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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

Public Redacted Version of the *Decision on the Prosecutor's Application to Redact Information Falling Under Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (Witnesses 6, 83, 102 and 221) of 18 May 2009*
(ICC-01/04-01/07-1145-Conf-Exp)

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
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Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
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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 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 addresses the Prosecutor's application (“the Application”) to redact documents falling under article 67(2) of the Statute and rule 77 of the Rules.¹ The Application was filed on 3 April 2009 as “Confidential, *ex parte*, only available to the Prosecutor” and submitted in accordance with the Chamber's *Decision on the Redaction Process*.² On 25 March 2009, the Prosecutor filed a public redacted version of the Application.³

2. The Prosecutor requests leave under rule 81(2) and (4) of the Rules to redact certain information contained in these documents. He also refers to information relating to internal comments made in an investigator's note pursuant to rule 81(1) of the Rules.

3. The Defence for Germain Katanga submitted observations on the Application on 22 April 2009.⁴ The Defence for Mathieu Ngudjolo did not submit any observations.

¹ Office of the Prosecutor, “*Requête aux fins d’expurgations d’informations dans certains éléments de preuve relevant de l’Article 67-2 ou de la Règle 77 (W-0006, W-0083, W-0102 et W-0221)*”, 3 April 2009, ICC-01/04-01/07-1021-Conf-Exp, 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 Office of the Prosecutor, “*Version publique expurgée du mémoire ICC-01/04-01/07-1021-Conf-Exp du 3 avril 2009*”, 22 April 2009, ICC-01/04-01/07-1069, with confidential, *ex parte* annexes only available to the Prosecutor.

⁴ Germain Katanga's Defence team, “Defence Response to Prosecution's « *Requête aux fins d’expurgations d’informations dans certains éléments de preuve relevant de l’Article 67-2 ou de la Règle 77 (W-0006, W-0083, W-0102 et W-0221)* »”, 1 May 2009, ICC-01/04-01/07-1089-Conf-Exp.

II. The Chamber's Analysis

4. The Chamber emphasises once again⁵ 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;⁶ (2) the existence of a link between the source of the risk and the accused persons;⁷ (3) the infeasibility or insufficiency of less restrictive protective measures;⁸ (4) an assessment of whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial;⁹ and (5) the obligation to periodically review the decision authorising the redactions should circumstances change.¹⁰

5. As the Chamber has had occasion to point out a number of times,¹¹ any application for redactions is subject to detailed judicial scrutiny on a case-by-case basis. Any decision by which the Chamber authorises non-disclosure to the Defence of part of a document must be sufficiently reasoned in light, in particular, of the arguments submitted by the Prosecutor in support of his application. The Chamber

⁵ *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 to Maintain Redactions or Reinstate Redacted Passages* (ICC-01/04-01/07-859, ICC-01/04-01/07-860 and ICC-01/04-01/07-862), 25 March 2009, ICC-01/04-01/07-987-Conf-Exp, para. 4.

⁶ 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.

⁷ ICC-01/04-01/07-475, para. 71.

⁸ 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.

⁹ ICC-01/04-01/06-773, para. 34.

¹⁰ ICC-01/04-01/07-475, para. 73.

¹¹ *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-tENG, para. 9; ICC-01/04-01/07-819-tENG, paras. 1 and 7; ICC-01/04-01/07-888-Conf-Exp-tENG; ICC-01/04-01/07-889-Conf-tENG, para. 3; ICC-01/04-01/07-987-Conf-Exp-tENG, para. 5.

has a duty to balance the various interests at stake as set out in rule 81 of the Rules, whilst ensuring that the proceedings include safeguards to 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. In order better to assess the redactions sought on a case-by-case basis, the Chamber has drawn a distinction between those redactions justified by the Prosecutor on the basis of rule 81(1) of the Rules, those whose objective is to avoid prejudicing further or ongoing investigations (rule 81(2) of the Rules) and those which aim to ensure the safety of witnesses and members of their families (rule 81(4) of the Rules).

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

8. The Prosecutor draws the Chamber's attention to threats allegedly made against [REDACTED]. He also states that there are serious grounds to believe that [REDACTED].¹² The Chamber has already recognised that there is an objectively justifiable risk resulting from the insecurity prevailing in Ituri and, more generally, in the Democratic Republic of the Congo ("DRC"), both for the Prosecutor's ongoing or further investigations and for the safety of witnesses, victims and members of their families.¹³

¹² ICC-01/04-01/07-1021-Conf-Exp -Anxs A, B, C and D.

¹³ 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-tENG, para. 10; ICC-01/04-01/07-1036-Conf-Exp-tENG, para. 8; ICC-01/04-01/07-1040-Conf-Exp, para. 8; ICC-01/04-01/07-1042-Conf-Exp-tENG, para. 10; ICC-01/04-01/07-1046-Conf-Exp-tENG, para. 8.

