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No.: **ICC-01/04-01/07**
Date: **23 January 2009**

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 Document

**Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and
Exculpatory Evidence and the Date of a Status Conference (rule 132 of the *Rules of
Procedure and Evidence*)**

Order 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 Éric Macdonald, Senior Trial Lawyer

Counsel for the Defence of Germain

Katanga
Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence of 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**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Mr Simo Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Trial Chamber II of the International Criminal Court (respectively, “the Chamber” and “the Court”), acting pursuant to articles 54, 64, 67 and 68 of the Rome Statute (“the Statute”), to rules 77 and 132 of the *Rules of Procedure and Evidence* (“the Rules”) and to regulation 54 of the *Regulations of the Court*, decides as follows:

1. The primary purpose of this Order is to notify the Prosecutor of the time limit for disclosure to the Defence of the evidence on which he intends to rely at trial and for the disclosure of exculpatory material pursuant to article 67(2) of the Statute and to rule 77 of the Rules.

I. Disclosure of incriminatory evidence

2. In the document filed by him on 24 November 2008, the Prosecutor stated that he [TRANSLATION] “aimed to present all of his incriminatory evidence by the end of January 2009”,¹ and he confirmed this at the status conference of 27 November 2008.² He further explained that, after the close of the proceedings on the confirmation of charges, he had obtained new evidence, which he intended, at least in part, to use at the trial.³ He indicated that there were 71 items of evidence, as well as 18 items of audiovisual material, which had yet to be disclosed to the Defence.⁴

3. Between 24 November 2008 and 12 January 2009, the Chamber received communications from the Prosecutor informing it that 27 items of incriminatory evidence and five audiovisual items had been disclosed to the Defence. It follows, if the Chamber’s calculations are correct, that, as at the date of this Order, 44

¹ Office of the Prosecutor, “*Réponse de l’Accusation à l’« Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) » du 13 novembre 2008*”, 24 November 2008, ICC-01/04-01/07-764, p. 3.

² ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, lines 9-10, 25.

³ ICC-01/04-01/07-764, pp. 3 and 4.

⁴ *Ibid.*, p. 4.

incriminatory documents⁵ and 13 audiovisual items⁶ have still to be disclosed to the Defence by 31 January 2009.

4. The Chamber is aware that, before discharging his obligation of effective disclosure of incriminatory evidence, the Prosecutor may well file a number of applications for redactions in respect of the above documents. In its Decision of 12 January 2009⁷ the Chamber requested the Prosecutor to present his views, by 30 January 2009, as to whether the redactions ordered by the Single Judge in the pre-trial phase should be maintained.⁸ On 21 January 2009 the Chamber further requested the Prosecutor to explain why had failed to comply with the procedure laid down by the Appeals Chamber regarding the redaction of documents obtained under article 54(3)(e) of the Statute where confidentiality had been required by the information provider.⁹ Here again, the Chamber is aware that this practice is liable to retard the conduct of the proceedings. Concerned to conduct the proceedings in a fair and expeditious manner, the Chamber seeks to ensure that all requests for authorisation are submitted within a reasonable time-frame and brought to the

⁵ The Chamber would emphasise that its calculation does not include the 48 incriminatory documents disclosed on 24 November 2008, as noted in the following communication: Office of the Prosecutor, Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 24 November 2008, 25 November 2008, ICC-01/04-01/07-770.

⁶ Office of the Prosecutor, Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 17 December 2008, 17 December 2008, ICC-01/04-01/07-798.

⁷ *Décision relative à la procédure d'expurgation*, 12 January 2009, ICC-01/04-01/07-819 (« the Decision of 12 January 2009 »).

