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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***

Public redacted version

**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)**

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 Germain Katanga

Mr David Hooper
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Counsel for Mathieu Ngudjolo Chui

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Legal Representatives of the Victims

Mr Jean-Louis Gilissen
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Legal Representatives of the Applicants

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

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 sets out in writing the grounds for the decision rendered orally by the Chamber on 3 February 2009. It follows three applications submitted by the Prosecutor to redact the eight statements of Witnesses 001, 155, 172, 280, 281, 284, 312 and 323¹ and one investigator’s note concerning Witness 176.² Those three applications (“the Applications”) were resubmitted in a single document³ following the *Decision on the Redaction Process* rendered by the Chamber on 12 January 2009.⁴

2. The Prosecutor is seeking authorisation from the Chamber to redact certain information contained in those statements and the investigator’s note pursuant to rule 81(1), 81(2) and 81(4) of the Rules. The Defence was invited to submit its observations, but did not do so. Witnesses 280 and 323 are prosecution witnesses on whose statements the Prosecutor relied at the confirmation hearing and whom he intends to call to testify at trial. Furthermore, those two witnesses, along with Witnesses 001, 155, 172, 176, 281, 284 and 312, have consented to their identity being disclosed to the Defence.

¹ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurger la seconde déclaration du témoin W-280*”, 10 December 2008, ICC-01/04-01/07-789; “*Requête de l’Accusation aux fins d’expurger les déclarations et note d’enquêteur des témoins W-001, W-155, W-172, W-176, W-281 et W-284*”, 24 December 2008, ICC-01/04-01/07-809; and “*Requête de l’Accusation aux fins d’expurger les déclarations du témoin à charge W-323 et du témoin à décharge W-312*”, 8 January 2009, ICC-01/04-01/07-812.

² Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurger les déclarations et note d’enquêteur des témoins W-001, W-155, W-172, W-176, W-281 et W-284*”, 24 December 2008, ICC-01/04-01/07-809.

³ Office of the Prosecutor, “*Requête de l’Accusation aux fins d’expurger certaines informations dans des éléments de preuve conformément à la Décision relative à la procédure d’expurgation*”, 16 January 2009, ICC-01/04-01/07-832.

⁴ *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG.

3. As the Chamber has had occasion to emphasise on several occasions,⁵ any application for redactions is subject to strict judicial supervision carried out on a case-by-case basis. Any decision whereby it authorises non-disclosure to the Defence of part of a piece of evidence must be sufficiently justified in light, *inter alia*, of the arguments submitted by the Prosecutor in support of his application.⁶ Thus it is for the Prosecutor sufficiently to support, in law and in fact, and with the assistance of a justification table,⁷ all of the requests for redactions that he submits.⁸ The Chamber is under an obligation to balance the various interests at stake, as stipulated in rule 81 of the Rules, whilst ensuring that the proceedings include safeguards which would protect the interests of the accused persons, so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms.⁹

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 persons;¹² 3) the infeasibility or insufficiency of less restrictive protective measures;¹³ 4) an assessment of whether the requested redactions are prejudicial to or inconsistent

⁵ *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-t-ENG, para. 9; *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-t-ENG, paras. 1 and 7.

⁶ *Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant sa requête aux fins d'expurger la seconde déclaration du témoin 280 (norme 28 du Règlement de la Cour)*, 19 December 2008, ICC-01/04-01/07-802-Conf-Exp, para. 3.

⁷ Annex A, ICC-01/04-01/07-819-Anx.

⁸ ICC-01/04-01/07-802-Conf-Exp, para. 3.

⁹ ICC-01/04-01/07-819-t-ENG, para. 7.

¹⁰ ICC-01/04-01/07-819-t-ENG, para. 8.

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.

with the rights of the accused and a fair and impartial trial;¹⁴ and 5) the obligation to periodically review the decision authorizing the redactions should circumstances change.¹⁵

II. The Chamber's analysis

5. The Chamber has distinguished between redactions justified by the Prosecutor on the basis of rule 81(1) of the Rules, those whose objective is not to compromise further or ongoing investigations (rule 81(2) of the Rules) and those which are to ensure the safety of witnesses and members of their families (rule 81(4) of the Rules).

