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

Date: **10 March 2011**

TRIAL CHAMBER II

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

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

Public document

**with a confidential, *ex parte* annex only available to the Office of the Prosecutor
and the Victims and Witnesses Unit**

**Public redacted version of the Order to Consult the Victims and Witnesses Unit
Regarding the Situation of Witnesses 219, 267 and 353
(ICC-01/04-01/07-1037-Conf-Exp, 7 April 2009)**

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
Mr Éric MacDonald

Counsel for the Defence of Germain

Katanga
Mr David Hooper
Mr Andreas O'Shea

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II* of the International Criminal Court (“the Chamber” and “the Court”, respectively) decides the following in accordance with articles 43, 54, 64(3)(c), 64(6)(e) and 68 of the Rome Statute (“the Statute”).

I. Background

1. On 23 January 2009, the Chamber ordered the Prosecutor to disclose to the Defence, by no later than 30 January 2009, the evidence on which he intends to rely at trial,¹ as he himself had proposed.² At an *ex parte* hearing held on 28 January 2009 in the presence of the Office of the Prosecutor, during which the issue of protection for prosecution witnesses was discussed, the Prosecutor stated that he intended to present new prosecution witnesses³ at the trial, in addition to those witnesses whose statements were used for the confirmation of charges hearing. He referred to the need for protective measures for these additional witnesses and indicated several times⁴ solutions he planned to adopt.

2. At the request of the Chamber,⁵ the Prosecutor submitted his proposals in writing on 9 February 2009.⁶ The Defence teams,⁷ together with some of the legal

* On 7 April 2009, Trial Chamber II consisted of Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra and Judge Fumiko Saiga.

¹ *Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 23 January 2009, ICC-01/04-01/07-846, p. 8.

² 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; ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, lines 9 and 10, and p. 46, lines 24 and 25.

³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 44, lines 2 to 20. See also for example, ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 75, lines 8 to 10.

⁴ ICC-01/04-01/07-T-54-CONF-EXP-FRA ET 28-01-2009, p. 102, lines 9 to 16; ICC-01/04-01/07-T-56-ENG ET WT 03-02-2009, p. 22, line 11 to p. 23, line 13.

⁵ ICC-01/04-01/07-T-56-ENG ET WT 03-02-2009, p. 26, line 1 to 25.

⁶ Office of the Prosecutor, “Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses”, 9 February 2009, ICC-01/04-01/07-882.

⁷ Mathieu Ngudjolo’s Defence Team, *Réponse de la défense aux « Mesures proposées par l'Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge*, 20 February 2009, ICC-01/04-01/07-907; Germain Katanga’s Defence Team, “Defence Response to the Prosecution’s

representatives of the victims,⁸ filed their submissions on 20 February 2009. The Prosecution subsequently clarified the situation regarding some of the additional witnesses at the status conferences held on 25 February⁹ and 16 March 2009.¹⁰ Furthermore, in an exchange of correspondence between 31 March and 3 April 2009 between the legal advisor to the Chamber and the Prosecutor, the latter provided additional information about three prosecution witnesses.¹¹ He also stated his intention shortly to file specific applications on the disclosure of the identity of two of the witnesses (“the Applications”).¹²

II. Prosecutor’s Proposals

3. The Prosecutor is of the view that a distinction needs to be drawn between the situation of witnesses who have applied to join the ICC protection programme or to receive other forms of non-judicial protection and that of witnesses who are not prepared to use this programme or any other forms of protection. In the present case, if there is no mistake, the latter scenario applies to witnesses [REDACTED], on whose statements the Prosecutor intends to base his case at trial. Only witness [REDACTED] appears to fall within the former category as things stand.

4. For witnesses [REDACTED], the Prosecutor is proposing a system which, he believes, strikes a proper balance between the need to ensure the security of the witness and the right afforded to the Defence to conduct its investigations regarding the

Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses”, 20 February 2009, ICC-01/04-01/07-909.

⁸ Legal Representatives of Victims a/0333/07 and a/0110/08, *Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux « Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses »*, 20 February 2009, ICC-01/04-01/07-908; Legal Representatives of Victims, *Observations des représentants légaux de victimes sur les mesures proposées par l’Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge*, 20 February 2009, ICC-01/04-01/07-910.

⁹ ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009.

¹⁰ ICC-01/04-01/07-T-62-CONF-EXP-ENG ET 16-03-2009.

¹¹ See Annex to this Order.

