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No.: ICC-01/04-01/07

Date: 18 August 2009

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

Public redacted version of the *Decision pursuant to the additional information provided by the Prosecutor on the requests to redact information concerning the statement of Witness 243 as well as material relating to Witness 12 of 9 April 2009* (ICC-01/04-01/07-1051-Conf-Exp)

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 the Defence of Germain
 Katanga**

Mr David Hooper
 Mr Andreas O'Shea

**Counsel for the Defence of Mathieu
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Mr Jean-Pierre Kilenda Kakengi Basila
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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 Fidel Nsita Luvengika
 Mr Vincent Lurquin
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Legal Representatives of 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 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 to rules 77 and 81 of the *Rules of Procedure and Evidence* (“the Rules”), decides as follows.

I. Procedural History

1. This decision is issued pursuant to the Prosecutor’s brief (“the Brief”) providing, at the Chamber’s request,¹ additional clarification on a request for redactions, on the one hand, in respect of information contained in various pages of the transcript of a telephone interview with Witness 243 and, on the other, in regard to an employee of the Congolese Red Cross.²

2. The Prosecutor had initially planned, pursuant to rule 81(1) of the Rules,³ not to disclose to the Defence over 18 pages of the transcript of the conversation he had had with Witness 243. On 26 February 2009, the Chamber instructed him to provide additional information regarding his applications ICC-01/04-01/07-860 and ICC-01/04-01/07-862.⁴ The Prosecutor responded to this request for clarification on 3 March 2009⁵ and indicated that he intended to recharacterise his application by now basing it on rule 81(4) of the Rules, without, however, reviewing the proposed redactions. The Chamber accordingly instructed him to review the redactions sought,

¹ *Décision concernant trois requêtes du Procureur aux fins de maintien des suppressions ou de rétablissement de passages supprimés* (ICC-01/04-01/07-859, ICC-01/04-01/07-860 et ICC-01/04-01/07-862), 25 March 2009, ICC-01/04-01/07-987-Conf-Exp; public version filed on 7 April 2009, ICC-01/04-01/07-1034.

² Office of the Prosecutor, “*Mémoire de l’Accusation en réponse à la demande de la Chambre formulée dans la Décision concernant trois requêtes du Procureur aux fins de maintien des suppressions ou de rétablissement de passages supprimés en date du 25 mars 2009*”, 27 March 2009, ICC-01/04-01/07-1001-Conf-Exp, with confidential *ex parte* annex only available to the Prosecutor.

³ ICC-01/04-01/07-860-Conf-Exp-Anxs Q-1 and Q-2.

⁴ Trial Chamber II, *Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant ses requêtes ICC-01/04-01/07-860 et ICC-01/04-01/07-862 (norme 28 du Règlement de la Cour)*, 26 February 2009, ICC-01/04-01/07-930-Conf-Exp.

⁵ Office of the Prosecutor, “*Réponse de l’Accusation relative à l’Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant ses requêtes ICC-01/04-01/07-860 et ICC-01/04-01/07-862*”, 3 March 2009, ICC-01/04-01/07-939-Conf-Exp.

restricting them to the passages where they were strictly necessary, after consulting the Victims and Witnesses Unit.⁶

3. In respect of the employee of the Congolese Red Cross, the Chamber requested the Prosecutor to provide additional clarification in regard, on the one hand, to the exact basis for his request, which initially referred to rule 73(4) of the Rules, and, on the other, to the reasons given for the proposed redactions.⁷

II. The Chamber's Analysis

4. The Chamber reiterates⁸ 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;⁹ 2) the existence of a link between the source of the risk and the accused persons;¹⁰ 3) the infeasibility or insufficiency of less restrictive protective measures;¹¹ 4) an assessment of whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;¹² and 5) the obligation periodically to review the decision authorizing the redactions should circumstances change.¹³

⁶ ICC-01/04-01/07-987-Conf-Exp, paras. 51 and 53.

⁷ ICC-01/04-01/07-987-Conf-Exp and ICC-01/04-01/07-1034 para. 51.

⁸ 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, para. 4; ICC-01/04-01/07-987-Conf-Exp, para. 4

⁹ 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.

¹⁰ *Ibid.*, para. 71.

¹¹ 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.

¹² ICC-01/04-01/06-773, para. 34.

¹³ ICC-01/04-01/07-475, para. 73.

