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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 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)**

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 Eric MacDonald, Senior Trial Lawyer

Counsel for the Defence of Germain

Katanga
Mr David Hooper
Mr Andreas O'Shea

Counsel for 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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Mr Vincent Lurquin
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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 Participation and Reparations Section

Detention 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 under article 67(2) of the Statute and 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 filed on 13 March 2009, after the prescribed time limit had expired. 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]”,⁴ at an *ex parte* hearing held on 15 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. In addition, he refers to information falling under rule 81(1) of the Rules. The Defence for Germain

¹ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurgations 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, with Confidential *ex parte* Annexes A to E 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, para. 12.

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.

Katanga submitted observations on 23 March 2009.⁶ The Defence for Mathieu Ngudjolo did not submit any observations.

II. The Chamber's Analysis

4. The Chamber emphasises once again⁷ 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;⁸ 2) the existence of a link between the source of the risk and the accused;⁹ 3) the infeasibility or insufficiency of less restrictive protective measures;¹⁰ 4) an assessment of whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;¹¹ and 5) the obligation to periodically review the decision authorising the redactions should circumstances change.¹²

5. As the Chamber has had occasion to point out more than once,¹³ any application for redactions is subject to strict judicial scrutiny on a case-by-case basis.

⁶ Germain Katanga's Defence Team, "Defence Observations in response to Prosecution's *'Requête aux fins d'expurgation d'informations dans certain éléments de preuve relevant de l'Article 67-2 ou de la Règle 77'*", 23 March 2009, ICC-01/04-01/07-979-Conf.

⁷ *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.

⁸ 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.

⁹ *Ibid.*, para. 71.

¹⁰ 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.

¹¹ ICC-01/04-01/06-773, para. 34.

¹² ICC-01/04-01/07-475, para. 73.

¹³ *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, paras. 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.

Any decision by which the Chamber authorises the 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.

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

6. The Prosecutor requests, pursuant to rule 81(1) of the Rules, that certain passages in an investigator's notes pertaining to Witness 156 be redacted.¹⁴ He submits that this document contains comments which are internal to his office or information about the running thereof and consequently considers this to be covered by rule 81(1) of the Rules.

7. The Chamber takes note of the request, but points out that the provisions of rule 81(1) of the Rules cannot provide a valid legal basis for the submission of requests for redactions. The Chamber suggests, once again, to the Prosecutor that, in future, he should set out in a separate document everything which falls strictly under rule 81(1) of the Rules, such that only information which should be disclosed may be the subject of requests for redactions.¹⁵

¹⁴ ICC-01/04-01/07-957-Conf-Exp-Anx A.

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

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

i) Locations where interviews were conducted

8. The Prosecutor requests that references to the location where Witness 156 was interviewed, namely “[REDACTED]”, “[REDACTED]” and “[REDACTED]” in the record of the interview and also in an investigator’s note about him/her, be redacted.¹⁶

9. Noting the existence of threats to persons who cooperate with the Court, the Prosecutor wishes that the names of these places be temporarily removed in order to avoid the obstruction of his activities by persons who are hostile to the Court’s action. He proposes that the redacted information be disclosed 30 days prior to the commencement of the trial.¹⁷

10. The Defence for Germain Katanga¹⁸ reiterates the observations it submitted on 5 March¹⁹ and 9 March 2009.²⁰ It does not object to the redaction of the names of the locations where interviews are conducted, provided such redactions are strictly limited.²¹ However, it points out that this information is relevant to the Defence because it details the circumstances in which the witnesses’ statements were taken.²²

11. The Chamber has already admitted that, because of the prevailing instability in Ituri and the resulting danger, disclosing the interview location could indeed impede ongoing investigations.²³ Moreover, the Chamber notes that the proposed

¹⁶ ICC-01/04-01/07-957-Conf-Exp-Anx A.

¹⁷ *Ibid.*

¹⁸ ICC-01/04-01/07-979-Conf.

¹⁹ 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 des documents obtenus par le Procureur en vertu de l’article 54-3-e du Statut et ordonnance enjoignant le Procureur de soumettre des documents à la Chambre*’”, 5 March 2009, ICC-01/04-01/07-944, paras. 3-16.

²⁰ 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.

²¹ ICC-01/04-01/07-948, para. 14.

²² ICC-01/04-01/07-948, para. 15.

²³ 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, para. 20.

redactions are limited in time and that, given their limited scope, it does not seem feasible, at this stage, to have recourse to measures which are less restrictive than those proposed.

