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No.: **ICC-01/04-01/07**
Date: **18 August 2009**

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

Public Redacted Version of the *Decision on the Prosecutor's Brief in Response to the Chamber's Requests in Four Decisions on Applications for Redactions* of 8 May 2009 (ICC-01/04-01/07-1119-Conf-Exp)

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

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REGISTRY

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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 64(6)(e), 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 is rendered further to the brief submitted by the Prosecutor on 14 April 2009¹ responding to the Chamber’s requests in four decisions concerning the Prosecutor’s applications for redactions of information in certain documents relating to Witnesses 36, 55, 314 and 336.²

II. Analysis by the Chamber

2. The Chamber notes that the Prosecutor, having consulted with the Victims and Witnesses Unit, has reviewed the requests for redactions concerning safety issues and the procedures for putting in place witness protection mechanisms, and that he is submitting amended and more limited requests for redactions.³

¹ Office of the Prosecutor, “*Mémoire de l’Accusation en réponse aux demandes de la Chambre formulées dans quatre décisions concernant des requêtes du Procureur aux fins d’expurgations d’informations dans certains éléments de preuve* (ICC-01/04-01/07-1038-Conf-Exp, ICC-01/04-01/07-1041-Conf-Exp, ICC-01/04-01/07-1042-Conf-Exp, ICC-01/04-01/07-1046-Conf-Exp)”, 14 April 2009, ICC-01/04-01/07-1057-Conf-Exp, with confidential *ex parte* Annexes only available to the Prosecutor.

² *Decision on the Prosecutor’s Application to Redact Information under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (ICC-01/04-01/07-934), 8 April 2009, ICC-01/04-01/07-1038-Conf-Exp-tENG, para. 44; *Decision on the Prosecutor’s Application to Redact Information from Certain Evidence under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (ICC-01/04-01/07-957), 8 April 2009, ICC-01/04-01/07-1041-Conf-Exp-tENG, para. 35; *Decision on the Prosecutor’s Application to Redact Information under Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (ICC-01/04-01/07-971), 8 April 2009, ICC-01/04-01/07-1042-Conf-Exp-tENG, para. 41; *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-01/04-01/07-991-Conf), 8 April 2009, ICC-01/04-01/07-1046-Conf-Exp-tENG, para. 22.

³ ICC-01/04-01/07-1057-Conf-Exp, paras. 6, 9, 12 and 15.

a) Redactions sought concerning the statement of Witness 36

3. The Prosecutor had requested leave of the Chamber to redact certain passages from the statement of Witness 36 concerning information on the implementation of witness protection procedures.⁴ The Chamber asked him to review these requests in consultation with the Victims and Witnesses Unit in order to limit them to the passages that were strictly necessary.⁵ In his brief, the Prosecutor informs the Chamber that he has decided to withdraw his request for redactions.⁶

4. Having examined the relevant statement and having verified that the disclosure of the information concerned does not risk endangering the witness's safety, the Chamber takes note of the withdrawal of the request for redactions.

b) Redactions sought in the statement of Witness 55 (rule 81(2) and 81(4) of the Rules)

5. Concerning the statement of Witness 55, the Prosecutor had requested the redaction of information relating to the assessment of the safety of this witness in an investigator's note and in the transcript of the witness's statement. Having noted that the redactions sought covered a very significant portion of the document and apparently far exceeded the objective sought, the Chamber asked the Prosecutor to review, in consultation with the Victims and Witnesses Unit, the redactions sought by limiting them to those passages that were strictly necessary.⁷

6. The Chamber notes that in this new request the Prosecutor considerably limits the number of paragraphs for which he is requesting redaction. The passages he is now seeking to have redacted relate to information on relocation and on data that might enable identification of Witness 55 and the witness's family members. Disclosure of this information would not only endanger the latter but would also

⁴ ICC-01/04-01/07-1057-Conf-Exp, para. 14.

⁵ ICC-01/04-01/07-1046-Conf-Exp-tENG, para. 22.

⁶ ICC-01/04-01/07-1057-Conf-Exp, para. 15.

⁷ ICC-01/04-01/07-1038-Conf-Exp-tENG, par. 44.

reveal how the competent organs of the Court put witness protection measures in place.

