limits ordered by the Chamber in order to ensure the proper conduct of the proceedings.

FOR THESE REASONS, THE CHAMBER

- 1) **GRANTS** the Application, whilst reserving the right to periodically review the redactions authorised, either *proprio motu* or upon an application filed for that purpose, with the exception of the application referred to at paragraph 22 of this decision, for which the Prosecutor must review the redactions sought, limiting them to the passages that are strictly necessary;
- 2) **DIRECTS** the Prosecutor to submit new proposals no later than 4 p.m. on 14 April 2009; and
- 3) **AUTHORISES** all of the redactions sought until the thirtieth day prior to the date of the commencement of the trial, save that the Prosecutor may, no later than 45 days prior to that date, request that they be maintained;
- 4) **AUTHORISES** the permanent redaction of the information concerning the telephone number and e-mail address of Witness 180 in accordance with paragraph 21; and
- 5) **AUTHORISES** the request for reinstatement of redacted passages and **ORDERS**, where applicable, the disclosure of the relevant information to the Defence as soon as practicable.

Done in English and in French, the French version being authoritative.

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Hans-Peter Kaul

Dated this 4 May 2009

At The Hague, The Netherlands