¹² *Idem*.

credibility of prosecution witnesses.¹³ It is the Prosecutor's view that the risk incurred by these witnesses is not so much the result of disclosure of their identity by the Defence counsel but rather the potential dissemination of that information by persons they question during investigations into the existence, status and possible role of these witnesses.¹⁴

5. The Prosecutor is of the view that this risk justifies the fact that the identity of the witnesses in question should be disclosed only within an agreed time limit prior to their testimony, that is, 30 days prior to the date of testimony.¹⁵ The Prosecutor emphasises the fact, however, that in the interim he is prepared to disclose a summarised or redacted version of their statements to the Defence.¹⁶ Furthermore, he proposes that rule 87(3)(b) of the *Rules of Procedure and Evidence* ("the Rules") be applied, which requires Defence counsel to undertake not to reveal to any other third party the information about the identity of the witness once this has been obtained.¹⁷

III. Information currently available to the Chamber regarding witnesses 267 and 353

6. [REDACTED], witness 267, [REDACTED]. He has agreed to his identity being disclosed to the Defence, but has requested that such disclosure be delayed for as long as possible. According to the Prosecutor, [REDACTED]. He indicated, moreover, that the witness was prepared to testify in person, provided protective measures such as those provided for by rule 87 of the Rules¹⁸ are implemented. The witness further indicated that he would move [REDACTED] prior to the date of disclosure of his identity in order to minimise the risks, which would place him [REDACTED].

¹³ ICC-01/04-01/07-882, para. 6; ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 77, lines 3 to 8.

¹⁴ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 77, lines 3 to 10.

¹⁵ ICC-01/04-01/07-882, para. 7.

¹⁶ ICC-01/04-01/07-882, para. 6, footnote 4.

¹⁷ ICC-01/04-01/07-882, para. 9.

¹⁸ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 91, lines 11 to 17 and p. 119, lines 1 to 3; ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009, p. 25, lines 24 to 25 and p. 26, lines 1 to 14.

7. To date, an anonymous summary of his statement was disclosed to the Defence during the pre-trial phase, but at no point was his identity revealed. On 25 March 2009, the Chamber granted an application by the Prosecutor for the name, signature, function and identity of that witness to be redacted from a document dated 1 April 2008, in which he agreed to the disclosure and use of the said summary in the present case.¹⁹ However, no further applications for redactions have been submitted so far.

8. The Prosecutor maintains that, if the witness's statement needed to be redacted whilst the disclosure of his identity is pending, it would need to be redacted fully in order to ensure maximum protection.

9. [REDACTED], witness 353, was subjected to sexual violence. According to the Prosecutor, she is an important witness for his case, who has agreed to her identity being disclosed²⁰ provided such disclosure occurs as late as possible. She does not wish [REDACTED].

IV. Additional information requested by the Chamber regarding witnesses 267 and 353

10. The Chamber is seeking to obtain information from the Victims and Witnesses Unit:

- 1) regarding the actual and objective risks of disclosing the identity of witnesses [REDACTED] to the Defence prior to the commencement of the trial; and
- 2) regarding the actual and objective risks of the identity of these witnesses being disseminated by persons questioned by the Defence as part of its investigations.

¹⁹ ICC-01/04-01/07-987-Conf-Exp-AnxR-2.

²⁰ ICC-01/04-01/07-T-54-CONF-EXP-ENG ET 28-01-2009, p. 76, lines 24 to 25.

11. The Unit must, moreover, inform the Chamber of the date which it deems most appropriate for the identity of the witnesses to be disclosed, in view of the personal circumstances of each witness. The aim is not to formulate an opinion on the actual principle of rolling disclosure as put forward by the Prosecutor, but to provide the Chamber with all the necessary information to enable it to assess the suitability of the modes of disclosure suggested for each of these witnesses.

FOR THESE REASONS, the Chamber

ORDERS the Prosecution to disclose the Applications to the Victims and Witnesses Unit no later than 4 p.m. on 9 April 2009, as well as the statements of witnesses [REDACTED] and any other useful information likely to assist the said Unit with its appraisal;

ORDERS the Victims and Witnesses Unit to set out its observations in a report on the issues mentioned in paragraphs 10 and 11 of the present Order, to be filed no later than 4 p.m. on 23 April 2009;

INSTRUCTS the Victims and Witnesses Unit, in view of the statement of victim 267, to provide the Chamber with an objective assessment of the need to redact that statement in full in order to ensure the victim's protection prior to his testimony at the trial;

INVITES the Victims and Witnesses Unit to inform the Chamber of its proposals to ensure the most appropriate protection for these witnesses, both prior to and during the trial; and

ORDERS the Victims and Witnesses Unit to provide a report on the specific situation of witness 219 [REDACTED].

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 10 March 2011,

At The Hague, The Netherlands