7. The Chamber finds that the redactions sought are now limited and do not appear disproportionate, and that it is not possible to resort to less restrictive measures. The statement of Witness 55 remains readable, intelligible and usable by the Defence. The Chamber considers that these redactions do not prejudice the right to a fair and impartial trial. It authorises therefore that the redactions sought be made on a permanent basis, since it considers that the disclosure of the information about the relocation of the witness and the Court's protection programme does not affect the substance of this witness's statement and is such as to compromise the witness's safety and that of the witness's family, as well as the effectiveness of the protection programme.⁸

c) Redactions sought concerning the statement of Witness 314 (rule 81(2) and 81(4) of the Rules)

8. The Prosecutor had requested the redaction of information about assessing the safety of Witness 314 in the transcript of the witness's statement. Noting that the redactions sought apparently went beyond the objective sought, the Chamber asked the Prosecutor, after consulting with the Victims and Witnesses Unit, to review these redactions by limiting them to those passages that were strictly necessary.⁹

9. The Prosecutor reviewed the redactions previously requested relating to evidence pertaining to the assessment of the security and application of the [REDACTION], and to concerns about the witness's safety.¹⁰ After a review in conjunction with the Victims and Witnesses Unit, the Prosecutor decided to

⁸ See also ICC-01/04-01/07-1042-Conf-Exp-tENG, para. 39.

⁹ ICC-01/04-01/07-1042-Conf-Exp-tENG, paras. 40 and 41.

¹⁰ ICC-01/04-01/07-1057-Conf-Exp, para. 8.

withdraw the requests for redactions concerning the assessment of the witness's safety and the application of the [REDACTION].¹¹

10. Having examined this request and having verified that the disclosure of this information does not risk endangering the witness, the Chamber grants leave to disclose the witness's statement without the said redactions.

11. Furthermore, the Prosecutor also reviewed the redactions relating to the means of communication authorised by the Chamber, and he informs it, in a footnote, that he no longer requests certain redactions, but wishes to keep others.¹² The Prosecutor explained, on 29 April 2009,¹³ that this footnote should be interpreted as a request to amend the Chamber's decision of 8 April 2009 which authorised these redactions.¹⁴

12. Having examined this request and having verified that the disclosure of information relating to the means of communication does not risk jeopardising the ongoing investigations, the Chamber grants leave to remove those redactions which the Prosecutor considers to be no longer necessary.¹⁵

d) Redactions sought concerning the statement of Witness 336 (rule 81(2) and 81(4) of the Rules)

¹¹ ICC-01/04-01/07-1057-Conf-Exp, p. 4, footnote 9, and AnxB.

¹² ICC-01/04-01/07-1057-Conf-Exp, page 4, footnote 9. The Prosecutor no longer requests the redactions sought at lines 436, 438-439, on page 0143 of the document DRC-OTP-1036-0131.

¹³ E-mail communication from the Office of the Prosecutor to the Chamber received by the Legal Adviser of the Trial Division on 29 April 2009.

¹⁴ ICC-01/04-01/07-1042-Conf-Exp-tENG, para. 31.

¹⁵ The following redactions were withdrawn: lines 436, 438-439, on page 0143 of document DRC-OTP-1036-0131. The following redactions were kept under the terms of this decision and authorised by the Chamber in its decision ICC-01/04-01/07-1042-Conf-Exp-tENG: lines 450 to 452, on page 0144 of document DRC-OTP-1036-0131; lines 618 to 619, 622, 627 to 628 and 632, on page 0148 of document DRC-OTP-1036-0131; lines 636 and 638 to 640, on page 0149 of document DRC-OTP-1036-0131.

13. The Prosecutor had requested that information relating to the assessment of the safety of Witness 336 be redacted.¹⁶ The Chamber considered this request excessive in view of the objective sought and requested that the Prosecutor review the redactions sought by limiting them to those passages that were strictly necessary.¹⁷

14. In this brief, the Prosecutor has reduced the number of redactions sought and he requests that the legal basis of some of these requests for redaction be re-characterised. He relies on rule 81(2) of the Rules to justify the redaction of place names enabling identification of the journey made by the witness to reach the place of the interview, up to thirty days before the date of the commencement of the trial. He also requests, on the basis of rule 81(2), that the name of a Court employee working on site be redacted.¹⁸

15. The Prosecutor requests furthermore, pursuant to rule 81(4) of the Rules, that certain information enabling identification of the members of the witness's family, in addition to certain places where the witness and the witness's family reside, be redacted.¹⁹

