Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/07**
Date: **1 June 2010**

IN THE TRIAL CHAMBER

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public Document

Defence Request with Regard to Private Session Hearings

Source: **Defence for Mr Germain Katanga**

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

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Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Mr. Katanga ("Defence"), being concerned at the extent to which Mr. Katanga's trial has been conducted out of the public view through the use of private sessions, hereby requests the Chamber to review the position and to mitigate the effect of such a practice. The extent of private sessions has meant that interested third parties seeking to follow the proceedings are confronted with a disrupted and disjointed record. The Defence is aware that its concerns of the extent and effect of private hearings is shared by both the Chamber and by other parties.

2. Attempting to monitor the proceedings remotely and in the public gallery is significantly hampered by the frequent movement into or out of private sessions. For example, a witness may have commenced his testimony in public session, but the party questioning him may thereafter indicate that it needs to go into private session to ask additional questions. For individuals following remotely via the ICC's web-link, the message appearing on the screen indicates "closed or private session". However, on some occasions, the message has simply been "no broadcast".

3. Those following remotely and in the public gallery then have to wait for the public session to resume. Quite often though, the testimony of the witness is completed in private session, and the trial is adjourned without any public indication to this effect. It is disconcerting that at least one element of the public, notably the International Bar Association (IBA), concludes in light of these difficulties, that "to many observers, aspects of the [case] appear to be shrouded in secrecy."[1] As set forth below, recourse to private session where not strictly necessary, undermines the fundamental right of the Defence to a public hearing and thus to a fair trial.

4. Whilst private session is necessary where warranted, the Chamber similarly shared the Defence concerns about the sometimes "superfluous" recourse to private session.[2] Indeed, the Chamber has ruled on several occasions that matters that were dealt with in private session at the behest of one of the parties should instead have been heard in

[1] International Bar Association, *The ICC Trials : An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010*, May 2010, pp 17, 39.
[2] ICC-01/04-01/07-T-149-CONF-ENG ET, 28 May 2010, pp 53-54 ("PRESIDING JUDGE COTTE: Just one word, Mr. Hooper. What you have just said ties in with the concerns of the Chamber on our part, and informally, we are carrying out some reflection to try to provide solutions to that recourse to private session, which is sometimes inevitable and sometimes superfluous. So all your proposal are very much welcome.")

open session, and ordered that the relevant transcripts of the public portion of the hearing be revised so as to include the proceedings that took place in private session.[3]

5. The IBA has expressed its concerns in a recent report[4] that provides some insight into public perceptions. The IBA noted with regard to these incidents, that it was clear from the reclassified transcript that there had in fact been no need to resort to private session. This observation accords with the Defence reaction to a number of private session requests by the Prosecutor that the Defence felt went beyond what was strictly necessary for the protection of victims and witnesses.

6. The Defence recognises the undoubted difficulties met in attempting to balance the public nature of the trial with an acceptable level of security for protected witnesses. Some necessary questions that clearly lead to identifying evidence can be asked in a relatively short private session dedicated to that purpose. In practice, however, a witness's response may be difficult to judge, and the risk that the witness may volunteer information that is identifying creates a danger best met by the safety of a private session. It is inevitable where any doubt exists as to the nature of possible responses or questions put, that a Chamber will prefer the more cautious private session so as not to risk the danger of identity being revealed.

7. In some instances, the nature of the questioning requires extensive recourse to private sessions. It may be that, for the purposes of effective questioning, it is not always possible to draw a clear distinction between questions to be asked in private or in open session. The process of entering and exiting private session is sufficiently cumbersome to militate against frequent changes of status of the hearing. The result is that it becomes tempting for the parties and participants to remain in private session rather than risk reverting to public session, only to have to return quickly to private session again. The Defence accepts that private sessions are a necessary part of the process and that no easy answer is available to limit them.

[3] *See*, e.g. ICC-01/04-01/07-T-140-CONF-ENG CT2 12-05-2010 1-59 EA T, 12 May 2010, pp 39-42; ICC-01/04-01/07-T-144-CONF-ENG ET, 20 May 2010, pp 25-29 (Pursuant to the instructions from the Chamber, these portions of the transcripts T-140 and T-144 were reclassified from Private Session to Open Session); International Bar Association, *The ICC Trials : An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010*, May 2010, p. 17.