12. The Chamber notes that redacting the names of the locations where interviews are conducted does not affect the intelligibility or use of the documents by the Defence. In the Chamber's view, knowing the place where an interview is conducted is not, at this stage, essential to the preparation of the Defence, and redacting the name of the location does not prejudice the rights of the accused. Accordingly, the Chamber authorises the redactions requested by the Prosecutor until the thirtieth day prior to the commencement of the trial.

ii) Sources of the Office of the Prosecutor

13. The Prosecutor seeks permission to redact, pursuant to rule 81(2), the identity and personal data of one of his intermediaries.²⁴ In this regard, he seeks the redaction of that person's name, "[REDACTED]", his/her telephone numbers and job title, "[REDACTED]", from the investigator's note concerning Witness 156.²⁵ He explains that the person in question is no longer acting as an intermediary at the present time and that he/she lives in the DRC, but that he considers him/her still to be exposed as a result of his/her past cooperation with the Court. In this regard, he states that the title of "[REDACTED]" was only given to a very limited number of people in the field.²⁶

14. The Prosecutor seeks the redaction of the identity of this intermediary for the duration of the trial.²⁷ Where the nature of the redacted information cannot be inferred from the text, the Prosecutor suggests specifying that it involves the name of

²⁴ ICC-01/04-01/07-957-Conf., paras. 12-14 .

²⁵ ICC-01/04-01/07-957-Conf-Exp-Anx A.

²⁶ *Idem.*

²⁷ *Idem.*

an intermediary, as well as providing information enabling the intermediary to be identified.²⁸

15. The Defence for Germain Katanga maintains that the general statement whereby there is a prevailing state of insecurity in Ituri is not sufficient to justify the permanent redaction of the names of the intermediaries.²⁹ It considers that such redactions should only be allowed on an exceptional basis, after it has been demonstrated that these intermediaries are actually in danger. Moreover, the Defence fails to understand why the accused would want to threaten persons who do not provide incriminating information.³⁰ Furthermore, the Defence objects to the redactions being authorised on a permanent basis, given that these intermediaries are in possession of information that could be relevant to its preparation.³¹

16. The Chamber considers that disclosing the identity of this intermediary would only increase the threats hanging over him/her. 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 working with the Office of the Prosecutor and, more generally, with the Court, in the event that their names were disclosed. Redacting their names is therefore necessary for the protection of the investigations, and it does not appear feasible to resort to less restrictive measures.

17. The Chamber considers that these redactions do not interfere with the overall intelligibility of the documents. The Defence will, in fact, have access to most of the information contained therein. However, it is of the view that it cannot authorise the redactions until the end of the trial, as the Chamber does not believe that such a measure takes sufficient account of the rights of the Defence. In fact, the Chamber must reconcile the contradictory interests of the Prosecutor, who is anxious to protect his investigations and the people working on them, and of the Defence, which must

²⁸ *Idem.*

²⁹ ICC-01/04-01/07-948, para. 18.

³⁰ ICC-01/04-01/07-948, para. 21.

³¹ ICC-01/04-01/07-948, para. 23.

be able to contact persons who are likely to possess exculpatory information. The Defence will have the opportunity to analyse and assess the utility and relevance of the redacted documents once it has received them, and, if necessary, will be able to submit to the Chamber a request for review prior to the commencement of the trial. The Prosecutor will also be able to request, no later than 45 days prior to the commencement of the trial, that the redactions be maintained.

18. 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

19. The Prosecutor requests, pursuant to rule 81(2) of the Rules, the redaction of the surnames, initials and signatures of an Office of the Prosecutor interpreter, “[REDACTED]”, who was present at the taking of the statements of Witness 156.³²

20. The Prosecutor submits that disclosing the names of the interpreters, like his Office’s sources, might prejudice ongoing investigations, since the interpreters who are involved in the interviews and 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 qualifications 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.³³

³² ICC-01/04-01/07-957-Conf-Exp-Anx A.

³³ *Idem*.

21. The Prosecutor states that the information pertaining to the names of the interpreters may be disclosed 30 days prior to the commencement of the trial and that there are no other less restrictive protective measures.³⁴

22. 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 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.³⁵

23. The Chamber notes that the redaction sought does not interfere with the document's intelligibility. It therefore considers that this redaction does not jeopardise the right to a fair and impartial trial. The Defence will indeed be able to find out the identity of the interpreter 30 days prior to the trial; this safeguards the rights of the accused. Accordingly, the Chamber agrees with the proposed redactions.

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

i) Identity of witnesses and information about their families

24. The Prosecutor requests, pursuant to rule 81(4) of the Rules, leave from the Chamber to permanently redact the information concerning either the witnesses themselves or the names of members of their families, as well as information enabling them to be identified.³⁶ This information includes the telephone number of

³⁴ *Idem*.

³⁵ See also 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.

