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No.: **ICC-01/04-01/07**
Date: **22 December 2009**

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

CORRIGENDUM
Public Document

Public Redacted Version of the *Decision on the Prosecutor's Application to Redact Information in the Second Statement of Prosecution Witness 249* of 18 May 2009
(ICC-01/04-01/07-1149-Conf-Exp)

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

The Office of the Prosecutor

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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, 64(2), 64(3)(c), 67 and 68 of the Rome Statute (“the Statute”), rules 77 and 81 of the Rules of Procedure and Evidence (“the Rules”) and regulations 35(2) and 54 of the Regulations of the Court, decides as follows:

I. Procedural History

1. This Decision addresses the Prosecutor’s application to redact the second statement of Witness 249 (“the Application”).¹ That Application was filed as a “[TRANSLATION] Public Document with confidential, *ex parte*, annex only available to the Prosecutor”, and submitted in accordance with the Chamber’s *Decision on the Redaction Process*.²

2. The Application was submitted on 27 April 2009, after the time limit of 30 January 2009 for submitting applications to redact prosecution evidence had expired.³ The Prosecutor indicates that Witness 249 gave evidence for a second time on 27, 28 and 29 February 2009, and that the transcript and translation of what the witness said were only completed on 20 April 2009.⁴

3. The Prosecutor requests leave under paragraphs 2 and 4 of rule 81 of the Rules to redact certain information contained in this statement.

¹ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurgation d’informations dans la seconde déposition du témoin à charge W-249*”, 27 April 2009, ICC-01/04-01/07-1078, with a confidential, *ex parte* annex 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 ICC-01/04-01/07-1078, para. 2.

4. The Defence for Germain Katanga submitted observations on 5 May 2009,⁵ and the Defence for Mathieu Ngudjolo has not submitted any observations.

II. The Chamber's analysis

a) Leave to extend the time limit for submission of an application for redaction

5. Acting pursuant to regulation 35(2) of the Regulations of the Court, the Prosecutor requests the Chamber's leave to disclose the second statement of Witness 249.⁶ He indicates that, because the statement was not at his disposal on 30 January 2009, he was unable, for reasons beyond his control, to submit an application for extension of time in order to file his application for redaction within the given time limit. He considers therefore that the criteria required by paragraph 2 of regulation 35 have been met.⁷

6. He considers, furthermore, that disclosing the second statement of Witness 249 will contribute to the discovery of the truth, and that the submission of this evidence five months before the start of the trial will not deprive the Defence of the time needed to make use of its content.⁸

7. The Defence for Germain Katanga has not made any observations on the admission of this second statement of Witness 249.

8. Under article 64(3)(c) of the Statute, the Chamber is obliged to disclose documents or information sufficiently in advance of the commencement of a trial to enable adequate preparation for trial, while article 67(1)(b) enshrines the right of the accused to have adequate time to prepare his or her defence, a right for which the Chamber is required to ensure respect pursuant to article 64(2) of the Statute. It is

⁵ Germain Katanga's Defence Team, "Defence Response to the « *Requête de l'Accusation aux fins d'expurgation d'informations dans la seconde déposition du témoin W-249* »", 5 May 2009, ICC-01/04-01/07-1105.

⁶ ICC-01/04-01/07-1078, para. 3.

⁷ ICC-01/04-01/07-1078, para. 4.