⁸ Pre-Trial Chamber I, *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements*, 7 December 2007, ICC-01/04-01/07-90; Pre-Trial Chamber I, *Decision on the Prosecution Request for Authorisation to Redact the Statements of Witnesses 4 and 9*, 23 January 2008, ICC-01/04-01/07-160; Pre-Trial Chamber I, *Corrigendum to the Third Decision on the Prosecution Request for Authorisation to redact materials related to the statements of Witnesses 7, 8, 9, 12 and 14*, 5 March 2008, ICC-01/04-01/07-249; Pre-Trial Chamber I, *Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233*, 3 April 2008, ICC-01/04-01/07-361; Pre-Trial Chamber I, *Fifth Decision on the Prosecution request for Authorisation to Redact Statements, Investigator's Notes, Written Consents and documents relating to Witnesses 157, 161, 268, 279, 280 and 311 and Other Documents*, 21 April 2008, ICC-01/04-01/07-427; Pre-Trial Chamber I, *Sixth Decision on the Prosecution Request for Authorisation to Redact Interview Transcripts of Witness 238*, 21 April 2008, ICC-01/04-01/07-425; Pre-Trial Chamber I, *Public Redacted version of the 'Seventh Decision on Redactions' issued on 26 May 2008*, 28 May 2008, ICC-01/04-01/07-526; Pre-Trial Chamber I, *Public Redacted Version of the 'Eighth Decision on Redactions'*, 9 June 2008, ICC-01/04-01/07-568.

⁹ *Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant certaines notes de communication, des rapports d'inspection et le rapport daté du 5 janvier 2009 (norme 28 du Règlement de la Cour)*, 21 January 2009, ICC-01/04-01/07-838, para. 5.

knowledge of all participants. For this reason it now directs the Prosecutor to file all applications for the redaction of incriminatory evidence by 30 January 2009.

5. In view, *inter alia*, of the possible submission of applications for redaction, effective disclosure to the Defence of incriminatory evidence may well not be achieved by 31 January 2009. Nonetheless, it is important that, by the scheduled deadline of 31 January 2009, the Chamber and the participants should be aware of the total number of items of incriminatory evidence on which the Prosecutor is intending to rely at the trial, and of the applications for redaction submitted by him. For its part, the Chamber will see to it that such applications are dealt with expeditiously. This means that all applications must comply scrupulously with the new procedures for submission set out in the Decision of 12 January 2009.

6. With regard to the possible need for the implementation of measures to protect Prosecution evidence prior to disclosure, as indicated by the Prosecutor at the status conference of 27 and 28 November 2008, the Chamber recalls that an *ex parte* hearing is scheduled for 28 January 2009 at 10.00 a.m.

7. The Chamber furthermore stresses the importance it attaches to ensuring that the Prosecutor presents in an organised and systematic manner the incriminatory evidence on which he intends to rely at trial. To this end, it has requested him to submit his proposals for a model table showing how the charges confirmed by Pre-Trial Chamber I and the relevant modes of responsibility are linked to the facts alleged and to the evidence on which he intends to rely at trial.¹⁰ The Prosecutor submitted his proposals on 9 January 2009.¹¹ As soon as it has studied the responses of the other participants, the Chamber will inform him of its decision and will set a deadline for him to provide a completed copy of the table.

¹⁰ Order Instructing the Participants and the Registry to File Additional Documents, 10 December 2008, ICC-01/04-01/07-788, para. 7.

¹¹ Office of the Prosecutor, *Proposition de tableau type pour la présentation des éléments de preuve sur lesquels l'Accusation entend se fonder au procès*, 9 January 2009, ICC-01/04-01/07-813.

II. Exculpatory evidence falling within the terms of article 67(2) of the Statute or of rule 77 of the Rules

8. On 24 November 2008, after recalling that in his view the disclosure of exculpatory evidence was a standing obligation, the Prosecutor stated that there still remained to be disclosed 134 items of evidence under article 67(2) of the Statute and 297 items under rule 77 of the Rules.¹² He added that 102 items were still being analysed.¹³ He confirmed this figure at the status hearing of 27 November 2008.¹⁴ Finally, the Prosecutor stated that he had also noted 35 audiovisual items which might fall within the terms of article 67(2) or of rule 77 of the Rules.

9. The Chamber notes that, between 24 November 2008 and 12 January 2009, date of his most recent communication, the Prosecutor disclosed to the Defence 54 documents under article 67(2) of the Statute, as well as 211 documents and 14 audiovisual items falling under rule 77 of the Rules. It follows, if the Chamber's calculations are correct, that, as at the date of this Order, at least 80 documents under article 67(2) of the Statute, as well as 72 evidentiary items falling under rule 77 of the Rules, have still to be disclosed to the Defence.