³⁶ ICC-01/04-01/07-957-Conf, paras. 21 to 24; ICC-01/04-01/07-957-Conf-Exp-Anxs A, B, C, D and E.

witness 168,³⁷ the first name and surname of the parents of Witness 180,³⁸ the first name and surname of the parents of Witness 181³⁹ and information enabling the occupation of the father of Witness 336⁴⁰ to be identified.

25. The Prosecutor also proposes to redact permanently any information which enables the place of residence of the families of Witnesses 180⁴¹ and 181⁴² to be identified.

26. According to the Prosecutor, these persons run a genuine risk, even if they are not family members of prosecution witnesses. In fact, he considers that the mere fact that these witnesses have provided a written statement identifies them as persons who have cooperated with him. Lastly, he points out that, while witnesses personally assume risks when they cooperate with the Court, they do not, however, intend that their action would have repercussions on their families.⁴³

27. Furthermore, the Prosecutor draws the Chamber's attention to threats allegedly made against [REDACTED].⁴⁴

28. The Prosecutor submits 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 and were mentioned by witnesses only incidentally.⁴⁵ Thus, he considers that disclosing the identity of relatives would undermine the position of witnesses and their families, a situation that is not "[TRANSLATION] offset by a manifest interest on the part of the accused".⁴⁶

³⁷ ICC-01/04-01/07-957-Conf-Exp-Anx B.

³⁸ ICC-01/04-01/07-957-Conf-Exp-Anx D.

³⁹ ICC-01/04-01/07-957-Conf-Exp-Anx C.

⁴⁰ ICC-01/04-01/07-957-Conf-Exp-Anx E.

⁴¹ ICC-01/04-01/07-957-Conf-Exp-Anx D.

⁴² ICC-01/04-01/07-957-Conf-Exp-Anx C.

⁴³ ICC-01/04-01/07-957-Conf, para. 23.

⁴⁴ ICC-01/04-01/07-957-Conf-Exp-Anxs B, C, D and E.

⁴⁵ ICC-01/04-01/07-957-Conf, para. 22.

⁴⁶ ICC-01/04-01/07-957-Conf, para. 24.

29. In certain instances, the Prosecutor proposes other forms of redaction, where it is not clear from the text that the information in question pertains to the families of witnesses. In particular, he suggests that the redacted information be replaced by the “first name of the witness’s father” and by “first name and surname of the witness’s mother” for Witnesses 180 and 181.⁴⁷

30. The Defence for Germain Katanga submits that the redaction of the names and whereabouts of the family members of witnesses is not justified since they are not participants in the case.⁴⁸

31. The Chamber considers that disclosing the identity of the family members of the witnesses as well as information enabling them to be identified or located might jeopardise their safety, especially where they are located in Ituri. The Chamber is also 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, given, moreover, that the family members of the witnesses in question are not covered by the Court’s witness protection programme.

32. The Chamber is of the view that the telephone number of Witness 168 is personal information and, as such, is protected under international human rights treaties.⁴⁹ Furthermore, the Chamber considers that the Defence teams may not contact this witness directly, and, as a result, must obtain the consent of the witness through the Office of the Prosecutor, if they consider such contact necessary for their preparation.⁵⁰ The Chamber therefore authorises this redaction on a permanent basis.

⁴⁷ ICC-01/04-01/07-957-Conf-Exp-Anx C and D .

⁴⁸ ICC-01/04-01/07-948, para. 25.

⁴⁹ 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).

⁵⁰ 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.

33. 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 as, in its opinion, such a measure seems excessive with 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.

ii) Information pertaining to the assessment of the safety of the witness

34. The Prosecutor requests the redaction of information pertaining to the assessment of the safety of Witness 336 in the transcript of the witness's statement. He maintains that if this information were to be disclosed, it could reveal the methods used to implement the Court's 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.⁵¹

35. Having reviewed the information contained in the statement of Witness 336, the Chamber notes that it encompasses a very significant portion of the document and appears to go way beyond the objective sought. It would, in fact, appear that some of this information is not directly connected to the safety of the witness in an obvious way. This includes information on the witness's place and date of birth and the identity of his/her family members.⁵² The same goes for certain portions of the transcript pertaining to the operation of the Court, the disclosure of evidence between the parties and the public nature of the proceedings.⁵³ 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.

⁵¹ ICC-01/04-01/07-957-Conf-Exp-Anx E.

⁵² ICC-01/04-01/07-957-Conf-Exp-Anx E, pp. 11-15.

⁵³ *Ibid.*, pp. 24-29.

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 submitted for that purpose;
- 2) **DIRECTS** the Prosecutor to submit his new proposals in accordance with paragraph 35 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 the date of the commencement of the trial, request that they be maintained.

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