[4] International Bar Association, *The ICC Trials : An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010*, May 2010, p. 17.

8. Aside from exercising care and restraint when requesting a private session, the Chamber recently expressed a further possible way to reduce the need to be in private session:

> PRESIDING JUDGE COTTE: Perhaps also when a witness appears before the Court and we have probably discussed the geographical context and family context, then the parties may agree on a table to identify the themes that can be discussed in open or closed session, and even identify the terms that can be used. For example, when reference was made to a camp, everyone should know what camp is being referred to.[5]

Names of family and the like could also be listed in this way. The Defence notes that a similar procedure has been attempted in the course of the proceedings. However, the danger inherent when discussing such matters remains.

9. The Defence submits, for reasons set out below, that a practicable way to mitigate the problem is for private session transcripts to be reviewed so as to permit a fuller, redacted version to be made public. This would meet the requirement of ensuring, where strictly necessary, the protection of victims and witnesses and of confidential information, while at the same time respecting the obligation of the Court to provide a fair and public trial for Mr. Katanga.

10. A less effective way of mitigating the problem is for a summary of the evidence heard in private session to be provided when the court returns to public session – this can be provided by counsel or by the Chamber itself. Such a summary has the advantage of not completely excluding the public from the evidence, but clearly falls short of the fuller and more accurate review that redaction of the private session testimony would provide.

[5] ICC-01/04-01/07-T-149-CONF-ENG ET, 28 May 2010, pp 53-54.

The Right of the Defence to Open Proceedings

11. Article 67(1) of the Statute sets out the right of a defendant to a public hearing. Whilst this right is subordinated to other provisions of the Statute, the exceptions to this general right are limited.

12. Article 64(7)) should be construed in accordance with the principles of necessity and proportionality,[6] and in a manner that is consistent with internationally recognized human rights law (as per article 21(3)). Moreover, the fact that the right to a public hearing is set out in article 67 – The Rights of the Accused – rather than in general provisions concerning the trial proceedings, underscores the fact that the right to a public hearing is a fundamental right of the defence. The utmost importance of a public hearing has been reiterated on a number of occasions by this Chamber and by the Chamber in *Lubanga*:

> PRESIDING JUDGE COTTE: We must all be very careful as regards the fact that this is a public hearing. We realise, of course, that the necessity to protect the security of our witnesses requires that we go into private session, but we have to be very careful so that we not discover with disappointment after the fact that there were more closed sessions than open sessions. And we were discussing earlier this morning the role of the International Criminal Court. One of the essential characteristics is that the hearings are to be public. I know it's a very difficult exercise. Perhaps this is just a vain wish, but I think we have to continually remember that it's extremely important to have [an open] hearing inasmuch as possible, and I thank you for keeping that in mind.[7]

13. The European Court of Human Rights has held in this regard, that the public character of proceedings "protects litigants against the administration of justice in secret with no

[6] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R 31, July 1996, para. 8; *Prosecutor v. Milosević*, Case No. IT-02-54, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), 20 July 2002, para 5.

[7] ICC-01/04-01/07-T-147-CONF-ENG ET, 26 May 2010, p. 42. *See* also ICC-01/04-01/07-T-129-CONF-ENG ET, 19 April 2010, p. 9 (In asking the parties for their observations on the protective measures granted for DRC-OTP-287, the Chamber pointed out to the defence that "just like you, we attach great importance to the fact that the proceedings should be carried out in public to the extent possible [...]");ICC-01/04-01/07-T-144-CONF-ENG ET, 20 May 2010, pp 4-5 (The Bench reiterated that it "[...] gives particular importance to the fact that the proceedings may have the widest possible publicity [...]"). In *Lubanga*, *see* ICC-01/04-01/06-T-104-ENG, 16 January 2009, pp 3-4 ("The Chamber recognises the importance of truly open justice as enshrined in the Statute. By Article 67(1), the accused is 'entitled to a public hearing, having regard to the provisions of (the) Statute.' The importance of this principle has been emphasised by the European Court of Human Rights in its repeated observations that the public character of proceedings is an essential element of a fair hearing. (See B. And P. v the United Kingdom, application numbers 36337/97 and 35974, judgement delivered on the 24th of April, 2001). Any derogation from that principle must be for good reason, and the proceedings must remain fair.")

public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial."[8]

14. A superfluous or excessive use of private session is therefore prejudicial to the right to a fair trial. If, for example, the identity of the witness is protected, the Defence is forced to raise any issues concerning the credibility of the witness in private session[9], as has often been the case in the current proceedings. Inevitably, this affects the public perception of the defendant's responsibility.