⁸ ICC-01/04-01/07-1078, para. 5.

thus the Chamber's responsibility to ensure that the Defence does not suffer any prejudice in the present case, and to this end it will consider the volume of the material and decide whether it raises new issues, and whether the Defence has adequate time to use it and prepare for trial.⁹

9. The Chamber notes that the Prosecutor seeks to disclose the second statement of Witness 249, which was not in fact at his disposal on 30 January 2009, leaving him unable to request an extension of the time limit before it expired. It notes that this witness's first statement has already been disclosed to the Defence and that an application for leave to redact that statement was previously submitted.¹⁰ Moreover, although this second statement is very long, the Chamber notes that the witness is already included among the prosecution witnesses and that the witness's first statement has been disclosed. This is therefore not totally new material for the Defence. The Chamber further considers that these documents are relevant and useful for the Defence and that the latter will have sufficient time fully to familiarise itself with them before the commencement of the trial.

b) Application for leave to redact pursuant to rule 81(2) and 81(4) of the Rules

10. The Chamber reiterates¹¹ the requirements laid down by the Appeals Chamber: (1) the existence of an objectively justifiable risk to the safety of the person

⁹ *Décision sur les témoins 002, 030, 323 et 373*, 14 May 2009, ICC-01/04-01/07-1135, para. 2.

¹⁰ *"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-Conf-Exp-AnxM. The Chamber ruled on the matter in its *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-tENG, para. 44.

¹¹ *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-tENG, para. 4.

concerned or which may prejudice further or ongoing investigations;¹² (2) the existence of a link between the source of the risk and the accused persons;¹³ (3) the infeasibility or insufficiency of less restrictive protective measures;¹⁴ (4) an assessment of whether the redactions sought are prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial;¹⁵ and (5) the obligation to periodically review the decision authorising the redactions should the circumstances change.¹⁶

11. As the Chamber has had occasion to stress a number of times,¹⁷ 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 to the Defence of a part of a document must be properly reasoned, in light, in particular, of the arguments submitted by the Prosecutor in support of his application. The Chamber 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 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.

¹² 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.

¹³ ICC-01/04-01/07-475, para. 71.

¹⁴ 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.

¹⁵ ICC-01/04-01/06-773, para. 34.

¹⁶ ICC-01/04-01/07-475, para. 73.

¹⁷ *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.

12. In order better to assess the redactions sought on a case-by-case basis, the Chamber has drawn a distinction between those redactions whose purpose is to avoid prejudicing further or ongoing investigations (rule 81(2) of the Rules) and those which aim to protect the safety of witnesses and members of their family (rule 81(4) of the Rules).

13. The Chamber notes that the Prosecutor's arguments regarding 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 appears appropriate to provide a joint response on this issue.

14. The Prosecutor draws the Chamber's attention to threats allegedly made against [REDACTED]. He states that there are serious grounds to believe that [REDACTED].¹⁸ 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 the Democratic Republic of the Congo ("the DRC"), both for the Prosecutor's further and ongoing investigations and for the safety of witnesses, victims and members of their families.¹⁹

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

¹⁸ ICC-01/04-01/07-1078-Conf-Exp-AnxA.

¹⁹ 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.

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

16. The Prosecutor requests the redaction under rule 81(2) of references to places where the interviews were held, namely “[REDACTED]”, in the transcript of the statement of Witness 249.²⁰

17. Noting the existence [REDACTED], he asks that the name of this place be temporarily redacted in order to avoid the obstruction of his activities by persons who are hostile to the Court’s activities. He recalls that he is in the process of concluding his investigation and that it is accordingly necessary for this location to remain confidential. He proposes that the redacted information be disclosed 30 days prior to the commencement of the trial.²¹

18. The Defence for Germain Katanga does not object to this request for temporary redaction and refers to the principles laid down by the Chamber in its previous rulings.²²

19. The Chamber has already accepted that disclosing the interview locations could indeed impede ongoing investigations.²³ It notes that simply redacting the names of places where the interviews are held does not affect the intelligibility or the use of the documents by the Defence, because the redactions are very limited. Moreover, the proposed redactions are also limited in time. Given this twofold limitation, it does not seem feasible at this stage to have recourse to a measure less restrictive than the one proposed. Accordingly, the Chamber approves the redactions requested by the Prosecutor until the thirtieth day prior to the commencement of the trial.

²⁰ ICC-01/04-01/07-1078-Conf-Exp-AnxA.

