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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 CONGO
IN THE CASE OF
THE PROSECUTOR
v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public Document

Defence Observations on the Interpretation of Regulation 42 of the Regulations of the Court

Source: **Defence for Mr Germain Katanga**

Document 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
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain Katanga
Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims
Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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

Introduction

1. In response to the Trial Chamber's *Ordonnance relative à la soumission d'écritures sur l'interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)*,[1] the Defence for Germain Katanga (« Defence ») hereby files its observations on the interpretation that should be given to Regulation 42 of the Regulations of the Court.

Scope of Regulation 42

2. Regulation 42 (Application and variation of protective measures) provides:

> 1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
> 2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.
> 3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.
> 4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

3. Regulation 42 sets out the leading principle that protective measure orders issued in any proceedings before the Court equally apply in full force and effect to any other proceedings before the Court, and shall continue to do so after the proceedings where the order was adopted have been concluded. The terms of the order can be varied only upon authorisation to do so by the Chamber which issued the original order or, if this Chamber is no longer seized of the proceedings in which the protective measures were ordered, the Chamber in the proceedings where such variation is sought.

4. The principal objective of this Regulation is to avoid that parties in proceedings before the Court who are in possession of material which is subject to a protective measure ordered by another Chamber, but not yet to an order of their own Chamber, may not be bound by any protective measure order and disclose the confidential information to the public. Such would render the imposition of protective measures meaningless.

[1] ICC-01/04-01/07-1205, 12 June 2009.

5. This Regulation also reinforces the principle that it is the Chamber, not the parties, which decides upon protective measures. Solely a Chamber can vary or lift the measures concerned. The Chamber who initially ordered the protective measures did so after a careful evaluation of all interests involved. The balance between the interests of a person seeking protection and the public at large ordinarily remains the same irrespective of the proceedings, but may change over time. In such a situation, the parties may apply to a Chamber for variation of the order to adjust it to the changed circumstances.

6. The balance between the interests of the person seeking protection and the rights of the Defence, however, varies from case to case. The Defence, therefore, submits that Regulation 42 does not extend to protective measures withholding disclosure to the Defence. Whether it is appropriate to order non-disclosure of information to the Defence in the circumstances is a determination only the Chamber in that particular case can make.

7. In accordance with Regulation 42(2), the Prosecution shall inform the Defence to which protected information is being disclosed of the nature of the applicable protective measures. The Defence will have to abide by these measures unless it applies to the Chamber that ordered the measures for variation. If such measures include redactions from the Defence, they can only apply to the Defence in the case where the measures were ordered. Unlike the Prosecution, the Defence is not one organ but consists of independent teams for each accused with their own strategy and needs. A Chamber does not have jurisdiction to issue orders restricting the right to disclosure of Defence teams before other Chambers. The obligation rests on the Prosecution to seek additional protective measures in relation to information the Defence is entitled to regardless whether such information is protected from the Defence in other proceedings. Such additional protective measures will only be authorised where necessary and justified.

8. Accordingly, when a pre-existing order grants protective measures in respect of victims and, or witnesses in the present proceedings, all parties and participants involved in the present proceedings and having access to the protected information must abide by the terms of the order until and unless the order is varied or lifted by the initial Chamber. Whilst a pre-existing order imposes obligations on the parties and

participants in the second proceedings where the protected information is used, it does not exclude them from receiving the material.

Relationship with fundamental disclosure obligations

9. It is submitted that Regulation 42 does not justify non-disclosure to the Defence in subsequent proceedings of material it is entitled to receive in accordance with the statutory rights of the accused to disclosure. Regulation 42 must be read in light of the Prosecution's statutory disclosure obligations vis-à-vis the Defence. As the Appeals Chamber has held, full disclosure of incriminating and exonerating material to the Defence is the rule and non-disclosure the exception.[2] The exceptional measure of non-disclosure can only be imposed after a case-to-case evaluation and can, therefore, not be pre-determined by a Chamber in other proceedings which did not assess the impact on the Defence, other than in their own proceedings.