5. As the Chamber has had occasion to stress on several occasions,¹⁴ 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 document must be sufficiently justified in light, *inter alia*, of the arguments submitted by the Prosecutor in support of his application. The Chamber is under an obligation to balance the various interests at stake, as set out in rule 81 of the Rules, whilst ensuring that the proceedings include safeguards which will protect the interests of the accused, so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms. The Chamber has reviewed in detail each request for redactions in light of the criteria set forth in the previous paragraph.

a) Information about the Congolese Red Cross employee

6. Pursuant to rule 81(4) of the Rules, the Prosecutor requests the Chamber's leave not to disclose the face of an employee of the Congolese Red Cross, which appears on two photographs taken by Witness W-12.¹⁵

7. According to the Prosecutor, the Red Cross employee voluntarily posed for these two pictures. He emphasises that the individual in question belongs to an organisation for which neutrality is essential and that he must be protected as a precautionary measure.¹⁶ [REDACTED].¹⁷

¹⁴ 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, para. 5.

¹⁵ Office of the Prosecutor, *Requête de l'Accusation aux fins de maintien ou de suppression des expurgations dans 47 documents*, 30 January 2009, ICC-01/04-01/07-860, confidential, *ex parte* annexes C-1 and C-2, only available to the Prosecutor.

¹⁶ ICC-01/04-01/07-1001-Conf-Exp, para. 5.

¹⁷ ICC-01/04-01/07-902-Conf-Exp-Anxs C1 and C2.

8. The Chamber recalls that rule 81(4) of the Rules also covers persons at risk on account of the activities of the Court.¹⁸ Furthermore, it considers that the redactions sought do not impair overall comprehension of the documents, and therefore considers the requested redactions to be warranted. They will be authorised until the thirtieth day prior to the commencement of the trial.

b) Information concerning Witness 243

9. The Prosecutor requests authorisation, pursuant to rules 81(2) and 81(4) of the Rules, to redact certain material from the telephone conversation between his Office and Witness 243. This conversation was reproduced in a transcript which “[TRANSLATION] pertains to security issues, contains many identifying elements, and reveals [REDACTED]”.¹⁹

10. According to the Prosecutor, the purpose of disclosing this transcript to the Defence was to prove that Witness 243 had consented to the disclosure of a summary of his interview. Furthermore, he considers that the information which was initially redacted was neither incriminating nor exculpatory.²⁰ Nevertheless, in consultation with the Victims and Witnesses Unit, he has reviewed the transcript of this telephone conversation in order to limit redactions to those passages where they are absolutely necessary.²¹ The document containing the revised request for redactions is annexed to his Brief.²²

11. Having taken note of the redactions sought, the Chamber considers that they do not impair overall understanding of the transcript. The Defence will in fact have access to most of the information it contains. However, the Chamber considers that it cannot authorise these redactions through to the end of the trial, since, in the

¹⁸ 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. 43, 55 and 56.

¹⁹ ICC-01/04-01/07-1001-Conf-Exp, para. 7.

²⁰ *Ibid.*, para. 8.

²¹ *Ibid.*, para. 9.

²² ICC-01/04-01/07-1001-Conf-Exp-AnxA.

Chamber's view, such a measure does not take sufficient account of the rights of the Defence. At this stage, it is difficult to make a definitive assessment of the usefulness and relevance of such information to the Defence. In effect, it is up to the Defence to conduct such an assessment, since it is for the Defence, and for the Defence alone, to decide on the strategy that it intends to adopt.

12. In this instance, the Defence has so far been unable fully to assess the value of this information, since the applications for redactions describe it only in general terms. It will have an opportunity to analyse and assess the usefulness 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. In that event, the Chamber will assess the practical impact of the requested redactions in light of the Defence's arguments. The Prosecutor will also be able to request, not later than 45 days prior to the commencement of the trial, that the redactions be maintained.

13. Having thus balanced the interests at stake, the Chamber finds that the requested redactions are warranted, until the thirtieth day prior to the commencement of the trial.

FOR THESE REASONS, THE CHAMBER

1) GRANTS the Prosecutor's Application, while reserving the right periodically to review the authorised redactions, either *proprio motu* or following an application submitted for that purpose; and

2) AUTHORISES all of the requested redactions until the thirtieth day preceding the date of commencement of the trial, unless the Prosecutor requests, no later than 45 days prior to the commencement of the trial, 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 18 August 2009

At The Hague, The Netherlands