6. The Chamber notes that the Prosecutor's arguments relating to an objectively justifiable risk are identical both for the Applications under rule 81(2) of the Rules and for those under rule 81(4). It therefore seems appropriate to provide a joint response on this point.

7. The Prosecutor points out the insecurity prevailing in the Democratic Republic of the Congo ("the DRC"), in particular in Ituri and the Kinshasa region, as described in several United Nations reports.¹⁶ He also claims that threats have been made against persons cooperating with the Court and members of their families.¹⁷

8. Furthermore, he calls to the Chamber's attention threats alleged to have been made against the family members of one witness whose identity was disclosed. Finally, he indicates that he has serious grounds to believe that Mathieu Ngudjolo Chui has had contact with the outside from the Detention Centre in The Hague in order to put pressure on that witness.¹⁸ In this regard, he refers to the application he

¹⁴ ICC-01/04-01/06-773, para. 34.

¹⁵ ICC-01/04-01/07-475, para. 73.

¹⁶ ICC-01/04-01/07-809-Conf-Exp-AnxA.

¹⁷ ICC-01/04-01/07-831-Conf-Exp.

¹⁸ ICC-01/04-01/07-832-Conf-Exp-Anxs A, B, C, D, E, F, G, H and I.

filed on 14 January 2009 for an *ex parte* hearing on the protection of witnesses and victims.¹⁹

9. The Chamber recalls that that hearing was indeed held on 28 January 2009, and that, on that occasion, the risk of pressure was discussed. At this stage, and in light of the information it currently possesses, the Chamber recognises that there exists an objectively justifiable risk resulting from the insecurity prevailing in Ituri and, more generally, in the DRC, both for the Prosecutor's further and ongoing investigations and for the safety of witnesses, victims and members of their families. This conclusion does not, however, mean that the Chamber intends to make an advance ruling in general terms on the merits of the Applications. On the contrary, it intends to verify the persistence of the risk on a case-by-case basis.²⁰

a) Non-disclosure of an internal document from the Office of the Prosecutor

10. The Prosecutor requests the redaction under rule 81(1) of the Rules of certain passages contained in an investigator's note pertaining to Witness 176. He states that these are internal comments of the Office of the Prosecutor and, considers that, as such, they are covered by the aforementioned rule 81(1). The Chamber takes note of this request, but considers that it must emphasise that rule 81(1) of the Rules cannot constitute a valid legal basis for the submission of applications for redactions. The very terms of rule 81(1) of the Rules provide that documents covered by it are not subject to disclosure. It is therefore for the Prosecutor to make a clear distinction between information which must be disclosed pursuant to the Statute and reports, memoranda and other internal documents of his Office. Redacting documents containing both types of information is not conducive to an efficient and consistent implementation of rule 81 of the Rules. To prevent any confusion, the Chamber therefore suggests that, in future, the Prosecutor should set out in a separate

¹⁹ Office of the Prosecutor, *Requête urgente de l'Accusation aux fins de convocation d'une audience ex parte relative à la protection des témoins et des victimes*, 14 January 2009, ICC-01/04-01/07-831-Conf-Exp.

²⁰ *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-Conf-t-ENG, para. 9.

document all information which strictly falls under rule 81(1), so that only information which must be disclosed may be the subject of applications for redactions.

b) Protection of further or ongoing investigations

11. The Prosecutor requests authorisation to redact three types of information under rule 81(2) of the Rules: the locations where the interviews with Witnesses 176, 281, 312 and 323 took place; the Office of the Prosecutor's sources who appear on reading the interviews with Witness 312 and the investigator's note concerning Witness 176; and the names, initials and signatures of the interpreters present during the taking of the statements of Witnesses 155, 172, 280, 281 and 284. Furthermore, it should be recalled that, at the status conference held on 27 and 28 November 2008, the Prosecutor stated that he was coming to the end of his investigation and that disclosure of such information would prejudice it.²¹

i) Locations where the interviews took place

12. The Prosecutor requests the redaction of references to the [REDACTED] in the investigator's note concerning Witness 176 and the reference to "Beni" in the statement of Witness 281, as well as references to "Beni", including references to "Beni, North Kivu" and "Beni Huku", in the statements of Witnesses 312 and 323.²²