10. As the Appeals Chamber clearly stated, any request for non-disclosure to the Defence in order to protect victims and or witnesses must be considered on the basis of the individual circumstances of each application, and has rejected a category approach. Indeed, it held that "a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber."[3]

11. The Appeals Chamber concluded that, "while the non-disclosure of information for the protection of persons at risk is permissible in principle pursuant to rule 81(4) of the Rules, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake."[4]

12. The criteria that need to be considered in assessing whether a request for redactions should be authorised are "a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including

[2] Public Document 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", ICC-01/04-01/07-475, 13 May 2008, paras. 61 & 70.
[3] Ibid, para. 59. Also see para. 62, citing the Defence Response to the Document in Support of the Appeal, paras 12 and 14, referring to the case of Prosecutor v Bagosora et al, Decision On Disclosure Of Identity Of Prosecution Informant, 24 May, 2006, para 8.
[4] Ibid, para. 66; also para. 69.

whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[5]

13. Whilst the risk assessment may be the same in different trials, other considerations may vary. If, in principle, a Chamber considers that disclosure of a victim's or witness's identity to the Defence involves a risk for his or her safety, needs protection, the relevance of the information in question to the Defence must be carefully assessed. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, "that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake."[6]

14. Following this approach from the Appeals Chamber, which has also been adopted by the present Chamber,[7] can only lead to the conclusion that the Prosecution cannot withhold information from the Defence on the ground that such would be in accordance with a protective measures order issued by another Chamber in other circumstances. Indeed, a Chamber can only authorise protective measures after carefully balancing the need for the protective measure on the one hand, and the need to protect the rights of the accused on the other hand.[8]

15. The existence of Regulation 42 does not alter these principles, even where the victim or witness does not consent to disclosure of his or her identity to the Defence in the second proceedings. The views of the victim or witness concerned may be considered in determining whether protective measures should be adopted together with all other interests, but cannot override the rights of the accused.[9] Accordingly, Regulation 42 merely applies to the public, but not to the parties and participants in other proceedings where the information is being used, provided they are entitled to disclosure of the material concerned in accordance with the principles of disclosure set

[5] Ibid, para. 67.
[6] Ibid, para. 72.
[7] See, inter alia, ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 7, 9.
[8] Ibid.
[9] As previously argued in: ICC-01/04-01/07-1016, 1 April 2009, para. 10.

out in the Statute and the Rules. A Regulation can, in any event, not set aside principles set out in the Statute and or the Rules.

Jurisprudence of *ad hoc* tribunals

16. This interpretation of Regulation 42 accords with the interpretation given to similar provisions at the *ad hoc* international criminal tribunals, notably Rules 75(F) and (G) of the ICTY, ICTR and SCSL Rules of Procedure and Evidence.[10] In those tribunals, the Prosecution does not need authorisation from the Trial Chamber which issued the protective order in the initial proceedings to fulfil its disclosure obligations in other proceedings. Accordingly, if confidential information falls under the scope of the Prosecution's disclosure obligations vis-à-vis the Defence in second proceedings, no such authorisation is required and the information must be disclosed, provided that the Defence in the second proceedings are being made aware of the protective order in place and are bound by it unless and until they are rescinded, varied, or augmented pursuant to Rules 75(F), (G), or (H).[11]

17. The reason for not needing authorisation from the Trial Chamber in other proceedings for the Prosecution to fulfill its disclosure obligations towards the Defence in second proceedings is that it avoids situations where the Prosecution relies on a protective order in another case as an excuse for disregarding its disclosure obligations.[12]

18. It has further been recognised that protective measures are unique to the case for which they have been issued and cannot automatically be transplanted into another

[10] Rules 75(F) and (G) of the ICTY and ICTR Rules provide:
(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:
(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but
(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:
(i) to any Chamber, however constituted, remaining seised of the first proceedings; or
(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.
Rules 75(F) and (G) of the SCSL Rules are almost identical, the difference being that an application to vary a protection order must in all circumstances be filed with the Chamber seized of the second proceedings (Rule 75 (G) SCSL Rules).
[11] *Prosecutor v Bizimungu et al*, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence, 2 February, 2005.
[12] *Prosecutor v Karemera et al*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July, 2005, para. 18.