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

a) Non-disclosure of internal information of the Office of the Prosecutor (rule 81(1))

10. The Prosecutor requests, pursuant to rule 81(1) of the Rules, that a passage in an investigator's note pertaining to Witness 102 be redacted.¹⁴ He submits that the relevant passage contains internal comments of his Office and considers that, as such, they fall under rule 81(1) of the Rules.

11. The Chamber takes note of this request, while at the same time recalling that the provisions of rule 81(1) of the Rules cannot constitute a valid legal basis for the submission of applications for redactions. It once again invites the Prosecutor, for the future, to set out in a separate document all matters falling strictly within the terms of rule 81(1) of the Rules, such that only information requiring to be disclosed may be the subject of requests for redactions.¹⁵

b) Protection of further or ongoing investigations (rule 81(2))

i) Locations where the interviews were conducted

12. The Prosecutor requests, pursuant to rule 81(2) of the Rules, that references to "[REDACTED]" in the statement of Witness 83¹⁶ and to "[REDACTED]" in the statement of Witness 221/96 be redacted.¹⁷ Both establishments are located in Kinshasa.

13. He contends that [REDACTED] is one of the only cities in the Democratic Republic of the Congo ("DRC") where it is possible to take statements from

¹⁴ ICC-01/04-01/07-1021-Conf-Exp-Anx C.

¹⁵ ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf-tENG, para. 10; ICC-01/04-01/07-987-Conf-Exp-tENG, para. 14.

¹⁶ ICC-01/04-01/07-1021-Conf-Exp-Anx B.

¹⁷ ICC-01/04-01/07-1021-Conf-Exp-Anx D. At an *ex parte* hearing of 16 March 2009, the Prosecutor had indicated to the Chamber that Witness 221 has a dual number, 96 and 221 (ICC-01/04-01/07-T-62-EXP-FRA ET 16-03-2009, p. 21, lines 14 and 15).

witnesses in complete safety. Furthermore, he indicates that disclosing the exact locations of the interviews would enable the Lendu population [REDACTED] to keep watch in order to identify potential witnesses.¹⁸ He therefore considers that only the redactions sought would lessen that risk, and that there is no less restrictive protective measure available. Noting the existence of threats to persons cooperating with the Court, the Prosecutor would like the name of these locations to be temporarily removed in order to avoid obstruction of his activities by persons demonstrating hostility towards the Court's actions. He proposes that the information redacted be disclosed 30 days prior to the commencement of the trial.¹⁹

14. The Defence for Germain Katanga does not object to these requests for temporary redactions and refers to the principles laid down by the Chamber in its previous rulings.²⁰

15. The Chamber has already accepted that disclosing interview locations could indeed interfere with ongoing investigations.²¹ It notes that redacting the names of these places does not impair the Defence's ability to understand or use the documents since the redactions are limited to their precise location. It further notes that the proposed redactions are also limited in time. Because of this double limitation, it does not seem feasible, at this stage, to have recourse to measures which are less restrictive than those proposed. Accordingly, the Chamber grants the redactions requested by the Prosecutor until the thirtieth day prior to the commencement of the trial.

¹⁸ ICC-01/04-01/07-1021-Conf-Exp-Anxs B and D.

¹⁹ *Idem.*

²⁰ ICC-01/04-01/07-1089-Conf-Exp, para. 3.

²¹ ICC-01/04-01/07-888-Conf-Exp-tENG; ICC-01/04-01/07-889-Conf-tENG, para. 15; ICC-01/04-01/07-987-Conf-Exp-tENG, para. 20; ICC-01/04-01/07-1038-Conf-Exp, para. 18; ICC-01/04-01/07-1040-Conf-Exp, para. 14; ICC-01/04-01/07-1041-Conf-Exp, para. 11; ICC-01/04-01/07-1042-Conf-Exp, para. 18.

ii) Sources of the Office of the Prosecutor and field staff

16. The Prosecutor seeks the redaction of the name, occupation and place of work of an intermediary of the Office of the Prosecutor, “[REDACTED]”, in the investigator’s note relating to Witness 102.²² The Prosecutor believes that the redaction sought is necessary, since this person facilitates contacts between witnesses and his Office. He also points out that three members [REDACTED].²³

17. The Prosecutor considers that intermediaries are vital for the conduct of his activities and that, without their cooperation, his investigations would be slowed down considerably, if not rendered impossible. He also states that intermediaries will generally stay in the DRC. Accordingly, he considers that disclosing their identity could jeopardise their safety and, hence, prejudice ongoing investigations. He therefore requests that the names of these sources be redacted for the duration of the trial.²⁴ Given that the nature of the redacted information cannot be inferred from the text, the Prosecutor proposes specifying that it relates to an “intermediary of the Office of the Prosecutor”.²⁵

18. The Prosecutor also makes reference to “[TRANSLATION] the explanations provided in his previous briefs concerning the Office of the Prosecutor’s sources and intermediaries”,²⁶ referring in particular to the arguments put forward in his application of 16 April 2009 seeking leave to appeal against the Chamber’s decision of 10 February 2009.²⁷ The Chamber considers that any application for redactions must state all the information necessary for it to be assessed. Referring back to general arguments or to those related to specific applications is therefore of very

²² ICC-01/04-01/07-1021-Conf-Exp-Anx C.