10. In his report of 5 January 2009,¹⁵ the Prosecutor stated that he had had confidentiality restrictions lifted in respect of 118 documents obtained under article 54(3)(e) of the Statute and falling within the terms of article 67(2), of which 100 had been disclosed, while the 18 others had yet to be disclosed.¹⁶ He further stated that confidentiality had been lifted for 84 evidentiary items obtained under article

¹² ICC-01/04-01/07-764, pp. 5 and 6.

¹³ ICC-01/04-01/07-764, p. 6.

¹⁴ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 51, lines 24-25.

¹⁵ Office of the Prosecutor, *Rapport de l'Accusation sur les documents ou renseignements obtenus en vertu d'accords de confidentialité conclus sur la base de l'article 54(3)(e) suite à « l'Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires »*, 5 January 2009, ICC-01/04-01/07-811.

¹⁶ ICC-01/04-01/07-811, para. 1.

54(3)(e) of the Statute and falling within the terms of rule 77 of the Rules, of which three had yet to be disclosed.¹⁷

11. Here again, there are numerous factors liable to retard the proceedings. Thus, of the 181 items already disclosed, the Chamber notes that several were disclosed after being redacted, but without the Chamber's prior authorisation.¹⁸ Moreover, in the case of 39 documents, consultations are currently being held with the information providers with a view to the lifting of confidentiality restrictions, while this has so far been refused for seven others.¹⁹ The Chamber will very shortly be convening an *ex parte* hearing with the Prosecutor with a view to being kept abreast of the course of the current discussions. Furthermore, in its Decision of 12 January 2009 the Chamber ordered the Prosecutor to present his views, by 30 January 2009, on the desirability of maintaining the redactions effected by him *proprio motu* on the 47 exculpatory documents disclosed to the Defence during the pre-trial phase. Finally, at the *ex parte* status conference scheduled for 28 January 2009, the Chamber intends to examine the problems raised by the disclosure of statements by Prosecution witnesses that the Prosecutor does not intend to use at trial, but which contain exculpatory material.²⁰

12. In order not to delay the conduct of the proceedings still further, it is essential that the Prosecutor shall have disclosed all items of exculpatory evidence, including those still in course of analysis, by 27 February 2009, so as to give the Defence the necessary time to prepare adequately for trial. In order to meet this deadline, the Prosecutor will need to have submitted all further applications for redactions by 16 February 2009.

FOR THESE REASONS, THE CHAMBER:

¹⁷ ICC-01/04-01/07-811, para. 2.

¹⁸ *Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant certaines notes de communication, des rapports d'inspection et le rapport daté du 5 janvier 2009 (norme 28 du Règlement de la Cour)*, 21 January 2009, ICC-01/04-01/07-839.

¹⁹ ICC-01/04-01/07-811, paras. 1 and 2.

²⁰ ICC-01/04-01/07-788, para. 17.

1. **ORDERS** the Prosecutor to disclose to the Defence, by 4.00 p.m. on 30 January 2009, the evidence on which he intends to rely at trial;
2. **DIRECTS** the Prosecutor, in the event that, in his view, one or more items of incriminatory evidence can only be disclosed to the Defence after first being redacted, to submit all applications for redaction by 4.00 p.m. on 30 January 2009;
3. **REQUESTS** the Prosecutor to ensure that all questions relating to the protection of Prosecution witnesses are raised at the *ex parte* hearing scheduled for 28 January 2009;
4. **ORDERS** the Prosecutor to disclose to the Defence, by 4.00 p.m. on 27 February 2009, all evidentiary items currently in his possession that fall within the terms of article 67(2) of the Statute or of rule 77 of the Rules, including those still undergoing analysis;
5. **DIRECTS** the Prosecutor, in the event that, in his view, one or more items of exculpatory evidence, or of material falling within the terms of rule 77 of the Rules, can only be disclosed to the Defence after first being redacted, to file all applications for redaction by 4.00 p.m. on 16 February 2009;
6. **REQUESTS** the Prosecutor to ensure that all questions concerning the modalities of disclosure of potentially exculpatory material contained in statements of witnesses which he does not intend to use at trial are raised at the *ex parte* hearing scheduled for 28 January 2009;
7. **CONVENES** a status conference for 4.30 p.m. on 3 February 2009, such conference to be resumed, if need be, at 4.30 p.m. on 4 February 2009. An agenda will be sent to all participants as soon as possible.

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 23 January 2009

At The Hague (The Netherlands)