case without modification, taking account the particular circumstances of that other case.[13] Similarly to the ICC, the Chambers of the ad hoc tribunals have emphasised the importance of carefully balancing the rights of the accused and the protection of victims and witnesses for each individual case. See, for instance, the submission of the ICTY Trial Chamber in *Milosevic*:[14]

> "The Prosecution asserts that the duty to provide for the protection and privacy of the witnesses is an affirmative one. The measures which are appropriate should be determined after balancing the right of the accused to a fair and public trial and the protection of victims and witnesses. These propositions are uncontroversial. What is clear from the Statute and Rules of the Tribunal is that the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one."

19. That the Prosecution must meet its disclosure obligation irrespective of pre-existing protection orders is also apparent from the reasoning of the ICTY Trial Chamber in *Stanisic and Simatovic*, holding:[15]

> « Pursuant to Article 21 of the Statute, an accused has the right to examine, or have examined, the witnesses against him. In accordance with Article 22 of the Statute, the Rules of the Tribunal address the protection of witnesses. Rule 75 of the Rules governs measures for the protection of victims and witnesses. Any protective measures granted pursuant to Rule 75 are to be consistent with the rights of the Accused. It is also noted that this Rule concerns measures that ensure the protection of the identity of the witness from the public or the media. It does not include measures to shield the identity of the witness from an accused in whose case the witness is giving evidence. This is regulated in Rule 69, which provides that the identity of a witness can be withheld from the Defence of an accused until such person is brought under the protection of the Tribunal. Rule 69(C) provides that the identity of witnesses shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence, subject to Rule 75. It follows that an accused will know the identity of the witnesses brought against him. »

20. Accordingly, Rule 75 cannot form an obstacle to the accused fully exercising his rights under the Statute. This is no different in a situation where the victim or witness concerned objects to his or her identity being disclosed to the Defence in other proceedings. His or her consent or lack thereof is not determinative of whether

[13] *Prosecutor v. Blaskic*, Décision relative à la requête de l'accusation aux fins d'éclaircissements concernant la décision de la Chambre d'appel datée du 4 décembre 2002 relative à la requête de Pasko Ljubicic aux fins d'avoir accès à des pièces, comptes rendus d'audience et pièces à conviction confidentiels de l'affaire Blaskic, 8 March 2004, para. 34.
[14] *Prosecutor v. Milosevic*, Decision on prosecution motion for provisional protective measures pursuant to rule 69, 19 February 2002, para 23
[15] *Prosecutor v. Stanisic and Simatovic*, Decision Reconsidering Conditions for the Defence Access to Confidential Testimony and Documents from the Slobodan Milosevic Case, 4 February 2008, para. 6.

material should be disclosed to the Defence.[16] On the contrary, the rights of the accused remain first consideration. In this regard, the ICTY Trial Chamber in *Brdjanin and Talic* held:[17]

> "Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia* , interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration . It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases."

Conclusion

21. In accordance with the above observations, the Defence submits that the Prosecution cannot rely on a protective measures order from another Trial Chamber to justify non-disclosure to the Defence in the present case. Regulation 42 applies to protective orders only to the extent that they protect the victims and or witnesses involved from the public at large. It is respectfully submitted that Regulation 42 does not cover protective measures to the extent that they include non-disclosure to the Defence of information it is entitled to receive. Any other interpretation would violate the principles set out by the ICC Appeals Chamber and would be contrary to the interpretation of similar provisions in the *ad hoc* international criminal tribunals.

Respectfully submitted,

David HOOPER

Dated this 19 June 2009

At The Hague

[16] *Prosecutor v. Stanisic,* Decision Reconsidering Conditions for the Defence Access to Confidential Testimony and Documents from the Slobodan Milosevic Case, 4 February 2008, para 9; *Prosecutor v Simba*, Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal, 9 April, 2008, para. 8.

[17] *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protected Measures, 3 July 2000, para. 30 ; also see : *Prosecutor v. Milošević*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002, para. 8.