13. The Prosecutor states that [REDACTED] is in Ituri, where the situation remains dangerous, and that Beni is not far away. He submits that both towns are small, making the interview locations more easily identifiable. Consequently, he maintains, there is a risk to the safety of witnesses who go there, which might dissuade other witnesses from going to meet the members of the Office of the Prosecutor.²³

²¹ ICC-01/04-01/07-832-Conf-Exp-Anxs B, C, D, E, F and G.

²² ICC-01/04-01/07-809-Conf-Exp-Anx A, paras. 7 and 8.

²³ ICC-01/04-01/07-832-Conf-Exp-Anxs D, F, H and I.

14. The Prosecutor considers that only the redaction of the name of the interview locations would reduce this risk and that no other less restrictive protective measures are feasible, since those are the only locations where interviews can be held in complete safety in the east of the DRC.²⁴ He therefore wishes the names of those places to be redacted temporarily so that his activities are not hindered by persons demonstrating hostility towards the Court's action. He proposes disclosing the redacted information 30 days prior to the commencement of the trial.

15. The Chamber recognises that, given the instability prevailing in the region and the resulting danger, disclosing the interview locations could indeed hinder ongoing investigations. The Chamber also considers that the scope of the requested redactions is relatively limited, and that it is not detrimental to the Defence's comprehension or use of the document. Thus they relate only to particulars of the place where the interviews were held. Furthermore, the proposal is to reinstate the redacted passages 30 days prior to the opening of the trial. Moreover, it does not seem feasible, at this stage, to contemplate measures which are less restrictive than those proposed.

16. The Chamber considers that knowledge of the location where the interviews are held is not essential to the Defence, at least prior to the 30 days preceding the opening of the trial, and does not compromise the rights of the accused. Lastly, it notes that the Defence has not submitted any observations. Accordingly, it supports the redactions requested by the Prosecutor for the proposed period.

ii) Sources of the Office of the Prosecutor

17. The Prosecutor requests authorisation to redact, from the investigator's note concerning Witness 176, the reference to the identity of [REDACTED], as well as other personal information about him. According to the Prosecutor, redacting that name is necessary since he performs the role of an intermediary and facilitates contact

²⁴ ICC-01/04-01/07-812-Conf-Exp-Anx A, para. 6.

between witnesses and the Office of the Prosecutor. Revealing his identity might therefore jeopardise the safety of the Office of the Prosecutor's sources and, hence, ongoing investigations.

18. The Prosecutor also seeks authorisation to redact the name of the NGO [REDACTED] in the statement of Witness 312. Again, the redaction of that name appears necessary to him, since this NGO, which works in the region, is a source of the Office of the Prosecutor and helps it identify and locate [REDACTED]. The Prosecutor also states that staff members of that NGO, in particular, [REDACTED] and their family members, have already suffered intimidation for several years, and were even recently victims of attacks at their homes [REDACTED].²⁵

19. According to the Prosecutor, redactions to the statements of Witness 312 and the investigator's note concerning Witness 176 are necessary throughout the duration of the trial, since he hopes to use those intermediaries for the entire duration.²⁶ Furthermore, he states that the NGO in question is a source for other investigations which are still ongoing within his Office. Accordingly, he considers that the redactions requested are preventive measures which must be implemented for the protection of the intermediaries.²⁷

20. The Prosecutor nevertheless proposes that, in relation to the investigator's note concerning Witness 176, the information should be disclosed in the following manner: "[TRANSLATION] name of an intermediary of the Office of the Prosecutor and his or her telephone number".²⁸ In relation to the statement of Witness 312, he considers that no other less restrictive protective measures are feasible.²⁹

21. The Chamber takes note of the fact that real threats are hanging over the intermediaries whose names appear in the statement of Witness 312 and that it is

²⁵ ICC-01/04-01/07-812-Conf-Exp-AnxA, para. 7.