²³ ICC-01/04-01/07-1021-Conf-Exp-Anx C.

²⁴ ICC-01/04-01/07-1021-Conf-Exp, para. 3.

²⁵ ICC-01/04-01/07-1021-Conf-Exp-Anx C.

²⁶ ICC-01/04-01/07-1021-Conf-Exp, para. 3.

²⁷ ICC-01/04-01/07-1021-Conf-Exp, p. 6, footnote 8. See *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-01/04-01/07-889-Conf-tENG.

limited value. The Chamber further stresses that, should the Prosecutor deem it necessary to refer back to arguments put forward in other applications, he must indicate the exact references thereto. Nevertheless, it considers that in this instance the Prosecutor has submitted sufficient information to enable the Chamber to decide whether these requests are justified.

19. The Defence for Germain Katanga opposes any application for permanent redactions and refers to the principles laid down by the Chamber in its previous rulings.²⁸

20. The Chamber considers that disclosing the identity of an intermediary could indeed only increase the threats hanging over any person working with the Court who is located in the DRC. Accordingly, it considers it necessary to redact the names of the persons and organisations acting in this capacity between the Court and potential witnesses in order to ensure their protection. It is also mindful of the important role played by these sources in the proper conduct of the investigations and of the risk that they might refuse to continue to cooperate with the Office of the Prosecutor and, more generally, with the Court, in the event that their names were disclosed. Redaction of the name of the intermediary in question is therefore necessary in order to safeguard the investigations, and it is not feasible to have recourse to less restrictive measures.

21. The Chamber considers that these redactions do not impair the overall intelligibility of the document. The Defence will in fact have access to most of the information it contains. However, the Chamber considers that it cannot authorise the redactions through to the end of the trial, since such a measure does not appear to it, in current circumstances, to take sufficient account of the rights of the Defence. At this stage, it is difficult for the Chamber to make a definitive assessment of the usefulness and relevance of such information for the Defence. It is in fact up to the

²⁸ ICC-01/04-01/07-1089-Conf-Exp, para. 3.

Defence to make such an assessment, since it is for the Defence, and for the Defence alone, to determine the strategy that it intends to adopt.

22. In this instance, the Defence has so far been unable fully to assess the value of this information, since the requests only describe it in general terms. It will have an opportunity to analyse and assess the usefulness and relevance of the redacted documents once it has received them, and, if necessary, it will be able to submit to the Chamber an application for review prior to the commencement of the trial. In that event, the Chamber will assess the practical impact of the redactions sought, in the light of the arguments set out by the Defence. For his part, the Prosecutor will also be able to request, not later than 45 days prior to the commencement of the trial, that the redactions be maintained.

23. Having thus balanced the interests at stake, the Chamber finds that the redactions sought are warranted, until the thirtieth day prior to the commencement of the trial.

iii) Surnames, first names, initials and signatures of the interpreters present at the taking of the witness statements

24. The Prosecutor requests, pursuant to rule 81(2) of the Rules, the redaction of the surnames, first names, initials and signatures of the interpreters mentioned in the records of the interviews with Witnesses 6²⁹ and 102.³⁰

25. He submits that disclosing the names of the interpreters, like those of his Office's sources, might prejudice ongoing investigations, since the interpreters involved in the interviews and the taking of statements reside in the DRC together with their families. He also refers to the limited number of Congolese interpreters currently available to take part in the investigations, as well as to the level of qualifications of such staff, which makes them difficult to replace. He therefore

²⁹ ICC-01/04-01/07-1021-Conf-Exp-Anx A.

³⁰ ICC-01/04-01/07-1021-Conf-Exp-Anx C.

considers that the redactions sought are preventive measures necessary for the protection of these interpreters.³¹

26. The Prosecutor adds that the information pertaining to the names of the interpreters could be disclosed 30 days prior to the commencement of the trial and that there are no other less restrictive protective measures available.³²

27. The Defence for Germain Katanga states that, as with the names of the interview locations, it does not object to temporary redactions and refers once again to the principles set out by the Chamber in its previous rulings.³³

28. The Chamber takes note of the difficulties encountered by the Office of the Prosecutor in finding suitably qualified persons to provide quality interpretation services *in situ*. It also considers that it is necessary to protect the interpreters who take part 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 might compromise the conduct of the Prosecutor's investigations.³⁴

29. The Chamber notes that the redactions sought do not affect the documents' intelligibility. It therefore considers that they do not prejudice the right to a fair and impartial trial. The Defence will be able to learn the identity of the interpreters 30 days prior to the trial, which safeguards the rights of the accused. Accordingly, the Chamber is in favour of the proposed redactions.