15. Furthermore, if a witness provides incorrect testimony in public session, there is a greater possibility that persons involved in the event in question will be in a position to identify the false testimony and to offer to testify as a defence witness (e.g. by testifying that the witness was not present on the date in question, did not participate in the attack, or was not a member of the particular militia). This possibility will be greatly affected, however, if the public is unable to access key information pertaining to the testimony of the witness.[10]

16. Former Vice-President and ICTY Appeals Judge Florence Mumba has underscored the point that while there may be a need for limited exception to the right of a public trial, public hearings "serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on 'framed' trials, and giving the public a chance to suggest changes to the law or justice system."[11]

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[8] ECHR , Werner v. Austria, Judgement of November 24, 1997, para. 45. *See* also UN Human Rights Committee (HRC), *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, §6: "6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general [...]").

[9] International Bar Association, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, June 2009, p. 28.

[10] International Bar Association, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, June 2009, p. 28.

[11] Florence Mumba, Ensuring a Fair Trial Whilst Protecting Victims and Witnesses--Balancing of Interests, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Richard May et al. eds., 2001), pp. 359, 365. *See* also Al Rawi [2010] EWCA Civ 482, para. 21 (The common law has long accepted that there are exceptions to the open justice principle. In Scott [1913] AC 417, Viscount Haldane LC made it clear while affirming and applying the open justice principle, that a court could sit in private where "justice could not be done at all if it had to be done in public", but went on immediately to say, that the court considering

17. In this way, publicity is seen as one guarantee of the fairness of trial. Moreover, "it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered".[12] Publicity also contributes to the reconciliation of the very communities affected by the proceedings.

18. The need to limit the number of private session hearings to those that are strictly necessary for the protection of witnesses pursuant to article 68, or of confidential information, as per article 72, is therefore an important one. Mr. Katanga's right to a fair trial, including open justice, as well as the maintenance of public scrutiny in relation to the proceedings, must not be unduly affected by the use of private sessions that are not otherwise strictly required.

19. The Defence proposes that the Chamber order the Registry to put in place a facility for *ex post facto* review of private session transcripts so as to allow for the fullest possible record of the hearing being made public, while preserving the necessary interests of the protected witness. The review would redact those parts of the testimony that may reasonably identify the witness. The Defence submits that the party best placed to redact the testimony, subject to the overriding view of the Chamber, is the party that calls the witness.

20. Alternatively, the responsibility for such redactions could be placed in the hands of the Victims and Witnesses Unit (VWU). In any event, the redacting process should be done promptly and the transcripts capable of being made public in as short a time as is reasonably possible.[13] The Chamber remains the final arbiter in the event that the parties may disagree as to the necessity for redactions.

Relief Sought

21. The Defence respectfully requests that the Chamber further considers the general problem of the preservation of the public nature of the trial and;

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the issue "must treat it as one of principle, and as turning, not on convenience, but on necessity" – [1913] AC 417, 437-438. (*see* too per Lord Diplock in Leveller [1979] AC 440, 450B-F))".

[12] *Prosecutor v. Delalić*, Case No. IT-96-21, Decision on the Motions by the Prosecution or Protective Measures for the Prosecution Witnesses Pseudonymed "B""Through To "M", 28 April 1997, paras 33- 34.

[13] Of note is the time that elapses between the hearing and the date on which the transcript becomes publicly available. The last transcript publicly available on the ICC website is that dated 16 February 2010.

(i) Requests the Registrar to put in place, in consultation with the Chamber and the parties, an *ex post facto* review of private session transcripts.

(ii) Permits a party who has questioned a witness in private session to summarise such evidence appropriately when returning to public session.

Respectfully submitted,

David HOOPER Q. C.

Dated this 1st day of June 2010
At The Hague