²⁶ ICC-01/04-01/07-832-Conf-Exp-AnxD.

²⁷ ICC-01/04-01/07-832-Conf-Exp-Anxs D and H.

²⁸ ICC-01/04-01/07-832-Conf-Exp-AnxD.

²⁹ ICC-01/04-01/07-832-Conf-Exp-AnxH.

necessary to redact from the document the names of persons and institutions acting as intermediaries between the Court and potential witnesses in order to protect them.

22. The Chamber notes that non-disclosure of the names of those intermediaries is a limited measure and that it does not seem feasible to use less restrictive measures.

23. The Chamber considers that such redactions do not prejudice the document's comprehensibility or the use by the Defence of the information it contains. Moreover, the Defence has not submitted any observations. The Chamber is therefore in favour of the redactions sought and of these being, to the extent possible, in the alternative form proposed by the Prosecutor. However, it considers that it cannot authorise these redactions through to the end of the trial, since, in its opinion, such a measure seems, in the circumstances and in the absence of any indication to the contrary, excessive in relation to the exercise of the rights of the Defence. It therefore authorises all redactions up to the thirtieth day preceding the date of the trial.

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

24. The Prosecutor requests, under rule 81(2) of the Rules, the redaction of the last names, first names, initials and signatures of the interpreters who were present at the taking of the statements of Witnesses 155,172, 280, 281 and 284.³⁰

25. The Prosecutor submits that disclosing the names of the interpreters and his Office's sources might prejudice ongoing investigations, since the interpreters who participate in the interviews and the taking of statements reside in the DRC with their families. He also refers to the limited number of Congolese interpreters currently available to participate in the investigations, as well as the level of

³⁰ ICC-01/04-01/07-789-Conf-Exp-AnxA. para. 4; ICC-01/04-01/07-809-Conf-Exp-AnxA, para. 12; ICC-01/04-01/07-832-Conf-Exp-AnxB, C, E, F and G.

qualifications of such staff, which makes them difficult to replace. He therefore considers that the redactions requested are preventive measures which are necessary to protect those interpreters.³¹

26. Finally, the Prosecutor states that the information related to the names of the interpreters may be disclosed 30 days prior to the commencement of the trial and that, in his view, there is no possibility of other less restrictive protective measures.³²

27. The Chamber takes note of the difficulty in finding suitably qualified persons to provide quality interpretation services *in situ*. It also considers that it is necessary to protect the interpreters who participate in the interviews and the taking of witness statements, given the small number of them 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.

28. The Chamber notes that the requested redactions do not make the document unreadable. They are restricted to the names, initials and signatures of those persons, and do not seem disproportionate. In the Chamber's view, the right to a fair and impartial trial is therefore not compromised by those redactions. The Defence, which has not filed any observations, will indeed be able to discover the identity of the interpreters 30 days prior to the trial, which safeguards the rights of the accused. Accordingly, the Chamber supports the proposed redactions.

c) Safety of witnesses and their family members

29. The Prosecutor requests, under rule 81(4) of the Rules, the Chamber's authorisation to redact the names of the family members of Witnesses 001, 155, 280, 281, 284, 312 and 323, as well as information enabling them to be identified, in order

³¹ ICC-01/04-01/07-809-Conf-Exp-AnxA, paras. 12 and 13; ICC-01/04-01/07-832, para. 9; ICC-01/04-01/07-832-Conf-Exp-AnxB, C, E, F and G.