²¹ ICC-01/04-01/07-1078-Conf-Exp-AnxA.

²² ICC-01/04-01/07-1105, p. 3.

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

ii) Identity of and information about members of Witness 249's family (rule 81(4))

20. The Prosecutor requests the Chamber's leave under rule 81(4) of the Rules to redact permanently the names of the witness's [REDACTED] participating in the Court's protection programme.²⁴ He also seeks the permanent redaction of the names [REDACTED] Witness 249's [REDACTED], as well as of the particulars enabling [REDACTED] to be located.²⁵

21. The Prosecutor cites the arguments developed in his previous application relating to the witness's first statement.²⁶ The Chamber considers that the applications for redaction must state all the information needed in order to assess them. In this case, however, it considers that the Prosecutor has submitted sufficient information to enable it to decide whether his requests are justified.

22. According to the Prosecutor, the redaction of names and information enabling members of the witness's family to be located is necessary in order to guarantee to witnesses who have chosen to cooperate with his Office that their families' safety will be protected. Furthermore, he notes that there are no other less restrictive measures available, since [REDACTED] not participating in the Court's protection programme. Lastly, he considers that information pertaining to relatives is of limited interest and is not material to the preparation of the Defence.²⁷

23. The Prosecutor proposes other forms of redaction where it is not clear from the text that the information in question pertains to the witness's family. Thus, he suggests referring to the "[REDACTED]", the "[REDACTED]", a "[REDACTED]" and the

²⁴ ICC-01/04-01/07-1078-Conf-Exp-AnxA as corrected by the e-mail exchange between the Prosecutor and the Legal Advisor to the Trial Division, 15 May 2009.

²⁵ ICC-01/04-01/07-1078-Conf-Exp-AnxA.

²⁶ ICC-01/04-01/07-1078, para. 14.

²⁷ ICC-01/04-01/07-1078-Conf-Exp-AnxA.

“[REDACTED]”.²⁸ The Chamber welcomes this proposal, which enables the Defence to assess the nature of the redacted information.

24. As in relation to the interview location, the Defence for Germain Katanga does not object to these temporary redactions and refers once again to the principles set out by the Chamber in its previous rulings.²⁹

25. The Chamber concurs with the Prosecutor that disclosing the identity of witnesses’ family members, and information enabling them to be identified or located, might compromise their safety, in particular where they are present in Ituri. Moreover, it considers that, even though these persons are taking no part in the case, it is not impossible that individuals seeking to exert influence over the witnesses in question might use them to put pressure on the latter.

26. The Chamber is of the opinion that some of the redactions sought constitute an appropriate measure to lessen that risk, and that, for the reasons stated in paragraph 22, no other less restrictive measure would achieve the same result.³⁰

27. The Chamber considers that the redactions sought in the form suggested by the Prosecutor do not prejudice the rights of the accused, since the documents can still be read, understood and used by the Defence. The Chamber is therefore in favour of 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 such a measure appears to it to be excessive, having regard to the exercise of the rights of the Defence. It considers, however, that the redactions intended to ensure that the relocation of Witness 249’s [REDACTED] is successful can be authorised on a permanent basis. It therefore authorises the last-named redactions through to the end of the trial, and all other redactions until the thirtieth day prior to the date of the trial.

²⁸ *Idem*.

²⁹ ICC-01/04-01/07-1105, p. 3.

³⁰ ICC-01/04-01/07-1078-Conf-Exp-AnxA.

FOR THESE REASONS, THE CHAMBER

1) AUTHORISES the extension of the time limit for submission of the application for leave to redact the second statement of Witness 249;

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

3) AUTHORISES all of the requested redactions until the thirtieth day preceding the date of the commencement of the trial, unless the Prosecutor requests, not less than 45 days prior to that date, that they be maintained, and with the exception of the redaction authorised on a permanent basis in paragraph 27 of this Decision.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 22 December 2009

At The Hague, The Netherlands