³¹ ICC-01/04-01/07-1021-Conf-Exp-Anxs A and C.

³² ICC-01/04-01/07-1021-Conf-Exp, para. 6, and Anxs A and C.

³³ ICC-01/04-01/07-1089-Conf-Exp, para. 3.

³⁴ See also ICC-01/04-01/07-888-Conf-Exp-tENG and ICC-01/04-01/07-889-Conf-tENG, para. 27; ICC-01/04-01/07-987-Conf-Exp-tENG, para. 36; ICC-01/04-01/07-1036-Conf-Exp, para. 24; ICC-01/04-01/07-1040-Conf-Exp, para. 25; ICC-01/04-01/07-1041-Conf-Exp, para. 22.

c) Safety of witnesses and members of their families (rule 81(4))

30. The Prosecutor requests leave from the Chamber under rule 81(4) of the Rules to redact permanently the names of the family members of Witnesses 6³⁵ and 102,³⁶ as well as references to their current or past places of residence and the birthplace of Witness 6.³⁷

31. In the Prosecutor's view, these persons run a genuine risk, even though they are not family members of Prosecution witnesses. Thus he considers that the mere fact that these witnesses have provided him with a written statement identifies them as cooperating with the Court. Lastly, he notes that, while the witnesses personally assume risks by cooperating with the Court, it is not, however, their intention that their action might have repercussions on their families.³⁸

32. 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 will not be called by his Office to give evidence and that they were mentioned by witnesses only incidentally.³⁹ He considers that disclosing the identity of family members would jeopardise the position of witnesses and their families, a situation that is not "[TRANSLATION] counterbalanced by a manifest interest on the part of the accused".⁴⁰

33. He 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. Hence he

³⁵ ICC-01/04-01/07-1021-Conf-Exp, paras. 10 and 11 and Anx A.

³⁶ ICC-01/04-01/07-1021-Conf-Exp, paras. 10 and 11 and Anx C. The Chamber notes that the application erroneously refers to Witness 221 (see ICC-01/04-01/07-1021-Conf-Exp, p. 9 and para. 13 and ICC-01/04-01/07-1069, p. 9 and para. 13). In fact, Annex D, which describes the requested redactions in the statement of Witness 221/96, does not request redactions pursuant to rule 81(4). However, the investigator's note and the statement of Witness 102 include requests for redactions of the place of residence of the witness's family members.

³⁷ ICC-01/04-01/07-1021-Conf-Exp-Anx A.

³⁸ ICC-01/04-01/07-1021-Conf-Exp, paras. 10 and 11.

³⁹ ICC-01/04-01/07-1021-Conf-Exp, para. 10.

⁴⁰ ICC-01/04-01/07-1021-Conf-Exp, para. 12.

suggests referring to the “place of residence of family members” of Witness 102.⁴¹ The Chamber welcomes this proposal, which makes the nature of the redacted information fully intelligible to the Defence.

34. The Chamber concurs with the Prosecutor that disclosing the identity of the family members of witnesses, and information enabling them to be identified or located might jeopardise their safety, in particular where they are located in Ituri. It also considers that, even where the family members of witnesses are taking no part in the case, persons wishing to exert influence on the witnesses could use their family members to exert pressure on them.

35. The Chamber is further 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.⁴²

36. The Chamber considers that the redactions sought in the format proposed 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 considers that it can only redact the passages in question on a temporary basis and not through to the end of the trial, as such a measure appears to it to be excessive in current circumstances, having regard to the exercise of the rights of the Defence. It therefore authorises the redactions until the thirtieth day prior to the date of the trial.

FOR THESE REASONS, THE CHAMBER

- 1) **GRANTS** the Application, whilst reserving the right periodically to review the authorised redactions, either *proprio motu* or upon an application submitted for that purpose;

⁴¹ ICC-01/04-01/07-1021-Conf-Exp-Anx C.

⁴² ICC-01/04-01/07-1021-Conf-Exp-Anxs A and C.

2) **AUTHORISES** all of the redactions sought until the thirtieth day prior to the date of the commencement of the trial, subject to the Prosecutor's right to request, not later than 45 days prior to that date, that they be maintained.

Done in both 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 18 May 2009

At The Hague, The Netherlands