³² ICC-01/04-01/07-809-Conf-Exp-AnxA, paras. 12 and 13.

to ensure their safety.³³ The said information includes, in particular, the number of children, brothers or sisters and the age of Witness 001; the name of the guardian, brother and sister of Witness 155; the names of the family members of Witness 280; the name of the father of Witness 281; the name of the wife, children and aunt of Witness 284; and the name of the father, mother and husband of Witness 312. The Prosecutor also requests that references to the whereabouts of the family members of Witnesses 001, 280, 281, 284 and 323 be redacted, in order to prevent them from being identified and therefore put in danger.³⁴

30. The Chamber concurs with the Prosecutor that disclosing the identity of the witnesses' family members as well as information allowing them to be identified or located might compromise their safety, in particular where they are present in Ituri. Disclosing such information might facilitate their identification, increase the risk of their being located and therefore further compromise their safety and wellbeing.

31. Moreover, the Chamber is of the opinion that the requested redactions constitute an appropriate measure to reduce that risk, and that no other less restrictive measure would produce the same result, since the family members of the witnesses in question are not participating in the Court's witness protection programme. The Prosecutor proposes other forms of redactions, which the Chamber considers to be appropriate. Hence he suggests: for Witness 001, "name of the witness's mother", "name of the witness's wife" and "name of the witness's child"; for Witness 155, "name of the witness's guardian"; for the family members of Witness 284, "first name of the witness's wife", "first name of the witness's son" and "first name of the witness's daughter"; for the family members of Witness 312, "name of the witness's father", "name of the witness's mother" and "name of the witness's husband". For the remaining redactions requested, substitution is

³³ ICC-01/04-01/07-798-Conf-Exp-AnxA, para. 3; ICC-01/04-01/07-809-Conf-Exp-AnxA, paras. 14-15; ICC-01/04-01/07-812-Conf-Exp-AnxA, para. 9; ICC-01/04-01/07-832-Conf-Exp-AnxB, C, E, F, G and H.

³⁴ ICC-01/04-01/07-812-Conf-Exp-AnxA, para. 9; ICC-01/04-01/07-832-Conf-Exp-AnxB, E, F, G and I.

unnecessary, since simply reading the relevant paragraph is sufficient to discern the nature of the information contained therein.

32. The Prosecutor further proposes that, in addition to references to their identity, those which enable the whereabouts of the witnesses' family members to be identified should also be redacted. He also suggests other forms of redaction. For Witness 280, the redacted information could be disclosed as "place of residence of the witness's parents". For the family members of Witness 281, he proposes "place of residence of the witness's brother and his family"; for Witness 284, "place of residence of the witness and his family" and "place of residence of the witness's nephews"; and for Witness 323, "place of residence of the witness's family members".

33. The Chamber takes note of these observations, which are founded on the decision rendered by the Single Judge on 3 December 2007³⁵ and make the point that, first, the Defence has had access to the witnesses' identity and, secondly, that the witnesses' family members are neither prosecution witnesses nor sources of the Office of the Prosecutor and have no knowledge of the crimes;³⁶ accordingly the Prosecutor requests that these redactions be made permanent.

34. The Chamber is of the view that the requested redactions in the form proposed by the Prosecutor do not compromise the rights of the accused, since the documents remain readable, comprehensible and usable by the Defence, which, moreover, has access to the nature of the redacted information and has not considered it necessary to submit observations. The Chamber therefore authorises those redactions in the new form proposed. However, it considers that it cannot authorise them through to the end of the trial since, in its opinion, such a measure seems, in the circumstances and in the absence of any indication to the contrary, excessive in relation to the

³⁵ Pre-Trial Chamber I, *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements*, 3 December 2007, ICC-01/04-01/07-84-Conf-Exp.

³⁶ ICC-01/04-01/07-809-Conf-Exp-AnxA, para. 15; ICC-01/04-01/07-832-Conf-Exp-AnxB, C, E, F, G, H and I.

exercise of the rights of the Defence. It therefore authorises all redactions up to the thirtieth day preceding the date of the trial.

FOR THESE REASONS, THE CHAMBER

1) **GRANTS** the Applications, while reserving the right to periodically review the redactions authorised, either *proprio motu* or on an application filed for that purpose; and

2) **AUTHORISES** all of the requested redactions until the thirtieth day preceding the date of the opening of the trial, unless the Prosecutor requests, not less than 45 days prior to that date, that they be maintained.

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 10 January 2011

At The Hague, The Netherlands