Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/07**
Date: **19 December 2008**

TRIAL CHAMBER II

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Redacted Version

Order Directing the Prosecutor to Provide Additional Details Pertaining to His Application for Redactions to the Second Statement of Witness 280 (Regulation 28 of the *Regulations of the Court*)

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

The Office of the Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga
Mr David Hooper
Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kagengi 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 Nsokoloni

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
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Pursuant to articles 54, 67 and 68 of the *Rome Statute* ("the Statute"), rule 81(2) of the *Rules of Procedure and Evidence* ("the Rules") and regulation 28 of the *Regulations of the Court*, Trial Chamber II of the International Criminal Court ("the Chamber" and "the Court", respectively) orders:

1. On 10 December 2008, the Prosecutor submitted an application for redactions to the second statement of Prosecution witness 280 ("the Application")[1] to the Chamber; he attached three annexes thereto, the first of which sets out the grounds in support thereof,[2] the second contains the statement of witness 280 showing the proposed redactions[3] and the third is in the form of a table outlining the underlying legal grounds therefor.[4]

2. Before ruling on the merits of the Application, the Chamber wishes to obtain additional details about one of the redactions requested under rule 81(2) of the Rules, namely the redaction proposed [REDACTED] of the above-mentioned statement.

3. The Chamber recalls that decisions authorising non-disclosure to the Defence of part of a statement from a Prosecution witness must be supported by sufficient reasoning in accordance with the requirements repeatedly stated by the Appeals Chamber.[5] Not only must it refer to the legal arguments advanced in support of the requested redactions, but also to the underlying factual basis therefor.[6] Accordingly, the onus is on the Prosecutor to provide sufficient legal and factual justification for all of the requested redactions.

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[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.
[2] ICC-01/04-01/07-789-Conf-Exp-AnxA.
[3] ICC-01/04-01/07-789-Conf-Exp-AnxB.
[4] ICC-01/04-01/07-789-Conf-Exp-AnxC.
[5] 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, paras. 20 to 22.
[6] Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"*, 14 December 2006, ICC-01/04-01/06-774, paras. 31 to 33.

4. The Chamber considers the justifications submitted in annexes A and C to be insufficient to enable it to make an informed assessment of the merits of the redactions requested [REDACTED] of the witness statement and presented as only pertaining to the ongoing investigation "[TRANSLATION] in this case".[7]

5. At the status conference of 27 November 2008, the Prosecutor announced that he would do his utmost for all incriminating evidence to be disclosed by the end of January 2009.[8] [REDACTED] The Chamber wishes to be informed how immediate disclosure to the Defence at this advanced stage in the proceedings constitutes an objectively justifiable risk that may be prejudicial to the ongoing investigation.[9]

6. The requirement for such information is essential in view of the Chamber's obligation to balance the conflicting interests of the Prosecutor and the Defence at this very particular stage in the proceedings. In this respect, the Chamber recalls that the assessment of the interests being weighed cannot be identical at the pre-trial and trial stages of the proceedings.

7. On the one hand, as emphasised by the Appeals Chamber, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if that is necessary to establish the truth.[10] The possibility of amending the charges after their confirmation, albeit with leave from the Pre-Trial Chamber, must necessarily mean that the investigation could continue after their confirmation.[11] The Chamber must therefore ensure that disclosure to the Defence is not prejudicial to the proper conduct of any continuation to the investigation. On the other hand, as the Appeals Chamber has also stressed, in principle, the Defence is entitled to contact persons

[7] ICC-01/04-01/07-789-Conf-Exp-AnxA, para. 5.
[8] ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, lines 24 and 25.
[9] Appeals Chamber, *Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Autorisation to Redact Witness Statements'*, 13 May 2008, ICC-01/04-01/07-476, para 60.
[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. 52.
[11] ICC-01/04-01/06-568, para. 53.

whom the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses in that they may have information which is potentially relevant to the Defence.[12]

8. Accordingly, the Chamber wishes to obtain specific answers to the following questions:

a) [REDACTED]

b) [REDACTED]

c) [REDACTED]

d) [REDACTED]

[12] ICC-01/04-01/07-476, para. 62.

FOR THESE REASONS,

The Chamber directs the Prosecutor to file the additional details pertaining to his Application by no later than 4 p.m. on 5 January 2009.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 19 December 2008

At The Hague, The Netherlands