16. The Chamber regrets that the Prosecutor has not provided a justification table relating to these requests for redaction in accordance with its decision of 12 January 2009.²⁰ However, it considers that he has presented sufficient information to allow it to assess the merits of the requests. It also refers to the reasons already stated by the Prosecutor in his initial application concerning the existence of an objectively identifiable risk.²¹

¹⁶ Office of the Prosecutor, "*Requête aux fins d'expurgation d'informations dans certains éléments de preuve relevant de l'Article 67-2 ou de la Règle 77*", 13 March 2009, ICC-01/04-01/07-957-Conf-Exp-AnxE.

¹⁷ ICC-01/04-01/07-1041-Conf-Exp-tENG, para. 35.

¹⁸ ICC -01/04-01/07-1057-Conf-Exp, p. 5, footnote 14.

¹⁹ *Idem*.

²⁰ See the *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG.

²¹ ICC-01/04-01/07-957-Conf-Exp-AnxE.

17. The Chamber has already acknowledged that, because of the prevailing instability in Ituri and the resulting danger, disclosing where interviews took place could indeed interfere with the ongoing investigations.²² It notes that redacting the names of locations where those interviews take place or which allow them to be identified does not impede the intelligibility or use of the documents by the Defence, because the redaction is very limited. In addition, the proposed redactions are also time-limited. Given this twofold limitation, it does not seem possible, at this stage, to employ less restrictive measures than those proposed. Accordingly, the Chamber accepts the redactions sought by the Prosecutor until the thirtieth day prior to the commencement of the trial.

18. The Chamber considers that disclosing the identity of a Court employee would only increase the threats to anyone cooperating with the Court who is in the Democratic Republic of the Congo. The Chamber deems it necessary therefore to redact the names of people acting as an intermediary between the Court and potential witnesses in order to protect them. Redacting their names is therefore necessary in order to protect the investigations and it is not possible to use less restrictive measures. The Chamber is of the opinion that this redaction does not hinder the general understanding of the document. The Defence will, in fact, have access to most of the information contained therein. Having thus balanced the interests at stake, the Chamber finds that the redactions sought are warranted, until the thirtieth day preceding the commencement of the trial.

19. Concerning the requests to redact the names of the witness's father, mother and spouse, as well as their location, the Chamber considers that disclosing this information could compromise their safety.²³ It also considers that, even if the family members of the witnesses are not involved in the case, people wishing to exert influence on the witnesses could use the family members to put pressure on them. Moreover, the Chamber is of the view that some of the redactions sought constitute

²² ICC ICC-01/04-01/07-1041-Conf-Exp-tENG, para. 9.

²³ See also, ICC ICC-01/04-01/07-1041-Conf-Exp-tENG, para. 31.

an appropriate measure to reduce that risk, and that no other less restrictive measure would produce the same result, since the family members of Witness 336 are not participating in the Court's witness protection programme.²⁴

20. The Chamber considers that the redactions sought in the form proposed by the Prosecutor do not compromise the rights of the accused, since the documents remain readable, intelligible and usable by the Defence. It therefore agrees to keeping the redactions sought, but considers that it can authorise the redaction of the passages concerned only on a temporary basis. It therefore authorises these redactions until the thirtieth day preceding the date of the trial.

FOR THESE REASONS, THE CHAMBER

AUTHORISES on a permanent basis the redactions in the statement of Witness 55;

AUTHORISES all the other redactions sought until the thirtieth day preceding the date of commencement of the trial, unless the Prosecutor requests, not less than 45 days prior to that date, that they be maintained, while reserving the right to periodically review the authorised redactions, either *proprio motu* or following an application submitted for this purpose, for which the Prosecutor must review the redactions sought, limiting them to those passages that are strictly necessary;

MODIFIES paragraph 31 of its decision of 8 April 2009 (ICC-01/04-01/07-971) as set out in paragraph 12 of this decision, and

ORDERS information relevant to the Defence to be disclosed as soon as possible.

²⁴ Office of the Prosecutor, e-mail communication to the Chamber received by the Legal Adviser of the Trial Division on 29 April 2009.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra
Title

[signed] 18/8/09

Judge Hans-Peter Kaul
Title

Dated this 18 August 2009

At The Hague, The Netherlands